Nobody can be denied the Right to (an own Identity in) Education

Legal Bottlenecks in National and International Law Concerning the Freedom of Religious Expression: The Case of the Headscarf in Education

Jan De Groof & Gracienne Lauwers[*]

> 'The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces that the world has ever known. But its full realization can come about only when the repressive action by which it has been restricted in many parts of the world is brought to light, studied, understood and curtailed through cooperative policies; and when the methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as the national plane.'[1]

This contribution explores the outlines of the debate on the wearing of conspicuous religious symbols, more in particular the headscarf. The authors restrict themselves to providing an overview of the legal provisions that may be applicable in the search for a regulation on the wearing of the headscarf in educational institutions and they also put forward some considerations regarding its practical implementation.

I. Introduction and Problem Definition

1. Can one actually legislate on religious symbols? Was the recent Europe-wide debate on the headscarf not really about political symbols and, as the case may be, about the cultural position and/or isolation of women/girls in certain population groups? Which fundamental rights should, in the case of mutual conflicts, be given precedence? After all, the debate concerns the scope of two crucial legal concepts in Belgium's educational system and the rule of law, namely freedom of religious practice for all and the neutrality or pluralism of education provided by the State.

The debate – including in Belgium – was spread out in the media. Contradictory statements were made by persons in authority and the proposal of resolution '*for safeguarding the equality of men and women and the neutrality of the State in compulsory public education and in public services by prohibiting the wearing of conspicuous symbols of religious conviction*'[2] drew attention from the international press.[3] The '*Intercultural Dialogue*'[4] – adopted by the Council of Ministers of 12 March 2004 at the proposal of the Minister of the Civil Service, Social Integration, Urban Policy and Equal Opportunities and in implementation of the Federal Government Policy

---

[*] Prof. Dr. Jan De Groof, PhD., teaches at the Europe College in Bruges and the TIAS Business School of the University of Brabant (Tilburg). He is also the Government Commissioner for the University of Antwerp (UA) and the Limburg University Centre (LUC). Gracienne Lauwers hold a master in Law and a master in Slavonic Studies. She is a researcher with the University of Antwerp.
Both authors presented a lecture on the topic of this paper at DISCOR – 'Hoofddoek en fundamentele rechten en vrijheden in het onderwijs' – on 2 June 2004.

[1] Krishnaswami, Arcot (1960), *Study of Discrimination in the Matter of Religious Rights and Practices*, United Nations, New York, E/CN.4/Sub.2/200/Rev.1 Sales No. 60.XIV.2 (1960).

[2] Doc., Senate, Z. 2003-2004, no 3-451/1.

[3] See '*WorldWide Religious News*' of 28 May 2004, articles mentioned under the title 'Belgian move to ban scarves, crosses': "Two prominent senators have argued that the ban is necessary to combat what they call Islamic sexism".

[4] See http://www.dialogueinterculturel.be/nl/.

Accord[5] – aspires to 'examine without prejudice the foundations of the Belgian democratic model so that they could be implemented more effectively in the new intercultural context'.[6] The 'Intercultural Dialogue Commission' – whose job it is to ensure that the 'Dialogue' succeeds, albeit in cooperation with the Centre for Equal Opportunities – immediately put the headscarf issue on its agenda, together with the French source of inspiration which explicitly influenced the debate.

Precisely because religious rights and the symbols with which they are expressed are at stake here, the debate is crucially important to the individual and to society. Freedom of thought, conscience, religion, and expression of opinion constitute the foundation of democracy. '*It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life (...).*[7] *The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest (one's) religion". Bearing witness in words and deeds is bound up with the existence of religious convictions*'.[8] The tone is immediately set: pluralism is not credible if all individuals cannot explicitly express their own religious conviction – though not at the expense of others, as this would inevitably compromise the latter's liberty.

The translation of pluralism, of the balance between individual and community (or communities) and between multiformity and social cohesion, requires policy and regulation that already exhibits variation within Europe and elsewhere, and that may evolve in accordance with the societal context and cultural characteristics, including differences in the juridical culture of countries. The answer lies in the joint reading of standards of international law and the (legal) culture of a people (or peoples), while taking into account the place of religion in the societal and legal system of a specific country. As Glenn has rightly asserted, 'in a curious way, the rejection of the hijab in French schools is of a piece with the positive value accorded to "multiculturalism" in many American schools.'[9]

The headscarf plays a prominent role in this debate. This is due in part to the strong presence of ethnic minorities in Western society and the growing awareness of Muslims, but also to the fact that the dominant ideology is ebbing away while individualisation and diversity have come to prominence. Moreover, a certain unease, fear even, vis-à-vis the Muslim population cannot be ignored. What is required is a contemporary interpretation of agreements on how diversity can contribute positively to the shaping of the principal values of a democracy, as in the recent wording of Article 2, para. 1 of the Draft Constitution for Europe: '*respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights*'. It is up to the competent authorities and school administrations, subject to judicial review, to attain a synthesis of freedom and responsibility. Comparative law may contribute to achieving this goal, but it is also immediately clear that it will be a perilous undertaking.

II. The limited contribution of comparative law in matters of ideology in education and the wide margin of appreciation within each Member State of the European Union

2. By decision of 24 September 2003,[10] the *Bundesverfassungsgericht* ruled that neither the constitution nor state law provided a basis to restrict teachers from wearing a headscarf at school. The religious conviction of the teacher was given precedence over the pupils' right to neutral education. Further, it gave the sixteen German states, or *Länder*, the right to legislate on the matter. The decision was carried by five votes to three. The dissenting voices[11] argued that pupils' and parents' right to neutral education is paramount and that a teacher is aware from the moment of his appointment that he or she should comply with the requirement of neutrality, and that consequently no specific legislation is required. The question also arises whether the decision is compatible with the earlier *Kruzifix-Beschluss* of 16 May 1995,[12] which caused quite a controversy in traditionally Catholic Bavaria

5 Which states that '*Belgium must remain an open society where people of different cultures can cooperate in an atmosphere of openness, tolerance, meeting and mutual respect; an open society that is permeated with divergent sensitivities, provenances and cultures, that is in constant development and is devoted to common, fundamental values of the Constitution and human rights.*'

6 In the letter of invitation to the Intercultural Dialogue on 23 February 2004, the Minister added that, what he understood this to mean, was, among other things, 'equality and non-discrimination, the separation of Church and State, the special duties of government services, equality of men and women'.

7 The ruling adds the following: '*..., but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.*'

8 ECHR, *Kokkinakis v. Greece*, App. No. 14307/88, 25-05-1993, para. 31.

9 Glenn, C. (1996), 'Hijab and the Limits of Tolerance', in: De Groof, J. and Fiers, J. (eds), *The Legal Status of Minorities in Education*, Acco, Leuven, p. 136, who also points out various other contradictions and ambiguities.

10 BVerfG, 2 BvR 1436/02 vom 3.6.2003, Absatz-Nr. (1-140), available at http://www.bverfg.de/entscheidungen/rs20030603 2bvr243602.html.

11 Paras 75-138.

12 BVergGE, 93, 1.

and elsewhere:[13] after all, on that occasion, the Constitutional Court ruled that the crucifix is incompatible with the neutrality of a State-run school, which is not a *Bekenntnisschule*.[14]

Clearly, then, the judgement is not entirely unequivocal: on the one hand, it allows teachers to wear a headscarf, while on the other States are left free to introduce a legal ban. Furthermore, each State was given an opportunity to formulate an answer, which will most probably happen, so that fundamental rights may be interpreted and observed differently in different parts of the country.

For that matter, divergent standards are already being applied: the *Länder* did not respond uniformly to the question regarding dispensation from physical education and swimming lessons: Münster was opposed and Bremen was in favour of dispensation.[15]

In Switzerland, religious tolerance was initially considered to be more important than any administrative complications that dispensation from certain subjects may cause for the educational authority or administration.[16] However, the outcome of the Lucia Dahlab case rather compromised this viewpoint. This judgement of 15 February 2001 by the European Court of Human Rights[17] (ECHR) gave weight to the margin of appreciation of the member state: the measure taken by the authorities of the Canton of Geneva to prohibit the wearing of a headscarf in class by a teacher was found not to be unreasonable, because it was proportional to the objectives of the protection of the rights of others, of public order and safety. The cantonal judge had defended the viewpoint that wearing a headscarf, in order to obey a precept laid down in the Koran, cannot be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. The European Court did not distance itself from this point of view.

In the Netherlands, on the other hand, the Law on Equal Treatment states that the neutral nature of public education provides insufficient ground to ban clothing that is seen as an expression of religious conviction. Restrictive regulations should be motivated by each school separately, on the basis of objective factors.

3. The French judge initially pronounced a rather qualified judgement. The ruling by the Conseil d'Etat of 27 November 1989[18] was subsequently confirmed in several other rulings. It states that, on the one hand, pupils should be allowed to wear symbols of religious expression, while on the other, teachers are denied the right to manifest their religious conviction at school. This ruling contained a rather qualified analysis of the legal provisions and placed the wearing of a headscarf in a broader perspective.[19] The Bernard Stasi Commission (*Commission de réflexion sur l'application du principe de laïcité dans la République*), which published its report on 11 December 2003, put forward a stricter interpretation of the notion of *laïcité*, arguing that there is no room for religion on the curriculum, nor for a positive acceptance of ideology and philosophy. A defensive political *discourse* is manifestly present and the tone is immediately clear from the outset, as the report claims that a certain extremism compromises republican values: *'... les comportements, les agissements attentatoires à la laïcité sont de plus en plus nombreux, en particulier dans l'espace publique. (...) Les difficultés de l'intégration de ceux qui sont arrivés sur le territoire national au cours de ces dernières décennies, les conditions de vie dans de nombreuses banlieues de nos villes, le chômage, le sentiment éprouvé par beaucoup de ceux qui habitent sur notre territoire d'être l'objet de discriminations, voire d'être rejetés hors de la communauté nationale, expliquent qu'ils prêtent une oreille bienveillante à ceux qui les incitent à combattre ce que nous appelons les valeurs de la République. Car il faut être lucides: oui, des groupes extrémistes sont à l'oeuvre dans notre pays pour tester la résistance de la République et pour pousser certains jeunes à rejeter la France et ses valeurs. La conjoncture internationale, et particulièrement, le conflit du Proche-Orient, contribue aussi à aggraver la tension*

[13] Avenarius, H. and Heckel, H. (2000), *Schulrechtskunde*, Luchterhand, Kriftel, pp. 76-77 with extensive bibliography; Richter, I. (1996), 'Multi-Religious Instruction in a Multicultural Society ? Juridical Considerations', in: De Groof, J. and Fiers, J. (eds), *The Legal Status of Minorities in Education,* Acco, Leuven, pp. 118-126.

[14] On the different types of schools in Germany, see among others Glenn, C.L., De Groof, J. (2002), *Finding the Right Balance. Freedom, Autonomy and Accountability in Education*, vol. I, Lemma Publishers, Utrecht.

[15] Cf. the article by Verstegen, R. (1994-1995), 'Over tekens en symbolen. Het dragen van de hoofddoek (in het onderwijs)', *T.O.R.B.*, No. 5-6, p. 299 ff.

[16] *Ibid.*

[17] See http://www/echr.coe.int.

[18] Assemblée générale (Section de l'intérieur) – no. 346.893.

[19] The classical doctrine of respect for the rights of others is expressed here quite accurately: 'Il résulte de ce qui vient d'être dit que, dans les établissements scolaires, le port par les élèves de signes par lesquels il entendent manifester leur appartenance à une religion n'est pas par lui-même incompatible avec le principe de laïcité, dans la mesure où il constitue l'exercice de la liberté d'expression et de manifestation de croyances religieuses, mais que cette liberté ne saurait permettre aux élèves d'arborer des signes d'appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public.'

et à provoquer des affrontements dans certaines de nos villes. Dans ce contexte-là, il est naturel que beaucoup de nos concitoyens appelant de leurs voeux la restauration de l'autorité républicaine et tout particulièrement à l'école.'[20]

In a tearing rush, the '*Projet de loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publiques*'[21] was approved by the National Assembly and the Senate (3 March 2004).[22] Art. L. 141-5-1 of Law No. 2004-228 of 15 March 2004[23] adds the following article to the *Code de l'éducation: 'Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève.'* In France, too, this had been preceded by a broad public debate.[24]

One of the key sentences in the abovementioned report by the Commission chaired by Mr Stasi is particularly revealing about the context in which the French debate was conducted: '*La commission, après avoir entendu les positions des uns et des autres, estime qu'aujourd'hui la question n'est plus la liberté de conscience, mais l'ordre public.*'[25] The question remains whether this assumption imposes itself to the same extent elsewhere.

4. Each country will thus need to formulate its own answer – albeit based on the same *constitutional principles* that may be derived in educational affairs[26] and which certainly include the application of basic rights in education as well as the principle of pluralism in state-run education. This search for a balance is, for that matter, ongoing in every modern state, including those with a so-called *Wall of Separation* between religion and government, as in the US, but with a substantially greater sensitivity to and explicit presence of religious symbols in public schools than is sometimes (negatively) suggested. In these countries, freedom of religion and expression is what makes the wearing of a headscarf in public school acceptable.

