Secular Assumptions implicit in the Margin of Appreciation and its Consequences for Religious Diversity Cases at the European Court of Human Rights

Figure 1. Cartoon by American Civil Liberties Union of New Jersey

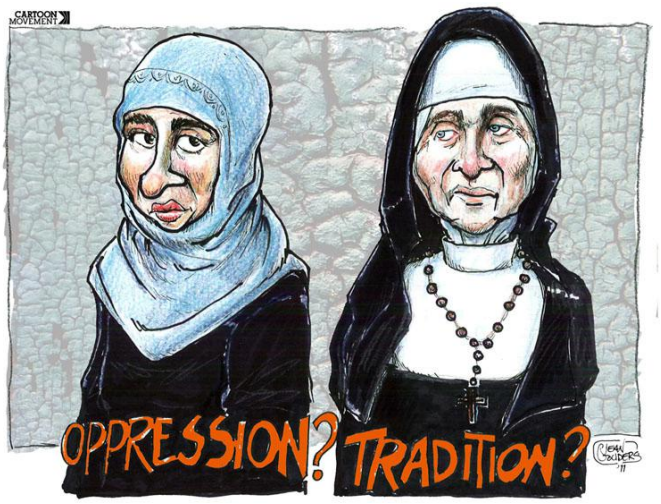

Figure 2. Cartoon by Cartoon Movement

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Introduction

"A human rights discourse now dominates politics; there is a powerful human rights 'movement'. It is the new secular religion of our time." (Julius, 2010: 453)

"Indeed, nothing heightens anxieties like religious symbols that remind those in power that others living within the same borders hold different worldviews (Renteln, 2004: 1590)."

The European Court of Human Rights has ruled on several religious diversity cases over the past few years. The Court's recent decisions involved the presence of religious symbols in the classroom and in the workplace. What is interesting about the rulings on *Dahlab v Switzerland*, *Lautsi v Italy*, *Jasvir Singh v France*, *Eweida v United Kingdom*, and *Ebrahimian v France* is the application of the margin of appreciation doctrine. In the case of *Dahlab* the wide margin of appreciation allowed the Swiss state to prohibit a state school teacher from wearing her Islamic headscarf. The European Court argued in favour of the state because of "the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children" (ECtHR, 2001: 13). The case of *Jasvir Singh* involved pupils who were expelled from attending high school because they refused to remove their Sikh keski. Again the European Court granted a wide margin of appreciation, this time to the French state, and argued that the French law prescribed the prohibition of wearing religious symbols in public shools. In *Ebrahimian v France* the European Court called for a wide margin of appreciation because the social worker, who wore an Islamic headscarf, did not abide by the rules of a neutral and secular workplace. On the other side we have the case of *Lautsi*, in which the European Court granted a wide margin of appreciation to protect the crucifix from being removed from classroom walls in Italy. The presence of the crucifix was not considered to carry a powerful message that could interfere with the pupil's freedom of religion. Lastly, the case of *Eweida* had a different outcome; the European Court argued that the state exceeded their margin of appreciation and granted the protection of the wearing of a Christian cross in the workplace. What these court cases have in common is the fact that the European Court tries to strike a

balance between secularism and the visible presence of religious symbols in the public sphere. This means that the European Court could influence the relationship of the state to secularism and neutrality. However, the different outcomes of the rulings influence whether religion or religious symbols remain in the public sphere or not. This leads us to question what the outcomes of the court rulings could tell us about the application of the margin of appreciation doctrine? Is there a secular bias in European law, and if so, is it possible to argue that the margin of appreciation is a manifestation of this secular bias?

This leads me to introduce my central research question and sub questions. The central question of my thesis is *What is the relationship between secularism and the margin of appreciation doctrine in religious diversity cases at the European Court of Human Rights?* The sub-questions will focus on specific aspects of my central question. The first sub-question *What is the role and impact of secularism in European law?* will discuss the influence of secularism on the law in Europe, and the European Convention on Human Rights. A discussion on what secularism is, can be found in my Theoretical framework. The second sub-question *What is the history of the margin of appreciation in the European Convention on Human Rights?* will explore the origins of the doctrine, and its application within Article 9. Before I turn to the third sub-question I will introduce my research methods. I will explain why I used a thematic and discourse analysis and how the analysis helped me to compare the cases. The court cases I will examine in the third sub-question share three characteristics: (1) state versus individual, (2) the visual presence or wearing of 'religious' symbols in the public sphere, and (3) the invoking of the margin of appreciation doctrine. The specific location of the classroom and workplace will allow me to research the influence of the margin of appreciation on notions of secularism, neutrality, diversity, and religion in the public sphere. The Chapter on research methods will also introduce what secular assumptions and values may be detected in the margin of appreciation. The third sub-question *What secular assumptions may be detected in the margin of appreciation doctrine in general and in specific religious diversity cases?* will discuss which secular assumptions might exist in the doctrine as well as in specific religious diversity cases. The fourth and final sub-question *What are the consequences of the secular assumptions in margin of appreciation doctrine at the European Court of Human Rights?* will discuss the consequences of the secular

assumptions and will connect the data of the chapters before answering my central question.

By answering these questions I hope to explore what the implications of secularism or ideas of the secular are on European law. It is often believed that secularism's aim is to separate the state from religion, because the state should be neutral towards all religions (Pollock, 2011). However, the state faces difficulty in remaining neutral when it comes to religious minorities. If we are living in a secular society this means that it becomes harder to engage with minority religious practices (Beaman, 2013: 126). This is partly because of the (mis)understandings of the concepts of neutrality and secularism (Jakobsen and Pellegrini, 2008: 16). By analysing the margin of appreciation doctrine I will be able to explore the relationship between secularism and European law and the influence of the court rulings on the visual presence of minority religions in the public sphere. The application of the margin of appreciation allows states and national authorities a space for manoeuvre in order to fulfil their obligations to the European Court. Furthermore, the margin of appreciation can be seen as a tool to respect traditions and protect national morals and measures of the Member States, because they are likely to vary between them (Gerards and Senden, 2009: 645). The application of the margin then leads to domestic interpretations of article 9 of the European Convention (Fokas, 2012: 400). In turn, the religious diversity cases of the European Court open the discussion on whether there exists a 'secular' mode of logic in European law and if the protection of religious beliefs is preceded by the protection of the rights and freedoms of others.

This is of specific importance because I would like to focus on 'manifestations'[1] of religion: the visible presence of 'religious' symbols in the public sphere. Ideas of what constitutes a 'religious symbol', and how they differ from other 'types' of symbols will be discussed in my Theoretical framework. One of the difficulties of examining the significance of 'religious' symbols is that they can carry various

[1] I have adopted the termination of Article 9 of the European Convention on Human Rights:

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

meanings. This includes negative emotions and feelings toward religious symbols (whether they are made of fabric or wood), which could sometimes inspire fear or be perceived as threatening (Renteln, 2004: 1590). This fear ultimately leads to the distrust of ethnic and religious minorities, simply because of the visual presence of their religious symbols. Lewis (2007) argues that the visible presence or wearing of religious symbols is a portrayal of a 'clash of civilisations', a widely criticised theory of Samuel Huntingon. This 'clash' is supposedly a result of immigration, and racial, cultural, and religious diversity and suggests that the liberal, pluralist, secular West with values such as democracy, women's rights and personal autonomy, is in stark contrast with an irrational, repressive Islam (Lewis, 2007: 395).

The debate on rights and wrongs of restricting religious symbols is complex. especially in regards to the interpretation of religious symbols as national symbols in order to protect their presence in the public sphere (Fokas, 2012: 408). The justifications for restricting the visibility of religious symbols tends to concern public health, public safety, and solidarity (Renteln, 2004: 1590). This means that upholding these restrictions could negatively impact ethnic and religious minorities. This is regardless of evidence of threat or harm to society. However, the European Court has to argue whether religious symbols should be protected or should remain in the private sphere. The application of the margin of appreciation by the European Court could be a tool to safeguard religious freedom *and* national laws.

Benjamin Berger (2014) has argued that obedience to the law is a manifestation of civic belonging. This is because obeying the law means escaping from anxieties (Berger, 2014: 15). The rule of law has an "ideological force" because legality can exceed community narratives and worldviews (Berger, 2014: 15). In Western Europe secularism helps to negotiate the relationship between religion and political authority (Berger, 2014: 11). As a result, if you belong to the political community, you belong to the law. However, is this possible when societies are faced with religious diversity? If the law is the basis for civic belonging, or identity then it becomes difficult to include ethnic or religious minorities. This means that because everyone belongs to the law everyone can appeal to its universality (Berger, 2014: 16). The challenges in our religiously diverse societies call for the rule of law because:

> "[The] law offers a symbolic tool of apparent solidity, clarity, and neutrality; moreover, at the same time that it marks civic inclusion and defines the good citizen, this demand to declare that one belongs to law also consolidates the authority of the secular state (Berger, 2014: 16).

This challenge is seen through the margin of appreciation, because states have the final responsibility to protect one's freedom of belief, conscience and religion. In order to protect this right the state must identify what 'religion' is. This definition is likely to be influenced by the fact that the state embodies secular power (Mavelli, 2011). The secular nation-state constructs what counts as religious and its place in our society (Asad, 2003: 210). In turn, this ensures that the political realm is separated from religious beliefs and influenced by public reason (Mavelli, 2011: 181). It is therefore important to research the limits of secular reasoning in order to find out religion's place in our modern societies. I will do so in regard to the European Court's application of the margin of appreciation.

In the words of Berger (2014): "The courtroom is like the Delphic oracle of the modern secular state" (11). This implies that modern law should ensure a regime of religious toleration and pluralism meaning that individuals and communities have "religious freedom" and are free to follow their conscience, religious belief and practice (Sullivan, Yelle, and Taussig-Rubbo, 2011: 2). However, both religion and secularism can take plural forms, which provides tension within the liberal modes of thought dominant in European societies (Sullivan, Yelle, and Taussig-Rubbo, 2011: 2). Europe consists of a variety of cultural and ideological diversity, but attempts to protect human rights as a unified whole (Ostrovsky, 2005: 48). The relationship or 'intertwinement' between law and religion captures the idea that these two concepts are each other's opposites (Årsheim, 2016: 290). The law is seen as the rational instrument of European governance, which contains 'secular' notions like the rule of law and public order (Årsheim, 2016: 290). This leads to the idea that the proper space for religion is not in the public sphere, but in the private sphere. The idea of a public order and public health, morals and security, however, seem to refer to the majority religion (Mahmood, 2009: 857). This brings us back to the idea that everyone is equal before the law in order to create and maintain public order. This aim of "liberal democratic legal traditions" is, however, concerned with the interests of the

majority (Mahmood, 2009: 857). In practice, this means that the law cannot be entirely neutral which means that in order to ensure religious freedom it is required to continuously cut and fit religion in a way so it can adapt to the demands of the law (Sullivan, Yelle, and Taussig-Rubbo, 2011: 16).

In order to ensure religious freedom, the law challenges 'religion', specifically "the resiliency, complexity, and resources of its own traditions" (Berger, 2012: 28). The various opposing notions on 'religion' thus need to be re-examined because the practice of religion is dynamic and the manifestations or meanings can change. This means that religious tolerance, equality, and pluralism impose certain obligations on national law *and* European law. The underlying assumptions or demands could be one way to try to adapt the law and the various conceptions of public values and public life. The attempts of the European Court to strike a balance between the individual freedom of religion and the rights and freedoms of others may influence the 'secular' European law, the definitions of 'religion', and the "sensitivity to majoritarian cultural sensibilities" (Mahmood, 2009: 851). The comparing of religious diversity cases at the European Court and the (secular) assumptions of the margin will provide a first step to do so. I will focus on Islamic symbols, Christian, and Sikh symbols in order to analyse if there is a secular bias. My analysis will consist of a thematic as well as a discourse analysis. A thematic analysis will help me to identify patterns or themes that repeat themselves and are deemed relevant in the court rulings. This will help me to identify similarities and differences between the cases. The discourse analysis will focus on the context of the rulings, the particular language that is used. This will build on the thematic analysis, because the patterns or themes might have a different meaning within the various cases I will discuss. The discourse analysis will also help me to see if there is a relation between the discourse/language and power. Especially when I will focus on the different 'religious' symbols.

In the next chapter I will introduce my Theoretical framework in which I will discuss the concepts of *religion*, *religious symbols*, *secularism* and the *secular*, the *public* and *private sphere*, and *neutrality*. By doing so I hope to create an understanding of these concepts in the specific context of religious diversity in the public sphere. This will be of specific importance when I will discuss the (secular)

assumptions of the margin of appreciation and the European Court's understandings of concepts such as 'religion' and neutrality.

Theoretical framework

> *"[T]he ways in which the concept of 'religion' operates in [a] culture as motive and as effect, how it mutates, what it affords and obstructs, what memories it shelters or excludes, are not eternally fixed. That is what makes varieties of secularism [...] always unique (Asad, 2006, 106)."*

In this chapter I will discuss the various meanings of the following concepts: *religion*; the *'religious' symbol*; *secularism* and *the secular*; *public* and *private sphere*; and *neutrality* from a social constructivist perspective. By doing so I hope to give an understanding of the various concepts and their contested nature. I will start with a discussion on social constructivist theory and how this will affect my understandings of the concepts as well as my research. Then I will analyse the various interpretations and meanings of the previously mentioned concepts and their value in my research.

Social constructivism is a theoretical perspective grounded in the idea that knowledge and reality are subjective and a product of human interaction. It is a dialectical process of individuals who reproduce and transform their notions of the world (Hjelm, 2011: 150). The way individuals interpret and construct knowledge depends on their social, linguistic, and historical contexts. Our realities are thus created through experiences, relationships, and social interaction. This means that reality as we see it is subjective. We are unable to view the world from an objective position and all perceive the world from context-dependent perspectives (Howell, 2016: 42). Our consciousness and world are a "holistic construction of lived experience". This construction includes histories and cultures in order to provide knowledge and truth (Howell, 2016: 30). By doing so we create our assumptions on reality and worldviews. This means that the concepts I will discuss in this chapter do not have pre-existing or static meanings, rather they are dynamic and based on context and who uses them.

Religion

What is *religion*? Unfortunately, there is no clear answer to that question. As Hurd (2015: 6) has argued religion cannot be treated as an "isolable entity", we cannot view religion as an "it". Therefore, it becomes clear that 'religion' cannot be separated from the law or politics. This is an interesting insight to bear in mind for the analysis of the discourse of the European Court. Especially because it is believed that 'religion' is entangled in all domains of life, this includes work and governance. In the words of Hurd (2015: 7):

> Religion cannot be singled out from these other aspects of human experience, and yet also cannot simply be identified with these either.

'Religion' is then a construct that brings a diverse and shifting set of social and cultural phenomena (Hurd, 2015: 19). This means that in the purpose of my research religions and religious actors cannot be seen as singular or static beings, nor can 'religion' be left at home or divided in 'good' or 'bad' (Hurd, 2015: 19). Instead, both religions and actors are dynamic and dependent on a specific context. However, the general notion of religion as a group of (semi)organised people who share a common belief system, might complicate ideas of freedom of religious belief. This is because 'religion' can have a communal sense and individuals perceive their religious beliefs as part of their identity. Nevertheless, there is not one form of Christianity, Islam or Sikhism, which means the understanding of what exactly constitutes 'religion' is left to the decision of those who hold political or religious power. The various meanings of religion are neither separated nor fused together with the law, but are interrelated or intertwined (Christofferson, 2006: 109). According to Reuter (2009: 9) state authorities control "the boundaries of the religious field", but should maintain neutrality in religious matters. This means that the state is in charge of controlling the place of religion in the public sphere, which includes regulations and laws concerning the public display of 'religion'.

I will now move to the *concepts* of religion and discuss the various meanings of religion embedded in wider frameworks. Meanings of religion depend on the appropriate research design and emphasise the need for alternative concepts. For

example, Linda Woodhead (2011) has articulated the importance of understanding religion through concepts, arguing that the social sciences should be more self-critical on the use of the term and its changing meanings. Another reason why we should focus on the various concepts of religion is because the word 'religion' is considered to be a modern idea "which carries a baggage of secular presuppositions, and which narrows, distorts, and sucks the living truth out of that which it attempts to dissect" (Woodhead, 2011: 121). There are postcolonial critiques on the term as well. Religion has "ethnocentric imperialist biases", and cannot be applied to non-Western contexts (Woodhead, 2011: 121). Furthermore, religion is continuously (re)constructed, usually by political and legal authorities who claim to have the right to define religion (Woodhead, 2011: 122). This leads to unequal power relations when one religion is privileged over the other, or when religion's sphere of influence is restricted.

Woodhead (2011) has developed five *concepts of religion*, I will discuss three of them and include the research of Orsi (1997, 2003) on *lived religion* and the research of Hurd (2015) on three 'types' of religion.

The first concept of Woodhead is *religion as culture* and argues that religion can be viewed as belief, meaning, discourse, and value. Religion as belief is understood as believing in supernatural 'things', beings or forces, and subscribing to propositions and accepting doctrines (Woodhead, 2011: 123). Peter Berger (1967) argues that religion provides a system of meaning which covers the whole of life. The argument of Berger relates to the work of Max Weber who understood that religion provides meaning, values, and sacred symbols in order to make sense of the world (Woodhead, 2011: 124). Religion can also play an important role in shaping, symbolising, and communicating shared societal values. What is important to note here is that these values can change over time. For example, Hugh McLeod (2007) researched secularisation in Western societies in the 1960s. Dominant values prior to the 1960s were order, respectability, convention, and authority, but because of the process of secularisation these values were replaced by notions of freedom, equality, personal empowerment, and democracy (McLeod, 2007: 108). Finally, Woodhead (2011) argues that discourse is an important part within religion as culture. In this view religion is seen as a set of quantifiable beliefs and behaviours.

The second concept of Woodhead (2011), *religion as identity*, includes community, boundary, and belonging. Religion can be understood as community-creating or boundary-forming and relates to the idea that religion can create and maintain social bonds and boundaries. The idea of creating communities and boundaries relates to the notion of a 'religious identity'. Specifically the reassertion of a religious identity in secular Europe is worth mentioning. Individuals and groups feel the need to define who they are through identification and dis-identification (Woodhead, 2011: 129). Religion can refer to an organisational belonging as well, which assumes that religion is a matter of incorporation in a religious institution. The idea of religion as identity is of specific importance because the reasoning of the European Court influences the place of religion in the public sphere which can interfere with one's right to manifest one's religion. The following quote of Reuter (2009: 4) explains the importance of religious beliefs on individuals:

> Religious life, however, illustrates like no other sphere of life that individual identity thrives on collectively shared resources of meaning, on tradition and community.

This idea of religion both emphasises the individual and private manifestation of religion as well as the communal sense of religious practices in the public sphere. In the analysis of the court rulings I will examine if the European Court is able to balance the individual and communal sense of religious practices. Especially because the right to religious freedom should protect this broad understanding of religious belief in order to safeguard the lived religion of all individuals. At the same time this seems to mean that if you "possess" religion you can claim certain rights or protections (Reuter, 2009: 5).

The third concept of Woodhead, *religion as a practice*, focuses on ritual, embodiment, and manifestation. What is meant by ritual in this instance is human action as a part of a social pattern (Woodhead, 2011: 132). Rituals can engage individuals in social performances (but also in a domestic or intimate setting), which reinforces emotions and commitments. Religion as practice is part of *everyday* or *lived religion* which has been described by Orsi (1997: 9):

> [R]eligion as it is shaped and experienced in the interplay among venues of everyday experience... in the necessary and mutually transforming exchanges between religious authorities and the broader communities of practitioners, by real men and women in situations and relationships they have made and that have made them.

