Guarding the Perimeter:  
Militant Democracy and Religious Freedom in Europe

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Abstract

This essay tracks the concept of militant democracy in the jurisprudence of the European Court of Human Rights, where it has migrated from a principle that authorizes a state to act in a militant manner to preserve democratic processes to one that entitles a state to establish perimeters and guard against threats of a different kind. Militant democracy now authorizes a state to assume a militant stance toward the exercise of religious freedom that threatens substantive conceptions of democracy instantiated in its constitutional order. The essay identifies four substantive conceptions of democracy – liberal democracy, secular democracy, republican democracy, and conservative democracy – to which militant democracy has migrated in recent years. It argues that militant democracy’s migration signals an ominous shift in the way in which the European Court of Human Rights comprehends the relationship between religion and state power.

Introduction

When he was a young boy, my son had a collection of stuffed animals – a dog, a wolf, a cat, a lion, a tiger, and a bear – that he liked to play with in bed before going to sleep. One night, after I said goodnight to him, he carefully arranged the animals facing outward around him. When I asked him what he was doing, he said, “guarding the perimeter.” For him, the perimeter was simple. It was his bed. For the rest of us, however, the perimeter is more complicated – as is how to guard it.

Militant democracy – a form of constitutional democracy authorized to protect civil and political freedoms by preemptively restricting their exercise – is one way of guarding one perimeter. The perimeter guarded by a militant democracy, traditionally understood, is the boundary of the democratic character of a constitutional order. But militant democracies are not simply constitutional democracies. Militant democracy refers to preemptive stances that a constitutional democracy assumes towards
members who exercise civil and political freedom in ways that threaten its democratic existence. The classic scenario is one where an extremist political party participates in a general election on a platform that proposes dismantling constitutional arrangements that entrench democratic self-rule. In non-militant democracies, such threats are typically addressed by judicial review of the constitutionality of actions that threaten democratic self-rule if and when such a political party actually assumes office and introduces legislation to this effect. By banning the party in question, placing content restrictions on electoral speech, or excluding the party in question from the electoral arena, a militant democracy operates preemptively to ensure that this scenario doesn’t come to pass.²

A political concept first articulated by Karl Lowenstein in the 1930s,³ militant democracy increasingly serves as a background legal principle that validates legal technologies deployed to determine the circumstances in which a state can act preemptively to curtail civil and political freedom to preserve democratic order.⁴ This essay tracks the concept of militant democracy in the jurisprudence of the European Court of Human Rights, where it appears to have migrated from a principle that authorizes a state to act in a militant manner to preserve democratic processes to one that entitles a state to establish perimeters and guard against threats of a different kind. Militant democracy now authorizes a state to assume a militant stance toward the exercise of religious freedom that threatens substantive conceptions of democracy instantiated in its constitutional order.⁵ Some of this migration has to do with ambiguities inherent in legal technologies deployed to determine the legality of militant measures. One such technology – the margin of appreciation – calibrates the extent of discretion that national authorities enjoy, when balancing interests associated with Convention rights and freedoms with countervailing state objectives, according to the gravity of the threat to Convention values posed by the exercise of civil or political freedom. Some of this migration also to do with ambiguities surrounding who belongs
to a political community and who doesn’t. But most of it has to do with ambiguities surrounding the concept of democracy itself.

After describing the Court’s approach to militant measures that seek to preserve what might be called procedural conceptions of democracy, the essay identifies four substantive conceptions of democracy – liberal democracy, secular democracy, republican democracy, and conservative democracy – to which militant democracy has migrated in recent years. The migration of militant democracy, I argue, signals an ominous shift in the way in which the European Court of Human Rights comprehends the relationship between religion and state power. Instead of treating the protection of religious freedom as essential to democracy, the Court has begun to reframe religious freedom as a threat to democracy and immunize states from judicial oversight when they take preemptive measures to curb its exercise.