On the other hand, such a national interpretation of common principles adheres to the European *subsidiarity notion*:[27] the national authorities are assumed to be better placed than an international court of law to assess 'local needs and conditions',[28] the so-called '*margin of interpretation*'. The ECHR formulated it even more unequivocally in its ruling in the case of Leyla Sahin v. Turkey: '*The court observes at the same time that the role of the Convention machinery is essentially subsidiary*'.[29] The argument that the weighing up of basic rights and fundamental freedoms can vary from country to country, depending on their 'national traditions', is reiterated a little further, when it is claimed that 'there is no uniform European conception of the requirements of "the protection of the rights of others" and of "public order"',[30] all the more so when the principles at stake are *equality* and interpretations of *secularism* in the national community concerned.

III. Headscarves in (subsidised non-governmental and official) education in Flanders: Problem definition and tentative considerations for a contextual answer

A. Enhancement of diversity is considered optimally through local policy

5. The relationship in Belgium between subsidised non-governmental educational institutions on the one hand and parents and children on the other is of a contractual nature. The Decree concerning equal educational opportunities-I (known as the 'GOK Decree') largely reflects the obligations of subsidised non-governmental schools as a '*functional public service*', e.g. it extends the enrolment right of parents and pupils to subsidised

[20] *Ibid.*, pp. 4-5.
[21] See http://www.education.gouv.fr., rubrique 'Actualités'. The recommendation by the Council of State was never made public.
[22] Projet de loi nr. 4 (2002-2003), déposé par le gouvernement; projet de loi nr. 1218, adopté par le Sénat.
[23] *JO*, 17 March 2004. For the preparatory work, as well as the '*Bibliographie établie par le service de la bibliothèque de l'Assemblée nationale sur le principe de laïcité*', see http://www.assemblee-nat.fr/12/dossiers/laicité.asp.
[24] On this topic, and for the most important bibliography, see Legrand, A., 'L'actualité de droit de l'éducation en France', in this issue of the *International Journal for Education Law and Policy*, Wolf Legal Publishers.
[25] *Sub* para. 4.2.2.1. (p. 15).
[26] Cf. volume II of the publication by Glenn, C.L. and De Groof, J. (2002), *o.c.*
[27] Cf. the first report of the *European Education Law and Policy Association:* De Groof, J. (ed) (1994), *Subsidiarity and Education. Aspects of Comparative Educational Law*, Acco, Leuven.
[28] ECHR, *Handyside v. the United Kingdom*, App. No. 5493/72, 7-12-1976. para. 48.
[29] Ruling of 6 May 2004, Application No. 34400/02.
[30] See below.

non-governmental education on condition that the parents agree with the pedagogic project and the school regulation of that subsidised non-governmental school.[31]
In a subsidised non-governmental school, it is the organising authority that must decide on the appropriateness of prohibiting the wearing of a headscarf. If it imposes such a ban, it may refer to a religious conviction or a denominational expression as a justification. The condition remains that the pedagogic project should adequately encompass the 'denominational foundation' that the organising authority wishes to apply.[32] Parents who are unable to approve of such a ban in subsidised non-governmental education are offered the alternative of 'neutral' public education.

An entirely different situation arises if the ban on the wearing of a headscarf is imposed by the management of a public school. Unlike subsidised non-governmental education, public education is accessible to anyone, irrespective of their religious conviction. This requirement of universal accessibility restricts the regulatory autonomy with regard to the banning of headscarves at a particular public school. After all, a ban on headscarves may, albeit indirectly, make it impossible for certain girls to attend that school. A number of questions therefore arise: Would such a public school be infringing upon the constitutional right of freedom of expression in conjunction with the right to education? Could the legislator impose a ban on the wearing of headscarves in public schools? In the Flemish constellation, would the legislator be guilty of *direct discrimination* if the motivation for the ban made reference to religious expression? Or indeed would he be guilty of *indirect discrimination* if the motivation for the ban did not refer explicitly to a religious conviction and yet, in practice, primarily affected people of a particular faith?
In other words, what needs to be ascertained is the degree to which a general ban on the wearing of headscarves is compatible with the ideological foundations of public education. This question will be considered in further detail later.

6. First, however, we should repeat that policymaking and regulation regarding *diversity in education* and, *a fortiori*, regarding the *non-discrimination of pupils* is *particularised* in the educational project. One of the essential options of the GOK-I Decree is the enhancement of diversity. The preceding broad-based Non-Discrimination Declaration – known in full as the 'Common declaration on a non-discriminatory policy in education, drawn up within the context of the Flemish Educational Council on 15 July 1993'[33] – was explicitly aimed at encouraging cultural diversity in schools. An equal opportunities policy towards allochthones and autochthones first and foremost presupposes '*a spirit of co-operation, tolerance, consultation, intercultural exchange…*'.[34] 'Interculturalism' is considered an enrichment of the formative project of the educational institution.[35] In the 'Model Code', which was to be drawn up by the organising authorities, attention is paid to school culture (incl. rules for dealing with pupils, problematic situations with a racial context) and to the formal organisation of the school. This encompasses the headscarf issue. The school regulation/school working plan, both in subsidised non-governmental and in public education, should be in implementation of this code.

Yet one cannot deny that the aspect of 'intercultural education', both in the aforementioned Non-Discrimination Declaration and in the Gok-I Decree, was implemented rather carelessly.[36] The responsibility of the organising authorities and the local school community is delineated all the more sharply. This holds not only for the 'integration of the components of intercultural education';[37] the autonomy of the school also necessitates that rules be provided in, among other things, the school regulation regarding the institution's 'problem-solving capacity'. Both the stipulations relating to the Model Code, for which the Flemish government explicitly called on the educational partners,[38] and the mutual agreement to adapt conventions 'if new developments unfold'[39] prevent the government from considering measures that might compromise that autonomy. We may refer, *mutatis mutandis*, to the conclusions of the scientific evaluation of the non-discrimination policy, in which it is asserted that research has shown there to be a definite connection between interculturalisation at schools and local social

31 Art. III.1, para. 2 of the GOK-I Decree. See the special issue of *T.O.R.B.*, 2003-2004, No. 4-5.
32 Art. III.1, para. 2, second clause of the GOK-I Decree.
33 Most extensive: Verstegen, R. (1998), *De non-discriminatieverklaring in het onderwijs. Moeilijkheden en Mogelijkheden. Cahiers voor Onderwijsrecht en Onderwijsbeleid,* nr. 5, Kluwer Rechtswetenschappen, Antwerpen.
34 Preamble to this Joint Declaration.
35 According to the first clause of para. 1 '*Een bewustere opstelling t.a.v. non-discriminatie op school*'.
36 Verstegen, R., 'Gelijke onderwijskansen in de Vlaamse Gemeenschap', *T.O.R.B.*, 2003-2004, No. 4-5, pp. 284-302, De Groof, J., 'Het decreet betreffende gelijke onderwijskansen-I', *ibid.*, pp. 279-283.
37 Cf. the statement of principle in clause 5 of the aforementioned first paragraph of the Non-Discrimination Declaration.
38 Clause 12.2.2. of the Declaration.
39 Clause 3 of the appendix: *Addendum bij de gemeenschappelijke verklaring inzake een non-discriminatiebeleid in het onderwijs, eveneens afgesloten in de schoot van de Vlaamse Onderwijsraad op 9 juli 1996.*

evolutions, and that, in order to give these evolutions a chance, the present top-down policy ought to be replaced with a more locally rooted policy.[40] A locally rooted policy framework could also give new meaning to the notion of 'diversity' within the 'unitary school'. In this respect, it is essential that the trust of parents in the school is respected. It could be argued that we would be giving up a particularly valuable basis of our society if parents' right to choose a type of education and a school were no longer recognised or if it were eroded in practice. Therefore, new circumstances should not be allowed to lead to a situation where our freedom of education is, either in fact or by law, transmuted into imposed education at a unitary school.[41] The previously existing 'opposition' between non-governmental and public schools is now placed in a different context, in part because private-law Islamic schools are not a self-evident option. To what extent should contemporary public education opt for a new interpretation of the notion of the 'unitary school' in which cultural diversity is actively reflected?

Consider the following question: if a public school were to introduce a ban on headscarves for educational reasons, while sufficient alternatives are available to parents in order for them to exercise their right to choose a school freely, could we rightly speak of a (possible) infringement upon the freedom of school choice? Does the introduction in certain public schools of a ban on the wearing of a headscarf for educational reasons jeopardise the 'neutrality' of the entire public school network?

The invocation of the notion of the *equivalent alternative* for the passive freedom of education is not an uncommon construction in educational law and it can in fact underpin a policy response. The ECHR, too, has ruled in matters relating to the right to education that the freedom of school choice is guaranteed if parents have an alternative at their disposal that meets the requirements of their religious conviction. Moreover, the ECHR has also ruled in such cases that the fact that exercising this free choice may cause an additional cost is irrelevant. '*Although recourse to these schools involves parents in sacrifices which were justifiably mentioned by the applicants, the alternative solution it provides constitutes a factor that should not be disregarded in this case*'.[42] Under (Belgian and) Flemish constitutional education law, such an approach would be deemed too minimalist.

B. The exercise of religious and ideological rights and local consultation

7. The issue touches upon other principles if the wearing of a headscarf has no religious significance. If the headscarf merely serves a materialistic purpose or if it is a material symbol, it may, for example, be seen as a manifestation of status and wealth. Particularly in the past, clothing could certainly reveal the class or social group to which one belonged. The wearing of a headscarf may also be a fashion statement, as may become apparent in the choice of fabric or in the manner that it is tied or pinned. Or it may be worn as headgear to protect against the cold or the sun, just like hats, caps, headbands or shawls. The headscarf can further be used as a means of expressing one's identity, much in the same way as the Mohican hairstyle is identity-related for punk rockers. The purpose of wearing a headscarf is then to show to which group one belongs. However, the headscarf may also be indicative of a certain religious conviction or it may be a means of cultural expression for a certain ethnic group. The notion of a group is inextricably connected with the phenomenon of social control: a code to which one must adhere in order to belong to the group.

To the extent that headgear is an expression of status, a fashion statement or a means of protection, few problems arise. Usually, such issues are dealt with in the school regulation.[43] If, however, the headgear is a means of religious expression or identity, it can meet with (other) objections: the headscarf may be experienced as a threat. However, other fundamental rights are also at stake.

In the Netherlands, if a girl or woman claims to wear a headscarf because of her Muslim faith, then the Commission for Equal Treatment considers the wearing of the headscarf to be a direct expression of religious

[40] Janssens, M., Kesteloot, Chr. and Verlot, M. (March 2000), *Evaluatie van het non-discriminatiebeleid. Onderzoek uitgevoerd i.o.v. de Vlaamse minister van Onderwijs*, p. 48.

[41] Van der Ven, F.W.M. (1974), *Openbaar en bijzonder onderwijs samen?*, Tjeenk Willink, Groningen, who quotes the words of Idenburg, Ph.J. (1964): 'in de wijze waarop een volk de vraag van eenheid of verscheidenheid in het schoolwezen oplost, interpreteert het voor zichzelf en de anderen het wezen van zijn bestaan', *Schets van het Nederlandse Schoolwezen*, Wolters, Groningen, p. 96, cited by De Groof, J. (1984), *Recht op en vrijheid van onderwijs*, Cepess, Brussel, p. 25.

[42] ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, 5920/72 and 5962/72, 7-12-1976, para. 50.

[43] Moreover, all too long the criticism was heard that school regulations focused excessively on clothing issues and not enough on educational prescriptions and the implementation of the pedagogical project: De Groof, J. and Mahieu, P. (1993), *De school komt tot haar recht. Over de uitoefening van grondrechten in het onderwijs*, Garant, Leuven.

conviction.[44] The fact that other Islamic women choose not to wear a headscarf is considered irrelevant.[45] A regulation or action that prohibits, by law or *de facto*, the wearing of a headscarf is therefore seen to make a direct or indirect distinction on the basis of religion in the sense of the so-called General Law on Equal Treatment (*Algemene Wet Gelijke Behandeling*, henceforth GLET).[46] There is however disagreement over the *chador*. A chador is a veil that covers almost the entire face. It is seen as an expression of religious conviction (if the woman asserts that it is). In the case of this garment, a healthcare school asked for a ruling on the (im)permissibility of a clothing regulation that bans the wearing during classes of any item that make it impossible for others to observe one's facial features. The wearing of the chador was considered to impede the educational process, as this was deemed to rest largely on interpersonal contact between teacher and pupil, in which face-to-face moments play an important part. The Commission ruled that the regulation was a form of indirect distinction, given that it primarily affected persons of a particular religious conviction (i.e. Muslims) (Article 1 sub c General Law on Equal Treatment). To make such a distinction in an educational context conflicts with Article 4 section 1 sub c GLET, as it is not objectively justifiable (Article 2 section 1 GLET). The Commission[47] felt that the educational motivation was insufficient to motivate the indirect distinction. It also argued that the teachers held divergent opinions on the need for a clothing regulation: some objected to teaching pupils whose face is only very partially visible, others did not. Moreover, there were no indications that the learning process of the pupils in question had been hampered during the period that they had worn a chador. Finally, the Commission considered that it may reconsider its viewpoint if a more students were to cover large parts of their faces, as this could give rise to compelling didactic arguments for (as yet) introducing the clothing regulation.