Orsi (2003) has argued that *lived religion* is impossible to separate from practices of everyday life. As a consequence 'religion' is not in "isolation" from public spaces such as workplaces, streets, hospitals, or schools (Orsi, 2003: 172). The idea of *lived religion* shows similarities with Article 9 of the European Convention because it refers to manifestations of religion. *Lived religion* relates to religion as practiced by individuals and groups as well as their interactions through rituals and texts. It focuses on how people make sense of their lives, their connections with others, and their place in the world (Hurd, 2015: 8). This does, however, mean that many forms of religious practices, relations, and beliefs may not be identified as 'religion' in the law. It is necessary for the European Court (and other [inter]national courts) to decide what counts as 'religion' in order to enforce the law (Sullivan, 2005: 3). This does however mean that *lived religion* is not easily protected, especially when religious beliefs are not part of the majority religion. Sullivan (2005: 3) questions if this could lead to "a legal hierarchy of religious orthodoxy" which is unable to guarantee religious freedom for all. Hurd (2015) introduces two additional 'types' of religion: *expert religion* and *official* or *governed religion*. The field of *expert religion* perceives religion as a source for morality and cohesion, as well as a potential danger. Ideas are generated by those who have "policy-relevant knowledge" and leads to the view that religion has two faces (Hurd, 2015: 8). The other 'type' is known as *official* or *governed religion*, which refers to religion constructed by those who hold political and religious power (Hurd, 2015: 8). This idea is of specific importance because understandings of 'religion' and religious belief are laid down in the law; i.e. freedom of religious belief, which means that the European Court's judgments can influence the place of religion in the public sphere.

The various meanings of religion thus depend on the specific context. That is why I will focus specifically on the ideas of *religion as culture*, *religion as identity*, *lived religion*, and *official* or *governed religion*. These concepts of religion will help me to

analyse the discourse of the European Court and their understandings of 'religion'. Furthermore, in order to research the relationship between secularism and European law as well as the margin of appreciation doctrine these ideas of religion will show if the European Court's ideas of religion are static and narrow or dynamic and broad, and thus able to protect the religious freedom of all. Especially because the law is regarded as a cosmology or a technique of textual interpretation, while religion provides law-like norms and narratives that govern our everyday lives (Sullivan, Yelle, and Taussig-Rubbo, 2011: 3).

The 'religious' symbol

What constitutes a 'religious symbol'? Tillich (1958) explains that symbols have inherent power, and that religious symbols represent the transcendent. However, as the research of Lori Beaman (2013) shows, 'religious' symbols can have multiple meanings depending on the specific context. This means that it is difficult to answer what qualifies as a 'religious' symbol. The religious diversity case of *Lautsi v Italy* serves as an example, because the Grand Chamber of the European Court argued that the crucifix represented the cultural heritage of Italians, as well as being a religious symbol (Beaman, 2013: 101). That is why I will not focus on why a symbol is *classified* as 'religious', but rather look at how religious symbols are *recast* as cultural. Lori Beaman (2013: 114) distinguishes "five interrelated techniques of displacement or transition from religion to culture". The author argues that the transformation of religious symbols preserves the majority religious hegemony in the name of culture (Beaman, 2013: 102). This move to culture also indicates that religious values are seen as universal values.

The first technique is called *denial*, which means that the religious significance of the symbol is entirely denied (Beaman, 2013: 114). The reason behind this technique is to reconstruct the symbol as universal and shelter it within heritage. The second technique is *passivity*, or the neutralising of a symbol (Beaman, 2013: 118). While the symbol still has religious meaning, the power to mobilise this effect is again denied. However, this passivity ignores what Riis and Woodhead (2010: 91) call a religious emotional cultivation. Religious objects can carry various meanings and provoke

reactions in relation to different individuals and groups. The object becomes a symbol when the viewer adds a relational aspect (Beaman, 2013: 121). It then becomes difficult for individuals, even without religious commitment, to deny the religious emotion of an object. The third technique is the *diversity and necessity for cultural survival*. The symbol is not coercive but rather opens up discussions on religious diversity. If the symbol would be removed this would mean losing the value of cultural diversity. In order to retain diversity, groups must preserve what distinguishes them from others (Beaman, 2013: 124). This means that the object becomes a symbol of cultural survival. The fourth technique Beaman (2013) identifies is transforming *religious into secular, universal symbols*. The religious becomes the secular, and the secular merges into the religious. In other words, (liberal) values are projected on the religious symbol, which means the symbol becomes a reminder of these universal values. The fifth and final technique is *representing the nation*. Religion represents the nation, which allows religion and nation to become one. The symbol not only represents a religious institution but the entire nation (Beaman, 2013: 132). This means the symbol can define who its citizens are or should be.

It becomes clear that symbols are powerful and carry meaning and emotions. There is however one dilemma:

> The dilemma is how to create space for symbols that are important to some people without lending endorsement to hegemonic practices that leave others, especially religious and other minorities, disempowered (Beaman, 2013: 138).

This is especially the case when one symbol is considered to be neutral and passive whereas others are viewed as powerful or at odds with liberal and democratic views. As a result, religious symbols can unite people, but can also divide and create barriers between 'us' and the 'other' (Mancini and Rosenfeld, 2012: 5). The visible presence of the Islamic headscarf as well as the Sikh turban and the alleged powerful meanings these symbols carry have raised controversy. The Islamic headscarf has been viewed as a "powerful external symbol" and is not reconcilable with tolerance, equality and non-discrimination (Rovive, 2009: 2697). The headscarf seems to be a powerful symbol because large numbers of people "know exactly who the Muslim woman is and what she stands for" (Evans, 2006: 52). Symbols can thus carry religious emotion

(Riis and Woodhead, 2010: 69). This has an impact on the (dis)advantage to be identified as (non)religious in a particular time and place. A symbol is not just a symbol but holds power in class, gender, and race relations.

The relationship between Member States and the place of 'religious' symbols in the public sphere may vary greatly (Rorive, 2009: 2696). In liberal democracies it is believed that the state should not favour one religious community at the expense of others and should adopt a "neutral position" (Renteln, 2004: 1574). This includes the public display of the majority religion's religious symbols. The visual presence of religious symbols could undermine the goal of promoting a cohesive national (and secular) identity (Renteln, 2004: 1579). This is also the case if we look at institutions such as schools or the workplace. In these settings pupils and employees should abide by the policies that influence the way they can manifest their ethnic or religious identities (Renteln, 2004: 1588). This depends on the specific context and meaning of the religious symbol. For example, some individuals from ethnic minority groups view the wearing of symbols as crucial for the maintenance of their group identity (Renteln, 2004: 1574). The individual could have a special connection to the symbol because it represents their religious beliefs. However this depends on the context and the personal beliefs of individuals, not everyone manifests one's religion the same way.

In my analysis on the rulings of the European Court I will examine which meanings 'religious' symbols have or carry. For example, in the case of *Lautsi*, the cultural character of the crucifix can show how various religious symbols are treated and whether they are allowed in the public sphere. Are there differences between the examination of Christian and non-Christian symbols? Can Christian and non-Christian symbols only carry a religious meaning, or do they carry political values as well? And do these political values represent secular values such as neutrality, equality, and modernity, or are they incompatible?

Secularism and the secular

Secularism and the secular are often seen as the opposite of religion or the religious. The idea of secularism is that it can ensure peace and harmony among different religions. But, the term secularism is not neutral: "secularism remains an exercise of power" (Hurd, 2008: 16). Secularism is a presence, a something (Calhoun, Juergensmeyer, VanAntwerpen, 2011: 13). In this section I will try to describe the multiple secularisms and distinguish secular values by discussing the works of Calhoun, Juergensmeyer, and VanAntwerpen (2011), Asad (2003), and Casanova (2011).

Secularism is considered to be a Western process, although this does not mean there is one path. Calhoun (2011: 45) argues that secularism can follow a different path depending on the religion(s) and political or cultural setting. Secularism can also be viewed as an ideological underpinning of secular society and politics (Calhoun, Juergensmeyer, VanAntwerpen, 2011: 16). In order to create an equal, just, and tolerant social order secularism serves as the moral and theoretical basis (Calhoun, Juergensmeyer, VanAntwerpen, 2011: 16). Even though secularism often seems to be an assertion of neutrality towards religion or the religious, in practice there is always a political context. The specific political context of secular regimes and the way they shape distributions of power and recognition influence the degree of religious pluralism (Calhoun, Juergensmeyer, VanAntwerpen, 2011: 23). Casanova (2011: 57) adds that secularism can refer to a range of modern secular worldviews and ideologies concerning religion. Secularism can also be thought of as a liberal political doctrine; this doctrine aims for universality through the notion of toleration and neutrality with the emphasis on secular or public reason (Meerschaut and Gutwirth, 2008: 8).

Talal Asad (2003: 24) argues that secularism is a political doctrine, a strategy to form a political system. The distinctive feature of modern liberal governance is statecraft, which means that secularism could create a democratic political system. Casanova (2011: 67) believes that secularism can be a statecraft principle as well. Secularism as a statecraft principle ensures that there is a separation between religious and political authority. This separation can serve three purposes: (1) guaranteeing neutrality of the state toward all religions, (2) facilitating equal access of all

(non)religious citizens to democratic participation, and protecting freedom of conscience (Casanova, 2011: 67). The idea of secularism as statecraft should be separated from secularism as an ideology. Secularism as an ideology relates to Casanova's (2011) argument that when the state holds a particular conception of religion, this is part of the realm of ideology.

Asad (2003) states that modernity, which is closely linked to secularism, is a series of interlinked projects. The aim of these projects is to institutionalise principles such as secularism into our 'modern' societies (Asad, 2003: 24). This would mean that being 'secular' means being 'modern', while being 'religious' means not fully 'modern' (Casanova, 2011: 60). This also means that secularism and the secular are interdependent. Asad (2003) explains that the secular brings together behaviours, knowledges, and sensibilities into our modern life (Asad, 2003: 25). Most importantly, both secularism and the secular should be viewed within their historical and geographical context. For the sake of my research I will follow this line of thought, because the European Court focuses on secularism as a state principle. The idea of secularism as a state principle highlights the separation between religious and political authority and relates to the notion of state neutrality.

The secular concerns on the one hand the separation of religion from politics, and the separation between religion and other dimensions of culture and ethnicity (Calhoun, 2011: 45). In a way scholars believed that the secular is "a kind of maturation", a developmental achievement to reach the point of secularism (Calhoun, 2011: 47). However, by using the term secular we imply that there is a distinction between the secular and religious, which immediately defines what we consider to be part of the religious realm and the secular realm (Calhoun, Juergensmeyer, VanAntwerpen, 2011: 13). This leads to the idea that the secular encompasses our reality and replaces the religious, and being modern and being secular is viewed as the same thing (Casanova, 2011: 57).

> To be secular [...] means to leave religion behind, to emancipate oneself from religion, overcoming the nonrational forms of being, thinking, and feeling associated with religion. It also means growing up, becoming mature, becoming autonomous, thinking and acting on one's own (Casanova, 2011: 69).

This quote shows an underlying assumption that secular people are rational and free agents, while religious people are the opposite. It becomes clear that the 'secular' and secularism have certain connotations and mean different things within different contexts. Our ideas and understandings of both concepts influence the law and could help us understand how we think of the terms. The various meanings of secularism(s) and the secular will shape how the European Court rules on the religious diversity cases. What is their understanding of secularism and the secular? And what consequences does this have for the application of the margin of appreciation?

The public and private sphere

Our understandings of the public and private sphere are ever changing. One of the foundational scholars who articulated the idea of a clear-cut distinction between the public and private sphere is liberal philosopher John Rawls. Mancini and Rosenfeld (2010: 2), who base their arguments on Rawls, argue that the project of the Enlightenment lead to the understanding that the public sphere should be dictated by reason and promote equal liberty. In theory this would mean that individuals with competing ([non]religious) conceptions could live side by side, as long as everyone abides by the dictates of public reason. However, today the boundary between the two spheres or realms are blurred, and some might wonder why we still want to draw a distinction between the two. In the following paragraphs I will explore the changing meaning of the public and private sphere and discuss the place of religion.

'Public' in its most simple form means everything that can be seen and heard by everybody (Arendt, 1998: 50). A second way of perceiving public is that it signifies the world itself, because it is common to us and separate from our private place (Arendt, 1998: 52). It means that we make a distinction between what remains hidden and what can be publicly displayed. Arendt (1998) distinguishes three 'realms' or spheres: the private, public, and social realm. The social realm does not belong to the private nor the public, and emerged together with the modern age and the nation-state (Arendt, 1998: 28). The consequence of these developments is the blurring of the boundary between the public and the private. This is because the rise of the city-state

and the public realm took over the private realm (Arendt, 1998: 29). Another scholar who has written on the subject of the public sphere is Jürgen Habermas (1974 [1964], 2006). In one of his earliest pieces on the public sphere he defines it as "a realm of our social life in which something approaching public opinion can be formed" (Habermas, Lennox, and Lennox, 1974: 49). In addition to that statement, Habermas (1974: 49) argues "a portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body". However, this is only possible when the public body has freedom of assembly and the freedom to express and publish opinions. We should not confuse the public sphere, or the public body with the political public sphere. The latter one is associated with the activity of the state, and is executed by the state authority. Habermas furthermore argues that the public sphere mediates between the state and society. This is because the public can organise itself and express its public opinion (Habermas, Lennox, and Lennox, 1974: 50).

The question remains in which sphere is religion located? Locke (in Wilson, 2012) argues that religion divides the private from the public sphere. To be more precise, religion should be restricted to the private realm and separated from politics and public life (Locke in Wilson, 2012: 49). On a different note, Habermas (1974: 51) has argued that religious freedom was the first area of private autonomy, but the church continued to be a public and legal body. Habermas (2006: 4) expands on this line of thought when he argues that because of a common human reason the secular state no longer depends on religious legitimation. It is then possible to separate church and state at the institutional level. The challenges of religious pluralism can be avoided if constitutional freedom of religion is in place. One of the critiques on Habermas is the fact that religious citizens have to "split their religious and non-religious identities, and that the obligations of citizenship are asymmetrically distributed between religious and non-religious citizens" (Yates, 2007: 881). Instead Habermas believes that laws and public policies should be regarded as neutral in order for people with conflicting worldviews to accept them (Yates, 2007: 881). That is part of the reason Ferrari (2012: 356) has argued that 'religion' should be part of the private sphere only:

> [T]he need to keep religion out of the public sphere is justified by the fact that every religion teaches a particular conception of life, potentially conflicting with the conceptions upheld by other religions. To prevent the danger of a clash and to ensure the equal treatment of all religions, it is essential to ground the public sphere on a principle that is universal and neutral, and therefore capable of being accepted by all people regardless of their religion: this principle is human reason.

The idea that reason is the opposite of religion is present in current debates on the place of religion in the public sphere. This is of specific importance in the examination of the court rulings of the European Court. If we rely on the quote of Ferrari one could argue that reason should prevail in the public sphere, because the public sphere should be constructed and designed in secular terms (Ferrari, 2012: 356). However, this seems to be a narrow understanding of 'religion' and its importance for both individuals and groups.

Marshall (2016: 74) has researched the divide between public and private through discussing the legal decisions on choices and lifestyle behaviour; this includes in the form of dress. For example, in the name of state secularism individuals' private religious beliefs should not be overtly displayed in the public sphere (Marshall, 2016: 79). The public display of religious beliefs may interfere with values such as gender equality and the human dignity of women. It also relates to the notion of concrete risks for the neutrality and rights of others (Marshall, 2016: 82). The definition of Charney (1998) on the private sphere is then questionable. He argues that the private sphere is, in liberal terms, "a realm of thought and action that is protected from the coercive power of the state and that involves the concepts of limited government, liberty of conscience, and the separation of church and state" (Charney, 1998: 97). However, it is impossible to move from the private to the public sphere and 'take off' your religious identity.

The question remains what the 'place' of religion is, especially because the divide between the public and private sphere is blurry and there exist various interpretations of religion. What becomes clear is the fact that the visual presence or wearing of religious symbols moves religion from the private to the public sphere. I perceive the classroom and the workplace as part of the public sphere. This is because they are

outside of the private home and under the oversight of the government. Thus, both the classroom and workplace are influenced by governmental authorities.

Neutrality

In this section I will present some ideas of the concept of neutrality. I will do so because religious symbols carry meaning, including in the public sphere. The wearing of religious symbols in public spaces such as the classroom and the workplace could influence the 'neutral' setting. Why is neutrality important in a (secular) public sphere and what are the consequences for the presence of religion in this sphere? In the next paragraphs neutrality will be connected to religious symbols and the public sphere.

Douglas Laycock (1990) states that neutrality is essential to and consistent with religious liberty. Neutrality toward religion refers to the fact that religion is a private choice and should not be influenced by the government (Laycock, 1990: 1002). Neutrality includes the expression of government opinion, but the meaning of neutrality is not self-evident (Laycock, 1990: 1018). This latter point is clearly shown in the example of religious symbols. The impact of religious symbols and their meanings in public schools is seen as a "contentious issue" (Beaman, 2013: 120). This is because the presence of religious symbols can have a coercive effect, even if students do not have to participate in practices or hold different beliefs. In the workplace, the wearing of a visible religious symbol is said to interfere with someone's professional appearance. However, it remains unclear why one cannot be professional as well as showing one's religion at the same time (Marshall, 2016: 77).

This means that even though the modern state is supposed to be neutral with respect to religion and be protective of freedom of and from religion in the private sphere, in reality this is not always the case (Mancini and Rosenfeld, 2012: 6). It is simply impossible to be culturally neutral, because the norms and values of one cultural group in society will always dominate over others (Fraser, 1990: 69). Why then does the European Court argue for a restriction of religious practices in the public sphere in the name of neutrality? The ideas of neutrality might present a bias

toward the approved majority religion or other underlying assumptions. I will elaborate on this in the analysis of the religious diversity cases in Chapter 3 and 4.

Conclusion

In this chapter I used a social constructivist approach in order to provide understandings of the concepts of religion, religious symbols, secularism and the secular, public and private sphere, and neutrality. All of the concepts have multiple understandings and are context-dependent. Meanings of religion in the context of the European Court could focus on *religion as culture*, *religion as identity*, *lived religion*, and *governed religion*. By focusing on these understandings of 'religion' I can analyse the Court's discourse and examine the consequences of their definitions. This is important to keep in mind when the Court argues for the application of the margin of appreciation and the protection of religious freedom. The meanings of what constitutes a 'religious' symbol are context-dependent as well. It will be interesting to see how the Court interprets various religious symbols and what 'their' place might be in the public sphere. When is a symbol considered to be passive or a threat, and does this depend on the 'religion'? Can symbols represent secular values, or can symbols have various meanings at the same time?

The meanings of religious symbols influence their place in the public sphere. Various scholars have argued that there is a divide between the private and public sphere, however, there is confusion on the place of 'religion'. There is an assumption that 'religion' could pose a risk to state neutrality and the rights of others. The visual presence of religious symbols moves religion from the private to the public sphere, e.g. the classroom or workplace. These spaces are public because they exist outside the private home and are under the influence of governmental authorities. Mancini and Rosenfeld (2012) have argued that the modern state is supposed to be neutral with respect to religion and protective of freedom of and from religion in the private sphere. In my analysis I hope to see whether the margin of appreciation is able to protect neutrality and religious freedom.

As Jakobsen and Pellegrini (2008) have argued: there are multiple secularism*s*. I will focus on the idea of secularism as a state principle that suggests a separation between religious and political authorities and the notion of state neutrality. This is because the Court's invoking of the margin of appreciation seems to be influenced by this particular notion of secularism and neutrality. In the analysis of the Court's discourse I will be able to see how their interpretations of secularism and neutrality influence the ruling on religious diversity cases. Ideas on secularism and secular values in European law will be presented in the next chapter.