I. Militant Democracy

Constitutional expression of militant democracy first occurred in Europe as a foundational principle of post-war West Germany. Drafted against the backdrop of the collapse of the democratic Weimar Republic and World War II, the German constitution authorizes the state to regulate and in some circumstances prohibit political activities, associations and movements that threaten Germany’s “free basic democratic order.” Other European states also accepted the post-war necessity of antidemocratic measures to combat extremist movements seeking to unseat democratic norms by radical political agendas. In 1948, for example, Italy amended its constitution to prohibit the resurrection of the Fascist Party. Article 16 of the French Constitution of 1958 authorizes militant state action more generally, empowering the President of the Republic to take “measures required by the circumstances,” when “the institutions of the Republic are under serious and immediate threat.”
Militant forms of democracy have also found specific authorization in the written constitutions of several European states. The Polish Constitution forbids political parties and other organizations devoted to totalitarianism or racial or national hatred. The Ukrainian constitution authorizes the prohibition of parties that threaten the independence of the state. The Bulgarian constitution prohibits the formation of political parties on the basis of ethnicity. The Spanish constitution guarantees freedom of association but authorizes the state to declare an association illegal if its goals or means are criminal or it is of a secret or paramilitary nature. More generally worded constitutional provisions are also often capable of being interpreted to authorize the enactment of militant legislative measures that infringe civil and political freedom in the name of democratic self-preservation. Article 55(1) of the Hungarian Constitution, for example, guarantees that “everyone has the right to liberty and personal security, and no one may be deprived of freedom except for reasons defined in the law.”

Despite its historical pedigree, questions relating to the nature and scope of militant democracy thus have acquired greater political and legal salience in recent years. No doubt the rejuvenation of militant democracy is partly a response to the profoundly destabilizing potential of new forms of terrorism and religious fundamentalism. Neo-Nazi movements, empowered perhaps by successful exploitation of fears associated with economic and cultural globalization, may have also provoked states to assume militant stances towards threats to democratic institutions. Militant democratic stances by post-communist democracies in central and Eastern Europe also perform a symbolic function by negating their histories of totalitarian rule. Whatever its causes, militant democracy is emerging as a new archetype of statehood. It represents a fundamental challenge to traditional conceptions of constitutional democracy at the very moment when Europe itself appears to be evolving into its own constitutional order.

Defining the legal contours of militant democracy is a first order task for national courts to the extent they bear the constitutional responsibility for policing the exercise of legislative and executive power. In Europe, however, it is also a second order task for
the European Court of Human Rights, which supervises domestic compliance with the European Convention on Human Rights. Like many post-war constitutions of European states, Article 17 the Convention stipulates that the Convention does not confer on “any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms” enshrined in the Convention. Drafters of Article 17 understood it as a bulwark against a democracy’s capacity to surrender to fascist rule. In the early years of the Convention, the European Commission upheld West Germany’s ban on the German Communist Party, thereby extending the reach of Article 17 to permit a member state to enact militant measures to preclude democracy’s capacity to surrender to communist rule.15

Beyond the bookends of fascism and communism, which threaten procedural democratic commitments to free elections and a multi-party system, can a democracy, consistent with the European Convention, assume a militant stance toward transformative political projects that don’t pose a threat to democratic processes but which, instead, threaten substantive conceptions of what democracy means to a political community? In several notable cases involving political parties and the actions of political party officials, the European Court of Human Rights has identified transformative political projects that a state cannot, in the name of democracy, seek to prevent by militant means. In United Communist Party of Turkey v. Turkey,16 for example, the political party in question asserted the inalienability of the right of self-determination, called for constitutional recognition of the Kurdish people, and advocated peaceful Turkish-Kurdish co-existence “within the borders of the Turkish Republic.”17 The European Court held Turkey’s preventive measures to be contrary to freedom of association and expression, stating that “there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.”18
Similarly, in *Socialist Party and Others v. Turkey*, the Socialist Party claimed that the Kurdish people possessed an unconditional right of self-determination, up to and including external self-determination. Given historical circumstances, however, the Party advocated a form of internal self-determination involving the establishment of a bi-national and bilingual federal order that would allow for the constitutional coexistence of the Kurdish and Turkish peoples. Holding Turkey in violation of the Convention for banning the party, the Court stated that “it is the essence of democracy to allow diverse political programs to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.”