It is often assumed that the competence to assess whether or not the chador hampers the educational process does not lie with individual teachers, but with the school administration. If responsibility of the school administration must be consistent with the restrictive testing procedure, as the abovementioned Commission put it, is enough room left for the educational institution's own discretion and professionalism? According to European jurisprudence, 'the means to achieve an objective must correspond to a real need' (on the part of the institution). The question arises whether the assessment of whether this is the case, within a certain *margin of appreciation*, should not be left exclusively to that institution. It must assure that – even if many pupils were to wear the chador – adequate communication remains possible with these pupils.

IV. Starting points for a principled response – The enforceability of a standard of international law

A. The exercise of religious freedom

Individual and collective exercise – Involvement of the state and of religious communities

8. The two 'elements of response' that have been put forward thus far, i.e. the (in)availability of adequate *alternatives* and the recognition of a margin of appreciation for the school administration, *do not preclude* that a legal rationale needs to be developed that goes beyond casuistry and endeavours to lay a foundation for a universal approach. Therefore – within the scope of the present contribution – a number of starting points need to be delineated sharply: the exercise of religious freedom and of other fundamental rights, a deliberate consideration in the case of limitation of fundamental rights, and the scope or the implications of the neutrality requirement. Subsequently, we shall briefly outline some suggestions for a problem-solving approach.

The wearing of the headscarf at school touches upon the exercise of religious freedom in an educational context. The wearing of certain items of clothing, symbols, jewellery even, and – as the case may be – the headscarf is or may be considered by people belonging to a particular ideology[48] to be a *religious duty*. This is hardly new or surprising: Jewish yarmulkes, the hoods of nuns, the Christian crucifix, Sikh turbans, the Islamic chador, and the headscarf have traditionally been prominent in the debate on the pluralistic society and the integration issue. The societal context has, however, turned the headscarf into a hot topic of debate. It would appear increasingly

[44] See for example CGB 7 August 1995, judgement 95-31, *Rechtspraak Vreemdelingenrecht* 1995.
[45] CGB 21 March 1997, judgement 97-23.
[46] CGB 17 October 1996, judgement 96-85; CGB 3 February 1997, judgement 97-14; CGB 9 November 1998, judgement 98-121; CGB 22 December 1999, judgement 99-103, *Rechtspraak Vreemdelingenrecht* 1999, 100.
[47] CGB 6 September 2000, judgement 2000-63 (verbod op Chador niet verenigbaar met Algemene Wet Gelijke Behandeling), RR 1995-2000, no. 566.
[48] Referred to in Belgian administrative jargon as '*ideologische of filosofische*' or '*levensbeschouwelijke*' '*strekkingen*'.

to be becoming a political rather than an ideological (and certainly not an educational) topic, while government action is threatening to blur this distinction.[49]

Even though it concerns a certain interpretation of Islam (or Islamic doctrine), the wearers of the headscarf may call on their *right to religious freedom*.
The active exercise of this freedom guarantees religious and ideological pluralism, a cornerstone of European society. *It would appear that, in various countries, precisely these values are under threat, while freedom of religious conviction remains a condition for a societal consensus.*
In this context, we refer to the collective exercise of religious freedom and the relation between the churches and the civil authorities. As in most other European Member States, there are two predominant principles to take into account: mutual independence on the one hand and forms of cooperation or recognition on the other. This certainly holds for Belgium, where it is an important aspect of the positive attitude with which the State has traditionally approached religious, ideological and philosophical convictions.[50] One of the aspects of the neutrality requirement for the State is that the authorities should observe the greatest possible restraint vis-à-vis the so-called 'truth value' of religions, and should not hazard any attempt at appreciation of religious content.[51] This also holds with regard to membership of any denomination and its possible impact on the pedagogical project.[52] The State will refrain from commenting on religious prescriptions, including if they concern aspects of dress. It should recognise that such regulations are justified by the freedom of religion and should merely be concerned with assuring that the rights of others are not violated by them.[53] Thus, the wearing of the headscarf or kippah (a ritual head garment for Jewish men) cannot be catalogued as an unwarranted act (or error) in itself. Belgian jurisprudence has ruled in this sense on numerous occasions.[54]

9. The freedom to practice one's religion or to express one's opinion through *worship in an educational context* would appear to pose few problems.[55] In a sense, it is guaranteed by the formal involvement of the recognised religions in the establishment, the organisation and the supervision of religious instruction in official education. The *facilitating* and *positive* attitude of the civil authorities may pride itself on a consistency in Belgian educational law and administrative practice.[56] The government recognises the positive contribution of confessional and non-confessional communities and this is regarded as a touchstone in the general *cooperative* interaction between religions and the State. Confrontations with regard to the question of whether schools should provide prayer rooms so that pupils and students could worship, together or individually, never materialised. For that matter, such provisions would need to respect the equality of the various religions, as laid down by national (education) law,[57] and equal access for all should not be compromised, nor, finally, should the pluralistic concept of the school be undermined under any circumstance. This also holds with regard to the question of whether schools should perhaps pay greater attention to the religious feast days of the various creeds and to optional holidays.

The limitation of fundamental rights

10. Thus, the headscarf issue also touches upon the internationally recognised freedom of religious conviction or expression of opinion, in relation to both its practical application and the maintenance of commandments and prescriptions. In this context, the distinction between types of law is useful. *Absolute* rights can never be subject to limitations; *qualified* rights can. It is up to the national courts of law to assess whether a decision, law or policy complies with this condition.[58] The ECHR has ruled that the member states are better able to assess local needs and conditions. If it concerns a qualified right, the onus of proof lies with the authorities, who must

---

49 Cf. the poignant remark that '... all too often a state seeking to suppress religious freedoms characterizes the activities of religious groups and leaders as impermissible political action or subversion', Rullivan, D.J. (1988), 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', *Am. Journal International Law*, 82, p. 504.

50 See among others 'De bescherming van de ideologische en filosofische strekkingen in België. Een inleiding', in: Alen, A. and Suetens, L.P. (1988), *Zeven knelpunten na zeven jaar staatshervorming*, E. Story-Scientia, Brussel.

51 E.g. ECHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, App. No. 45701/99, 13-12-2001, para. 115 ff.

52 Antwerp, 19 December 2000, *T.O.R.B.*, 2000-2001, No. 4, p. 314. Membership of a religion or a community within a religion is an autonomous matter of that religion; only the religious authorities possess the competence to take decisions on such issues. In this particular case, membership of Shomre Hadass was not regarded to be an acceptable ground for refusing enrolment at the Jewish school concerned.

53 See below.

54 See among others Labour Court of Charleroi, 26 October 1992; also still worth reading is Blaise, P. and De Coorebyter, V. (1990), 'L'Islam et l'école: anatomie d'une polémique', *C.H. CRISP*, No. 1270-1271.

55 EHRM, *Manoussakis And Others v. Greece*, App. No. 18748/91, 26-09-1996; EHRM, *Chappell v. The United Kingdom*, App. No. 12587/86, 14-07-1987.

56 De Groof, J. (1984), *Recht op en vrijheid van onderwijs*, Cepess, Brussel,, and *idem* (1985), *De overheid en het gesubsidieerd onderwijs*, Cepess, Brussel.

57 Cf. De Groof, J., Martinez Lopez-Muniz, J.L. and Lauwers, G., *Religious Education in Public Schools. Comparative Studies*, Springer, publication forthcoming.

58 In other words, a matter of 'margin of appreciation': cf. for example ECHR, *Hatton and Others v. the UK*, App. No. 36022/97, 02-10-2001; 8-7-2003, para. 101.

demonstrate that the limitation imposed is justified and proportional.[59] In other words, the European Convention of Human Rights (henceforth the Convention) is interpreted here in the light of contemporary reality.[60]

The purpose of the European Convention on Human Rights is, first and foremost, to offer protection against any direct interference on the part of government with the private sphere. However, in cases where (national and other) constitutional systems require an active intervention by government in order to guarantee an effective compliance with the freedom of religion, the jurisprudence by the ECHR is rather rudimentary.[61] The *contemplative aspect* of freedom of religion cannot be restricted, unless the State avails itself of the right of derogation (Article 15 of the Convention). The *expressive aspect*, on the other hand, may be limited by government. Those calling on their religious conviction in order to obtain exemption from a regulation imposed by government must be able to provide evidence that the manner of expression is *prescribed* by their religion, rather than merely 'recommended'.[62]

Article 9 paragraph 2 of the Convention steers a middle course between prescriptions that 'are necessary in a democratic society' on the one hand and the protection of particular rights on the other. Freedom of religious expression can only be restricted if such limitations are prescribed by law,[63] if they are necessary in a democratic society,[64] and if they are in the interest of public safety and the protection of public order,[65] health[66] or morals,[67] or for the protection of rights or freedoms of others.[68] Governments have a certain margin of appreciation[69] – except in the case of an apparent violation of rights.[70] In the event of a conflict between the so-called public interest on the one hand and personal rights relating to conscience and religious conviction on the other, one should not automatically assume that the former deserves precedence:[71] they should be weighed against each other with care. The ECHR, however, tests whether any measures taken on the basis of the margin of appreciation comply with the conditions of article 9: '*Another way of describing the play of the ECHR in this context is to say that the margin within which States may opt for different fundamental balances between government and individuals. It defines the area within which fundamental boundaries may be drawn.*'[72]

11. This margin of appreciation allows a contextual interpretation of freedom of religion.[73] The role of religion(s) within society is experienced differently in each country[74] and moral standards do not comply[75] with a uniform European conception.[76] The appreciation of religious freedom should be considered in the light of differences in the relationship between the Church and the State[77] that are inevitable because they are historical and are essentially reflected in education:[78] the Anglican model (State church in the UK), the principle of *laïcité* in France (separation between State and Church), and the more cooperative model that is applied in Belgium (a system of cooperation between the State and several religious communities). Nevertheless, common patterns can be

59 'Onus of proof', see for example ECHR, *Handyside v. the United Kingdom*, App. No. 5493/72, 7-12-1976, para. 48; ECHR, *Hatton and Others v. the UK*, App. No. 36022/97, 02-10-2001; 8-7-2003, para. 101.

60 'Living instrument', see for example ECHR, *Handyside v. the United Kingdom*, App. No. 5493/72, 7-12-1976. para. 48; ECHR, *Hatton and Others v. the UK*, App. No. 36022/97, 02-10-2001; 8-7-2003, para. 101.

61 Evans, Carolyn (2001), *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, pp. 67-74. A first step towards a change in attitude on the part of the ECHR is taken in ECHR, *Serif v. Greece*, App. No. 38178/97, 26-01-1999.

62 This is the so-called 'necessity test'. ECHR, *Pat Arrowsmith v. the United Kingdom*, App. No. 7050/75, 12-06-1979.

63 ECHR, *Kokkinakis v. Greece*, App. No. 14307/88, 25-05-1993.

64 ECHR, *Handyside v. the United Kingdom*, App. No. 5493/72, 7-12-1976.

65 *Omkaranda and Divine Light Zentrum v. Switzerland*, App. No. 8118/77.

66 Fawcett, J.E.S. (1987), *The Application of the European Convention on Human Rights* (2nd ed.), Oxford University Press, Oxford, pp. 235-250.

67 For a critical remark about morals, see United Nations Human Rights Committee, *General Comment No. 22 on Article 18*, para. 8.

68 ECHR, *Kokkinakis v. Greece*, App. No. 14307/88, 25-05-1993

69 Yourow, H. C. (1996), *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Law International, The Hague; O'Donnell, T. (1982), 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', *HUM. RTs Q.*, p. 474; Jones, T.H. (1995), 'The Devaluation of Human Rights Under the European Convention', in: *PUB. L.*, p. 430; Merrills, J. (1993), *The Development of International Law by the European Court of Human Rights* (2nd ed.), Manchester University Press, Manchester.

70 Krishnaswami, A. (1960), *Study of Discrimination in the Matter of Religious Rights and Practices*, UN, New York: '... so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them or even to prohibit them altogether.'

71 According to, among others: Tahzib, B.G. (1996), *Freedom of Religion and Belief. Ensuring Effective International Legal Protection*, Nijhoff, The Hague, p. 292 ff.

72 Weiler, J.H.H. (1999), 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space', in: Weiler, J.H.H., *The Constitution of Europe*, Cambridge University Press, Cambridge UK, pp. 102-129 (107).

73 See, for example, Kiss, A.C. (1981), 'Permissible Limitations on Rights', in: Henkin, L., *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, p. 290.

74 ECHR, *Murphy v. Ireland*, APP. No. 44179/98, 10-07-2003, para. 48.

75 *Adopted by consensus by the European Convention on 13 June and 10 July2003, submitted to the President of the European Council in Rome.*

76 ECHR, *Handyside v. the United Kingdom*, App. No. 5493/72, 7-12-1976. para. 48.

77 See also ECHR, *Cha'are Shalom Ve Tsedek v. France*, App. No. 27417/95, 27-6-2000, para. 84; ECHR, *Wingrove v. the UK*, App. No. 17419/90, 25-11-1996, para. 58; ECHR, *Manoussakis And Others v. Greece*, App. No. 18748/91, 26-09-1996, para. 44; ECHR, *Casado Coca v. Spain*, App. No. 15450/89, 24-02-1994, para.55.