Chapter 1 Secularism in European law

In this chapter I will discuss the relationship between the European Convention on Human Rights (the Convention), the European Court of Human Rights (the Court) and secularism. I will highlight how ideas of secularism, neutrality, tolerance, and protecting the rights and freedoms of others influence the Court's interpretation of Article 9 of the Convention. This chapter will consist of four sections. In the first section I will discuss the critical analysis of Cumper (1999) on Article 9 of the Convention. In the second section I will discuss the current debates on the Court and its alleged secular logic. The third section will then bring us to the core values of the Convention and the interpretations of the Court. The fourth section highlights the implications of these core values on religious freedom. By doing so I hope to answer the sub question *What is the role and impact of secularism in European law?*

'Cautious' freedom of religion

The Strasbourg human rights institutions have tended to interpret Article 9 quite cautiously, and Cumper (1999) distinguishes five ways to illustrate this argument. Firstly, the Court has not defined, nor listed, the essential criteria of the word 'religion' (Cumper, 1999: 173). Secondly, the Court has not categorised certain New Religious Movements as religions. Thirdly, the Court tends to accord 'traditional' religions much greater deference and respect than 'non-traditional' faiths. Fourthly, the Court has often been reluctant to make reference to Article 9, preferring instead other articles of the Convention. And finally, on occasions when the Strasbourg institutions have invoked Article 9, they generally have interpreted it in a way that Member States retain considerable discretion and enjoy a wide margin of appreciation (Cumper, 1999: 173). Cumper (1999) goes even further by stating that the previous case law of the Strasbourg institutions reveal a bias against non-traditional religions and are not likely to be influenced by the critiques outlined above (174). The Strasbourg human rights institutions have been slow to protect unconventional systems of belief and have tended, on the contrary, to accord priority to those faiths that have had a long history in Europe (Cumper, 1999: 166). However, because

Cumper's ideas on the Strasbourg institutions are based on cases prior to the court rulings I will discuss in Chapters 3 and 4 I would like to see if the criticisms are still present today and whether the Court's position on Article 9 has indeed a secular bias.

The secular logic

Plesner (2005) has argued that the Court has taken up a "fundamentalist secularism", which means that religion is a private issue and religious manifestations have to be kept in the private realm (3). Carolyn Evans (2001: 200) has argued that the Court holds "a narrow and often confused concept of religious freedom". Wiesel (1999: 3) has described human rights as a "secular religion" that has replaced traditional faith communities. The significance of human rights cannot be denied, however Wiesel's statement might be a step too far. The 'secular' has not replaced the 'religious', but suggests that ideas of secularism influences European law. We might argue that the Court has a mode of secular logic, which could influence the Court's use of the margin of appreciation (Calo, 2010: 268). This is an important insight for my research on the relationship between secularism and the margin of appreciation, because the margin can only be invoked by the European Court. This mode is not necessarily hostile towards religion, but the Court's reasoning about the public life of religion is influenced by the secular assumptions of the Court (Calo, 2010: 268). This argument is based on the fact that the Court promotes the European political life, which ought to be secular in its constitution. In addition, religion is seen as a problem, not a solution (Calo, 2010: 268). The secular logic is a result of the cultural context in which the Court operates (Calo, 2010: 268). Religious beliefs and practices have left the secular culture of Europe. Within the context of secular (Western) European societies, the Court has to deal with questions of religious pluralism (Calo, 2010: 269). This has resulted in a secular understanding of human rights that have an impact on European politics and culture (Calo, 2010: 273). Ideas of human rights are dominated by European assumptions about universal rights (Calo, 2010: 275). The secular tradition of human rights denies forms of religious expression as well as the sources of meaning (Calo, 2010: 280).

Lewis (2007) builds on this thought when he argues that the Court operates in an international political climate known for its "liberal, and secular paradigm", which *may* influence the value of religious freedom (396, emphasis in original). Lewis (2007: 404) furthermore states that the nature of human rights play an important role as well:

> [...] the prevailing view is that human rights are essentially 'secular' in nature and whilst freedom of religion is certainly accepted as a human right its demands are no more pressing than other rights within the secularised canon.

According to Ferrari (2012: 367) the Court has developed its own definition of religion. This would mean that the definition of the Court would fit one religion better than others. For example, Evans (1999) highlights that the European Court rather protects "the cerebral, the internal, and the theological dimensions of religion and belief, instead of the active, the symbolic and the moral dimensions" (Evans, 1999: 396). Whereas Ringelheim noted that religion, viewed by the European Court, is an inward feeling, a matter of individual conscience (Ferrari, 2012: 367).

Ferarri (2012) argues that there should be a differentiation between two facets of religion. The first facet understands religion as an act of choice based on individual conscience and supported by sharing practices, symbols, and rituals (Ferrari, 2012: 368). This results in the notion that the language of religion is the language of choice. According to Jakelic (2010: 2), the choice of religion serves as a legal principle as well. It can define what religion is in order to protect two sacred freedoms within the Convention: namely, the freedom of conscience and the freedom of religion (Ferrari, 2012: 368). At the same time, there are some important differences between conscience and religion. Conscience is perceived to be chosen freely, private, and disestablished, whereas religion is ascribed, adopted by custom or tradition, public, and sensitive (Ferrari, 2012: 369).

The core values

Langlaude (2006) has researched the 'secular' values of the Court. When it comes to religious diversity cases the Court emphasises values such as the prevention of

indoctrination, neutrality, secularism, and laïcité (Langlaude, 2006: 929). This is most likely the case when it relates to Islam. The core values I am interested in are tolerance, neutrality, religious diversity, religious pluralism, and prevention of indoctrination. These values may influence the secular assumptions of the Court; I will present the detected assumptions in Chapter 3. Langlaude (2006: 929) argues that the Court "tries to promote and enforce a normative order of secularism", this does however affect religious freedom. This means the Court decides on a case-by-case basis how religion is perceived and whether this particular religion is valued as tolerant or neutral. In order to do so the Court upholds policies on the prevention of religious indoctrination and pressure (Langlaude, 2006: 929).

Lewis (2007: 405) argues that diversity and pluralism, which are two core values of the Convention, ensure that the right of religious freedom is necessary and important. This is especially the case when it comes to the public display of religious symbols, specifically religious clothing. The public display of these religious symbols receives low level protection exactly because of its public dimension (Lewis, 2007: 401). The freedom to manifest one's religious beliefs can be denied because the measure is necessary in a democratic society (Langlaude, 2006: 932). This is because the Court can deem the impact of a religious symbol as a compulsory religious duty, especially on those who choose not to wear it (Langlaude, 2006: 932).

According to Calo (2010: 263), the interpretation of Article 9 by the Court is influenced by their definition of religious pluralism as "an essential feature of a rightly-ordered liberal society". In addition, pluralism is essential to democratic order and is seen as the expression of liberal freedom (Calo, 2010: 263). At the same time, the Court acknowledges that pluralism can undermine the goal of preserving religious harmony or protecting the rights and freedoms of others (Calo, 2010: 264). The protection of a democratic culture sometimes requires limitations on religious expression, as concluded by the Court (Calo, 2010: 265). This means that pluralism as the "hallmark of the liberal democratic order" is trapped inside the boundaries of a "secular political narrative" (Calo, 2010: 268).

The Court has stated that secularism is the guarantor of democratic values, and is thus the meeting point of liberty and equality (Langlaude, 2006: 936). The Court has

also stated that secularism should be regarded as a "philosophical conviction worthy of respect in a democratic society" (Lobeira, 2014: 389). The context of values of pluralism, respect for the rights of others and equality before the law of men and women, is the reason to preserve the secular nature of the institution concerned, wearing or allowing religious attire is contrary to this notion (Langlaude, 2006: 936). The majority of the Court shares this particular notion or position of secularism because it provides an appropriate way to regulate religious freedom. Moreover, it involves the protection of some groups of people from the religious views of others (Langlaude, 2006: 936). However, this view neglects the fact that secularism could also be understood as "the aim of equal freedom and rights of all inhabitants to live according to their conceptions of 'the good', and peaceful coexistence in a plural society" (Plesner, 2005: 3-4). The Court's approach to neutrality and secularism interferes with substantial aspects of the religious freedom and religious identity of communities (Langlaude, 2006: 942).

Another core value is neutrality, which can be paired with religious pluralism. By doing so, neutrality refers to a public space free from the imposition of religion (Calo, 2010: 266). The Court has stated that Member States have a "duty of neutrality and impartiality" (Leigh and Ahdar, 2012: 1079). Neutrality is often seen as good or a desirable characteristic of those exercising power and authority (Lobeira, 2014: 389). Lobeira (2014: 389-90) distinguishes the analytical and normative approach to neutrality.

> Analytically, neutrality translates into a public political atmosphere that allows citizens and groups of citizens holding different worldviews, to live in harmony and agree on fundamental public questions, with the rest of the political community. Normatively, neutrality denotes the safeguard of the modern values of 'equality', 'freedom' and at least a precondition for solidarity or 'fraternity'.

The Court has argued that neutrality with regard to religion and the separation of the public and religious spheres is essential to create a secular and democratic society (Langlaude, 2006: 938). This is exemplified in the following statement:

> The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society (Plesner, 2005: 8).

If the State is not a neutral organiser then the State is unable to guarantee tolerance. Plesner (2005) argues that the use of the word 'neutral' by the Court refers to Article 14; non-discrimination and equal protection of rights (11). Therefore, neutrality refers to the equal protection of the specific right. The Court has difficulty defining what indoctrination or neutrality is (Langlaude, 2006: 935), or whether neutrality can really exist when it comes to matters such as faith. This is because religions are fundamentally different, which could influence the way we perceive the non-religious or a-religious.

The implications of core values for religious freedom

McGoldrick (2011) argues that modern European states "profess a predominantly secular identity" (453). The interpretation and application of secularism as well as the idea of religious neutrality, however, varies greatly. A variety of models of secularism and church-state relations exist within the Member States. The Court has argued that even though there are a variety of state-church relations they can still comply with the standards of the Convention (McGoldrick, 2011: 455). The case law emphasises neutrality, tolerance, religious pluralism, and the prevention of indoctrination. However, the Court does not realise that this potentially has negative consequences on religious communities and their place in the public sphere (Langlaude, 2006: 943). This is because there is no clear divide between the public and private sphere, which could result in the exclusion of religion in public settings. Thus, there is a dichotomy in the approach of the Court. On the one hand the Court recognises the principle of non-intervention of the State in the internal procedures of religious communities, while on the other hand the Court restricts the legitimacy of certain religious practices (Langlaude, 2006: 943). This dichotomy is a result of the inability of the State to define what is secular and what is religious. The Court stated in one of its rulings that:

> the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (Langlaude, 2006: 943).

This seems to mean that religions that do not respect the rule of law and democracy will not be protected under Article 9. Moreover, this means that there are "acceptable religions or ideologies" (Langlaude, 2006: 943). What is left out of the picture is the understanding of what is acceptable or not, especially because ideas about religion and religious belief differ among Member States. This leads to the inconvenient truth that the Court is "trying to impose its own conception of secularism at an unacknowledged cost to religious freedom" (Langlaude, 2006: 944).

> The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society (Plesner, 2005: 8).

The previous quote has been mentioned before, but this time I would like to focus on the word tolerance. The notion of the word tolerance seems to indicate that there are different conceptions of what is right and should be tolerated. Moreover, the idea of state neutrality has been criticised because it is "implausible, unrealistic, utopian, founded on a particular liberal theory and fundamentally insensitive to difference" (McGoldrick, 2011: 457). In addition, the Court has to decide what could be considered as 'right' and if the practices are in harmony within secular and democratic societies. For example, in the *Dahlab v Switzerland* case, the Court argued that wearing a headscarf is not compatible with the principle of tolerance (Plesner, 2005: 8). This position seems to be problematic. It shows that the Court has a cultural bias and negative associations with the headscarf, whereas the individual interpretations or religious belief are ignored (Plesner, 2005: 8). If the religious symbol is a sign of intolerance, this could stigmatise numerous women also wearing

the headscarf (Plesner, 2005: 9). In turn, this means that stigmatising the religious practice of women is contrary to the principle of secularism.

According to Danchin (2011: 670) Christianity shapes aspects of the state and state law, because it is still the dominant religious tradition in Europe. Moreover, because Christianity shapes certain aspects of the state law as well as European law "this is an embarrassment for liberal theories of rights and their assumption of state neutrality" (Danchin, 2011: 671). There has also been concern that the Court has turned the jurisprudence of Article 9 into a tool with the aim to repress religious liberty (McGoldrick, 2011: 463). Furthermore, the Court has not developed a "necessary robust intellectual approach to the principles of pluralism and neutrality", and without a clear approach the Court is unable to balance competing interests (McGoldrick, 2011: 463). Langlaude (2006) addresses neutrality in the context of the classroom. The absence of religion and religious symbols in educational settings seems to create the notion that schools are the "bearer of majority values", while there should be a policy of impartiality or neutrality (Langlaude, 2006: 933), especially when this neutrality equals Judeo-Christian values, or even imposing Christian values on children and teenagers. Langlaude (2006) continues by arguing "the Court's position on the prevention of indoctrination and pressure is problematic for the individual believer (933). "The Court fails children in relation to their religion when it decides that neutrality is the way forward in the education and religious education of children" (Langlaude, 2006: 936).

McGoldrick (2011: 496) further states that there exists "an orthodoxy in human rights law that the majority culture can and generally will look after itself through the normal operation of the democratic processes". This means that the Court has an important task to protect individuals and minorities from the effects of the majority rule. Because Christianity has dominated European traditions, non-dominant traditions cannot be equally represented in public reasoning or the public sphere (McGoldrick, 2011: 497).

> Christianity and Christian values have been defended even at the expense of trampling on fundamental individual freedoms because the Court does not perceive

them as conflicting with the core values of the Convention system (McGoldrick, 2011: 498).

At the same time, Islam has been restricted to the private sphere as it threatens the democratic basis of Member States (McGoldrick, 2011: 498). The decisions of the Court show a bias against Islam, however this bias is part of a larger trend that opposes envisioning and practising religion in the public sphere (Ferrari, 2012: 368). The attempt to restrict the right to freedom of religion or belief by referring to the principle of secularism can weaken the legitimacy of the Court, and especially weaken the basic rights that should be protected (Plesner, 2005: 16).

Conclusion

In this chapter I discussed the relationship between secularism and the European law. The Court deems religion a private issue, meaning that religious manifestations have to stay in the private sphere. The core 'secular' values take the place of religion, which suggests that human rights become Europe's religion. This has been called the mode of secular logic of the Court (see Calo 2010), implying that the Court's reasoning about the public life of religion is influenced by its secular assumptions. The Court has to operate within the context of an increasingly secular (Western) Europe, resulting in a secular understanding of human rights (Calo, 2010: 273). This becomes clear when the Court has to rule on religious diversity cases and the value of religious pluralism. The Court promotes and enforces "a normative order of secularism" (Langlaude, 2006: 929). This normative order influences decisions on religious diversity cases when it concerns minority religions. The Court seems to emphasise neutrality because it could promote a public space free from the impositions of religion. However, in practice the Court is unable to strike a fine balance between justifying State interference in religious matters, and safeguarding religious diversity and pluralism in diverse European societies. The next question is how the core values (neutrality, tolerance, religious diversity, religious pluralism, and protecting the freedoms of others), could influence the application of the margin of appreciation doctrine. How does this secular mode of logic influence the application

of the margin, and what could this tell us about the place of religion in European societies?

Chapter 2 Margin of Appreciation 101

"Definitely, the more important the rights in the scheme of the Convention are, the more convincing the reasons required to justify a restriction in them will be" - Council of Europe, 2009.

In the previous chapter I have discussed the core values of the European Convention on Human Rights (the Convention) and its implications for religious freedom. In this chapter I will turn to one specific doctrine within the Convention, namely the margin of appreciation. I will describe how the doctrine came into being and will discuss the use of the margin in recent religious diversity cases. The chapter will consist of five sections. The first section will give an overview of definitions of the margin of appreciation. In the second section I will look into the history or the emergence of the doctrine and *why* it is applied by the European Court of Human Rights (the Court). The third section will then focus on the width of the margin, what are the factors or standards that influence this? The fourth section will provide some critiques on the application of the margin. Finally, the fifth section will focus on religion and the margin of appreciation. By doing so I hope to answer my sub question: *What is the history of the margin of appreciation in the European Convention on Human Rights?*

The definitions

Instead of calling the margin a doctrine, Greer (2000: 32) argues that the margin is a pseudo-technical way of referring to discretion, which permits national authorities to invoke a margin of appreciation in certain circumstances. In the same line of thought Beaman (2013: 131) states that the margin of appreciation gives "ultimate sovereignty" to the Member States of the Council of Europe in order to resolve conflicts between individual rights and national interests or among moral convictions. This ultimate sovereignty is granted to the Member States in certain cases because the idea is that the States are in a better position than international judges, and should therefore be permitted "an element of discretion" (Cumper, 1999: 176). This discretion is applicable in cases of public emergency under Article 15, national

security cases, and the protection of public morals (Harris, O'Boyle, Warbrick, 1995: 13).

The past President of the Court and the European Commission, Sir Humphrey Waldock, described the margin as an "important safeguard developed [...] to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy" (O'Donnell, 1982: 476). O'Donnell (1982) himself argues that the margin "represents a doctrine of deference in the exercise of judicial review" (495). The online paper *The Margin of Appreciation* published by the Council of Europe sheds light on the way the Council interprets the margin. The Council elaborates on flexibility, discretion, and protecting the rights and freedoms of all citizens. The Council of Europe (2009) argues that the margin gives a certain flexibility in order to avoid confrontations between the Court and the Member States. This flexibility ensures that the Member States still follow the Convention. The Court offers a margin of appreciation to the Member States and its institutions, but the Court also carries the task of protecting human rights of all (Council of Europe, 2009). The margin goes hand in hand with European supervision. This is because the Court's fundamental task is to arbitrate between the States and their citizens. The Court has to establish a balance between the interest of the States' power of discretion, and the interest of the applicants' high level of protection. This is a difficult task because the power of discretion signifies a lower protection standard for citizens, especially because the Convention was created in the interest and benefit of the citizens, not the States.

Before I turn to the next section on the emergence and application of the margin, it is important to note that the doctrine has increasing importance because the Court needs flexibility to deal with the vague language of the Convention, and the diversity among Member States (O'Donnell, 1982: 496). The doctrine allows both the Member States as well as the Court some flexibility in meeting their obligations. Furthermore, the margin is a matter of *who* takes the decisions (Hutchinson, 1999: 640, emphasis added). Only when a Member State has exceeded its discretion, the Court will intervene, this means that the discretion is not unlimited but is guarded by the Convention. The Court is the final interpreter of the Convention, which is why the use of the margin of appreciation and the standards for its application are critical to the

enforcement of the Convention. The fact that the Court, the final interpreter of the Convention, can apply the margin of appreciation shapes how the Convention is enforced (O'Donnell, 1982: 474).

Emergence and application of the Margin of Appreciation

The doctrine is nowhere mentioned in the Convention, but a product of the Strasbourg organs (Hutchinson, 1999: 639). The margin was originally borrowed from German Administrative law, which emphasises process above substance (Ostrovsky, 2005: 59). The margin allows the Court to consider the Convention as a vague statute. In turn, this vagueness must be interpreted by the administrative state, i.e. the Member States. The term margin of appreciation was first found in 1958 in the Commission's report in the case brought by Greece against the United Kingdom over alleged human rights violations in Cyprus (Greer, 2000: 5). The original idea behind the doctrine was the concern of national governments that international policies could intervene in their national security (Benvenisti, 1999: 845). States could derogate from treaty obligations due to a state of national emergency. These cases referred to Article 15, known as the derogation article (Hutchinson, 1999: 639). Article 15 states that governments can take measures that derogate from certain rights guaranteed by the Convention in time of war or other emergency (O'Donnell, 1982: 477). In Article 15 cases the question was if the existence of an emergency was properly assessed by the government. The Court could reassure States that their efforts in protecting themselves would not be compromised by international policies through the margin of appreciation (Ostrovsky, 2005: 48).