In two other cases, the Court assumed a similar stance. In *Freedom and Democracy Party v. Turkey*, the Court upheld the right of a political party to advocate the establishment of a democratic assembly of elected representatives to address the place of the Kurdish people in the Turkish constitutional order. In *Yazar and others v. Turkey*, the Court held that a transformative political agenda must be compatible with “fundamental democratic principles” and the means chosen to implement such an agenda themselves must be “legal” and “democratic.” A political party whose platform amounted to little more than claims that “citizens of Kurdish origin were not free to use their own language and were unable to make political demands based on the principle of self-determination, and the security forces campaigning against pro-Kurdish terrorist organisations were committing illegal acts and were responsible in part for the suffering of Kurdish citizens in certain parts of Turkey” could not be said to threaten Turkish democracy.

The Court has also reviewed militant measures aimed at party officials. In *Vajnai v. Hungary*, the Court held Hungary in violation of Article 10’s guarantee of freedom of expression for arresting and convicting the vice-president of the Worker’s Party, a left wing political party, for wearing a “totalitarian symbol” (a five-pointed red star) when speaking to supporters at a lawful demonstration. The Court stated that it was
“mindful of the fact that the well-known mass violations of human rights committed under Communism discredited the symbolic value of the red star.”25 It concluded, however, that Hungary had “not shown that wearing the red star exclusively means an identification with totalitarian ideas, especially when seen in light of the fact that the applicant did so in his capacity as vice-president of a registered left-wing, political party, with no known intention of participating in Hungarian political life in defiance of the rule of law.”26 It noted further that the evidence disclosed no instance “where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary.”27

Where words or actions by party officials manifest support for transformative political projects that involve violence, however, the Court has held that the state can act in a militant manner to minimize the threat that such violence poses to democratic institutions. In 2009, the Court rendered judgment in three cases involving political parties and party officials seen to be aligned with Euskadi Ta Askatasuna (“ETA”), an organization deemed by Spain to be terrorist in nature, due to its use of violence in its campaign for independence for the Basque region. The Court upheld the dissolution of two political parties,28 and prohibited successor organizations of the two dissolved parties from presenting candidates in municipal, regional and autonomous community elections.29 The Court identified several acts and speeches of party members and leaders that were “very close to explicit support for violence and praise of people likely related to terrorism.”30 It concluded that “given the situation in Spain for many years regarding terrorist attacks, especially through the ‘politically sensitive Basque country, these connections can be considered objectively as a threat to democracy.”31

In none of these cases was a political party or its members proposing a political agenda untainted by violence that, according to the Court, ran counter to the concept of democracy as comprehended by the Convention. The Court’s jurisprudence suggests that a state can act in a militant manner to preserve democracy in the face of communist and fascist political agendas. Until relatively recently, however, apart from
party platforms or statements advocating or aligning a political party with violence, it
offered little insight into whether the Convention authorizes a constitutional democracy
to assume a militant stance toward the exercise of civil and political freedom that
threatens substantive conceptions of democracy instantiated in its constitutional order.
In Refah Party v. Turkey, however, the Court identifies one such political agenda. In so
doing, it provides valuable insight into what the Court imagines as constituting the
boundary of the democratic character of a political community.