78 For an extensive discussion, see both the national reports (volume I and part of volume II) and the synthetic essay in Volume II of the previously mentioned publication by Glenn, C. and De Groof, J., *o.c.*

discerned in the relationship between Church and State throughout Europe, including France, arguably the most laicised country in Europe, where forms of cooperation exist even in State-run education.

Even in the Draft Treaty Establishing a Constitution for Europe,[79] the specific and positive contribution from churches and religious associations and communities is mentioned explicitly and it respects the status of religious, philosophical and non-confessional organisations.[80] However, each Member State is free to delineate the relationships with confessional and non-confessional communities, as well as to outline the neutrality principle for government. Taking into account these different approaches,[81] the ECHR has produced a jurisprudence which respects the (evolving) balance between fundamental rights on the one hand and interests that must be protected by national/regional authorities on the other. Thus, the manner in which the fundamental protection developed by the ECHR impacts nationally is dependent upon the specific 'cultural' structure of a country and the national interpretation of 'pluralism' and 'public order'. The balance that needs to be attained between the rights and liberties of different population groups, mutually and in relation to the public interest of a peaceful and democratic society, will therefore perforce vary from country to country. Nevertheless, the international standard, as we have previously mentioned, will be taken into account: '*The state must respect, protect, promote and fulfil the fundamental rights*'. In a young democratic regime, such as South Africa, the conclusion drawn is that 'it may be argued that the right to freedom of religion also requires state involvement in order to facilitate the effective exercise of the right.'[82] The South African constitution distinguishes between '*religious observance*' on the one hand and '*religious instruction*' on the other, and it attributes a differentiated regime to these notions. The former encompasses the wearing of any religious symbols, besides, for example, free moments for personal meditation. Thus, it is up to the school administration to 'regulate' within an essential restriction: 'Such rules may only regulate the observances and may not prohibit them.'[83]

12. If the wearing of a headscarf is considered to be a direct expression of religious conviction, any limitation should be meticulously and objectively motivated. The abovementioned criteria must, moreover, be applied cumulatively. The *necessity requirement*, for example, demands a justification: one must be able to demonstrate that the same objective cannot be attained by means of an alternative measure that is less discriminatory. This requirement alone prevents any competent regulator from outright banning the headscarf. However, other requirements may equally cause problems for the competent authority. A measure, such as the banning of the headscarf, must be *proportional* to the *goal envisaged*, e.g. the proper functioning of the educational process at school, the maintenance of order, or the protection of rights and liberties of fellow-pupils in the case of real or apparent evidence of individual social exclusion or influencing.[84] The goal itself must be *sufficiently relevant (pertinent or weighty), legal and non-discriminatory*. Any attempt to demonstrate the urgent social necessity of a measure must not be based on impressions or insinuations, and all other means to resist the necessity must have failed.

If Muslim girls who do not wear a headscarf are systematically pressurised, blackmailed or despised, one will still need to demonstrate that a general prohibition on the wearing of headscarves complies with all these requirements. In principle, such a State-imposed ban is not out of the question in a democratic society, provided that it meets the conditions imposed, and that the impact of the '*powerful external symbol*' and its *proselytising effect* are beyond doubt.[85] Likewise, the aforementioned ruling by the ECHR in Leyla Sahin v. Turkey, dd. 6 May 2004, tried to argue on the basis of such general principles[86] as the protection of the general interest (avoidance of civil unrest, public order and public safety), and the protection of the rights of others (ensuring peaceful coexistence between students of various faiths, protecting pluralism, preventing proselytism) and to place them in their specific context. The Court ascertained whether a sufficient analysis had been made of the '*local needs*

79 Approved on 18/6/2004, but yet to be signed – scheduled autumn 2004.
80 Art. 51.
81 Cf. http://www.svenskakyrkan.se/svk/eng/engkyst.htm.
82 Foster, F.W., Malherbe, R. and Smith, W.J. (July 1999), 'Religion, Language and Education: Contrasting Constitutional Approaches', *Education and Law Journal*, 9, 2, p. 218; see also Malherbe, R. (2000), 'Human Rights In South Africa: A Preliminary Assessment', in: De Groof, J., Malherbe, R. and Sachs, A., *Constitutional Implementation in South Africa*, Mys & Breesch publishers, Gent, p. 113 ff.; Malherbe, R. (2000), 'Education Rights in South Africa', *European Journal for Education Law and Policy*, No. 1, p. 49 ff.
83 *Ibid.*, p. 222.
84 Pettiti (the comparison is relevant *mutatis mutandis*) previously drew attention to the danger of the disproportional relationship between the behaviour giving rise to a measure on the one hand and the punishment on the other....'... sanction qui porte gravement atteinte à la liberté fondamentale du requérant de manifester sa religion. De plus, une telle sanction se révèle incompatible avec l'esprit de tolérance dont doit faire preuve, de nos jours, une société démocratique.' Pettiti, L.E. (1992), 'Liberté de religion. Textes internationaux et convention européenne des droits de l'homme', in: Velu, J., *Présence du droit public et des droits de l'homme/ Mélanges offerts à Jacques Velu*, Bruxelles, vol. III, p. 1853.
85 ECHR, *Karaduman v. Turkey*, App. No. 16278/90, 03-05-1993; ECHR, *Dahlab v. Switzerland*, App. No. 42393/98, 15-02-2001.
86 Cf. para. 97 ff.

and conditions', as well as the '*initial assessment of the "necessity" for an interference, as regards both the legislative framework and the particular measure of implementation*'.[87] In concrete terms, the ECHR, like the Turkish Constitutional Court, took account of the fact that the majority of Turkey's population adheres to the Islamic faith. It considered that imposing a ban on the wearing of a headscarf in higher education met a pressing social need, more specifically a need to assure the secularism of the State and to protect citizens who choose not to wear a headscarf, especially since the Turkish court had stated that this religious symbol has taken on political significance in Turkey in recent years and considering the impact of extremist religious movements.[88]

13. The fact that there is no uniformity across the European Union is further illustrated by the explicit exclusion of higher education from restrictive prescriptions concerning conspicuous religious symbols in the aforementioned French law. The *Rapport au Président de la République* of the abovementioned *Commission Stasi* states the following : '*La situation de l'université, bien que faisant partie intégrante du service public de l'éducation, est tout à fait différente de celle de l'école. Y étudient des personnes majeures. L'université doit être ouverte sur le monde. Il n'est donc pas question d'empêcher que les étudiants puissent y exprimer leurs convictions religieuses, politiques ou philosophiques*.'[89]
However, this reasoning also holds for the kind of education that strives towards such an open and pluralistic concept, as is the case within the Flemish Community, certainly vis-à-vis the third grade of secondary education or even earlier, and *a fortiori* with regard to pupils who are no longer of school age.

14. The notion of a '*law*' – as mentioned in the doctrine of the limitation of fundamental rights – does not refer to the formal (yet substantive) act on the part of the legislator.[90] The competent regulator, in conformity with national law,[91] may therefore be the school administration.[92] To the extent that the socio-cultural context differs significantly between neighbourhoods depending on the degree of urbanisation, or between educational institutions themselves, a general, decretal order would appear harder to argue.[93] Responsibility for the fulfilment of the pedagogical project remains with the organising authority. This also applies to neutral education, as an implementation of the relevant fundamental legal standards and, as the case may be, under supervision of the judge.
In Belgium, these principles are laid down in Article 24 of the Belgian Constitution and in implementation of it. *The community guarantees the freedom of choice of the parents. The community organises neutral education. This neutrality implies, among other things, respect for the philosophical, ideological or religious convictions of the parents and the pupils*. In Flanders, 'official education (...) is "the answer to the freedom of education" for those parents who want their children to grow up in a school environment where they can meet children educated in accordance with other religious convictions, and for minorities who, without official education, would be forced to attend school at an institution that explicitly belongs to a different ideological or social persuasion.'[94] We shall return to the issue of the scope and the nature of the neutrality of community education later.

B. Respect for religious or ideological convictions in education – The primacy of pluralism

15. The European Court reiterates in a number of judgements that without 'pluralism, tolerance and broadmindedness' there can be no democracy. The obligation to respect religious convictions in an educational context therefore lays a special responsibility on the shoulders of the authorities, which admittedly is interpreted rather minimalistically in European case law. Article 2 of the First Protocol to the European Convention on Human Rights was first refined in the so-called Belgian Linguistic Case.[95] The ECHR ruled that the article guarantees, in the first place, (1) the right of access to educational institutions existing at a given time, (2) the right to effective

87 Para. 100.
88 Para. 108 ff.
89 Aforementioned report, p. 58, under para. 4.2.2.2.
90 Cf. ECHR, *De Wilde, Ooms and Versyp v. Belgium*, App. No. 2832/66, 2835/66, 2899/66; 18-06-1971, para. 93; *Bartold v. Germany*, dd. 25 March 1985, para. 46; ECHR, *Sunday Times v. UK* (No. 1), App. No. 6538/74, 26-04-1979, para. 47; ECHR, *Sahin v. Turkey*, App. No. 44774/98, 29-06-2004, para. 72 ff.
91 ECHR, *Kruslin v. France*, App. No. 11801/85, 24-04-1990, para. 29; ECHR, *Casado Coca v. Spain*, App. No. 15450/89, 24-02-1994, para. 43.
92 See above.
93 Which is not to say that a 'child impact report' should be considered, as the intended measured apparently touches directly upon the interest of the child: see the decree of 15 July 1997 concerning the introduction of a child impact report and the testing of government policy for compliance with children's rights.
94 The School Pact does not restrict parents' free choice of educational institution to a choice between a 'confessional' and a 'non-confessional' institution. It also leaves parents free to opt for a school that does not present itself as either confessional or non-confessional. De Groof, J. (1985), *De overheid en het gesubsidieerd onderwijs*, Cepess, Brussel, p. 12.
95 ECHR, *Case Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium*, App. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23-07-1968.

education and (3) the right to official recognition of the studies which a student has completed. '*By binding themselves not to "deny the right to education", the Contracting States guarantee to anyone within their jurisdiction "a right of access to educational institutions existing at a given time" and "the possibility of drawing", by "official recognition of the studies which he has completed", "profit from the education received".*'[96]

According to the ECHR, it is essential that, within the existing 'public' (State-run) educational system, religious convictions should be respected: '*It (Article 2 Protocol 1) enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.*'[97] Special concessions to meet the requirement of respect may take the shape of exemptions for religious instruction.[98] Only if parents want their child to be exempt from religious teaching must their request be respected.[99] As regards other subjects on the curriculum, different interests may be weighed against each other. With regard to sexual education, for example, it will be tough to exempt a child if the course is part of an obligatory programme and is restricted to biological aspects. By analogy, a child may, in principle, not be exempt from physical education if the course is part of the mandatory curriculum. '*It follows in the first place from the preceding paragraph that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. (...) It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. (...) The second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.*'[100]

Thus, in drawing up the curriculum, the State has a considerable margin of appreciation, but it is not infinitely wide. The ECHR defines its boundary as follows: '*Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination (...)*'.[101]
In the search for a healthy balance, the ECHR also involves the parents and the effort that may be expected from them: '*It does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.*' This means that limitations imposed by the school, or certain courses on the school curriculum that represent a certain value judgement without the intention of being indoctrinating, are permitted, as they do not violate parents' right to educate their children in accordance with their own beliefs outside of school.

The ECHR believes that the availability of alternatives for the education of children is an important factor in the weighing up of interests, as is apparent from the rulings in Kjeldsen, Busk Madsen and Pedersen[102] and Alonso and Merino.[103] The State must, in any case, respect the rights of parents by granting them the freedom to organise private, non-official education.[104] This implies that the State may not prohibit the establishment of such schools, without, at least in implementation of the European Convention on Human Rights, being compelled to set up such a non-official school itself or to subsidise a certain type of education to the same extent as State-run education.[105]

A joint reading of the rights mentioned in paragraphs A and B leads us to conclude that religious or philosophical rights in education should enjoy special protection: the exercise of freedom of conscience and expression can only be restricted under very exceptional circumstances[106] and the right to education leads to an explicit respect for personal philosophical and ideological convictions. Belgian and Flemish constitutional law has made more explicit the European 'minimum' by means of a positive incorporation of the neutrality principle, as we shall argue later on.

---

96 ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 52, with reference to the Judgment of 23 July 1968 on the merits of the *Belgian Linguistic case*.
97 ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 51.
98 ECHR, *Valsamis v. Greece*, App. No. 21787/93, 18-12-1996, paras 36-37.
99 ECHR, *Valsamis v. Greece*, App. No. 21787/93, 18-12-1996, paras 36-37.
100 ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 53.
101 ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976.
102 ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 54.
103 ECHR, *Jimenez Alonso et Jimenez Merino v. l'Espagne*, App. No. 51188/99, 25-05-2000.
104 ECHR, *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, App. No. 11533/85, 06-03-1987.
105 See on this matter Glenn, C.L. and De Groof, J. (2002), *o.c.*, vol.II.
106 See also Van Der Schyff, G. (2004), 'Het concept van democratie in het EVRM', in: Adams, M. and Popelier, P. (eds), *Recht en democratie. De Democratische verbeelding in het recht*, Intersentia, Antwerpen, p. 566.