The margin has evolved, and largely focuses on accommodating diversity within Europe, national sovereignty, and the will of domestic majorities (Ostrovsky, 2005: 48). Instead of focusing on Member State's direct security, the margin is now a tool to create a long-term balance between and among conflicting domestic social interests. It ensures that the Court can delineate between matters to decide at the local level, and matters that are fundamental and imposed on every Member State regardless of cultural variations (Ostrovsky, 2005: 48). In other words, the 'tool' can detect when core rights are violated within the context of a diverse system. There is an underlying

assumption that States are more capable and better suited to judge local conditions and interests even though this might compete with the interest of the individual (Ostrovsky, 2005: 48). This is because the national authorities are said to have direct and continuous contact with vital forces of their countries. The rulings of the Court could jeopardise the legal and factual features that characterise the society of the Member State, which is why the margin can serve as a meaningful legal concept. The Member State's margin of appreciation is closely related to the requirement of proportionality. This means that the Member State may restrict certain rights in order to protect the purpose of the restriction (Ostrovsky, 2005: 49). However, the rights of individuals cannot be "overburdened" in return for social goods because the rights are restricted to "a point but not beyond what is necessary" (Ostrovsky, 2005: 49). The Court can intervene when the Member State shows an inability or unwillingness to act upon violations (Lugato, 2013 : 67).

Greer (2000: 5) states that there is "no simple formula" to describe how the doctrine works, instead it has an "unpredictable nature". The margin is usually applied when the interpretation of exceptions is at stake. Even though the margin is nowhere mentioned in the Convention, the Court reads the doctrine within the exceptions in the Convention (Council of Europe, 2009). This means that the margin is a crucial part of interpreting the exceptions. The doctrine can serve as a tool for articles with "accommodation clauses"; these clauses permit infringement when in the interest of national security, public order, health, morals, or rights and freedoms of others (O'Donnell, 1982: 477). Examples of articles with accommodation clauses are Articles 8-11. The qualified rights are not absolute and have limitations expressed within themselves. The limitations are seen in the second paragraphs of the Articles; Member States can breach their obligation of non-interference because the individual liberties are "in accordance with the law", "prescribed by law", or "necessary in a democratic society" (Council of Europe, 2009). I will elaborate on this in the section on the width of the margin.

Width of the Margin of Appreciation

The Convention is seen as a living document, and described as a "European Consensus" (Council of Europe, 2009). This label also refers to the Court's inquiry into the (non-)existence of a common ground in the law and practice of Member States. This means that the margin of appreciation can have a wider or narrower character. If there is no European consensus on a certain subject matter this will normally lead to a wider margin of appreciation (Council of Europe, 2009). The consensus depends on the relative importance of the interest at stake and how to best protect it. However, what is important to note here is that the margin is context dependent and its limits can only be drawn within a specific case.

This brings us back to the "accommodation clauses" in Articles 8-11 (Rasilla del Moral, 2006: 613). The articles are considered to be Personal Freedoms Articles, have "weaker language", and deal with personal liberties including freedom of speech and freedom of conscience and religion (Ostrovsky, 2005: 50). The two-paragraph structure of Articles 8-11 allows for a balance between the individual's right and the greater social good (Lewis, 2007: 397). There can only be an interference if the legitimate aims in the second paragraphs, are "prescribed by" or "in accordance with" the law, or "necessary in a democratic society" (Lewis, 2007: 397). The latter clause, *necessary in a democratic society* relates to the proportionality principle, the interference has to be proportionate to the legitimate aim pursued (Ostrovsky, 2005: 50). The term "necessary" is not seen as a flexible term, but is rather viewed by the Court as a "pressing social need" (Ostrovsky, 2005: 53). This would mean that the margin of appreciation is left to national authorities to assess any pressing social need. However, when morals are concerned, and there is no European consensus on morals, a wider margin can be granted. When it comes to Personal Freedom Articles the specific human right must balance the individual interest against the public interest. The margin becomes important in these cases when Member States have no consensus on the matter. This is because Member States have to decide how they protect the individual rights set out in the Convention, especially when there is an absence of consensus or common practice (Lewis, 2007: 397). This absence is most likely to be found in the fields of morals and religion because there is no universal, or European consensus.

The margin applies with respect to the Convention's rules on non-absolute rights and freedoms with respect to the derogation clause in Article 15 (Lugato, 2013: 50). The rules consist of two elements; they are unsettled which allows a plurality of implementation (non-consensus), and they permit restrictions under specified conditions determined by the Member State. This influences the three standards that may determine the width of the margin of appreciation. The standards I will discuss are: (1) the (absence of) European consensus, (2) the nature of the right, and (3) the aim pursued (Hutchinson, 1999: 640).

If there is a substantial *consensus* among Member States this results in a narrow margin (O'Donnell, 1982: 479). The absence or presence of a consensus is based on an examination of the law and practice of other states parties (O'Donnell, 1982: 495). The notion of consensus is connected to the weight of the legal tradition of the European system. If there is no consensus between the Member States and the contracting parties a wide margin can serve as a tool to solve the issue. For example, there is no universal conception of the significance of religion in society, which is why the Court is likely to grant a wider margin (Cumper, 1999: 176).

The second standard to determine the width of the margin is the *nature* of the right, and if this right is *fundamental to democracy* (O'Donnell, 1982: 484). If the right is regarded as fundamental the Court will invoke a narrow margin of appreciation. For example, freedom of expression or the right of property rights ask for different examinations. This does however mean that the Court decides which rights are more fundamental than others.

The third standard is a *close textual analysis* and focuses on the *aim* (O'Donnell, 1982: 489). This standard is only applied to cases that involve the accommodation clauses. The wording in the accommodation clauses may be used to apply the margin in their narrow or broad terms. O'Donnell (1982) argues that Article 10, freedom of expression, is the likeliest to have a wide margin, because the accommodation clause pairs the freedom of expression with duties and responsibilities (490). The clause of Article 9 would provide a narrow margin: only the right to manifest one's beliefs may be restricted.

A wide margin is also applied when the State has to strike a balance between competing interests or Convention rights (Harris, O'Boyle, Warbrick, 1995: 13). A

narrow margin is applied when an important facet of an individual's identity or existence is at stake (Harris, O'Boyle, Warbrick, 1995: 13). The margin, then, serves as a mechanism in order to examine state conduct within its context. However, this does not mean that it is clear in every case how wide or narrow the margin should be. The width is uncertain. The margin is also said to open up the possibility of "arbitrary decision-making", because explicit, or clear analysis and application of the Convention is inadequately backed up (Hutchinson, 1999: 640). The membership of the Convention continues to grow, which means that consensus is much more difficult to achieve. At the same time protecting core human rights needs to be done while respecting diverse cultural norms (Ostrovsky, 2005: 51). The nature of the right and the consequences of restricting the right on the individual complaint influence the application of the margin. This is because the Court can argue against a wide margin when the Member State wants a severe restriction.

Critiques on the application of the Margin

There is critique on the application of the margin as well. It is said that the margin places too much emphasis on cultural relativism. And there is no definitive method for measuring the consensus on which the Court bases its application. Without defining consensus the Court risks illegitimacy. It is said that the doctrine is a threat to the viability of the Convention, because the Court does not take its enforced responsibilities (O'Donnell, 1982: 476). Furthermore, if the Court applies the doctrine the decision can be seen as a ratification of national action. This is largely due to the fact that there is a lack of clear standards for the doctrine's use.

Benvenisti (1999) argues that the margin of appreciation has implications for the ethnic, national, and religious minorities in society. In each community there exist groups that are outvoted and under-represented in the political process. There are ethnic, national, or religious minorities who are "political captives of the majority" (Benvenisti, 1999: 848). The absence of political influence is one of the factors that leads minorities to rely upon the judicial process when they try to secure their interests (Benvenisti, 1999: 848). However, the national judicial process may fail to protect them, that is why international courts are often a last resort and reliable

institution to turn to. In theory, the doctrine has been justified as a means to promote democracy within communities (Benvenisti, 1999: 849). However, the promotion of democracy could interfere with the interests of the minorities, because the majority gains political power with little more than half of the votes. That is why Benvenisti (1999) argues that external supervision is necessary to complement the domestic guarantees against abuses by domestic majorities (853). The margin coupled with the notion of consensus, reverts the difficult policy questions back to national institutions. If national procedures are prone to failure, in the case of minority rights and interests, the margin or consensus should not be tolerated (Benvenisti, 1999: 854).

Furthermore, Lewis (2007: 414) states that it is "inevitable" that religion is afforded less protection in the Convention compared to rights with an instrumental value or rights that take place in the private domain. The notion of religion and education is a delicate and complex matter. This is because there is no common European practice, which leads to a wide margin of appreciation when education policies and its relationship to religion are discussed. Furthermore, this means that States should organise, regulate, and restrict the rights and freedoms of others in connection with the historical and local context (Lugato, 2013: 52). Lugato (2013) argues that the margin of appreciation is not compatible with human rights and the underlying aspiration to a universal standard for their protection. This is because the doctrine allows Member States to give preferential treatment to their majorities at the cost of the protection of individuals and minorities (Lugato, 2013: 53).

The Margin of Appreciation in practice

In this section I give an overview on the application of the margin of appreciation in religious diversity cases. The Court has stated that the margin of appreciation is particularly appropriate when it comes to the regulation of wearing religious symbols in educational contexts (Ostrovsky, 2005: 54). Specifically, because the requirements of the protection of the rights of others and public order do not share a European consensus. For example, in the case of *Dahlab v Switzerland* the regulation of wearing headscarves in public schools is a means to preserve the secular tradition of the Member State (Ostrovsky, 2005: 54). This statement refers to Paragraph 2 of

Article 9: the protection of the rights and freedoms of others trump the individual right to freedom of religion. The interference with Dahlab's freedom of religion was justified, because there was a need to protect the right of State school pupils to be taught in a context of "denominational neutrality" (Ostrovsky, 2005: 55). The Court then argued that the Swiss government did not exceed its margin of appreciation, mostly because the impact of Dahlab's veil on school children was difficult to assess.

Another example occurred in the court ruling of *Sahin v Turkey*, where the application of the margin of appreciation was explained in the following way:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision making body must be given special importance [...] It is not possible to discern throughout Europe a uniform conception of the importance of the significance of religion in society [...] and the meaning or impact of the public expression of a religious belief will differ according to time and context [...] Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the needs to protect the rights and freedoms of others and to maintain public order [...] Accordingly the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context [...] (Lewis, 2007: 397-8).

The Court applied a wide margin of appreciation because there is little to no consensus as to whether the veil is granted protection under Article 9 (Council of Europe, 2009). The lack of a core European consensus on how to treat the wearing of religious symbols justifies the actions of the Member State authorities, thus they are granted a wide margin. The application of a wide or narrow margin of appreciation thus relies heavily on European consensus, especially when it concerns religious diversity cases. The margin must be examined within the context of the specific human right and allows Member States ultimate sovereignty to resolve conflicts between individual rights and national interests under European supervision.

In the next three chapters I will discuss my research methods and discuss the religious diversity cases in order to examine if there exist secular assumptions in the application of the margin of appreciation. By doing so I will be able to argue if Fokas' (2012) argument on the "secularist approaches" are indeed present in the rulings of the European Court (400).

Conclusion

The margin of appreciation doctrine should resolve conflicts between individual rights and national interests. The application of the margin is granted to provide a certain flexibility in order to avoid confrontations between the Court's interpretation of the Convention and the Member States. The margin then, seems to be a tool to create a balance between conflicting social interests of the State and the applicant. Article 9 has a two paragraph structure which means that the rights of the individual can only be restricted by State interference if this is "prescribed by law" and "necessary in a democratic society". In religious diversity cases it is difficult to reach a European consensus on the place of religion or religious symbols. Thus, the margin tends to be wide and grants Member States the "ultimate sovereignty" on religious matters (Beaman, 2013: 131). This can be seen as a threat to the viability of the Convention, because the Court does not take its enforced responsibilities (O'Donnell, 1982: 476)..

In the Court's rulings, the application of the margin of appreciation has been justified to promote democracy within communities, however, this interferes with the interests of minorities. It seems that the margin fails to protect the rights and freedoms of all, and instead supports the religious majority. This can have severe consequences for the place of religion in European societies, and postpones meaningful discussions on the significance and presence of religion in the public sphere.

Chapter 3 Methodology and Secular Assumptions in the Margin of Appreciation

In this chapter I introduce my research methods and give a first impression on the secular assumptions that may be detected in the margin of appreciation doctrine. In the first and second section I introduce my thematic and discourse analysis and how these methods are helpful in studying religion and legal texts. I will both describe the general technical issues regarding my methods and the theory and conceptualization of these methods. In the third section I will turn to the implementation of the research methods in the court rulings of the European Court of Human Rights (the Court or ECtHR). How is religion or religious diversity presented, if at all, and what is the role of the margin of appreciation? Furthermore, I will introduce recurring patterns and discourses and I will answer what secular assumptions may be detected in the margin of appreciation in general. This chapter will be followed with the outcomes of the thematic and discourse analysis of religious diversity cases in the classroom and workplace.

Thematic analysis

A thematic analysis has been described as "a method for identifying, analysing and reporting patterns (themes) within data" (Vaismoradi, Turunen, and Bondas, 2013: 400). This type of analysis will help me to identify, analyse and report patterns or themes that repeat themselves and are deemed relevant in the court rulings. This will help me to identify similarities and differences between the cases. Vaismoradi, Turunen, and Bondas (2013) show what a thematic analysis entails. In figure 1. the authors explain the steps of a thematic analysis. The steps *searching for themes* and *reviewing themes* are of specific importance. This is because the themes and patterns I detect within the data can generate a thematic map, which helps to compare the court rulings and their similarities and/or differences, especially in regards to the margin of appreciation and its alleged secular assumptions. What is important to note here is that I cannot rely on the visible contents of the text only, but have to search for interpretations that could uncover secular assumptions. This is because assumptions

are things or actions that are accepted as the truth. Instead of relying on the visible content I have to read 'between the lines' and focus on *why* the Court argues in a certain way. Both description and interpretation are vital to understand the secular assumptions within the context of the European Court. The first step is thus a thematic analysis, because it combines analysis and meaning within a particular context and can find patterns that influence the discourse of the European Court.

Familiarising with data
Transcribing data, reading and rereading the data, noting down initial ideas.

Generating initial codes
Coding interesting features of the data systematically across the entire data set, collating data relevant to each code.
Searching for themes
Collating codes into potential themes, gathering all data relevant to each potential theme.
Reviewing themes
Checking if the themes work in relation to the coded extracts and the entire data set, generating a thematic map.
Defining and naming themes
Ongoing analysis for refining the specifics of each theme and the overall story that the analysis tells, generating clear definitions and names for each theme.
Producing the report
The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back of the analysis to the research question and literature, producing a report of the analysis.

Figure 1. Vaismoradi, Turunen, and Bondas, 2013: 402.

Discourse analysis

According to Kocku von Stuckrad (2013) we should not perceive discourse analysis as a method, but as a methodology or theoretical perspective (supra note 7). This is because "the study of discourse is an interpretative endeavour and thus a hermeneutical strategy to scrutinize the organization of knowledge in a given societal and historical situation" (von Stuckrad, 2013: 18). Titus Hjelm (2011) defines discourse analysis as the "study of how to do things with words" (134). Furthermore, discourse can construct reality in a certain way; this includes social identities, power relations between people, and systems of knowledge (Niemi-Kiesiläinen, Honkatukia, and Ruuskanen, 2007: 82). And how identities, beliefs, relationships, and knowledge systems are constructed in our language use. A discourse analysis then is suitable to research processes of social construction. The way we speak can tell the researcher

how we construct and constitute concepts, including religion. In addition, our social reality and relationships are constructed through discourse (Hjelm, 2011: 135). Von Stuckrad (2013) argues that a discourse analysis "aims at reconstructing the processes of social construction, objectification, communication, and legitimization of meaning structures" (9). Discourse is a form of social practice that contributes to the reproduction of society but can result in social change as well (Hjelm, 2011: 135). If we perceive reality as a product of human interaction, commonly seen as constructionism, then discourse is the tool people use to make sense of the world while at the same time discourse reproduces and transforms the world (Hjelm, 2011: 150). Discourse and practice organise knowledge in a given community; this results in a shared order of knowledge within a social context (von Stuckrad, 2013: 15).

Hjelm (2011) turns to *critical* discourse analysis, which focuses on ideology in discourse and the reproduction and transformation of power relations (134, emphasis added). The focus is on a reality "outside of discourse that is reproduced and changed discursively" (Hjelm, 2011: 140). A critical discourse analysis not only focuses on what is said, but sometimes more importantly on what is *not* said. Hjelm (2011) argues that power is "persuasive in nature", and discourse is the "most important vehicle for power", because discourse examines how we speak and *do not* speak about things (149). Discourse analysis can focus on "self-evident knowledge, the truth that is not formalized but generally accepted" (von Stuckrad, 2013: 10). What will be interesting to see in the court rulings is how this self-evident knowledge about religion or religious diversity influences the application of the margin of appreciation. This is because it is difficult to strike a balance between the interests of the State and the right of religious freedom. The interests of the State influence the position of religion in the public sphere, while at the same time the right to manifest one's religion should be safeguarded. Niemi-Kiesiläinen, Honkatukia, and Ruuskanen (2007) have argued that researching the construction of meanings in legal texts should focus on what is regarded as self-evident knowledge and how this knowledge is constructed (76). A discourse analysis can then be incorporated, because this type of analysis focuses on how meaning is constructed through linguistic exchanges and expressions (Niemi-Kiesiläinen, Honkatukia, and Ruuskanen, 2007: 79).

What is important to note here is that there is not a universal discourse analysis to apply to every case. Rather, the study needs to be designed individually and can have a range of analytical 'tools' (Hjelm, 2011: 134). Discourses should be examined in their social context and involve the way discourse, social action, and structure are related (Hjelm, 2011: 145). So how can we study religion using discourse analysis? First of all, I should note that religion is not an object we can study in order to understand 'it'. As I described in the Theoretical framework, our definitions of religion are socially constructed and can have different meanings in different cultural and political contexts. The way religion is organised and discussed in certain contexts can tell us more about the role or place of religion in the public sphere. That is why my discourse analysis will focus on the context of the rulings and the particular language that is used. This will build on the thematic analysis, because the recurring patterns and themes can help to detect similar or different meanings of religious diversity and secular assumptions. Discourse could also display power relationships, which will be particularly interesting in the case of passive and powerful religious symbols.

Analysing the Margin of Appreciation

The court rulings of the European Court are accessible through the online database HUDOC. The court rulings of *Dalhab v Switzerland*, *Lautsi v Italy*, and *Eweida v United Kingdom* were available in English. The court rulings of *Jasvir Singh v France*, and *Ebrahimian v France* were available in French only. In order to research the latter two I used Google Translate to translate the document.

The court rulings of the European Court in the five court rulings consisted of five sections: *the facts* or *background*, *complaints*, *domestic law*, *law* (Articles of the Convention), and the *court's assessment*. I first read the entire document in order to familiarise myself with the background of the case, the alleged violations, and the reasoning of the governments. I used the fifth section, *court's assessment*, in the thematic and discourse analysis because this section represented the legal interpretation of the laws by the European Court as well as the application of the margin of appreciation.

Through a thematic analysis of the documents I was able to gather the following themes: secularism, neutrality, Christian heritage, discretion, and protection of rights and freedoms of others. In general, these themes led to the examination of the aims pursued justified the State's interference, in other words, if the interference of the State was in accordance with their margin of appreciation. Before I turned to the discourse analysis I searched for the specific interpretations or determinations of the Court. How did they come to the conclusion that the margin was justified and the manifestation of religious symbols in the public sphere should not be allowed? What exactly influenced their decision and how was this shown in the application of the margin? As a part of my discourse analysis I searched for hidden power relations, whose discourse was presented, and if reification occurred [treating something non concrete, i.e. religion, as a concrete 'thing'].

The margin of appreciation doctrine seems to protect the principles relating to the secular values I introduced in Chapter 1 *Secularism in the European law*. Values of neutrality, discretion, and religious pluralism are regarded as part of democratic societies. The Court's application of the margin of appreciation also demonstrates implicit secular assumptions. The general secular assumption is that religion is a private matter and should not take a significant place in European societies. This assumption is, implicitly, present in the rulings of the Court. For example, the manifestation of religion is not safeguarded under the Convention if this is necessary in a democratic society, which suggests that some manifestations contravene State secularism and/or neutrality. 'Religion' seems to be a problem and a private matter. The principles of neutrality and secularism are deemed necessary in a democratic society, which means that pluralism and religious diversity are preceded by the culturally appropriate religion or culture. However, if the Court has to decide on Christian symbols another assumption is present. The Court tends to use a context-dependent meaning of the cross or crucifix, because it considers Christian symbols as carriers of secular and universal values. This has implications for the place of religion in European societies and the Court's ability to protect religious freedom.