II. Militant Liberalism

The background to the Court’s decision in Refah Party v. Turkey is as follows. In 1998,
the Turkish Constitutional Court dissolved the Refah Party. Refah had been in existence
for fifteen years. At the time of its dissolution in 1998, it had the most seats in the
Turkish Parliament, having gained approximately 22% of the popular vote, and was part
of a national coalition government. The leader of Refah, Necmettin Erkaban, was the
Prime Minister of Turkey. The Constitutional Court held that Refah was inconsistent
with Turkey’s constitutional commitment to secularism, which, in Turkish constitutional
tradition, calls for a radical separation between church and state.32

An appeal to the European Court of Human Rights, asserting a violation of freedom of
association as guaranteed by article 11 of the European Convention on Human Rights,
was unsuccessful. In 2001, a Chamber of the Court affirmed the dissolution, holding that
the prohibition had been prescribed by law, in support of a legitimate aim, and
“necessary in a democratic society.”33 In 2003, a Grand Chamber of the Court
unanimously upheld the Chamber’s ruling, stating that “it is not at all improbable that
totalitarian movements, organized in the form of democratic parties, might do away
with democracy, after prospering under a democratic regime, there being examples of
this in modern European history.”34 It further held that state authorities possess a right
to protect state institutions from an association that, through its activities, jeopardizes democracy.\textsuperscript{35}

Specifically, the Court held that the ban was a justifiable interference with the Convention guarantee of freedom of association because it pursued a legitimate aim and was “necessary in a democratic society.”\textsuperscript{36} The Court further held that a state can act in a militant manner – what it termed as the “power of preventive intervention” – before a party assumes power and begins to implement an antidemocratic agenda “through concrete steps that might prejudice civil peace and the country’s democratic regime.”\textsuperscript{37} Elsewhere in its judgment the Court held that the state is entitled to act when the threat to democracy is “sufficiently imminent.”\textsuperscript{38} It defended this conclusion by stating that it is consistent with Article 1 of the Convention, which imposes on states a positive state obligation to secure the rights and freedoms of individuals within its jurisdiction.\textsuperscript{39}

One reason the Court offered in support of Turkey’s militant action is that the party proposed an unacceptable form of legal pluralism. Refah advocated a type of legal pluralism that appears to have had its origins in a system established in the early years of Islam where Jewish and polytheist communities possessed a modicum of self-government independent of Islamic law. It apparently proposed to divide Turkish society into several religious orders and require each individual to choose the order to which he or she would be subject. Refah argued, unsuccessfully, that all it sought to introduce was a private law “civil law system” founded on freedom of contract, enabling individuals to conduct their private lives in accordance with their religious beliefs, not public law reforms that would alter relations between individuals and the state. The Court held that such a regime would run counter to the Convention’s guarantee of equality and more generally the rule of law. This is because, according to the Court, it would “undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of their public freedoms.”\textsuperscript{40}
Whether the Court was correct in concluding that Refah’s model of legal pluralism would produce discrimination depends in part on the extent to which an individual can choose to be bound by the laws of his or her religion or elect to be governed by secular law on the same topic. The evidence before the Court on the role of consent in Refah’s model was inconclusive at best and the Court appeared to have assumed that individual choice was not one of the model’s central features. Additional factors relevant to such an inquiry would include the nature and scope of lawmaking authority to be vested in the various religious legal orders, and the extent to which state law is paramount over religious law in the event of conflict. The Court assumed that religious legal orders would assume jurisdiction over “all fields of public and private law” and that the state would be incapable of acting as “the guarantor of individual rights and freedoms” and as “the impartial organizer of the practice of various beliefs and religion in a democratic society.” Several scholars have criticized the Court for reaching these critical conclusions in the absence of supporting evidence.