It would appear to be a precarious undertaking to try and bring a general preventative ban on the wearing of the headscarf in line with the criteriology that applies to the limitation of fundamental (religious) rights. The French *Conseil d'Etat* therefore persisted for years with a case-by-case approach and rejected any regulation according to which '*le port de tout signe distinctif, vestimentaire ou autre, d'ordre religieux, politique ou philosophique est strictement interdit*' is unlawful: '*...que par la généralité de ses termes, ledit article institue une interdiction générale et absolue en méconnaissance des principes ci-dessus rappelés et notamment de la liberté d'expression reconnue aux élèves dans le cadre des principes de neutralité et de laïcité de l'enseignement public.*'[107]
Elsewhere, the Council of State asserted that '*une interdiction générale et absolue est contraire au principe de notre Droit Public lorsque de telles interdictions s'appliquent à des activités licites, encore plus à des libertés; elles sont illégales.*'[108]
The so-called *Conclusions des commissaires du Gouvernement* stated among other things that '*... il nous paraît difficile d'admettre que le port ostentatoire du foulard puisse à lui seul, en l'absence d'autres éléments de fait, constituer un acte de prosélytisme et encore moins de prosélytisme abusif.*'[109] The possibility of granting exemptions for certain courses, on the other hand, was approached very restrictively.[110]

C. The 'parallel functioning' of other relevant provisions of international law

Common European values

16. Other fundamental rights and liberties are also at stake. One could speak of a 'parallel functioning' of basic rights. Standards of international law emphasise the *non-discrimination* and the *equality* principles and the rights of *minorities*.[111] The application of these principles may contribute to the debate on the headscarf. Within the scope of the present article, we merely mention a few aspects.

For many young Muslim women, the wearing of the headscarf is a way of expressing their religious identity and emancipation, rather than their 'submission' under the very traditional interpretation of the relationship between man and woman. Government, including school administrations, should refrain from judging in the name of others and gauging people's personal convictions. This attitude of religious *diffidence* may only be shed if there is certainty that pupils are being coerced. After all, democracy also presupposes acceptance of other people's choices. This is referred to as *mutual tolerance*. International treaties and national policy documents emphasise the role that school plays in instilling upon pupils the values of tolerance and human rights.

As long as one respects the freedom of others, one is entitled to demand respect from others for one's own opinions. Thus, *freedom of expression* entails the right to question prevailing opinions. The jurisprudence of the ECHR on Article 10 of the Convention is explicit and consistent: protection should be offered to ideas '*that offend, shock and disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without there is no democratic society.*'[112] The Court of Arbitration has tried to echo this formulation in its own rulings.[113] This does not imply that one cannot impose boundaries on the exercise of these rights. Freedom of expression can be restricted in conformity with the criteria stemming from art. 10, second paragraph of the Convention and Article 19, third paragraph of the International Covenant on Civil and Political Rights, which are entirely comparable to those of the previously mentioned Article 9, second paragraph of the Convention.

17. The boundaries of the margin of appreciation of the individual Member States is moreover influenced by a number of factors that are beyond the control of the national lawmaker but that nevertheless impact on the latter's legislative activities. The Charter, as formulated under the Treaty of Nice, is already applied marginally on the part of the European judge and is to be confirmed by the European Constitution.

---

[107] Conseil d'Etat, 2 November 1992, *Kherouaa et autres*; see Sabourin, P. (1993), Note de Jurisprudence: 'L'affaire du Foulard Islamique', *Revue du Droit Public et le Science Politique en France et à l'Etranger*, p. 220 ff.
[108] Conseil d'Etat, 10March 1995, *M. et Mme Aoukili, L'Actualité Juridique – Droit Administratif*, 20 April 1995, p. 332.
[109] 'Conclusions des commissaires du Gouvernement', *Revue du Droit Public et de la Science Politique en France et à l'Etranger*, 1995, p. 1357.
[110] *Revue du Droit Public et de la Science Politique en France et à l'Etranger*, 1995, p. 1357. 'L'obligation est totale. Il ne peut être question de refuser d'étudier certaines parties des programmes. Une absence, même momentanée, sans motif légitime, est passible de sanction, à l'égard de l'élève et de sa famille (éventuellement suppression des prestations familiales)', Basdevant-Gaudemet, B. (1996), 'Le statut juridique de l'Islam en France', *Revue du Droit Public et de la Science Politique en France et à l'Etranger*, p. 374.
[111] Which will not be examined further in the present contribution.
[112] Basic ruling: ECHR, *Handyside v. the United Kingdom*, App. No. 5493/72, 7-12-1976, para. 49.
[113] Ruling No. 10/2001, 7 February 2001, para. B.4.8.1.

According to Article 2 of the draft European Constitution, the characteristics of the EU member states are *pluralism,* tolerance, justice, solidarity and *non-discrimination*. *Unity in diversity* is the European motto. Therefore, with a view to the realisation of this 'unity in diversity', one may expect that, *within each member state*, space would be offered to the various religions by means of a *positive recognition* of differences in ideological and philosophical convictions, rather than a *denial of diversity*. Both this collective dimension[114] as the application of individual liberties,[115] including of (the draft) Article II-14 regarding the right to education, is encompassed in the Draft Constitution. According to the commentary on Article 14, the text exudes both the spirit of the constitutional traditions that the Member States have in common and that of Article 2 of the additional protocol to the European Convention on Human Rights.[116]

This *positive* interpretation of pluralism must also be apparent in the form and the content of official education. Pupils must be able to express their differences within the broader context of the school. The question therefore arises whether a Member State that excludes Islamic girls from public education because they wear headscarves perhaps sends a message to these girls that, by wearing a garment which expresses their Muslim identity, they cease to be European. Is it not so that integration of different groups into a multicultural and pluralistic society is, first and foremost, achieved by offering everyone an opportunity to obtain a good education and the prospect of proper employment, without disregarding the identity of the pupil?

The Rights of the Child

18. Unlike the ECHR, the United Nations Committee on the Rights of the Child and the United Nations Committee on Economic, Social and Cultural Rights have expressed their concern about the imposition of any ban on the wearing of the headscarf at schools.
The right to education is not only a matter of access (Article 28) but also of content. Article 29[117] of the Convention on the Rights of the Child adds a qualitative dimension to Article 28, i.e. the need for education to be child-oriented. Globalisation causes tensions, between the global and the local, the individual and the collective, tradition and modernity, competition and equal chances, etc.[118] Article 29 (1) stipulates that education should promote a broad range of values that go beyond the boundaries of religion, nation and culture. At first glance, this objective may lead to conflict, e.g. in the case of the promotion of the child's own cultural identity, between the language and the values from which it hails on the one hand and the national values of the country in which the child lives and other civilisations on the other. The significance of this stipulation lies in its emphasis on the need for a balanced approach to values within education and the promotion of dialogue and respect for others. Children do not lose their rights when they walk through the school gate. Their rights must be guaranteed in the educational process, the pedagogical method, the environment in which education is provided.

Children must be allowed to express their opinions freely in accordance with Article 12 (1) and to participate in a school life that respects the child's dignity. According to Article 2, any form of discrimination, be it overt or covert, is in violation of the dignity of the child. Denying access to education is primarily in contravention of Article 28, while there are numerous ways in which Article 29 (1) is violated, with similar effect.[119] (...) Education must be organised in a manner that enhances tolerance. Promoting these values must, first and foremost, focus on the child's own community. If States fail to incorporate the objectives of Article 29 into national law, it is unlikely to be attained in education policy. The school environment itself must promote tolerance between all ethnic, national and religious groups and persons of indigenous origin on grounds of Article 29 1b and d.[120]

---

[114] See also the previous section, with reference to preamble and Art. 51.
[115] Art. II-10, reiterating art. 9, para. 1 ECHR.
[116] JUR, Charte 4473/00 1st/BAR/kk, p. 16.
[117] Art. 18 should be interpreted within the context of the convention as a whole, including the stipulations regarding freedom from discrimination (Art.2), the best interests of the child (Art. 3), the right to life, survival and development of the child (Art. 6), the right to express an opinion and to have that opinion heard (Art.12), the rights of the parents (Art. 5 and 18), freedom to seek, receive and impart information (Art. 13), freedom of thought, conscience and religion (Art. 14), access to media and information (Art. 17), the rights of disabled children (Art. 23), the right to the highest attainable standard f health (Art. 24), the right to education (Art. 28), the right of children of minority communities to enjoy their own language and culture (Art. 30).
[118] United Nations Educational, Scientific and Cultural Organization (1996), *Learning: The Treasure Within,* Report of the International Commission on Education for the 21st Century, pp. 16-18.
[119] 'Quand l'interdiction du foulard entrera en vigueur, les filles que leurs parents forcent à porter le foulard risquent de sortir de l'enseignement public et d'être envoyées dans des écoles religieuses. Elles peuvent se retrouver mariées très jeunes à un homme que leurs parents jugent convenable et être mères de plusieurs enfants à 30 ans. Si les filles de ces milieux doivent obtenir plus de chances de décider activement de leur avenir, seule l'éducation dans un environnement culturel plus ouvert leur donnera ces chances', Giddens, A. (14.01.2004), 'Voile islamique: la France sur la mauvaise voie', *Le Monde*.
[120] CRC/C/118, 3 September 2002, Committee On The Rights Of The Child, 21 May-7 June 2002, Report On The Thirtieth Session: 'In this regard, the Committee takes note of General Comment No. 13 (1999) of the Committee on Economic, Social and Cultural Rights on the right to education, which deals, *inter alia*, with the aims of education under article 13 (1) of the International Covenant on Economic, Social and Cultural Rights. The Committee also draws attention to the general guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the

We look forward with interest to the implementation of Article 22*bis* of the Belgian Constitution,[121] which stipulates that each child has the right to respect for its moral, physical, mental and sexual integrity.

Within the French Community, pupils' rights on such matters were clarified after an interesting exchange of ideas regarding the scope of the neutrality principle (at official schools) within the Community. This was occasioned by the recurring question regarding the ideological nature of official subsidised education. This debate also led to a new regulation in Flanders.
The recommendation from the Council of State on the so-called *Avant-projet de décret 'organisant la neutralité inhérente à l'enseignement official subventionné et portant diverses mesures en matière d'enseignement'* confirmed the view that the constitutional lawmaker had not wanted to impose neutrality upon municipal and provincial schools[122] and referred to its earlier recommendations[123] and legal advice obtained[124] to advocate what it called '*une neutralité moins contraignante*', in particular based on the mandatory options in consequence of Article 24, para. 1, clause 4 of the Constitution. By decree, the public-law institutions may be compelled '*à établir une sorte de glacis protecteur de la liberté de consciences des élèves.*'
Article 4 of the decree of 3 July 2003 stipulates the following: '*L'école officielle subventionnée garantit à l'élève ou à l'étudiant le droit d'exercer son esprit critique et, eu égard à son degré de maturité, le droit d'exprimer librement son opinion sur toute question d'intérêt scolaire ou relative aux droits de l'homme.*'
The Article specifies in paragraph 2 what this entails and what are the (traditional) boundaries, and it also refers to the internal regulation for the fixing of the modalities.[125] Finally, the Article asserts that '*La liberté de manifester sa religion ou ses convictions et d'en débattre, ainsi que la liberté d'association et de réunion sont soumises aux mêmes conditions*', and that '*aucune vérité n'est imposé aux élèves, ceux-ci étant encouragés à rechercher et à construire librement la leur.*'

The general prohibition of discrimination

19. The new protocol 12 to the European Convention on Human Rights introduces a general prohibition of discrimination. Probably under the influence of this protocol (which is not in force yet, since it has only been ratified by four Member States), the ECHR has slowly progressed towards a *positive obligation* for States to take action in order to enforce a prohibition of discrimination. What consequences might this evolution have?
On the one hand, if a female student claims that she wears the headscarf as an expression of her Islamic faith, this should in principle be adopted as the starting point.[126] The fact that other female students do not wear a headscarf would then be irrelevant. Any decision to base access to education on a distinction between female students who do and those who do not wear a headscarf is then to be regarded as a distinction on the basis of religion. On the other hand, States enjoy a certain margin of interpretation in assessing such distinctions in the interest of, among other things, public order, which is thus interpreted nationally.
The ECHR has, however, begun to interpret the notion of public order differently: '*Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.*'[127]

The indirect restriction of mobility

20. The headscarf issue may be problematic, not only in view of the European Convention on Human Rights, but also in the light of European Community law.

Convention, (CRC/C/58), paras 112-116'.

121 Inserted into article for a Constitutional Amendment of 23 March 2000.

122 Avis 35.846/2 of 17 and 22 September 2003. See *Doc.,* Parlement de la Communauté Française, no. 456-1, S.2002-2003, 13 October 2003.

123 Avis 25.108/2 and 25.109/2 of 1 July 1996. *Doc.,* C.C.F., no. 218/2, S. 1994-1995 and no. 29/2, S.E. 1995.

124 Recommendations by Delpérée and Uyttendale, recorded in the DARAS report by the working committee '*Neutralité de l'enseignement official subventionné*' and the working group '*Extension de la neutralité à l'enseignement official subventionné*', published in *Doc.,* C.C.F., 1998-1999, no. 297/1, p. 62 ff.