In the next chapter I will present how the secular values and assumptions influence the discourse and reasoning of the Court's application of the margin of appreciation. The restriction of religious symbols in the classroom and workplace

could tell us how the margin of appreciation is used as a tool to avoid confrontations between the Member State and the Court's interpretation of the Convention. The discourses I found are *democracy*, *religion as power*, *religion as culture or national identity*, *religion as individual identity*, and *protection from religion*. The analysis of these disourses will demonstrate the secular assumptions of the application of the margin of appreciation.

Chapter 4 Religion in the Classroom

In this chapter I will present the outcomes of my thematic and discourse analysis of religious diversity cases with regards to religion in the classroom. By doing so I hope to answer whether there are secular assumptions in the Court's discourse and implementation of the margin of appreciation. The chapter will consist of five sections. The first section presents the background of the religious diversity cases of *Dahlab v Switzerland*, *Jasvir Singh v France*, and *Lautsi v Italy*. The second, third, and fourth section examine themes and disourses I detected in the rulings of the European Court. These are: *democracy and protection*, *power*, and *national identity*; these will be highlighted through the use of quotes from the rulings. The fifth section concludes this chapter and discusses the implication of the margin of appreciation.

Background of the religious diversity cases

In this section I present the background of the religious diversity cases of *Dahlab v Switzerland*, *Jasvir Singh v France*, and *Lautsi v Italy*. The three cases share the same outcome: the application of a wide margin of appreciation. Before I turn to the rulings of the Court and its reasoning to invoke a wide margin I want to give a short overview of the cases. By doing so I present the necessary information to understand the rulings of the Court.

In 2001, the European Court ruled the case of *Dahlab v Switzerland* (Dahlab). Ms Dahlab, a converted Muslim and primary school teacher, was prohibited from wearing a headscarf at her State school. Ms Dahlab began to wear the Islamic headscarf towards the end of the 1990-91 school year. She wore the headscarf because of the precept laid down in the Koran whereby women veil themselves in the presence of men. In 1996 Ms Dahlab was requested to remove her headscarf while carrying out her professional duties, because this was incompatible with section 6 of the Public Education Act (ECtHR, 2001: 1). The Director General stated that the practice of veiling contravened section 6 as it is "an obvious means of identification imposed by a teacher on her pupils, especially in a public, *secular* education system" (ECtHR, 2001: 2, emphasis added). Ms Dahlab was prohibited from wearing the headscarf

because of the principle of denominational neutrality in schools and religious harmony (ECtHR, 2001: 9).

Ms Dahlab took her case to the Swiss courts who argued that the Islamic headscarf is a powerful religious symbol, and the public display of such a symbol could be a threat to public safety and to the protection of public order (ECtHR, 2001: 2). Therefore, the freedom of conscience and belief should be weighed against the denominational neutrality of State schools. Ms Dahlab then took her case to the European Court of Human Rights and argued that prohibiting her to wear a headscarf at her school infringed her freedom to manifest her religion (ECtHR, 2001: 7).

In 2009 the European Court discussed the case of *Jasvir Singh v France*. The case involved several high school pupils who faced expulsion from school for refusing to remove religious symbols in the classroom. I will focus on one of the pupils, Jasvir Singh, who was prohibited from wearing the Sikh keski. When Singh returned to high school in September 2004 the headmaster urged him to remove his keski because "this accessory was contrary to the legislative provisions relating to the prohibition of the wearing of signs or clothing by which the pupils ostensibly showed their belonging to a religion" (ECtHR, 2009a: 2, translated). Singh refused to remove his keski and was expelled because he did not comply with the requirements of not showing religious affiliation.

The parents of Singh took the matter to the French courts because of an Article 9 and 14 violation of the European Convention. The State Council argued that even though the keski was more modest in size than the traditional turban, it could not be described as a "discrete sign" (ECtHR, 2009a: 3, translated). The call to remove the religious symbol was not an excessive interference with Singh's freedom of conscience and religion, because it was necessary to ensure the principle of secularism in schools (ECtHR, 2009a: 3). There was also no violation of Article 14 because the sanction did not discriminate between pupils' confessions, the ban equally prohibited all religious symbols or clothing (ECtHR, 2009a: 3).

Unsatisfied with the outcome Singh took his case to the European Court who regard the wearing of the turban by men of the Sikh faith as "an act motivated or inspired by a religious belief", as the Sikh religion imposes "the wearing of the turban in all circumstances" (ECtHR, 2009a: 6, translated). Singh relied on Articles 8 and 9 of the Convention, because the prohibition to wear a turban "disproportionately

affected his private life and freedom of religion" (ECtHR, 2009a: 5, translated). Furthermore, Singh also emphasised Article 2 of Protocol No. 1, because he had been deprived of his right to education. Finally, based on Article 14 Singh has been the subject of an unjustified difference of treatment based on his religion (ECtHR, 2009a: 5).

The Grand Chamber of the European Court discussed the case of *Lautsi v Italy* in 2011. In the school year 2001-2 the two sons of Ms Lautsi attended a State school where a crucifix was placed on the walls of the classrooms. In April 2002, the husband of Ms Lautsi questioned the presence of religious symbols in the classroom and asked if these could be removed (ECtHR, 2011: 4). After the school voted not to remove the crucifix, Ms Lautsi took her case to several Italian courts. Ms Lautsi argued that the principle of secularism was not safeguarded by the Italian government. The presence of the crucifix breached Articles 3 and 9 of the Italian Constitution and Article 9 of the European Convention, because the principle of impartiality of public schools should not allow the display of religion. However, the Italian courts argued that the crucifix was a historical and cultural symbol and part of the Italian identity (ECtHR, 2011: 5). Furthermore, the crucifix is a symbol with a variety of meanings and can serve various purposes, depending on the place of display (ECtHR, 2011: 8).

Ms Lautsi took her case to the European Court first in 2009. Lautsi pointed out that the Court previously noted that religious symbols can exert particular power in a school environment, a reference to the Dahlab case of 2001 (ECtHR, 2011: 19). The Court found that crucifixes could be considered "powerful external symbols" in the context of the school environment, because it was impossible not to notice (ECtHR, 2011: 30). Thus, the Court held the application admissible and argued that the non-removal of the crucifix was a violation of Article 2 of Protocol 1 (right to education) taken together with Article 9 of the Convention (ECtHR, 2011: 2). The Italian State had the duty to uphold confessional neutrality in public education.

The Italian government appealed and argued that the Court failed to take the margin of appreciation into account, because there was no common approach in Europe to the public display of religious symbols (ECtHR, 2011: 16). Furthermore, there had been confusion between neutrality and secularism. The removal of crucifixes from classrooms "would amount to abuse of a minority position and would

be in contradiction with the State's duty to help individuals satisfy their religious needs" (2011: 18). The response of other Contracting States emphasised that the presence of religious symbols are not a "form of indoctrination but the expression of a cultural unity and identity" (ECtHR, 2011: 24).

Democracy and protection

The first theme I discuss is democracy and protection. These two concepts were used by the Court to argue for a wide margin of appreciation. The Court argued that the Contracting States have a certain margin of appreciation that is subject to European supervision. This means that the law and decisions of independent courts are able to determine if measures are "necessary in a democratic society" (ECtHR, 2001: 11). That is why the Court reasoned that in democratic societies it is sometimes necessary to place restrictions on the freedom to manifest one's religion "in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected" (ECtHR, 2001: 11). I have called this the *democracy* discourse, because the freedom to manifest one's religion presumably depends on the context. In the case of Dahlab, who lives in Switzerland, the principle of pluralism and democracy outweighs her ability to manifest her religion. This relates to the theory of Calhoun, Juergensmeyer, and VanAntwerpen (2011) who argued that the specific political context of secular regimes, in this case Switzerland, and the way they shape distributions of power influence the degree of religious pluralism. It becomes clear in the case of Dahlab that the degree of religious pluralism is lower in order to protect the religious freedom of others.

The case of Jasvir Singh shows similarities with the case of Dahlab. The European Court was very straightforward and held that the interference pursued the legitimate aim of protecting the rights and freedoms of others and public order. This displayed the *democracy* and *protection of religion* discourse because the Court emphasised the importance of the rights and freedoms of others in a democratic society. The Court held that the interference was justified and proportionate, and fell within the margin of appreciation. The interference was in accordance with the law and necessary in a democratic society. This is because in a democratic society several

religions coexist which means that it is necessary to impose limitations on the freedom to settle the interests of various groups and ensure respect for all convictions (ECtHR, 2009a: 6).

> Pluralism and democracy must also be based on dialogue and a spirit of compromise which necessarily implies, on the part of individuals, various concessions which are justified for the purpose of safeguarding and promoting the ideals and values of a democratic society (ECtHR, 2009a: 6-7, translated).

The margin of appreciation was invoked to protect pluralism and democracy and to safeguard the beliefs of others. The Court argued that there should be more emphasis on the role of the national decision-maker when it concerns the relationship between the state and religion (ECtHR, 2009a: 7), especially when the State limits the freedom to manifest a religion "if the use of that freedom prejudices the objective of protecting the rights and freedoms of others, public order, and public safety" (ECtHR, 2009a: 7, translated). This would mean that invoking the margin of appreciation is a means to promote democracy within communities (Benvenisti, 1999: 849). However, the notion of discretion and consensus as characteristics of the margin revert the discussion back to national institutions. The Court stated that the French state struck a fine balance and the prohibition of all religious signs in public schools was motivated by safeguarding the constitutional principle of secularism (ECtHR, 2009a: 8). This reasoning neglects the critique of Benvenisti (1999), because if national authorities and courts fail to protect minority rights and interests, the margin of appreciation becomes a tool to remove religion from the public sphere.

In the Dahlab case the Court displayed a *protection from religion* discourse. The protection of the rights and freedoms of others, public safety, and public order are deemed more important to protect than wearing a religious symbol to show a commitment to a religious belief. The protection from religion relates to the freedom of conscience and religion of the majority. The discourse was also shown in the following reasoning to prohibit the wearing of an Islamic headscarf, because this prohibition was justified "by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents, and by the breach of the principle of denominational neutrality in schools" (ECtHR, 2001: 12). In other words,

the freedom to manifest one's religion should be restricted to ensure neutrality in State schools. Thus, the *protection from religion* discourse not only focuses on protecting the freedom of conscience of others but aims to protect neutrality as well. This could be regarded as a "preferential treatment" (Lugato, 2013), because the majority should be protected from a powerful external symbol at the cost of the protection of indviduals and minorities. However, it is impossible to be culturally or religiously neutral (Fraser, 1990). The presence of Dahlab's and Singh's religious symbol was said to have a coercive effect on others, but the Court did not elaborate on the fact that neutrality can be essential and consistent with religious liberty (Laycock, 1990). This is a clear break from the ruling of Lautsi, because the *protection from religion* discourse emphasised the protection of a passive symbol rather than a powerful one. As a result, the application of the margin of appreciation seems to defend the passive nature of the crucifix, while preventing the visibility of an Islamic symbol. The notion of Power in the next section shows the differences between 'passive' and 'powerful' symbols.

Power

The Court's decision to grant a wide margin of appreciation in order to prohibit the wearing of the headscarf was not based on the religious beliefs of Ms Dahlab, but was a matter of preserving public order and safety (ECtHR, 2001: 13). The potential impact of "a powerful external symbol such as the wearing of a headscarf" on the freedom of conscience and religion of young children is not easy to determine, however the Court argued the following:

> In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf 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 (ECtHR, 2001: 13).

It becomes clear that the Court adopts a *religion as power* and *democracy* discourse. The Court argued that the headscarf is a powerful symbol and has a proselytising effect; this is incompatible with the idea of a tolerant, equal, and non-discriminatory democracy. It seems as if the Court implicitly argues that the headscarf is a threat, because of its power on young children. Even though the Court is unable to determine the exact influence of the headscarf, it argued for a wide margin of appreciation. The prohibition of wearing a headscarf in State schools was "necessary in a democratic society" (ECtHR, 2001: 13). In the case of Jasvir Singh, the Court argued that the keski was not discrete. The Court adopted the approach of the French State Council and argued that the visibility of the Sikh symbol carries meaning. Thus, the expulsion of pupils from a public school is then not disproportionate to the aims pursued, and did not affect the pupils' religious beliefs (ECtHR, 2009b: 2). This statement shows how the Court thinks about the manifestation of religion. How can the removal of a religious symbol not interfere with someone's religious beliefs? This can be related to the ideas of Habermas (1974) on the nature of the public sphere and the 'place' of religion. The public sphere should be free from religious symbols, and laws and policies should be neutral in order to prevent indoctrination or conflicting worldviews (Yates, 2007: 881). However, this means that religious citizens have to leave their "religion at home". If the public sphere is constructed and designed in secular terms, as has been argued by Ferrari (2012) this reinforces a narrow understanding of 'religion' and its manifestations.

On the other hand, the *religion as power* discourse presented a different outcome in the case of Lautsi. This time the 'religious' symbol, the crucifix had no external power. This is shown when the Grand Chamber argued that there was no evidence that the display of a religious symbol on classroom walls had a proselytising effect on young children. (ECtHR, 2011: 28). Instead, the Court argued in favour of the government's view that the crucifix symbolises the principles and values of democracy and western civilisation (ECtHR, 2011: 28). Thus, "a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality" (ECtHR, 2011: 29). The mere presence of a crucifix on a classroom wall is not associated with compulsory teaching about Christianity (ECtHR, 2011: 30). The passive nature of the crucifix on the classroom wall in combination with the lack of European consensus resulted in the

application of the margin of appreciation. The protection of the cultural history of the crucifix did not interfere with the freedom of conscience of Lautsi's children.

National identity

In 2011, the Grand Chamber of the European Court emphasised the national identity as a justification for a wide margin of appreciation in the case of Lautsi. The Grand Chamber argued that Contracting States have the responsibility to ensure the neutral and impartial exercise of religions, faiths, and beliefs (ECtHR, 2011: 26). In doing so, States maintain public order and religious harmony. In the case of Lautsi, the decision to "perpetuate a tradition falls in principle within the margin of appreciation" (ECtHR, 2011: 28). Besides that, there is no European consensus on the presence of religious symbols in State schools. The idea that the perpetuation of a tradition should fall within the margin shows the *religion as culture or national identity* discourse. Instead of perceiving the crucifix as a religious symbol only, 'it' is part of the Italian identity or heritage and has a passive nature. The presence of religious symbols are not a "form of indoctrination but the expression of a cultural unity and identity" (ECtHR, 2011: 24). This is an example of Beaman's (2013) *passivity* and *cultural survival* technique. The cruficix is passive or neutral, not coercive, stands for cultural diversity and represents the secular or universal values of society. Thus, in the context of Italian public schools, the Court implicitly argued that the crucifix has a secular dimension and part of the national identity. The application of the margin of appreciation can protect 'passive' religious symbols because they are part of the national or majority identity.

Conclusion

The themes and discourses I detected in my analysis of the religious diversity cases presented in this chapter demonstrate the secular assumptions of the Court. The Court's application of the margin of appreciation is based on principles of neutrality, pluralism, and preventing indoctrination. The discourse of the Court presents context-dependent ideas of religion and its manifestations. This is shown through the outcomes of the rulings, because the width of the margin can both result in the

removal of the headscarf and keski, and the 'approval' of the crucifix. The various discourses adopted by the Court, specifically the *protection from religion* and *democracy* discourse, show a bias toward the visibility of religious symbols in public spaces and thus the place of religion in society. On the one hand the freedoms and rights of others should be *protected from* a specific religion, Dahlab and Singh, while on the other hand the cultural heritage of a religious symbol should be protected, Lautsi. This is the point where the cases diverge. The principles of secularism and neutrality in the classroom are upheld when the religious symbol has a 'powerful' character, but the Court's application of the margin of appreciation does not present a definitive answer on the influence or impact of 'religious' symbols. This means that the Court's use of the margin of appreciation could be seen as an easy way out instead of opening up meaningful discussions on the 'place' of religion in the classroom. The lack of a European consensus on the visibility of religious symbols in the public sphere leads to a discussion on the "necessary in a democratic society" clause in Article 9, which seems to favour the Christian history of Europe, rather than the ideas of pluralism and protecting all religions. Even though it has been argued that neutrality is essential to and consistent with religious liberty (see Laycock 1990), my analysis of the rulings of the Court seem to show that majority religions benefit from religious liberty. The protection of a democratic culture could be seen as a requirement to limit religious expression by minorities. The assumptions of the Court lean toward the notion of state neutrality and a clear separation between religious and political authority, however this distinction cannot be easily made. The "secular political narrative" of the Court (Calo, 2010: 268) is unable to safeguard neutrality and religious freedom at the same time. In the next chapter I will discuss whether this is different in the context of the workplace.

Chapter 5 Religion in the Workplace

In this chapter I will present the outcomes of my thematic and discourse analysis of religious diversity cases with regards to religion in the workplace. By doing so I hope to answer whether there are secular assumptions in the Court's discourse and implementation of the margin of appreciation. The chapter will consist of five sections. The first section presents the background of the religious diversity cases of *Ebrahimian v France* and *Eweida v United Kingdom*. The second, third, and fourth section examine themes and discourses I detected in the rulings of the European Court. These are: *protection*, *power*, and *individual identity*; these will be highlighted through the use of quotes from the rulings. The fifth section concludes this chapter and discusses the implication of the margin of appreciation.

Background of the religious diversity cases

In this section I discuss the background of the religious diversity cases of *Ebrahimian v France* and *Eweida v United Kingdom*. The two cases have a different outcome: the Court ruled that France did not exceed its wide margin of appreciation whereas the United Kingdom did exceed its margin. Before I turn to the rulings of the Court and its reasoning I want to give a short overview of the cases. By doing so I present the necessary information to understand the rulings of the Court.

In 2015, the European Court ruled in the case of *Ebrahimian v France*. The case involved Ms Ebrahimian, a social worker in the psychiatric department of a public health and social institution in Paris who veiled herself, and the French government (ECtHR, 2015a: 1-2). In December 2000, she was informed that her contract would not be renewed on account of refusal to remove the Islamic headscarf and complaints of her patients, because according to French law public servants should not wear visible religious symbols (ECtHR, 2015a: 2). Irrespective of Ebrahimian's professional qualifications, her refusal to remove the headscarf led to disciplinary proceedings (ECtHR, 2015a: 28). In 2007, the High Council of Integration argued that "public service users have the right to express their religious beliefs *within* the limits for the neutrality of the public service, its proper functioning and the requirements of public policy, safety, health, and hygiene" (ECtHR, 2015a: 7, translated and emphasis

added). This means that the principle of neutrality is a justification to limit the manifestation of one's religion. Ms Ebrahimian took her case to the French courts, but the court argued that the headscarf had an ostentatious nature (ECtHR, 2015a: 13). The French courts furthermore stated that the limitation of the freedom to manifest one's religion is justified in order to protect the rights and freedoms of others, public order, and public safety (ECtHR, 2015a: 16). Ms Ebrahimian then took her case to the European Court and argued that the non-renewal of the contract was motivated by the fact that she was a Muslim (ECtHR, 2015a: 16).

In 2013, the European Court ruled the case of *Eweida and Others v United Kingdom*. The case involved four applicants, I will focus on the first applicant Ms Eweida. Ms Eweida complained about restrictions placed by her employer British Airways on the visible wearing of a cross. In 2006, Eweida decided to openly wear a cross around her neck as a sign of commitment to her faith (ECtHR, 2013: 4). In September 2006 she refused to remove the cross and was placed on unpaid leave until British Airways amended its rules on uniform policy in February 2007 (ECtHR, 2013: 34). Eweida went to both the Employment Tribunal, and the Employment Appeal Tribunal to demand compensation on the basis of discrimination on religious ground. The demands of Eweida were not granted and led her to take the case to the European Court.