For present purposes, what is relevant is not whether these conclusions were supported by the evidence but, assuming their validity, the extent to which they reveal that Refah comprehends the boundary of the democratic character of the political community in liberal terms. The perimeter imagined in Refah as guarded by militant measures is one that surrounds a liberal democracy. While liberalism means many things to many people, at its core lies a commitment to individual liberty. Liberalism treats restrictions on liberty as tolerable to the extent they do not presuppose any particular conception of the good and, broadly speaking, seek to prevent individuals from harming others. Liberalism, in the words of Stephen Macedo, has a “spine.” While liberal theorists may disagree about precisely what liberalism’s spine consists of, Refah suggests that it at least consists of three baseline norms. First, legal pluralism is consistent with liberalism only to extent that it provides individuals with the freedom to choose whether to be bound by the norms of religious, ethnic or cultural communities to which they belong or by state law on the same topic. Second, the scope of lawmaking
authority vested in the various legal orders nested within a state must be limited in scope. Third, a plural legal order must respect and retain the state’s role as a guarantor of individual rights and freedoms. Militant measures, according to Refah, are available to a democracy to preempt nascent political projects that fail to respect these baseline liberal norms.

III. Militant Secularism

Refah thus suggests that the principle of militant democracy authorizes preemptive action against the exercise of civil and political freedom that threatens to dismantle core features of a liberal constitutional order. But the Court viewed the Refah party’s pluralist political agenda as unacceptable not simply because the pluralism in question was inconsistent with liberal constitutionalism. Because Refah’s pluralist agenda was religious in nature, the Court also viewed it as inconsistent with Turkey’s constitutional commitments to a secular democracy. Pitched in the abstract, secularism and liberalism go hand in hand. Liberal democracies place limits on the role of religion in the public sphere. But liberalism is compatible with a variety of ways of constitutionally accommodating religious freedom, including arrangements such as those in England that contemplate an official church and those in the United States that insist on a separation between church and state. Can a state, under the banner of militant democracy, enact preemptive measures that restrict the exercise of religious freedom that, if left unchecked, has the capacity to undermine secular features of its constitutional arrangements?

The first indication that the principle of militant democracy had begun to migrate to authorize preemptive measures aimed at the exercise of religious freedom that represents a nascent threat to secular democracy but not necessarily liberal democracy arose in a subsequent case emanating from Turkey. As is well known, the Turkish constitutional order is deeply secular in nature and design. The Constitution of Turkey
declares Turkey to be a secular and democratic republic, deriving its sovereignty from the people. Before and after the proclamation of the Republic in 1923, under the leadership of Mustafa Kemal Atatürk, the founder of the Republic of Turkey and its first President, a series of revolutionary reforms radically separated religion from the public sphere in the face of an overwhelmingly Muslim population. In 1923, the caliphate was also abolished. In 1928, the Constitution was amended to no longer proclaim that the “the religion of the state is Islam.” And in 1937, the Constitution was amended to expressly accord constitutional status to the principle of secularism. Consistent with its constitutional commitment to secularism, the Turkish government has traditionally banned women who wear head scarves from working in the public sector, including teachers, lawyers, parliamentarians and others working on state premises. In late 1970s and early 1980s, the number of university students wearing head scarves increased substantially and in 1984, the ban was extended to prohibit the wearing of head scarves by university students.

In Şahin v. Turkey, the European Court of Human Rights was asked to rule on whether the ban on the wearing of head scarves by university students was consistent with Article 9 of the European Convention, which guarantees freedom of religion. Leyla Şahin was a fifth-year female medical student at the faculty of medicine of the University of Istanbul. She brought a suit against Turkey for upholding the decision of the University to prohibit her from taking exams or attending lectures while wearing her head scarf. In Şahin v. Turkey, the European Court of Human Rights upheld the ban, stating that “in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.”