125 More in particular, 'Ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées part out moyen du choix de l'élève et de l'étudiant à condition que soient sauvegardés les droits de l'homme, la réputation d'autrui, la sécurité nationale, l'ordre public, la santé et la moralité publiques. Le règlement d'ordre intérieur de chaque établissement peut prévoir les modalités selon lesquelles les droits et libertés précités sont exercés.'

126 This would imply that the ECHR would no longer concern itself with what is or is not an expression of faith. As such, it would evolve towards the viewpoint of the US constitutional court : '[c]ourts are not arbiters of scriptural interpretation', *Thomas v. Review Bd. of Indiana Employment Sec.*, 101 S. Ct. 1425, 1431 (1981).

127 ECHR, *Serif v. Greece*, App. No. 38178/97, 26-01-1999.

Freedom of movement of persons within Europe is one of the fundamental pillars of the European Union. When introducing new legislation, the national lawmaker must always – even in areas that belong to the lawmaker's exclusive competence – take into account the supranational institutions, in particular the four pillars of the European Union (i.e. freedom of persons, goods, services and capital) and the principles of non-discrimination. Freedom of movement is an integral aspect of the internal market of the Union. Part 1 of the Treaty defines freedom in general terms as well as the basic principles of the European Union.[128] Part 2 of the EU Treaty deals with citizenship of the Union. Article 18 is of great importance, as it introduces the potential right for every citizen of the EU to move and reside freely within the Union.
If certain Member States were to ban the wearing of headscarves in public schools, this may significantly – though indirectly – limit citizens' freedom of movement. One could, in theory, consider exemptions from the prohibition on the wearing of a headscarf at school for female students or for the children of workers from another Member State. However, this would be in violation of the equality principle for all citizens of the European Union as laid down in the Treaty Establishing the European Community.[129]

V. Fundamental rights in neutral education- Clothing rules for certain categories – National applications

A. The proper functioning of public services and compliance with the equality principle

21. It is generally accepted that persons in an exceptional power relationship can call on fundamental rights, yet that specific restrictions apply that are connected with their special status.[130] This is in line with European jurisprudence.[131] Such restrictions are required in order to allow public services to function properly. Performing these functions implies not only certain rights but also duties connected with the office. Deontological duties may in turn imply a restriction of freedom of expression, while specific duties may bring with them restrictions on religious worship or conviction.
For example, certain categories of people in an authoritative position are expressly bound by the requirement of *impartiality*. The equality principle demands that public provisions are organised in a way that respects the ideological and philosophical convictions of all. The trust that people must be able to put in public services requires a certain amount of restraint, as specified in general, statutory or deontological rules whereby the specific nature of the position may also come into play.[132]
These principles are systematically refined by or pursuant to the law or administrative jurisprudence. They are also assumed to apply in education,[133] particularly in the case of staff at official schools.[134] The *legal position* of staff in education contains a catalogue of rights and duties.[135]

For certain categories, explicit clothing rules apply. The general requirement of the proper functioning of the services implies that items of clothing must not hinder or preclude mutual communication and, a fortiori, identification. It would appear that not only the burka,[136] but also the chador are incompatible with this requirement.

---

[128] The purpose of the principle of legality, the principle of subsidiarity and the principle of proportionality, as laid down in Art. 5, is to divide competence between the Union and the Member States. Furthermore, there is the principle of loyalty, as laid down in Art. 10, which emphasises cooperation within the EU. Finally, there is the non-discrimination principle, which is laid down in Art. 12. This is a *lex generalis* and can be combined with other, more specific, stipulations. Given that it constitutes the fundamental basis of the European Union, it is interpreted by the European Court of Justice.

[129] For a legal exposition on this issue, see De Groof, J. and Lauwers, G. (2003), 'Vlaamse Identiteitsvorming binnen Europa', in: De Groof, J., Judo, F. and Storme, M.E. (eds), *De Vlaamse en Europese Uitdaging: Vlaming zijn nu*, Lannoo Campus, Tielt, pp. 139-159. The non-discrimination principle is laid down in Art. 121 EU, but the prohibition to discriminate on grounds of nationality is applicable only to citizens of EU Member States: 'In the field of application of this Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.' The Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin gives the EU the competence to act in the field of non-discrimination at work, in social security, healthcare, education and access to public goods and services. 'To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but *does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.*' (Preamble to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, PB L 180/22).

[130] See among others Velaers, J. (1991), *De beperking van de vrijheid van meningsuiting*, Maklu Uitgevers, Antwerpen, part II, p. 605 ff.

[131] See among others ECHR, *Vogt v. Germany*, App. No. 17851/91, 26-09-1995; ECHR, *Kalac v. Turkey*, 01-07-1997.

[132] With regard to the prescriptions for journalists of a public broadcaster, see our article 'Le droit à l'information et le devoir d'objectivité du service public de la radiodiffusion, *Administration Publique*, 1985, part. 4, pp. 264-289.

[133] See, for example, Rimanque, K. (1980), *De levensbeschouwelijke opvoeding van de minderjarige – Publiekrechtelijke en privaatrechtelijke beginselen*, Bruylant, Brussel, part I, p. 23.

[134] See among others De Groof, J. (1985), *Het levensbeschouwelijk karakter van de onderwijsinstellingen, Administratief Lexicon*, Die Keure, Brugge.

[135] See, among other publications, the special issue of *T.O.R.B.* on the occasion of the tenth anniversary of the two decrees on the regulation regarding the legal position.

[136] The hijab is a headscarf. The chador is a veil that covers the entire head, shoulders and face with the exception of the eyes. The burka is the Afghan version of the chador: it covers the entire body and also hides the wearer's eyes.

As a guideline, one could refer to common administrative practice in relation to passport photographs for identity documents: the face, i.e. chin, cheeks, eyes and forehead, must be visible.[137] Article 15 d) of section III of the circular letter of 7 October 1992 concerning the keeping of population registers and the register of foreign nationals stipulates in this context that a photo (for the purpose of an identity card) with headscarf is allowed 'for irrefutable religious or medical reasons', on condition that the face (i.e. the forehead, cheeks, eyes, nose and chin) is completely visible. The circular adds that it is desirable but not mandatory that hair and ears should also be visible and that 'this solution is only acceptable if the citizens concerned can submit a serious justification'.
The Court of Cassation, in its judgement of 22 December of 2000, in which it considers the ruling by the Appeals Court of 14 September 1998, rules that '*1. the wearing in public of a headscarf corresponds to the prescriptions of Islam; 2. the defendant has invoked an irrefutable reason and has shown convincingly to belong to the Islamic faith and generally wears a headscarf in public; that she also believes that it is her duty to exteriorise her faith in this manner*', and concludes on this basis that a serious justification has been submitted for an identity card to be issued bearing a photograph in which she is seen to wear a headscarf and '*that therefore the ruling does not violate any of the applicable legal provisions*'. Several parliamentary debates were subsequently held on how municipal authorities should be instructed on the matter.[138]

Likewise under labour law, the required respect for religious convictions entails that the employer must, in principle, accept any dress that is prescribed by a (earnest) faith of one of his or her employees.[139] It is up to the judge to decide whether ritual clothing is an obstacle to the execution of the labour contract and to weigh up the various rights that are at stake, i.e. the interest of the undertaking must also be taken into account.[140] The ruling by the Labour Court of Antwerp of 3 June 2004 expressed the court's point of view quite unequivocally: social tolerance and the protection of religious minorities require that one take the greatest possible account of religious prescriptions. More specifically, the ruling says that, in practice, the community must allow worshippers, in the assessment of whether the position offered to them is appropriate, to respect the rules prescribed to them insofar as this does not cause an excessive burden on society. The ruling deals in rather great detail with the test of 'earnestness' and of 'proportionality' that need to be applied in this assessment. With regard to the former, the court reiterates that it must concern a 'sincere and earnest conviction that is necessarily connected with an objective and absolute norm that is adhered to by an organised group'. In testing the reasonableness, the court makes an essential distinction between serious moral or religious convictions and other motives. Therefore, argues the Court, it is wrong to assess issues of conscience in the same manner as practical objections, and it adds that the result of such an equation would be that issues of conscience are trivialised, so that they are pushed aside as being irrelevant and extremely impractical. As a result of such trivialisations, fundamental rights lose their significance and are violated.
As regards the requirement of proportionality, the Court ruled that the religious prescription for Islamic women to wear a headscarf does not make them unavailable to the labour market, as most professional activities are entirely compatible with the wearing of such attire. Further, it ruled that the federal employment agency RVA could not have taken other measures to allow the unemployed seamstress to comply with the religious prescriptions or to seek another solution.

This viewpoint is all the more relevant because the education system as a whole is committed to recognising *diversity as value added*[141] and the education community stands behind an open and pluralistic interpretation of its own neutrality.[142]

22. Symbols and dress are used to express a distinctive identity.[143] To the extent that pieces of clothing or symbols are the marks of an ideological or philosophical persuasion, another point for debate comes to the fore. More specifically, is it acceptable that a public-sector employee openly confesses to adhering to a certain creed or

[137] Cf. Verstegen, R. (2001), 'Een grondrecht beschermd bij omzendbrief? Het Hof van Cassatie over de pasfoto's met hoofddoek', *T. Vreemd*, 206 ff.; see also Mosselmans, S. (2000-2001), 'Hoofddoekjesaffaire beslecht? Ja maar ...', *A.J.T.*, p. 589 ff.
[138] See, for example, the Chamber of Representatives, Commission for Home Affairs, General Affairs and the Civil Service of 21 January 2004.
[139] Cuypers, D., Kempen, M. and Meeusen, C. (1993), 'Culturele minderheden in het sociaal recht', in: Breugelmans, K. e.a. (eds), *Recht en verdraagzaamheid in de multiculturele samenleving, Bijdragen van het Centrum Grondslagen van het Recht, UFSIA,* Maklu, Antwerpen, p. 263.
[140] Cf. Labour Court of Charleroi, 26 October 1992; Brussels, 10 July 1992; cited by Cuypers, D. e.a., *ibid.*, pp. 263-264.
[141] Flemish Education Council, *Diversiteit als meerwaarde, engagementsverklaring van de Vlaamse onderwijswereld*, Brussels, 19 February 2003, and a similar declaration on the part of the Council of Higher Education, 17 March 2004.
[142] See below.
[143] Cf. commercial use: for definitions, see Van Innis, Th. (1997), *Les signes distinctifs,* Larcier, Brussels, p. 25 ff.

conviction? As a matter of fact, for quite a long time this was a requirement for certain positions in the cultural sector[144] as well as in educational legislation.[145]

The *specific requirement* for teachers to adhere to the neutrality principle *in the exercise of their duties* would appear to us to be an important test. The question then arises whether the pedagogical relationship between teacher and pupil is violated in neutral education or whether the 'pedagogical diffidence' on the part of the teacher is necessarily precluded if the teacher confesses a religion, for example by wearing a headscarf. The conclusion might be that there is nothing to reproach the teacher for and that the ban on the wearing of the headscarf is in fact an intentional process, creating a new inequality of justice, i.e. an exclusive measure on the basis of religion and even gender. Even if it concerns a general stipulation regarding any external sign, in reality it affects mostly women adhering to the Islamic faith.

B. The implications of the open nature of neutral education – The role of the teacher

23. The next step requires an analysis of the neutrality principle itself. To what extent does the present interpretation of this principle – which, as we have demonstrated, can vary in Europe depending on the societal context – enhance or impede reference to '*philosophical, ideological and religious convictions*'. The gradual evolution of the Neutrality Declaration of 8 May 1963[146] towards a more positive interpretation of pluralism, at least in Dutch-language education,[147] and above all the subsequent constitutional review,[148] bear witness to the '*positive recognition and appreciation of the diversity of opinions and attitudes*'. The aforementioned 'Explanatory Note' by the Belgian Constituent Assembly adds that *such education will help youngsters and prepare them to enter into society with a personal judgment and commitment. Only in this sense shall controversial issues be dealt with. The interpretation of such neutrality ties in closely with the educational project and the pedagogical methods.*[149]

The 'Declaration of Neutrality of Community Education, approved by the Central Council for Community Education on 25 May 1989 and ratified by the Flemish Executive' specifies *inter alia* the following terms from the preparatory documents for the amendment of the Constitution: '*As regards education specifically, neutrality presupposes a* perfect objectivity *in the account of the facts and a* constant intellectual honesty in the service of the truth. *The pupils must be taught* respect for the most fundamental conviction of each person.'[150] In this text, which is rather well-designed in comparison with similar texts elsewhere in Europe, the abovementioned Declaration of Neutrality stipulates that, in their contact with pupils and students, employees must not avoid issues relating to philosophical, ideological and religious convictions and states quite explicitly that *if the educational or teaching situation so requires, they can freely express their own personal commitment, albeit with circumspection, meaning that they must refrain from any form of indoctrination and/or proselytism (...) so that pupils and students would gradually become aware that motivations from different origins deserve respect and enquiry.*[151]

The so-called Declaration of Commitment to Community Education, approved by the Central Council for Flemish Community Education on 25 May 1989 expresses, in implementation of the special decree of 19 December 1988, its commitment vis-à-vis Community Education, stating solemnly that there is place in it for all ideological views *recognises the Community school as a privileged meeting place for all those in society who, in the spirit of the neutrality declaration, want to cooperate with each other, get to know, understand and appreciate one another.* The commitment implies that teachers should contribute *to creating a climate of ideological openness and active tolerance,* and that they should *always to show respect for the opinions of others and to experience actively their attachment to freedom of expression.*
The Pedagogical Project of Community Education also emphasises that there should be room for diversity.