Protection

The case of Ebrahimian presents the Court's discourse *protection from religion*. The Court argued for a wide margin of appreciation and argued that the interference was proportionate to the aim pursued (ECtHR, 2015a: 25). This interference was "prescribed by law", and protected the rights and freedoms of others (ECtHR, 2015b: 1). The Court adopted a *protection from religion* discourse and argued that Ebrahiminan's refusal to remove the headscarf conflicted with the law and the religious rights of others. The Court argued that the principle of neutrality and equality ensures that the religious beliefs of the patients are respected. This means that both Ebrahimian and her colleagues have to act upon these principles (ECtHR, 2015b: 1).

> Accordingly, interference with the exercise of freedom to manifest Ebrahimian's religion was necessary in a democratic society and there has been no violation of Article 9 of the Convention (ECtHR, 2015a: 28, translated).

The principle of neutrality and secularism struck a fine balance because, as the French government argued, these principles are able to safeguard the impact of a visible religious symbol on "the freedom of conscience of fragile patients" (ECtHR, 2015a: 18, translated). The Court seems to promote a "normative order of secularism" (Langlaude, 2006: 929) when assessing religious diversity cases. The application of a wide margin of appreciation then serves to uphold national policies and prevent 'religious' indoctrination and pressure. Neutrality and secularism are the guarantors of democratic values present in European societies and should safeguard values of pluralism, respect for the rights of others and equality before the law. By doing so, the Court regulates religious freedom through particular notions of religion. The discourse on *protection from religion* relates to the following section on Power.

Power

The Court has argued that the non-renewal of Ebrahimian's contract was influenced by her refusal to remove the veil. The wearing of the veil is an "uncontested expression of her membership in the Muslim religion" and "a manifestation of a sincere religious belief protected by Article 9 of the Convention" (ECtHR, 2015a: 19, translated). Ebrahimian was in contact with fragile and dependent patients, which is why the patient's rights and freedom of conscience should be protected. The principle of neutrality guarantees the secular nature of the French state and protects patients from influence or bias (ECtHR, 2015a: 24). The ostentatious nature of the veil in combination with the duty of neutrality in State institutions did not interfere with Ebrahimian's religious freedom (ECtHR, 2015a: 27). The margin of appreciation thus protected the rights and freedoms of the patients and the principle of secularism. The decision of Ebrahimian to manifest her religious beliefs even though she was obliged to follow the principle of neutrality lead to the Court's decision that the French authorities did not exceed their margin of appreciation (ECtHR, 2015a: 28). Public

servants working in State hospitals have the freedom to express their religious convictions, however because of the principle of neutrality and secularism, they should refrain themselves from proselytism (ECtHR, 2015a: 28).

> [T]he national authorities had not exceeded their margin of appreciation in finding that there was no possibility of reconciling the applicant's religious convictions with the obligation to refrain from manifesting them, and in deciding to give precedence to the requirement of neutrality and impartiality of the State (ECtHR, 2015b: 2).

The alleged power or influence of a religious symbol is said to interfere with the principles of neutrality and secularism. Through the margin of appreciation the Court decided that the interference of the French state was justified and necessary in a democratic society. The Court emphasises the neutral and impartial role of the State to protect public order, religious harmony, and tolerance in democratic societies. Thus, the application of the margin of appreciation serves as a tool to open up discussions on the place of religion in the workplace.

The Islamic headscarf of Ebrahimian was seen as a powerful symbol and was not in accordance with neutrality or discretion in the workplace. The Court's *religion as power* as well as *protection of religion* discourse emphasised the conscience of fragile patients because of the powerful character of the headscarf. This resulted in respecting the religious beliefs of the patients instead of granting Ms Ebrahimian to manifest her religion (ECtHR, 2015a: 21).

> In a democratic society where several religions coexist within the same population, it may be necessary to match the freedom to manifest one's religion or beliefs with limitations to reconcile the interests of the various groups and to ensure respect for their convictions (ECtHR, 2015a: 22, translated).

The limitations of Ebrahimian to express her religious beliefs in order to reconcile and respect the interests of others were necessary because of the powerful 'nature' of the headscarf. This relates to the theory of Marshall (2016) that State secularism can limit the public display of manifestations of religion in the public sphere. An overt display

of religious symbols or garments could influence or even interfere with values of gender equality, neutrality, and prevention of indoctrination. It is interesting to compare Ebrahimian's case to Eweida's case, especially because of the 'passivity' of Eweida's wearing of the cross. The British government stated that wearing a cross is not a mandatory requirement or form of practising the Christian faith (ECtHR, 2013: 22). However, in the case of Lautsi the Court did acknowledge that the cross is a recognised Christian symbol and a manifestation of the Christian faith (ECtHR, 2013: 28). The act or practice that could count as a manifestation, within the meaning of Article 9, should be "intimately linked to the specific religion or belief" (ECtHR, 2013: 31). The Court argued that Eweida's cross was discrete and did not diminish her professional appearance nor did it have a negative impact on British Airways' image (ECtHR, 2013: 35). Even though the Court is unable to determine whether a 'religious' symbol can interfere with or negatively impact a corporate image, the United Kingdom exceeded its margin of appreciation. The *religion as power* discourse of the Court emphasised the discrete nature of the religious symbol and did not interfere with the principle of neutrality. This was because religious symbols such as turbans and headscarves were already authorised by British Airways. Lastly, the amending of the uniform code within a time span of six months shows that the wearing of religious symbols could not have been "of crucial importance" (ECtHR, 2013: 35). Thus, the British authorities failed to protect Eweida's right to manifest her religion, because they gave precedence to the rights and interests of others (ECtHR, 2013: 40). This shows that the margin of appreciation granted the protection of the rights of Eweida, even though we have seen in previous cases that there is no European consensus on the visibility of religious symbols in the public sphere.

Individual identity

The final theme I detected relates to the discourse *religion as individual identity*. The Court argued that Eweida's wearing of a cross was a manifestation of her religious belief and should be granted protection of Article 9 (ECtHR, 2013: 33-4). The refusal of British Airways to allow Eweida to wear a visible religious symbol between September 2006 and February 2007 interfered with her right to manifest her religion. The margin of appreciation was exceeded because the Court stated that the domestic

law "did not strike the right balance between the protection of her right to manifest her religion and the rights and interests of others" (ECtHR, 2013: 40). The Court adopted a *religion as individual identity* and *protection of religion* discourse. The wearing of the cross was a manifestation of the religious beliefs of Eweida and her rights should be protected. This was influenced by the fact that male Sikh employees were authorised to wear a turban and display the Sikh bracelet, and female Muslim ground staff members were allowed to veil themselves (ECtHR, 2013: 3). Even though British Airways wanted to have a neutral and discrete image this should not interfere with the "the legitimacy of religious beliefs or the ways in which those beliefs are expressed" (2013: 30). The British state authorities should have secured Eweida's rights under Article 9, even though it concerns a private company (ECtHR, 2013: 32). The Court's argument on a neutral and discrete image represents a normative approach to neutrality. This is because neutrality should signify values of equality, pluralism, and religious harmony (see Lobeira 2014). The Court seemed to have implicitly argued that the inability of British Airways to allow the wearing of a cross contravened these values. Thus, an individual or personal manifestation of religion did not interfere with the neutral image of a private company, whereas Ebrahimian's manifestation of religion was not protected.

Conclusion

The themes and discourses I detected in my analysis of the religious diversity cases presented in this chapter demonstrate the secular assumptions of the Court. The Court's application of the margin of appreciation is based on principles of neutrality and preventing indoctrination. The discourse of the Court presents context-dependent ideas of religion and its manifestations. This is shown through the outcomes of the rulings, because the French authorities did not exceed their margin of appreciation whereas the British authorities *did* exceed their margin. As a result the headscarf was regarded as a powerful symbol that should be removed from the workplace, while the cross was granted protection in the name of equality and religious harmony. The various discourses adopted by the Court, specifically the *protection from religion* and *power* discourse, show a bias toward the visibility of religious symbols in public spaces and thus the place of religion in society.

This is shown in the comparison between Eweida and Ebrahimian which seems to show that the alleged passivity of a religious symbol influences the ruling of the Court. This is the point where the cases diverge. Even though I base my analysis on these two cases only we can detect there is a clear difference between the judgments of the Court. The way religion is interpreted by the Court, either as part of one's identity or in need of protection from powerful religious symbols, shapes the use of the margin of appreciation. The protection of the rights and freedoms of others is justified in the case of Ebrahimian, however the passive cross of Eweida is compatible with a neutral and discrete image. The principles of secularism and neutrality in the workplace are upheld when the religious symbol has a 'powerful' character, but has different outcomes for Ebrahimian and Eweida. The margin of appreciation is, again, a tool to postpone answers to the impact and influence of 'religious' symbols in the public sphere. As we have seen in the Lautsi case, the crucifix is part of the cultural heritage of Italy and can even stand for equality and democracy. Whereas the veil, and the keski in the case of Singh, 'possess' a negative power that interferes with the principles of neutrality and secularism. However, secularism is not the opposite of religion, and should actually guarantee the neutrality of the state toward all religions. It seems to be that through the margin of appreciation non-Christian religions are deemed as not 'neutral' enough. This would mean that the place of non-Christian religions is the private sphere, however there is no clear divide between what is public and what is private. The assumptions of the Court are based on a narrow understanding of religion as manifestations only. This leads to the examination of the consequences of the application of the margin of appreciation and the judgments of the Court. These will be discussed in the next chapter.

Chapter 6 The Consequences of the Secular Assumptions of the Margin of Appreciation

In the final chapter I will discuss the consequences of the secular assumptions of the margin of appreciation. The assumptions underlying the application of the margin of appreciation include the 'secular' values of neutrality, tolerance, religious pluralism, religious diversity and prevention of indoctrination. What became clear in the thematic and discourse analysis of the rulings of the Court is that these values should be safeguarded, even if it means that the manifestation of one's religion should be restricted. This means that the rights and freedoms of others should be protected, which is deemed necessary in a democratic society. The application of the margin of appreciation has been criticised, especially, because when the Court discusses religious diversity cases on the wearing of religious symbols invoking the margin seems to be the only answer (Andreescu and Andreescu, 2010: 48).

In the next four sections I will introduce the consequences of the secular assumptions. The first section introduces the Court's interpretation of religious belief and its consequences for Article 9 cases. I will specifically address the interpretation of religious belief within the context of the court rulings and the differences between Christian and non-Christian practices. In the second section I will look into the Court's inability to protect religious minorities, as a consequence of invoking the margin of appreciation. This section serves as an introduction to the third section in which I will talk about the consequences of perceiving religious symbols as powerful. In the fourth and final section I will summarise the problems that arise from the secular assumptions and consequences, this includes the consequences of the Court's 'secular' logic in regards to religious liberty and the margin of appreciation as a tool to postpone meaningful discussion on the place of 'religion' in the public sphere .

The individuality of religious belief and the limits of Article 9

Carolyn Evans (2001) has stated that the Court holds "a narrow and often confused concept of religious freedom" (200). In addition, Ferrari (2012) argued that the Court has developed its own definition of religion, which would favour one religion over others (367). For example, the Court tends to protect the internal and theological

dimensions of religion and neglects the symbolic and moral interpretations. This means that 'religion' as viewed by the Court is an "inward feeling, a matter of individual conscience" (Ferrari, 2012: 367). As a consequence, the Court seems to be unable to understand that within a 'religion', there can be multiple interpretations of the religious doctrine (Pearson, 2013: 587). This pluralism in religious belief is not accounted for and leads to a misinterpretation of how one can manifest his or her religion.

We can use the examples of Ebrahimian and Dahlab, who decided to veil in the public workplace and classroom. The Court seemed to limit Ebrahimian's and Dahlab's right to manifest their religion, rather than asking *why* the women wanted to veil. The Court's use of the *religion as power* discourse can have severe consequences for the inclusion of women in the public domain. This is because it would mean that women are not allowed to veil themselves and will be excluded from working in public schools or workplaces. If national policies will further restrict the visibility of religious symbols and clothing this could have a discriminatory effect. This is because professional and skilled people will be excluded from the workforce simply because they wear religious symbols. An entire community could then disappear in public settings, which cannot be seen as a neutral decision, or to the benefit of others.

Thus, the Court believes that religion is predominantly an individual concern, rather than communal or institutional. This became clear in the analysis of Eweida and the *religion as individual identity* discourse. However, the case of Eweida seems to be an exception in my analysis. Eweida was allowed to show a visible adherence to her Christian faith in the public sphere, whereas the cases concerning non-Christian faiths were not allowed to publicly display their powerful 'religion'. This means that religion is sometimes pushed back into the private sphere. In order to be granted the protection of Article 9 the applicants have to prove that their 'religious practice' is indeed a manifestation that should be protected under the Convention. Some practices could be seen as a part of the specific religion, even if there is no textual authority to which one can point (Pearson, 2013: 585). In practice this means that there is a difference between wearing a religious symbol because it is religiously *motivated* or religiously *required* (Pearson, 2013: 584, emphasis added). Whether an act is a religious obligation is according to the Court in some cases justified, whereas in other

cases it undermines the rights and protection of others. In the court ruling of Singh the Court argued that wearing the keski was a requirement of the Sikh faith, and thus a manifestation of belief. However, this still resulted in the ruling that the visibility was in breach of the secular nature of public schools in France. The keski was considered to be not 'neutral' or not discrete enough to be protected in the public sphere.

The rulings of Ebrahimian, Dahlab, and Singh are in stark contrast with the decision of Eweida, regarding individual religious practice. Bartlet (2013) states that the Court showed "a more nuanced approach than in previous case law". The Court did not question the wearing of a cross, but argued that "[i]n particular there is no requirement to establish that he or she acted in fulfilment of a duty mandated by the religion in question" (ECtHR, 2013: 31). The desire of Eweida's employer to display a corporate image was accorded too much weight and did not balance with Eweida's right to manifest her religion. Thus, the national authorities exceeded their margin of appreciation which resulted in the Court's decision to call for a broader protection of individualistic manifestations of religion. This seems to show that the Court values non-Christian and Christian religions differently. Furthermore, the case of Eweida shows that the Court adopted a broad understanding of religious rights and accept the importance of these religious rights within the workplace. The Court argued in the case of Eweida that religious freedom is thus an individual matter of thought and conscience (ECtHR, 2013: 30). The argumentation also showed that instead of focusing on the applicant's manifestation of religion, the focus was on the reasonableness of her employer (Bartlet, 2013: 73).

The Court's interpretation of religion through its examination of what counts as a religious practice also has an essentialising consequence. This is because once the Court argues that religious garments should be granted the protection of Article 9 this becomes *the* essence of the group identity (Peroni, 2014: 677, emphasis added). It would mean that religious acts which are not seen as 'essential' are denied legal protection. This can be seen in the case of Singh, where the wearing of the keski or under turban becomes the fixed group characteristic of the Sikh faith and identity. 'It', the wearing of the keski, might be a manifestation of belief, but it is not regarded as a dynamic practice and neglects other practices of the Sikh faith.

The lack of a clear definition of religion or religious practice can tell us more about the implications of Article 9 and the use of the margin of appreciation. This becomes clear in the Grand Chamber decision of Lautsi which completely overturned the Court's decision from 2009. In the decision of 2009 the Court argued the following on the presence of the crucifix in the classroom:

> Negative freedom is not limited to the absence of imposition of religious services or religious instruction. It covers the practices and symbols expressing in particular or in general, a belief, a religion or atheism. This freedom deserves particular protection if it is the State which expresses a belief and the individual is placed in a situation which he or she cannot avoid, or could do so only through a disproportionate effort and sacrifice (ECtHR, 2009c: 13).

The Grand Chamber of the European Court instead argued that the crucifix has an essentially passive nature. The Grand Chamber reinforced the idea that Christianity is "naturally inclusive and encompassing of the ideas of tolerance and freedom, which constitute the basis of a secular State" (Mancini, 2010: 18). This means, that the application of the margin of appreciation protected the religious and cultural freedom of the majority. The statement of the Grand Chamber also implies that the cultural heritage of Italy, and more broadly Europe, should be protected from non-Christian beliefs as they pose a threat. The display of the crucifix then, is a symbol of this heritage and the notion that this should be protected, especially, because Christianity seems to be compatible with democracy and the secular values of the Convention (Mancini, 2010: 23).

This leaves us with the question if the display of religious symbols in the classroom or workplace are compatible with the Court's ideas of fundamental rights and freedoms. The consequence of banning the visible wearing of religious symbols of minority religions interferes with the ideas of religious freedom. If religious freedom is regarded as safeguarding tradition and cultural diversity the rights of the majority will be protected (Andreescu and Andreescu, 2010: 66). Again the case of Lautsi serves as an example, because the Grand Chamber's decision to perpetuate the majority religious traditions was deemed necessary to protect the notion of secularism and neutrality (McGoldrick, 2011: 452). The Grand Chamber did so by using the

technique to 'de-religionise' the crucifix and emphasise its secular meaning (McGoldrick, 2011: 479). The consequence of using this technique is the blurring of a clear separation between secularism and religion. If the crucifix is perceived to embody civilisation and cultural heritage this reduces the possibility of ruling public life through the dictates of reason (McGoldrick, 2011: 480). The States have the power to 'use' religious symbols and interfere in religious matters.

Finally, Parker (2006) has argued that measures, deemed necessary to protect public order and the rights and freedoms of others, protects the majority from "extremist religions or religious ideas" (106). This means that the Court's acceptance of secularism and neutrality as justifications to restrict religious freedoms "is not a faithful reading of the [Convention]" (Parker, 2006: 125). This is because the notions of secularism and neutrality are not mentioned in Article 9 itself and should therefore not be granted more importance than religious freedom. The discourses of the Court seem to regard non-Christian faiths as carrying a threatening power that should not be present in the public sphere. Ultimately, using the principles of neutrality and secularism to justify the restriction on religious garments is a *protection from non-Christian religions*. The idea that religious symbols and clothing are perceived as threatening seems to be the consequence of the Court's narrow understanding of religious freedom. As a result, religious minorities are not equally protected.

The Court's inability to protect the religious minority

The fact that religious minorities face disadvantages relates to the idea that unfamiliar religious beliefs can pose a threat to the social order and undermine the religious traditions of the majority (Pearson, 2013: 601). In practice this means that religious minorities face discriminatory practices in both Member States of the European Union and decisions of the Court. It is safe to say that the rights of religious and ideological minorities are not granted the same protection as the rights of the majority denomination (Mancini, 2010: 16).

For example, the wearing of the headscarf by Dahlab and Ebrahimian is said to contravene the fundamental principles of secular States. This is because of the alleged

incompatibility of Islam and liberal democracy. As a consequence of invoking a wide margin of appreciation the Court "undermines its role of the external guardian against the tyranny of the majority" (Mancini, 2010: 26). If secular values remain to be more important to protect, true freedom of religious belief cannot be granted. The idea of European supervision seems to adhere to the decisions of the majority religion which means that minorities are visibly excluded from public spaces. There is according to McGoldrick (2011) "an orthodoxy" within human rights law (496); it is believed that in general the majority culture can protect itself through existing democratic processes, thus the Convention and Court play a deciding role in protecting minorities from the majoritarian rule. Pearson (2013) argues the same but adds a disclaimer. Religious majorities who have political power will be able to accommodate themselves because their rights are "natural and therefore not questioned" (Pearson, 2013: 590). However, one has to be conscious about this fact; the reality is that some will always have a disadvantage which demonstrates that it seems impossible that any religious symbol is essentially neutral. For example, Court has argued that the crucifix and cross are neutral and represent 'secular' values. This means that the symbols carry meaning, even though this is not perceived to be threatening or powerful. The Court has justified interference of Member States based on the principle of neutrality. However, how 'neutral' is that decision? The exclusion of non-Christian religions in the public sphere is not neutral and does not protect religious freedom for all.