In its reasons, the Court emphasized that the right to freedom of religion “is one of the foundations of a democratic society” and that “the pluralism indissociable from a democratic society...depends on it.” Consistent with prior holdings, however, the
Court declared that that “Article 9 does not protect every act motivated or inspired by a religion or a belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief.” And, as it has done in several cases in the past, it ducked the issue of whether wearing a head scarf constitutes a form of religious “practice” – a thorny issue for the Court given its stance that only acts dictated by religious duty constitute practices protected by Article 9 – by assuming without deciding that wearing a headscarf received Article 9 protection. It was able to do so because it went on to hold that that the ban was in pursuance of a legitimate aim and was “necessary in a democratic society.” As is also typical in many Article 9 cases, it noted that rules governing religious practices “vary from country to country according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.” It accordingly granted Turkey a relatively wide margin of appreciation concerning the necessity of the ban, requiring only that it establish “a reasonable relationship of proportionality between the ban and its objective of preserving the secular nature of the university” – a test easily met on the facts.

On its surface, the Court’s decision in Şahin appears to be a relatively straightforward application of its jurisprudence on freedom of religion – a jurisprudence that emphasizes the need to provide states with a wide margin of appreciation in relation to measures that seek to reconcile religious freedom with competing interests. Yet, while this theme of reconciliation dominates the Court’s reasons, another, very different theme – one of militancy – also informs the Court’s judgment. The Court offered additional reasons for concluding that the ban on headscarves does not violate Article 9 similar to those offered in Refah. It stated that “upholding the principle of secularism ... may be considered necessary to protect the democratic system in Turkey.” And it quoted with approval a passage from the reasons of the Chamber below, which, after citing Refah, appears to characterize the head scarf ban as a measure that constitutes “a stance” against “extremist political movements in Turkey which seek to impose on
society as a whole their religious symbols and conception of a society founded on religious precepts.”

It is precisely this linkage that Judge Tulkens, in her dissenting judgment in Şahin, decried:

While everyone agrees on the need to prevent radical Islamism, a serious objection may nevertheless be made to such reasoning. Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and “extremists” who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She is a young adult woman and a university student, and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.

Judge Tulkens is surely right to question the merits of automatically equating the wearing of a head scarf and religious fundamentalism. But the more important point is that characterizing the head scarf ban in this way means that it is not only a measure designed to promote secularism but it is also a preemptive measure taken by the state designed to combat a threat to a democratic Turkey. Preemptive measures of this sort, Refah tells us, merit a narrow margin of appreciation, and therefore can only be resorted to where there is an “imminent threat” to the capacity of a constitutional democracy to secure civil and political freedom. Yet the Court in Şahin gave Turkey a wide margin of appreciation, permitting it to act in a preemptive manner against religious extremism where the conduct in question – the wearing of a head scarf – in no way can be characterized as posing an imminent threat to democracy as understood by the Court in Refah. It is able to do this by inserting the principle of secularism into the militant democracy equation: the state can adopt measures that restrict the exercise of civil and political freedom that poses a non-imminent threat to democracy when those measures promote secularism. Militant secularism, in other words, is an acceptable form of militant democracy.
In Refah, the Court comprehends the boundary of the democratic character of the political community as the dividing line between liberal and illiberal forms of legal pluralism. The militant theme in Şahin comprehends this boundary as the dividing line between the secular and the sectarian. The head scarf ban, construed as “a stance” against “extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts,” guards Turkey’s secular perimeter from the exercise of religious freedom that fuels religious extremism. But Şalin’s militant secularism also affirms Refah’s militant liberalism. Spatially conceived, Şahin comprehends secularism and liberalism as nested: secularism is an outer democratic perimeter guarded to prevent against breach of democracy’s inner liberalism.

IV. Militant Republicanism

Like liberalism, republicanism means many things to many people. Unlike liberalism, however, republicanism does not place liberty at the normative centre of a political community. Instead, republicanism valorizes civic virtue and the public good. In France, it assumes particular content with a conception of the Republic as “a ‘color blind’ arena in which the defense of the ‘general interest’ is meant to triumph over parochialism and private interests.”58 In the words of Cécile Laborde, “the French tradition of the autonomy of the state, complemented after the Revolution by the republican ideal of a self-governing people democratically establishing the terms of its constitution, strongly rejected the ‘heteronomy’ involved in subjecting political authority to religious institutions, transcendental foundations and revealed truth.”59