---

144 See our previous contributions on this topic: De Groof, J. (1992), 'Welk gelijkheidsbeginsel is de moeder van het pluralisme ? Beschouwingen bij het arrest nr. 65/93 van het Arbitragehof inzake art. 20 van de Cultuurpactwet', *Nieuw Tijdschrift voor Politiek*, 4; De Groof, J. and Schramme, A., ' Het cultuurbeleid', in: Dewachter, W. e.a. (ed) (1995), *Tussen de staat en maatschappij, 1945-1995, Christen-Democratie in België*, Lannoo, Tielt, pp. 426-462. See also Dumont, H. (1996), *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*, Facultés universitaires Saint-LouisBrussels, two volumes.

145 See our overview 'De bescherming van de ideologische en filosofische strekkingen. Een inleiding', in Alen, A., Suetens, L.P., *o.c.*; and also Witte, E., De Groof, J., Tyssens, J., (eds) (1999), *Het schoolpact van 1958. Ontstaan, grondlijnen en toepassing van een Belgisch compromis*, VUB-press, Brussels.

146 The standard work is still: Houben, R. and Ingham, F. (1962), *Het schoolpact en zijn toepassingen*. Tweede herwerkte uitgave, bijgehouden tot 1/1/1962, Cepess, Brussels.

147 See the aforementioned publication *Het levensbeschouwelijk karakter van de onderwijsinstellingen, o.c.*

148 Doc., Senate, no. 100-1/1/ and 2/ B.Z., respectively of 25 May 1988 and 8 June 1988.

149 Verklarende nota i.v.m. de herziening van art. 17 van de Grondwet, *ibid.*

150 Doc. Senate, no. 100-1/2/ BZ, aforementioned, p. 43.

151 For the full text, see De Groof, J., in collaboration with Fiers, J. (1996), *De Schoolpactwetgeving. Coördinatie en Annotatie*, Kluwer Rechtswetenschappen, Antwerpen, p. 148 ff.

24. These texts recognise the principle that active, open pluralism provides an opportunity for expressing one's identity, e.g. by means of a symbol or by wearing a certain item of clothing, without this needing to be interpreted as an assault on that very pluralism. The assumption that the headscarf as such might 'disturb the feelings of others'[152] or should be equated to a 'philosophy or doctrinal explanation of facts' conflicts with the positive neutrality principle. Furthermore, the intent of the Declaration of Neutrality, i.e. that *pupils and students would gradually become aware that motivations from different origins deserve respect and enquiry* and that subsequently *their young minds would be made receptive for the plurality and diversity of values in society, so that they would come to respect people in their honest conviction and show an appropriate interest in all persons' manner of thought and emotions*, rather requires the exteriorisation of religious and ideological pluralism.

As regards any abuse of this right or non-compliance with the neutrality principle in the execution of professional duties, detailed disciplinary procedures and punitive measures are in place. Preventative measures, such as a ban on headscarves, do not provide a guarantee that the neutrality obligation will be respected, but would appear rather to be inspired mainly by a fear of failure in education policy or through political coercion. The enhancement of a positive pluralism would appear not to benefit from this or at least not under all circumstances within a specific school context.

C. 'Diversity' is not neutral – The task of positive recognition of diversity vis-à-vis pupils and parents

25. We have previously pointed out that the prescriptions that enhance 'diversity' are applicable in all schools, regardless of the organising authority. The GOK Decree I and the Non-Discrimination Declaration are '*particularised*' in community education. School regulations, which must contain a synthesis of the rights and duties of the pupils of a given school, translate this to the concrete situation at the school.

The rules of non-discrimination, in conjunction with the principle of neutrality, is interpreted and implemented in a particular way in community education. The constitutional review of 1988 confirmed the striving towards 'positive pluralism', which was already very much present within the Flemish Community,[153] and introduced a divergent regulation for the establishment and organisation of education in each of the Communities concerned.

The Commission for the amendment of the Constitution recalls the educational role of schools and focuses on the entire person, adding that '*School education does, however, not exhaust the entire content of general education. The family, the social milieu, the ideological culture and the religious community also contribute in this respect.*'[154]

This constitutional reading is not entirely neutral. It at least entails a mission to ascertain how the cultural and philosophical identity may be approached positively at school. The Declaration of Neutrality further specifies the interconnectedness between school education and the cultural and religious context in which a child is raised within the family: '*Education at school is only part of the entire education. Apart from school, the household and familial, the social and ideological, the cultural, the religious milieu and society as a whole all serve an educational purpose. The contribution from these milieus to the education and development of youths must be respected by school and be integrated into its activities.*'

The constitutional lawmaker intended to explicitly guarantee the ideological rights[155] of pupils within community education. Article 24 para. 1, clause 3 of the Constitution stipulates that 'neutrality entails, *inter alia*, respect for the philosophical, ideological or religious convictions of the parents and the pupils.'[156] As the minor's power of discernment increases,[157] a possible conflict between parents or the legal guardian or representative of the pupil will need to be assessed in balance by the judge.[158]

---

[152] To reiterate the terms used in the abovementioned report by the Constitutional Assembly, *ibid.*

[153] We refer the reader to our previous study in *T.B.P.* 'De bevoegdheidsverdeling van 1970 inzake onderwijs: zienswijzen van de Raad van State en lessen voor de Constituante', in *T.B.P.*, 1988 and De Groof, J. (1989), *De grondwetsherziening van 1988 in het onderwijs. De schoolvrede en zijn toepassing*, E. Story-Scientia, Brussel, pp. 85-88.

[154] Doc., Commission for Constitutional Review, *ibid.*, pp. 42-43.

[155] Besides caring for '*moral or religious education*' in conformity with other stipulations in Art. 24 of the Constitution: De Groof, J., *De grondwetsherziening van 1988 en het onderwijs, o.c.*, p. 104 ff.

[156] Our italics.

[157] See also below.

[158] Cf., among others, Van Slycken, L. (1996), 'Beschikkingsrecht van de minderjarige over eigen leven en lichaam', in : Velaers, J. (ed), *Over zichzelf beschikken? Juridische en ethische bijdragen over het leven, het lichaam en de dood*, Maklu, Antwerpen/Apeldoorn, p. 246 ff.

A general 'repressive' measure, such as the prohibition of the wearing of the headscarf, is not in line with this interconnectedness. Nor is it in line with the general objective in community education to allow pupils and students to '*process the cultural goods with which they come into contact in such a manner that they clearly learn to discern facts and values*' in a '*climate of ideological openness and active tolerance*' and (not only as far as staff are concerned) while '*always showing respect for the opinions of others and actually experiencing a commitment to freedom of expression*.'

26. It speaks for itself that the documents, applying particularly to community education, also have consequences for pupils and parents, the 'users of education'. Educational standardisation in general and the pedagogical project of community education in particular instil the values of tolerance and respect for the rights of others. However, the '*neutrality requirement*' *does not hold for pupils*. The pupils themselves can hardly be compelled to adopt a neutral position. They are required to adhere to the educational project and, in case of any violation, they are subject to punitive and corrective measures. Tolerance towards, and a positive appreciation of (all) convictions is encompassed by the Flemish concept of neutrality rather than a prohibition of personal beliefs. This is very relevant to the issue of the headscarf, including under international law. Enhancing diversity is diametrically opposed to a general prohibition. This is the difference with the duty of abstinence, which is incorporated in the notion of *laïcité*.

However, the wearing of a headscarf may, for the purpose of a proper functioning of education, be 'regulated'.[159] This implies that the wearing of head garments or scarves may be prohibited during some lessons '*if hygiene and/or safety so requires*'.[160] Moreover, the teaching objectives must be attained: this concern, too, is quite rightly expressed in the abovementioned documents. Yet, any prohibition on the wearing of a headscarf must be motivated on the basis of a concern for 'hygiene and safety'. A general prohibition would apparently be in contravention of this restrictive condition and could therefore only be considered if public order is at stake. Note that any such motivation would require meticulous care.

We should like to add that the prohibition on the wearing of a headscarf cannot be reconciled with certain other rights, including in recent regulations, to which 'users' of education in particular are entitled. The Flemish decree maker has intended to make *pupils' and students' rights* enforceable. This also holds for freedom of expression and religion. Likewise in international perspective, the Flemish community has made it a priority to make the legal position of pupils and the exercise of rights and fulfilment of duties a priority. The guideline for the Flemish lawmaker was compliance with international standards of law in general and, in particular, '*the right to education that develops respect for the cultural values of the child itself and for others*'.[161]

D. The general primacy of democratic substance in the exercise of the right to an identity

27. Another observation with regard to the constitutional reform of 1988 with regard to education is the attention that the Constituent Assembly repeatedly paid to the compliance with the democratic rights and liberties in the exercise of educational rights incorporated in or in implementation of Article 24 of the Constitution.

Article 24, para. 3, clause 1 of the Constitution sanctions the principle of the right to education, adding that this should be realised '*with respect for the fundamental rights and liberties*', a rule which holds for the exercise of any right.[162] The scope is both conformity with the exercise of *other* rights and freedoms, and the exercise of rights and freedoms *of others*.

The expression of one's religious conviction in the perspective of the right to education can therefore in no way lead to an unlawful influencing of the right to self-determination of others, any qualification of the equality of man and woman, or an erosion of the democratic rules of law in whatever manner. The wearing of a religious symbol or sign is the parallel exercise of a fundamental right and is therefore, in itself, not an act of proselytism, on condition that it coincides with respect for the opinion of others. From the moment that public order or safety

[159] Note: '*regulated*' though not '*entirely prevented*': see above.
[160] Tahzib, B.G., *Freedom of Religion and Belief, o.c.*, p. 296 argues that safety should be understood to mean 'public safety' or the safety of others, rather than personal safety. The author adds that 'It could be argued that the burden to the Sikh's freedom seems greater than necessary to achieve the public aim': *ibid.*, p. 297.
[161] Memorie van Toelichting bij het ontwerp van decreet betreffende gelijke onderwijskansen-I: Doc., Vlaams Parlement, Z. 2001-2002, no. 1143-1, p. 9.
[162] Cf. De Groof, J., *De grondwetsherziening van 1988 en het onderwijs, o.c.*, p. 108

is disturbed through the exercise of a right, e.g. in the case of incitement through the distribution of pamphlets, such acts need to be restrained, but not the underlying beliefs as such.

This outlines a framework for an institution-imposed ban on the headscarf. The criterion for the (un)lawfulness of such a measure is, on the one hand, whether the Muslim girl in question was able to decide freely to wear or not wear a headscarf and, on the other, whether the decision to wear a headscarf was imposed by others.

28. The parents or legal guardians of a child should respect its right to education and to freedom of conviction, conscience and religion. They must assume responsibility '*in a manner that is compatible with the developing capacities of the child*'.[163] In other words, it is up to the developing child to ultimately take decisions.

Under common law, an underage child who possesses the required power of discernment has judicial competence in personal matters. This holds not only for the issues of enrolment and refusal of enrolment[164] in education, but also with regard to the denial of a right of choice in the wearing of a headscarf. After all, it is assumed that 'a minor who is no longer an "*infant*" is able, from a certain age, to perform acts for which no representation is possible.'[165]

29. A second reference to the democratic content of the exercise of the right to education is found in Article 24, para. 1, clause 2 of the Constitution, i.e. in the basic description of the neutrality of community education. The mention of respect for the 'philosophical, ideological or religious convictions' was restricted to those viewpoints that are compatible with the '*principles of democratic society*', according to the Constituent Assembly.[166] Non-democratic ideologies or religious fanaticism is not entitled to any understanding or tolerance. From the merest sign of racism or fundamentalism, the democratic resilience is put to the test. This is the case for any social milieu, but it holds in particular for means of education. If need be, the school in question should denounce such practices and take appropriate measures.[167]

E. Some conclusions and suggestions with regard to policy practice

30. In Belgium, an important role has always been attributed to religion, philosophy and ideology in education in general and in the specificity and organisation of community education in particular. This was not only the case in the period when the distinction between confessional and non-confessional groups was quite noticeable, but it also has a modern application in a multicultural society and the presence of the Islamic faith and its socio-cultural identity. Despite the action taken in France, banning religion from school is not an option.[168]

The number of conflicts associated with the wearing of the headscarf has been rather limited. However, one does not need to wait for incidents to occur before outlining a policy approach. Successive ministers of education have, for that matter, tried to avoid conflicts or at least tried to avoid any escalation. A number of statements by policymakers may be described as 'not very helpful' in promoting a fruitful approach. They should most probably be situated within a certain political climate or context.