Lastly, the cases I analysed suggest that the idea of religious pluralism, sometimes seen as an important value in democratic societies, seem to benefit the majority religion. The Court has argued that pluralism can undermine the idea of "preserving religious harmony" (Calo, 2010: 264). The application of a wide margin of appreciation can serve to protect religious harmony, only when this concerns the majority religion. For example, in the case of Dahlab, her right to express her religious beliefs was limited. The rights and freedoms of others as well as preserving public order was more important than religious pluralism in the Swiss society. This leads to the exclusion of religious minorities in the public sphere and can also not be seen as a neutral decision of the Court.

The power of symbols

The Court accords Member States a margin of appreciation in order to determine the role of religion in the public sphere as long as it does not have a proselytising character (McGoldrick, 2011: 488). This immediately raises questions because the Court itself is unable to determine the exact power or threat of religious symbols and Member States do not have a consensus on this issue either. It seems to be quite the contrary because the religious beliefs of the minority are excluded which contravenes the ideas of neutrality, pluralism, and religious diversity. It is safe to say that every symbol carries meaning, this includes 'religious' symbols. However, it is important to examine if the meaning of the symbol has coercive or indoctrinating power. In the Court's judgment the Christian symbols, the crucifix and cross, were deemed passive and discrete whereas religious clothing, the headscarf and keski, interfered with the rights and freedoms of others.

It has been argued that the headscarf and other religious garments are "a challenge to secularism", because they carry both religious and political power (McGoldrick, 2011: 498). Islam has been restricted through the judgments of the Court because it could threaten the democratic basis of States. This democratic basis relies on the core values of the Convention which seem to have a secular bias , as well as the restrictive understanding of Islam (McGoldrick, 2011: 498). As has been stated before, Islamic symbols seem to be a threat to the religious majority and contravenes the principles of neutrality and discretion in public spaces such as the classroom and workplace. However, banning non-Christian symbols is not a neutral decision. In the case of Dahlab and Ebrahimian the headscarf is seen as imposed by Islam, which is seen as incompatible with democratic values (Danchin, 2011: 725). However, this notion actually opens up a discussion on conceptions of religion and religious subjectivity rather than coercive Islamic practices. The Court needs to have a certain understanding of what constitutes 'religion', this means that many forms of practices, relations, and beliefs will not be identified as 'religious' in the law (Sullivan, 2005). *Lived religion*, for example the wearing of religious symbols, is not protected when 'they ' are not part of the majority religion.

The case of Ebrahimian did not articulate the effects of the ostentatious headscarf. Even though some patients had complained about Ebrahimian's refusal to remove the veil, the nature of these complaints were not addressed. Instead, as stated in a fact sheet from 2016, the Court argues that "there was no possibility of reconciling the applicant's religious convictions with the obligation to refrain from manifesting them, and in deciding to give precedence to the requirement of neutrality and impartiality of the State" (ECtHR, 2016: 6). However, neither the State nor the public sphere can ever be completely neutral toward 'religion'. The argument of Hurd (2008: 16) seems to explain the problem of the Court's discourse: "secularism remains an exercise of power". Even though the Court embraces the principle of secularism and neutrality in order to ensure religious harmony, this results in the unequal protection of religious freedom. The veil was considered to be an ostentatious manifestation of religion which is not compatible with the principle of neutrality. The Court upheld the rulings of the national courts and emphasised that the patients should be protected from "any risk of influence or partiality in the name of their right to their own freedom of conscience" (ECtHR, 2016: 6). The lack of clarification *why* a symbol is powerful is usually masked by invoking a wide margin of appreciation. The application of the margin can be seen as postponing meaningful discussions on the place of religious symbols in the public sphere. It seems as if creating a European consensus is not a priority for Member States which results in the Court's inability to safeguard freedom of religion. The national courts, authorities, and their varied policies determine the place of religion and religious symbols in public spaces. Ideas of a universal and neutral public sphere seem to be influenced by a narrow understanding of religion as a problem and opposite to reason as has been discussed by Ferrari (2012) and Habermas (2006).

There is another consequence of the 'powerful' symbol, because firing a teacher for wearing a headscarf seems to carry an important message. Specifically, what consequences does this have for the minds of young children? The case of Dahlab might shed some light, because the Court did not question how young children would respond to the message that their teacher was dismissed for wearing a headscarf. As Evans (2006) describes:

> The Court's judgment makes clear that there were Muslim children in the school who wore traditional Muslim clothing and they might well wonder why dressing as they do or as their mothers do is so terrible that it requires an otherwise good teacher to be forced out of the school community (64-5).

Moreover, children and their parents who tend to mistrust other religions can see the banning as a justification of their stereotypes. This means that the Court's intervention in order to protect the rights and freedoms of others can actually be seen as a coercive message and shows intolerance and discrimination toward religious minorities (Evans, 2006: 65). It becomes clear that the Court is unable to objectively examine the reality of Muslim women's lives and the multiple reason to decide whether or not to veil. As a result, the various meanings religious symbols carry can create barriers between 'us' and the 'other' (Mancini and Rosenfeld, 2012: 5). The religious emotions of symbols can influence the Court's discourse on the *power* of symbols and what 'religion' is or should be.

Secular assumptions and its problems

The applicants of the religious diversity cases have shown that religion can play a central role in a person's life and influences the decisions this person makes. It remains unclear what constitutes religion and how individuals and groups might interpret 'their religion'. That might be the reason that a true freedom of religion and conscience is not possible. Instead the Court seems to opt for constraining the right of freedom of belief "within manageable limits" (Pearson, 2013: 581). However, it is difficult to determine if a certain action is an infringement of Article 9, nevertheless the Court sometimes limits the freedom of religion of the individual in order to protect the religious beliefs of others.

The inability of the Court to give consistent decisions shows what Calo (2010) calls "a mode of secular logic" (268). This mode of secular logic seems to influence the Court's idea on the place of religion in public life. In turn, this mode is said to promote "the principle that European political life ought to be fundamentally secular in its constitution" (Calo, 2010: 268). Even though the value of religious pluralism is

an important characteristic of the liberal democratic order it has to fit in to the secular political narrative. For example, in the case of Dahlab, Ebrahimian, and Singh, the Court sacrificed the idea of pluralism as these cases challenged the secular nature of the State. This relates to the idea of a "controlling paradox of the liberal project", explained by Danchin (2011):

> To preserve freedom, order must be created to restrict it. The difficulty is that while on the one hand, everyone is 'equal before the law', and has equal rights [...] on the other hand, the aim of the law is to create and maintain public order - an aim that necessarily turns upon the concerns and attitudes of its majority population (Danchin, 2011: 695).

As a consequence, the Court has acknowledged that Christianity plays an ongoing role in many European states which seem not to intervene with secularism, democracy, and the rule of law. It is therefore difficult to argue what exactly constitutes religion in the mind of the Court, which makes it even more difficult to determine what types of claims to religious freedom fall into the Convention's terms (Danchin, 2011: 715). In order to define what constitutes, 'religious liberty' there have to be underlying assumptions about the nature of religion itself (Danchin, 2011: 676). However, as we have seen in the rulings of the Court, the legal definitions lack clarity and can reinforce social or cultural attitudes towards either the 'favoured' or 'non-favoured' religion. The values of the religious majority seem to benefit from the application of the margin of appreciation, as it is used to protect public order and the rights and freedoms of others. If the Court continues to use the margin of appreciation in religious diversity cases there will never be a clear attempt to regulate the wearing of religious garments in the public sphere.

Conclusion

The reasoning of the Court and its application of the margin of appreciation has consequences for the 'proper' place of religion in the public sphere. One important consequence is the discriminatory effect of restricting the visibility of religious symbols and clothing. Professional and skilled people face exclusion from the

workforce because they adhere to an alleged threatening religion. What is considered to be a suitable corporate image in the secular public sphere? It seems that the Court is unable to determine why one 'religious' symbol is a threat whereas the other represents universal or secular values. However, once the Court grants the protection of religious garments this can become *the* essence of the group identity. This would mean that manifestations of religion that are not 'essential' are not protected even if the practices are believed to be religiously inspired.

'Religious' symbols cannot be protected if they do not carry universal or secular values, because they do not represent the cultural or national identity of the majority. This would mean that the visibility of minority religions interfere with other people's religious freedom, because of their threatening power. The application of the margin of appreciation wants to prevent indoctrination and support neutrality, but fails to equally protect religious freedom of all. This reinforces restrictive and homogenising ideas of non-Christian religions, because the Court is unable to argue how religious garments could challenge religious harmony, pluralism, or neutrality. Instead of engaging in discussions on the place of religious symbols in the public sphere, the Court argues that national courts and authorities are better suited to determine if 'religions' are neutral and discrete enough to be present outside of the private sphere. As a consequence, the Court is unable to examine the reality of religious practices and the reasons to wear religious garments. The restriction on these symbols carry a coercive message that shows intolerance and discrimination toward minorities.

Findings and conclusion

In this chapter I will summarise my findings from the four theory and analysis chapters and answer my main research question: *What is the relationship between secularism and the margin of appreciation doctrine in religious diversity cases at the European Court of Human Rights?* By doing so I hope to present how the European Court of Human Rights influences perceptions on religion and secularism in European societies today. The position of religion in the public sphere is not as clear as was supposedly the case in the last two centuries. Instead, the visible presence of both Christian and non-Christian faiths seem to influence ideas on the public dimension of 'religion' and religious symbols. The Court's discourse and reasoning to invoke the margin of appreciation could help to understand how religious freedom is protected or restricted. Furthermore, what are the consequences of the court rulings for religious diversity and pluralism in European societies? I will present an overview of the previous chapters before turning to the relationship between secularism and the margin of appreciation doctrine.

Chapter overview

In the first chapter I tried to answer the question *What is the role and impact of secularism in European law?* It became clear that the Court deems religion a private issue, meaning that religious manifestations have to stay in the private sphere. Core 'secular' values take the place of religion in the public sphere, suggesting that human rights become Europe's religion. This has been called the mode of secular logic of the Court (see Calo 2010), implying that the Court's reasoning about the public life of religion is influenced by its secular assumptions. The Court has to operate within the context of an increasingly secular (Western) Europe, resulting in a secular understanding of human rights (Calo, 2010: 273). This becomes clear when the Court has to rule on religious diversity cases and the value of religious pluralism.

Secularism in European law can be found in the secular values the Court has used in its discourse. The values I have discussed are neutrality, tolerance, religious diversity, religious pluralism, and the prevention of indoctrination. The values are

considered to be part of the secular mode of logic of the Court and should be present in democratic societies. By doing so the Court promotes and enforces "a normative order of secularism" (Langlaude, 2006: 929). This normative order influences decisions on religious diversity cases when it concerns minority religions, for example Islam and Sikhism. The values of diversity and pluralism play an important role in order to ensure the right of religious freedom. However, pluralism has sometimes been sidestepped because it can undermine the goal of preserving religious harmony and protecting the rights and freedoms of others.

The Court believes that secularism is the guarantor of other democratic values. This is part of the reason that religious symbols and clothing are believed to be contrary to the secular nature of the Court and the Convention (Langlaude, 2006: 936). However, this means that the values of neutrality and secularism interfere with the religious freedom and religious identity of communities within a society. This opposes the idea of religious diversity and pluralism which is deemed to be highly important in a democratic society. As argued by Langlaude (2006), the Court is "trying to impose its own conception of secularism at an unacknowledged cost to religious freedom" (944). In practice, this means that religious symbols of Christians are valued differently than Islamic or Sikh symbols. This attempt to restrict one's right to religious freedom on the grounds of secular values weakens the legitimacy of the Court and the basic rights that it should protect. The Court seems to emphasise neutrality because it could promote a public space free from the impositions of religion. However, in practice the Court is unable to strike a fine balance between justifying State interference in religious matters, and safeguarding religious diversity and pluralism in diverse European societies.

In the second chapter I provided an answer to the question: *What is the history of the margin of appreciation in the European Convention on Human Rights?* The idea behind the margin of appreciation doctrine was to reassure States that their efforts to protect the nation could not be compromised by international policies (Ostrovsky, 2005: 48). In today's conception, the margin of appreciation doctrine is said to resolve conflicts between individual rights and national interest or moral convictions. Furthermore, the application of the margin is granted to provide flexibility in order to avoid confrontations between the Court's interpretation of the Convention and the

Member States. It is a tool to create a long term balance between conflicting social interests of the State and applicant.

The margin of appreciation is usually invoked in cases discussing Articles 8-11 which contain accommodation clauses that are somewhat vague and open to interpretation. These Articles have a two paragraph structure which means that the rights of the individual can only be restricted by State interference if this is "prescribed by law", "in accordance with the law", or "necessary in a democratic society" (Lewis, 2007: 397). In general, there are three ways to explain the width of the margin: (1) the lack of European consensus, (2) the nature of the right, and (3) the aim pursued (Cumper, 1999: 176). Especially the first standard is used as the explanation to grant a wide margin of appreciation in religious diversity cases. There is no European consensus and due to the increase of new Member States a consensus seems impossible. This is part of the reason why several authors including Beaman (2013) have argued that the margin gives "ultimate sovereignty" to the Member States (131). This is because the Court is the final interpreter of the Convention, meaning that invoking the margin of appreciation is critical to the enforcement of the Convention. The Court shapes how the Convention is enforced, which has lead some to believe that the margin is actually a threat to the viability of the Convention, because the Court does not take its enforced responsibilities (O'Donnell, 1982: 476).

This is crucial when the Court discusses religious diversity cases involving minorities. In general, minorities have to rely upon the judicial process to secure their interests because they tend to have little or no political influence. In the Court's judgments, the application of the margin of appreciation has been justified to promote democracy within communities and interferes with the interests of minorities. This means that the margin sometimes fails to grant consensus or the protection of minority rights and interests. It has even been argued by Lugato (2013) that invoking the margin is incompatible with human rights, because the doctrine allows the Member States to protect their majorities at the cost of the protection of individuals and minorities (53). This has become clear in the analysis of the five court rulings I examined in chapters 4 and 5.

The third sub question I answered was *What secular assumptions may be detected in the margin of appreciation doctrine in general and in specific religious diversity cases?* The themes and discourses of the Court emphasised the core secular values of the Convention: neutrality, tolerance, religious diversity, religious pluralism, and protecting the rights and freedoms of others or prevention of indoctrination. In general, the secular assumptions of the margin of appreciation are found in the Court's application of secular values. I discussed the secular assumptions through the examination of the discourse of the Court in the following court rulings: *Dahlab v Switzerland*, *Lautsi v Italy* (Grand Chamber decision), *Jasvir Singh v France*, *Ebrahimian v France*, and *Eweida v United Kingdom*. The first three rulings discussed religious diversity cases in the classroom, the latter two in regards to the workplace.

The secular assumption of the Court's application of the margin of appreciation, regarding religious diversity in the classroom, seems to argue that minority religions are incompatible with the secular nature of (Western) Europe because of the proselytising effects of these symbols. The discourse of the Court emphasises the principles of neutrality, religious pluralism, democracy, and prevention of indoctrination. The three rulings invoked a wide margin of appreciation that resulted in the removal of the 'powerful' headscarf and keski and the 'approval' of the crucifix. The Court's discourse showed a bias toward the visibility of religious symbols in public spaces and, thus, the place of religion in European societies. However, the Court's application of the margin of appreciation does not present a definitive answer on the influence or impact of 'religious' symbols. This means that the Court's use of the margin of appreciation could be seen as an easy way out instead of opening up meaningful discussions on the 'place' of religion in the classroom. The protection of a democratic culture could be seen as a requirement to limit religious expression of minorities. The assumptions of the Court lean toward the notion of state neutrality and a clear separation between religious and political authority, however this distinction cannot be easily made.

The secular assumptions of the Court's application of the margin, regarding religious diversity in the workplace, seems to argue that minority religions contravene the principle of neutrality and the rights and freedoms of others. The margin of appreciation was narrow in the case of Eweida which resulted in the protection of the cross in the name of equality and religious harmony. The discourse of the Court and

its reasoning to invoke the margin of appreciation show that minority religions are restricted, because the alleged power or passivity of symbols influence the place of 'religion' in the workplace. Ideas of religion as either part of one's *individual identity* or in need of *protection from* powerful or even threatening symbols shows how the margin is used as a tool to postpone a discussion on the impact of religious symbols in the public sphere. Again, non-Christian religions are said to belong in the private sphere, but this neglects the reason *why* people want to manifest their religion. If the Court 'accepts' the cross as a manifestation of religion and grants protection why is the veil not considered 'neutral' or 'corporate'?

In the previous chapter I tried to answer the question: *What are the consequences of the secular assumptions in the margin of appreciation doctrine at the European Court of Human Rights?* The Court has trouble defining what constitutes as 'religion', religious beliefs, and religious traditions. The fact that there can exist multiple interpretations of a 'religion' leads to the misinterpretation of how one can manifest religious beliefs. The restriction of the visibility of religious symbols and clothing on the basis of neutrality and secularism actually has a discriminatory effect. The disappearance of religious minorities from public spaces cannot be seen as a neutral decision. Furthermore, the Court's interpretation of religious practices has an essentialising effect. When the Court argued that a particular religious garment is regarded a manifestation of one's religion this becomes *the* essence of the group identity. The idea that Ebrahimian's and Dahlab's headscarf is 'imposed' upon them neglects the question *why* someone veils. As a consequence women who choose to veil themselves are excluded from working in public spaces. The firing of a teacher because she wears a headscarf might carry a powerful message as well. There were Muslim children attending the school who could wonder why dressing as their mothers or they themselves dress is wrong. This means that the Court's idea of protecting the rights and freedoms of others can show intolerance toward religious minorities and emphasise stereotypes.

The Court seems to have a different approach to Christianity than to non-Christian religions. As a consequence, the religious and cultural freedom of the majority is protected through the application of the margin of appreciation. The crucifix is no longer just a religious symbol, but carries 'secular' values. By doing so,

Member States have the power to 'use' Christian symbols as the embodiment of civilisation and cultural heritage while non-Christian symbols should be kept in the private sphere. The consequence of invoking a wide margin of appreciation is the Court's inability to protect religious minorities from "the tyranny of the majority" (Mancini, 2010: 26). This results in the idea that religious pluralism should only serve or benefit the majority religion. As a consequence, pluralism could undermine the idea of "preserving religious harmony" (Calo, 2010: 264).

The lack of explaining *why* a symbol has a proselytsing effect or is incompatible with secular values is usually masked by invoking the margin of appreciation. The application of the margin of appreciation wants to prevent indoctrination and support neutrality, but fails to equally protect religious freedom of all. This reinforces restrictive and homogenising ideas of non-Christian religions. As a consequence there remains no European consensus on the visible presence of religious symbols or clothing in public spaces, probably because there is no European consensus on what 'religion' is. This means that the religious freedom articulated in Article 9 is not safeguarded under the Convention. The secular assumptions of the Court and its repetition of the principles of secularism, neutrality, discretion, and indoctrination lead to the misinterpretation of 'religion', religious traditions and beliefs.

Religious diversity, secularism, and the Margin of Appreciation

This leads us to define the relationship between secularism and the margin of appreciation in religious diversity cases. What immediately comes to mind is the Court's interpretation of religious manifestations and how this could influence religious diversity and pluralism in European societies. The application of the margin of appreciation might seem an 'easy way out', because the Court has argued that national courts are better equipped to decide on the visibility of religious symbols in the public sphere. The Court seems to forget the consequences of invoking the margin because it implicitly 'favours' the Christian religion. Årsheim (2016) has argued that when 'law' and 'religion' meet the Court extends favours to the majority religion, because this religion is considered to be "interwoven" within society in the sense that

the religion gains cultural features or because their demands are deemed to be better accessible by the Court (295).

As I have laid down in previous chapters the Court's judgment on the five cases can strongly influence our perceptions on religion and specifically which 'religion' is deemed to be more compatible with a secular Europe. The significance of Christianity in European societies might have decreased if we follow the theories of secularisation, but as shown in the rulings of the Court, Christianity did not lose its cultural significance. Instead of removing 'religion' to the private sphere, only non-Christian faiths have to deal with a lack of 'appreciation' by the Court. The place of religion, specifically non-Christian religions, in the public sphere remains unclear. Especially, because non-Christian religions are said to contravene secular values of democratic societies. Ferrari (2012) has argued that Western secularism is more hostile toward non-Christian religions. This has resulted in the notion that access to the secular public sphere is more demanding for non-Christian religions because their characteristics are said to be less compatible with the secular sphere. This would mean that religious symbols such as the headscarf and keski, which are said to carry a powerful message, should be kept from young children, fragile patients, but ultimately from our 'modern' society.