A general ban will simply lead to more confrontation and a politicisation of the debate. This would prevent the administration of institutions from assuming responsibility, from taking into account the local context and from striving towards concrete solutions, which should always happen in close consultation with all those involved. This is required not only with a view to a pragmatic approach, but also in order to adhere to the criteria for the restriction of fundamental rights. After all, for each case separately, an objective justification is needed that fulfils the requirements that the objective envisaged should be non-discriminatory, that the chosen means should correspond with a genuine need and be relevant and necessary in order to achieve the objective, and be proportional

[163] Art. 5 and Art. 14.2 of the Convention on the Rights of the Child.
[164] See, for example, the Ruling by the Council of State, no. 32054 of 22 February 1989 concerning Van Eynde and Collier.
[165] Recommendation by the Council of State no. 33 027/1 of 19 February 2002 with regard to the draft decree 'oncerning equal educational opportunities', Doc., Flemish Parliament, no.1143, Z. 2001-2002, no.1, pp. 142-143 with reference to legislation and jurisprudence.
[166] Doc., Senate, BZ, no. 100-1/2/, pp. 77-78.
[167] Diane Déom quite rightly asserts the following in 'La neutralité de l'enseignement des communautés et le choix entre le cours de religion et le cours de morale non confessionnelle', in: *Quels droits dans l'enseignement ? Enseignants, Parents, Elèves, Actes du Colloque des 13 et 14 mai 1993*, Die Keure, Brugge, p. 110: 'L'enseignant se trouve alors investi de droit, et de l'obligation, d'exercer une sorte de contrôle marginal sur les conceptions manifestées par les parents ou les élèves, et de mesurer le respect qu'il leur témoigne en fonction de leur compatibilité avec les valeurs démocratiques'. This is primarily, though not exclusively, an assignment for the teacher.
[168] This form of 'secularism' is even referred to as 'a *State religion*': cf. Glenn, C.L. (1996), 'Hijab and the Limits of Tolerance', in: De Groof, J. and Fiers, J. (eds), *The legal Status of Minorities in Education*, Acco, Leuven, p. 140.

to it. A general prohibition cannot possible fulfil these requirements. It would tie in more closely with a uniformised and centralised educational policy like that pursued in France.[169]

Nevertheless, a number of policy lines can be set out.
First, the headscarf must not prevent *identification* of the pupil.
The headscarf cannot be worn during certain courses either because this would make it impossible to *organise these courses properly* (e.g. physical education, sports) or because it would compromise the pupils' *safety* (e.g. chemistry lessons) or indeed because it would jeopardise the *accountability* of the teacher.[170]
The precise interpretation of the general principles must happen locally, more specifically with the inclusion of meticulous information procedures regarding any restriction and the settlement of conflicts. The content of the school regulation is a prerogative of the school. Room should be made available for weighing up rights and duties against each other, and for safeguarding a willingness to resolve disputes.

As pupils are required to complete the entire curriculum, and to reach attainment and development targets, there can, in principle, be no exemptions for certain classes, the only exception being the regulation in both primary and secondary education regarding the choice between one of six religious courses or a non-confessional ethics course.[171] This topic is beyond the scope of the present contribution. Still, one might consider exceptionally granting dispensation,[172] but only *after* alternatives or compromises have been put forward. Ultimately, it is up to the judge to balance the right of freedom of conscience on the one hand against the absence of the pupils in question during, for example, swimming classes[173] on the other.

31. The manner in which schools cope with cultural diversity also requires further *articulation*. Of course, the Islamic community has the fundamental right to establish its own autonomous schools. However, it should also be prepared to answer the question of whether the objective of integration is not better served by the participation of Islamic pupils in fundamentally pluralistic education if, in practice, they were to express their preference for this.

On the other hand, integration policy requires that the official school network be entirely accessible to this cultural community, as an exponent of multicultural society. The ban on the wearing of the headscarf and indeed of any sign or symbol that expresses a religious identity can, on the other hand, not be regarded as a positive appreciation of diversity. The school may be seen as a privileged environment for enhancing tolerance and combating obscurantism. This aim needs to be implemented in the pedagogical project, in the school regulation, and in the school working plan. In the curriculum and in the teacher training course, attention might be paid to how the principle of *tolerance as a responsibility* should best be implemented.

Finally, one should not only seek contact with the Muslim community, but possibly also strive towards a contract about the characteristics of a European Islam-oriented educational pluralism that specifies how the rights and duties of the various parties involved can best be visualised.

---

169 For a similar conclusion, see Verlot, M. (1996), 'The Hijab in European Schools. A Case for the Court or a Challenge for the School ?', in: De Groof, J. and Fiers, J. (eds), *The Legal Status of Minorities in Education,* Acco, Leuven, p. 154. For an extensive report on this matter, see the first volume of Glenn, C.L. and De Groof, J., *o.c.*

170 The Commission for Equal Treatment, for example, stipulates that in its decision of 17 October 1996 (*1996-85 Indirect distinction on the basis of religion*) that the objective of the clothing regulation, the safety of co-workers, i.e. the prevention of accidents, is in itself not discriminatory. The means by which the gaol is achieved, i.e. a prohibition on the wearing of a headscarf, corresponds to a real need in relation to safety and conditions of labour of co-workers (in this case, within a company). The appropriateness of the means employed by the applicant, and the demonstration of the need to attain the goal, were however both judged to be inadequate.

171 On this issue, see in particular: Overbeeke, A. (1999-2000), 'Recht op keuzevrijheid van het aangeboden levensbeschouwelijk onderricht, *T.O.R.B.*, p. 255 ff.

172 Overbeeke, A. (2003-2004), 'Levensbeschouwelijke onderricht: keuzepalet en keuzevrijheid in Vlaanderen anno 2002', *T.O.R.B.*, p. 115 ff.; *idem* (1999-2000), 'Recht op keuzevrijstelling van het in openbare scholen aangeboden levensbeschouwelijk onderricht. Een stand van zaken', *T.O.R.B.*, p. 249 ff. Also relevant: *idem* (1993-1994), 'Netoverschrijdend spreiden van migrantenleerlingen', *T.O.R.B.*, p. 220 ff.

173 See also Verstegen, R., art. cit.

VI. Synthesis

32. The Flemish Equal Opportunities Decree[174] introduced a right to/duty of enrolment. The purpose was, first and foremost, to provide certain marginalised groups with more *equality* through the introduction of an *individual right*, while integration would be enhanced by avoiding the emergence of so-called 'black' schools. The protection of individual rights is also characteristic of the jurisprudence of the ECHR.

Some member states (UK, the Netherlands, Sweden) believe that individual rights do not suffice to achieve social objectives. Individual rights cannot rectify the inequality that results from structural (economic/social) causes.[175] Other countries[176] would appear to be fiercely opposed to any identity-related rights.[177] The model of a 'colourless' and neutral law is particularly prevalent in France.[178] Article 2 of the 1958 Constitution stipulates equality without distinction of origin, race or religion. Origin and ethnicity are inexistent categories in French law.

The headscarf issue demonstrates clearly that the status of migrants should not be approached merely from an economic angle. The evolution in time is clear to see. In the context of the debate in France between, on the one hand, proponents of the republican notion of *laïcité* and, on the other, that of tolerance, the *Conseil d'Etat* initially left the power of decision to the school administrations.[179] After 1996, the rule was that girls wearing a headscarf should be allowed access insofar as the clothing was not provocative or geared towards proselytism. The more recent law has already been dealt with. Unemployment and poverty among Muslims has made Islam into an important factor of identification. '*It is not greater religiosity. It is that in British society, religion becomes one way of defining themselves as different*'.[180] Against a background of economic marginalisation, the question arises how a balance can be found between the individual right to equality, stipulations regarding non-discrimination, and a right to express a group-related identity, without this being in contravention of national, international or supranational regulations.

The traditional European answer to the integration of identity groups is welfare, not culture. The French Revolution was inspired by motives of redistribution. The German Federal Constitution was developed around the concept of the *Sozialstaatprinzip*. The question arises to what extent the ethnic 'colouring' of redistribution of means (which is increasingly the case in a multi-ethnic Europe) will have an effect on the sustainability of the welfare state.[181] Welfare begins with access to education. Welfare is a neutral concept that can, in a sense, be described as the granting of or redistribution of means to or among less-affluent citizens. It is in this context that the GOK decree should be seen. Culture, on the other hand, relates specifically to identity and values. Culture is by definition 'coloured'. It is the realm to which the wearing of the headscarf at school belongs. *Measures in education that are aimed at realising social equality for identity groups meet with significantly less resistance than measures that promote the expression of cultural diversity.*

33. The dichotomy between welfare and culture in education turns out to be less contradictory than would initially appear. First and foremost, both the granting of enrolment rights and the prohibition of conspicuous religious symbols are legal solutions to a societal problem.
Furthermore, the two aspects are interconnected, as in reality there appears to be a considerable overlap between economic marginalisation and culture (identity groups). So the right to enrol (welfare) does try to fulfil the needs of a certain group and is therefore coloured in the sense that it is 'group-related'.

---

174 See above. The Explanatory Memorandum provides insight into the willingness both to respect the international standard and to enhance the educational opportunities of cultural minorities: Flemish Parliament, draft decree concerning equal educational opportunities-I, 1143 (2001-2002) no. 1, Session 2001-2002, 29 March 2002.

175 Koskenniemi, M. (1999), 'The Effect of Rights on Political Culture', in: Alston, P., *The EU and Human Rights*, Oxford University Press, Oxford, pp. 99-116 (104).

176 Germany has a model of ethno-cultural exclusionism whereby ethnicity constitutes the basis for civil claims.

177 For a long time, France had a model of civic assimilation, which is now referred to as integration in order to emphasise growing sensitivity vis-à-vis diversity, while distancing itself from the Anglo-Saxon group model. See: Kostakopoulos, T. (2002), 'Integrating Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms', *Colum. J. Eur. L.*, pp. 184-187.

178 Bleich, E. (2001), 'The French Model: Color-Blind Integration', in: Skrentny, J.D. (ed), *Color Lines: Affirmative Action, Immigration And Civil Rights Options For America*, University of Chicago Press, Chicago, reports on a brief parenthesis of affirmative policies in France in the early 80s. Article 2 of the Constitution of 4 October 1958: 'La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion.'

179 The *Conseil d'Etat* only put forward some general guidelines. The rights of expression could only be limited in situations where they infringed upon freedom of religion of others or were detrimental to educational programmes at school. Scales-Trent, J. (1999), 'African Women in France: Immigration, Family, and Work', *Brooklyn Journal of International Law,* p. 705.

180 Yunas Samad, a sociologist with the University of Bradford, quoted in The Economist, 'Bradford's Muslims', 8 April 2003.

181 Alesina, A. and Glaeser, E., *Fighting Poverty in the US and Europe: A World of Difference*, Oxford University Press, Oxford.

Moreover, the opposition between welfare and culture in education, as comes to the fore in respectively the GOK Decree and the headscarf controversy, unfolds against a background of more general trends in Europe. The history of the European Union is characterised by an increasing degree of pluralism. The six founding member states in 1957 were largely catholic. With the accession of the UK and Denmark in 1973 and of Sweden and Finland in 1995, a reformative element was added. And the accession of Greece in 1981 meant the Christian horizon was further extended to the orthodox branch, a move that will be enhanced by the forthcoming accession of Rumania and Bulgaria. Meanwhile, Islam has also gained a foothold in Europe.[182] In a multicultural Europe, the needs of the various groups and individuals will need to be met.

It is up to the national authorities of each member state, within the context of a country's own structure and history, to try and find a legally sound answer to all these challenges. The diversity of initiatives aimed at the integration of identity groups into the social life of a member state have further expanded after the enlargement of the Union. Moreover, the entire issue should be considered against a background of the legal protection of human rights within the EU and the supervisory role of the European Court of Justice,[183] whereby that court must take into account the constitutional traditions of the member states.[184] In view of the diversity of structures, and given the great number of political and academic proposals, it is to be expected that (legal or other) solutions and decision-making in the various member states will diverge quite considerably.[185] Nevertheless, it remains essential that, at the same time, one should strive towards a level of coherence in relation to the common values and rights of all citizens within the Union. The main challenge in this respect is to bridge the distinction between cultural and political identity within Europe.[186]

[182] See, however, the interview with Valéry Giscard d'Estaing in *Le Monde*, 9 November, 2002, p. 1 ff., in which the former French President and Chairman of the European Convention stated that the accession of Turkey to the European Union would signify 'the end of the Union'.

[183] Philip, A., Weiler, J. (2002), 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in: Alston, P. (ed), *The EU and Human Rights*, Oxford University Press, Oxford p. 19.

[184] For a necessary qualification, see: Lenaerts, K. (2000), 'Fundamental rights in the European Union', *E.L.Rev.*, 25, 6, pp. 592-594.

[185] Kastoryano, R., *Transnational Participation and Citizenship: Immigrants in the European Union*, Transnational Communities Working Paper Series, Oxford University, December 1998. Some Member States will prefer local decision-making, while others will be proponents of a uniform policy or of supranational solutions.

[186] Cf. Schöpflin, G., 'Towards a European Cultural Identiy', in: De Groof, J., Judo, F. and Storme, M.E., *De Vlaamse en Europese Uitdaging, o.c.*, p. 61.