Even though the Court does not explicitly state its bias toward the Christian religion, or perhaps more accurately, Christian culture, the reasoning behind allowing a crucifix on the wall *because* it represents tolerance, democracy, and secularism suggests just that. If the crucifix represents a cultural or national identity this is likely to influence the place of religion in public life. The majority religious hegemony will be preserved in the name of culture. The religious values of Christianity are turned into universal values that should be protected and represented in the public sphere. If a 'religion' can represent the principles of neutrality and secularism 'it' is allowed to be present in the public sphere. However, if non-Christian religions try to be present in the public sphere the exact same principles are highlighted to call for the disappearance of religion in the public sphere. This shows how the principles of religious pluralism and religious diversity can serve a judicial or political agenda.

As long as religious symbols are passive or cultural they are seen as a part of history, something that should not be denied. This neglects the idea of religious pluralism and diversity, because in the case of Europe only one religion is represented: Christianity. This is not to say that Christianity should be removed from the public sphere, nor that we should deny or turn against Christianity. However, we can not deny that non-Christian faiths have an increasing importance in European societies today. As long as the Court interprets religion as a private matter this ignores the communal sense of religion and the fact that a person cannot 'turn off' their 'religion' when going to class or to work. Even though judges, civil servants, and in some cases even students and employees of private companies are prohibited from wearing religious symbols, the Court has deemed one religion to have more significance in the history of Europe.

The trend in Member State courts is to restrict the wearing of non-Christian symbols in the name of state neutrality and secularism (Koenig, 2015: 72). The European Court seems to follow this line of thought by invoking wide margins of appreciation. The margin of appreciation is a tool of the Court to postpone meaningful discussions on the place of religion in the public sphere, and instead seems to grant Christianity permission to be visibly present. If religious symbols are not 'neutral' or neutral enough, the margin turns out to be a meaningful doctrine in order to protect the rights and freedoms of others. This means that restricting religious beliefs or more specifically religious practices, the Court excludes religious diversity in the public sphere. The prevention of indoctrination, because of the alleged proselytising effects of headscarves and keskis, could lead to the misinterpretation of religious practices and stereotypes of 'others'. This has become clear when the Court assessed *Dahlab v Switzerland* and argued that the headscarf is imposed by a precept in the Koran which breaches the principle of gender equality, even though this has not been agreed upon within Islamic studies or Islamic theological discussions. The Court's arguments seem to resonate strongly in public debates throughout Europe, because the Islamic headscarf is perceived to be the opposite of secular values and principles, such as tolerance, respect for others, equality and non-discrimination (Lewis, 2007: 406). This means that individuals are excluded from their professional duties because their religious practice is said to contravene the principles of secularism and neutrality.

The Court has to uphold the equal protection of religious freedom for all. However, in my analysis the Court seems to use the margin of appreciation as a tool to restrict the visible presence of non-Christian faiths. The Court continues to grant national authorities a wide margin of appreciation in cases regarding religious symbols and clothing. If we follow the argument of Harris, O'Boyle, and Warbrick (1995) invoking a narrow margin would suggest that religion is not considered an important facet of an individual's identity. This could lead to a lowering of standards of the freedom of religion, because many countries have not (yet) adopted national law regarding the wearing of religious symbols in the classroom or workplace. The background assumptions of the Court lead to the application of the margin of appreciation. This means that in future religious diversity cases the Court will continue its approach of invoking a wide margin of appreciation to secure secularism and restrict religious diversity and pluralism if this would undermine the rights and freedoms of others. The Court should avoid reducing a religion to one core practice, and instead continue to examine the range of interpretations individuals *and* groups give to their religious beliefs. Thus, the relationship between secularism and the margin of appreciation in religious diversity cases presents a narrow understanding of 'religion' and the inability to bridge personal interpretations and manifestations of belief and universal, or 'secular', values. The consequences could shape our perceptions on what 'religion' should be and could continue to restrict the beliefs of minorities without giving a clear answer *why* this restriction is deemed necessary in a democratic society.

My research examined five rulings on the wearing of religious garments, this means that my analysis on the European Court and the application of the margin of appreciation is limited. Two of the rulings were only available in French, I had to use Google Translate which might have influenced the analysis of the discourse. The comparison between Ebrahimian and Eweida might not be sufficient to understand why some religious symbols are allowed in the workplace whereas others are not. A longer-term study on the views of the individual judges of the European Court, the application of the margin, or other religious diversity cases might provide new insights on the various perceptions of religion within the law. There is critique on the margin of appreciation, but there is not a clear alternative because of a lack of European consensus on the place of religion in public life. It might be interesting to

research how the Court can avoid using the margin of appreciation in religious diversity cases. However, without the consequence of essentialising what constitutes ‘religion’ or ‘religious belief’. Future research could also study the policies and laws regarding religious symbols in the public sphere of specific Member States. It could be interesting to for example compare France and the United Kingdom; the first included the principle of secularism in its constitution whereas the latter sometimes allows religious symbols or clothing in the public sphere. Is the European Court or the Convention able to guarantee freedom of religion if national policies and laws can vary greatly? This could help to examine new insights in the place and role of religion in ever-changing European societies.

Bibliography

Arendt, Hannah (1998). *The Human Condition*. Chicago: University of Chicago Press.

Andreescu, Gabriel, and Andreescu, Liviu (2010). The European Court of Human Rights' *Lautsi* Decision: Context, Contents, Consequences. *Journal for the Study of Religions and Ideologies*, 9 (26), 47-74.

Årsheim, Helge (2016). "Whose Religion, What Freedom? Discursive Constructions of Religion in the Work of UN Special Rapporteurs on the Freedom of Religion or Belief." In *Making Religion: Theory and Practice in the Discursive Study of Religion*, edited by Kocku von Stuckrad and Frans Wijsen, 287-316. Leiden: Brill.

Asad, Talal (2003). *Formations of the Secular: Christianity, Islam, Modernity, Cultural memory in the present*. Stanford: Stanford University Press.

Bartlet, Michael (2013). Conscience in the Courts - Another View of *Eweida*. *Law & Justice - The Christian Law Review*, 171 (70), 70-78.

Barzilai, Gad. (2004). "Legal Categorizations and Religion: On Politics of Modernity, Practices, Faith, and Power." In *The Blackwell Companion to Law and Society*, edited by Austin Sarat, 392-409. Oxford: Blackwell Publishing Ltd..

Beaman, Lori G. (2013). Battles over Symbols: The 'Religion' of the Minority versus the 'Culture' of the Majority. *Journal of Law & Religion*, 28 (1), 101-138.

Benvenisti, Eyal (1999). Margin of Appreciation, Consensus, and Universal Standards. *International Law and Politics* 31, 843-854.

Berger, Benjamin L. (2012). Inducing Fundamentalisms: Law as a Cultural Force in the Domain of Religion. *Canadian Diversity*, 9 (3): 25-28.

Berger, Benjamin L. (2014). Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion. *Osgoode Legal Studies*, 10 (5), 1-21.

Berger, Peter L. (1967). *The Sacred Canopy: Elements of a Sociological Theory of Religion*. New York: Doubleday.

Calhoun, Craig (2010). Rethinking Secularism. *The Hedgehog Review*, 12 (3), 35-48.

Calhoun, Craig, Juergensmeyer, Mark, and VanAntwerpen, Jonathan (2011). *Rethinking Secularism*. Oxford: Oxford University Press.

Calo, Zachary, R. (2010). Pluralism, Secularism and the European Court of Human Rights. *Journal of Law and Religion*, 26 (1), 261-280.

Casanova, José (2011). "The Secular, Secularizations, Secularisms." In *Rethinking Secularism*, edited by Craig Calhoun, Mark Juergensmeyer, and J. VanAntwerpen, 56-74. Oxford: Oxford University Press.

Charney, Evan (1998). Political Liberalism, Deliberative Democracy, and the Public Sphere. *The American Political Science Review*, 92 (1), 97-110.

Christoffersen, Lisbet (2006). Intertwinement: A New Concept for Understanding Religion-Law Relations. *Nordic Journal of Religion and Society*, 19 (2), 107-126.

Clapham, Andrew (1993). *Human Rights in the Private Sphere*. Oxford: Clarendon Press.

Council of Europe, the Lisbon Network (2009). *The Margin of Appreciation*. Paper. https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

Cumper, Peter. (1999). "The Rights of Religious Minorities: The Legal Regulation of New Religious Movements." In *Minority Rights in the 'New' Europe*, edited by Peter Cumper and S. Wheatley, 165-183. The Hague: Martinus Nijhoff Publishers.

Danchin, Peter G. (2011). Islam in the Secular *Nomos* of the European Court of Human Rights. *Michigan Journal of International Law*, 32, 663-747.

European Court of Human Rights (2001). *Dahlab v Switzerland*, no. 42393/98.

European Court of Human Rights (2009a). *Jasvir Singh v France*, no. 25463/08.

European Court of Human Rights (2009b). *Jasvir Singh v France*, English translation

European Court of Human Rights (2009c). *Lautsi v Italy*, no. 30814/06.

European Court of Human Rights (2011). *Lautsi v Italy* [Grand Chamber], no. 30814/06.

European Court of Human Rights (2013). *Eweida and Others v United Kingdom*, no. 48420/10.

European Court of Human Rights (2015a). *Ebrahimian v France*, no. 64846/11.

European Court of Human Rights (2015b). *Ebrahimian v France*, English translation

Evans, Carolyn (1999). "Religious freedom in European Human Rights Law: The Search for a Guiding Conception." In *Religion and International Law*, edited by M Janis and C Evans, 385-400. The Hague: Martinus Nijhoff Publishers.

Evans, Carolyn (2001). *Freedom of Religion under the European Convention on Human Rights*. Oxford: Oxford University Press.

Evans, Carolyn (2006). The 'Islamic Scarf' in the European Court of Human Rights. *Melbourne Journal of International Law*, 7 (1), 52-73.

Ferrari, Silvio (2012). Law and Religion in a Secular World: A European Perspective. *Ecclesiastical Law Society*, 14, 355-370.

Fraser, Nancy (1990). Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy. *Social Text*, 25, 56-80.

Fokas, Effie (2012). 'Eastern' Orthodoxy and 'Western' Secularisation in Contemporary Europe (with Special Reference to the Case of Greece). *Religion, State and Society*, 40 (3) 395-414.

Geertz, Clifford (1993). "Religion as a Cultural System." In *The Interpretation of Cultures*, edited by Clifford Geertz, 87-125. London: Fontana Press.

Greer, Steven (2000). The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights. *Human rights files, No. 17*. Council of Europe.

Habermas, Jürgen, Lennox, Sara, and Lennox, Frank (1974). The Public Sphere: An Encyclopedia Article (1964). *New German Critique*, 3, 49-55.

Habermas, Jürgen (1992). *Between Facts and Norms*. Cambridge: MIT Press.

Habermas, Jürgen (2006). Religion in the Public Sphere. *European Journal of Philosophy*, 14 (1), 1-25.

Harris, D.J., O'Boyle, M., and Warbrick, C. (1995). *Law of the European Convention on Human Rights*. Oxford: Oxford University Press.

Harris, Evan. "A secularist manifesto." *The Guardian*, September 18, 2010. https://www.theguardian.com/commentisfree/belief/2010/sep/18/secularist-manifesto-secularism

Hjelm, Titus (2011). "Discourse Analysis." In *The Routledge Handbook of Research Methods in the Study of Religion*, edited by Steven Engler and Michael Stausberg, 134-150. London: Routledge.

Howell, Kerry E. (2016). "Paradigm of Inquiry: Critical Theory and Constructivism." In *Corporate Governance in Africa: Assessing Implementation and Ethical Perspectives*, edited by Kerry E. Howell and M. Karim Sorour, 29-46. London: Macmillan Publishers Ltd.

Hurd, Elizabeth Shakman (2008). *The Politics of Secularism in International Relations*. Princeton: Princeton University Press.

Hurd, Elizabeth Shakman (2015). *Beyond Religious Freedom: The New Global Politics of Religion*. Princeton: Princeton University Press.

Hutchinson, Michael R. (1999). The Margin of Appreciation Doctrine in the European Court of Human Rights. *The International and Comparative Law Quarterly*, 48 (3), 638-650.

Jakelic, Slavica (2010). *Collectivistic Religions: Religions, Choice, and Identity in Late Modernity*. London: Routledge.

Jakobsen, Janet R., and Pellegrini, Ann (2008). *Secularisms*. Durham: Duke University Press.

Julius, Anthony (2010). *The Trials of the Diaspora: A History of Anti-Semitism in England*. Oxford: Oxford University Press.

Koenig, Matthias (2015). "The Governance of Religious Diversity at the European Court of Human Rights." In *International Approaches to Governing Ethnic Diversity*, edited by Jane Boulden and Will Kymlicka, 51-78. Oxford: Oxford University Press.

Langlaude, Sylvie (2006). Indoctrination, Secularism, Religious Liberty, and the ECHR. *The International and Comparative Law Quarterly*, 55 (4), 929-944.

Laycock, Douglas (1990). Formal, Substantive, and Disaggregated Neutrality Toward Religion. *Depaul Law Review*, 39, 993-1018.

Leigh, Ian, and Ahdar, Rex (2012). Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away. *The Modern Law Review*, 75 (6), 1064-1098.

Letsas, George (2006). Two Concepts of the Margin of Appreciation. *Oxford Journal of Legal Studies*, 26 (4), 705-732.

Lewis, Tom (2007). What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation. *The International and Comparative Law Quarterly*, 56 (2), 395-414.

Lobeira, Pablo Cristóbal Jiménez (2014). Veils, Crucifixes and the Public Sphere: What Kind of Secularism? Rethinking Neutrality in a Post-secular Europe. *Journal of Intercultural Studies*, 35 (4), 385-402.

Loenen, Titia (2016). *Divergence in Fundamental Labor Rights Case Law: Banning Religious Symbols in Public Employment*. Paper presented at Ensuring Coherence in Fundamental Labor Rights Case Law: Challenges and Opportunities. Social Justice Expertise Center Leiden.

Lugato, Monica (2013). The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity. *Journal of Catholic Legal Studies* 52, 49-70.

Mahmood, Saba (2009). Religious Reason and Secular Affect: An Incommensurable Divide? *Critical Inquiry*, 35 (4): 836-862.

Mancini, Susanna (2010). The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty. *European Constitutional Law Review*, 6, 6-27.

Mancini, Susanna, and Rosenfeld, Michel (2010). Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere. *Benjamin N. Cardozo School of Law - Yeshiva University*, *Working Paper No. 309*

Marshall, Jill (2016). Human Rights, Identity and the Legal Regulation of Dress. *Nottingham Law Journal*, 25, 73-85.

Mavelli, Luca (2011). Security and secularization in International Relations. *European Journal of International Relations* 18 (1), 177-199.

McGoldrick, Dominic (2011). Religion in the European Public Square and in European Public Life - Crucifixes in the Classroom? *Human Rights Law Review*, 11 (3), 451-502.

McLeod, Hugh. *The Religious Crisis of the 1960s*. Oxford: Oxford University Press.

Meerschaut, K., and Gutwirth, S. (2008). "Legal Pluralism and Islam in the Scales of the European Court of Human Rights: The Limits of Categorical Balancing." In: *Conflicts between Fundamental Rights*, edited by E. Brems, 431-465. Antwerp: Intersentia.

Niemi-Kiesiläinen, Johanna, Honkatukia, Päivi, and Ruuskanen, Minna (2007). "Legal Texts as Discourses". In *Exploiting the Limits of Law*, edited by Asa Gunnarsson, Eva-Maria Svensson, and Margaret Davies, 69-88. London: Routledge.

Orsi, R.A. (1997). "Everyday miracles: the study of lived religion." In *Lived Religion in America: Toward a History of Practice*, edited by D.D. Hall, 3-21. Princeton: Princeton University Press.

Orsi, Robert A (2003). Is the Study of Lived Religion Irrelevant to the World We Live In? *Journal of the Scientific Study of Religion*, 42 (2), 169-174.

O'Donnell, Thomas, A. (1982). The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights. *Human Rights Quarterly*, 4 (4), 474-507.

Ostrovsky, Aaron A. (2005). What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals. *Hanse Law Review*, 1 (1), 47-64.

Parker, M. Todd (2006). The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR. *Duke Journal of Comparative & International Law*, 17 (1), 91-130.

Pearson, Megan (2013). Article 9 at a Crossroads: Interference Before and After *Eweida*. *Human Rights Law Review*, 13 (3), 580-602.

Peroni, Lourdes (2014). The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review. *Chicago-Kent Law Review*, 89 (2), 663-687.

Plesner, Ingvill Thorson (2005). *The European Court on Human Rights between fundamentalist and liberal secularism*. Paper presented at The Islamic headscarf Controversy and the Future of Freedom of Religion or Belief. Strasbourg, France.

Pollock, David. "Secularism is neutrality towards all religion – including atheism." *The Guardian*, July 7, 2011. https://www.theguardian.com/commentisfree/belief/2011/jul/07/secularism-neutrality-religion-atheism

Quinn, Ben. "French police make woman remove clothing on Nice beach following burkini ban." *The Guardian*, August 24, 2016. https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach

Rasilla del Moral, Ignacio (2006). The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine. *German Law Journal*, 7 (6), 611-623.

Renteln, Alison Dundes (2004). Visual Religious Symbols and the Law. *American Behavioral Scientist*, 47 (12), 1573-1596.

Reuter, Astrid (2009). Charting the Boundaries of the Religious Field: Legal Conflicts over Religion as Struggles over Blurring Borders. *Journal of Religion in Europe*, 2, 1-20.

Riis, Ole, and Woodhead, Linda (2010). *A Sociology of Religious Emotion*. Oxford: Oxford University Press.

Rorive, Isabelle (2009). Religious Symbols in the Public Space: In Search of a European Answer. *Cardozo Law Review*, 30 (6), 2669-2698.

Stausberg, Michael, and Engler, Steven (2011). "Introduction: Research methods in the study of religion\s." In *The Routledge Handbook of Research Methods in the Study of Religion* edited by Michael Stausberg and Steven Engler, 3-20. London: Routledge.

von Stuckrad, Kocku (2010). Reflections on the Limits of Reflection: An Invitation to the Discursive Study of Religion. *Method and Theory in the Study of Religion*, 22, 156-169.

von Stuckrad, Kocku (2013). Discursive Study of Religion: Approaches, Definitions, Implications. *Method and Theory in the Study of Religion*, 25, 5-25.

Sullivan, Winnifred Fallers (2005). *The Impossibility of Religious Freedom*. Princeton: Princeton University Press.

Sullivan, Winnifred Fallers, Yelle, Robert A., and Taussig-Rubbo, Mateo (2011). *After Secular Law*. Stanford: Stanford Law Books.

Taylor, Charles (2007). *A Secular Age*. Cambridge: Harvard University Press.

Tillich, Paul (1958). The Religious Symbol. *Daedalus*, 87 (3), 3-21.

Vaismoradi, Mojtaba, Turunen, Hannele, and Bondas, Terese (2013). Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study. *Nursing and Health Sciences*, 15, 398-405.

Wiesel, Elie (1999). "A Tribute to Human Rights" in *The Universal Declaration of Human Rights: Fifty Years and Beyond*, edited by Yael Danieli, Elsa Stamatopoulou, Clarence J. Dias, 3-4. Amityville: Baywood.

Wilson, Erin, K. (2012). *After Secularism: Rethinking Religion in Global Politics*. New York: Palgrave MacMillan.

Woodhead, Linda (2011). Five concepts of religion. *International Review of Sociology*, 21 (1), 121-143.

Yates, Melissa (2007). Rawls and Habermas on religion in the public sphere. *Philosophy & Social Criticism*, 33 (7), 880-891.