Consistent with this republican ideal is a distinctively French commitment to secularism (laïcité). Secularism in France, Joan Scott notes, “refers not simply to separation of church and state but to the role of the state in protecting individuals from the claims of religion.”60 Protecting individuals from religion, according to this
conception, requires a secular and neutral public sphere. Only a public sphere shorn of religious influence can forge a common republican political identity among citizens. In light of the European Court’s jurisprudence on militant democracy, France’s secular constitutional stance raises questions about the extent to which it can introduce regulatory measures, consistent with the European Convention, designed to preempt threats to secular republicanism.

In *Dogru v. France*, the Court addressed some of these questions. At issue was a decision by a state secondary school in France to expel an eleven year old Muslim girl for refusing to remove her head scarf during physical education classes. The decision was based on the school’s rule that “discreet signs manifesting the pupil’s ... religious convictions shall be accepted in the establishment” but that all pupils must attend physical education classes in “sports clothes.” This rule was consistent with Conseil d’Etat jurisprudence which held that students should not be allowed:

To display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public serve.

In this vein, the Conseil d’Etat had annulled strict bans in schools on the wearing of any distinctive religious signs on the basis that they were worded too generally. It also held that a student could not be penalized for wearing a head scarf if it did not amount to an act of pressure or proselytism or interfered with public order in the school. The school’s rule was also consistent with a circular by the Minister of Education stating that “secularism, a constitutional principle of the Republic, is one of the cornerstones of state education.” After reiterating the Conseil d’Etat’s opinion on “any conspicuous sign, whether in ... dress or otherwise, that promotes a religious belief,” the circular went on to state that “a pupil’s dress must not in any circumstances prevent him or her from
engaging in the normal way in the exercises inherent in physical education and sports classes.”

After noting that the school’s rule was consistent with the jurisprudence of the Conseil d’Etat and government policy, the European Court of Human Rights held that it did not amount to a violation of Article 9 of the Convention. Like those in Şahin, the Court’s reasons in Dogru frame the issue as a relatively uncontroversial application of well-settled jurisprudence on the nature and scope of freedom of religion as guaranteed by Article 9. It recites almost verbatim the same principles that it invoked in Şahin, characterizing “the State’s role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs,” and requiring “the State to ensure mutual tolerance between opposing groups.” According to the Court, “pluralism and democracy must ... be based on dialogue and a spirit of compromise,” which requires “various concessions on the part of individuals ... to maintain and promote the ideals and values of a democratic society.”

Although not expressly stated by the Court, the particular “concession” at issue in Dogru, of course, is that an eleven year old girl take off her head scarf during physical education class. Why the “dialogue and compromise” that inheres in “pluralism and democracy” requires this particular concession is not explained by the Court. Instead, the Court reiterates that, in cases like Dogru, “where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely,” the state enjoys a wide margin of appreciation in relation to striking an appropriate balance among the competing interests at play. On the one hand, the Court noted with approval that the ban in question was not absolute; the applicant was free to wear her head scarf in her other classes. On the other hand, the Court did not offer any explanation as to why wearing a head scarf in a physical education class was, as claimed by the state, “incompatible with sports classes for reasons of health or safety” or why wearing a hat instead, as proposed by the
applicant, was an unacceptable alternative. Answers to these questions, according to the Court, fall “squarely within the margin of appreciation of the State.”

If this was all that the Court had to say about the appropriateness of the school’s rule, then Dogru would simply be another instance in which the Court, emphasizing reconciliation, takes a highly deferential stance toward state restrictions on the exercise of religious freedom. Whether one believes that deference is appropriate in such circumstances or that it wrongly legitimates excessive interference with religious freedom turns on analytically prior questions about the role that the margin of appreciation doctrine should play in Convention jurisprudence on religious freedom. But Dogru wraps the flag of secularism around the issue and implicitly introduces a theme of militancy, turning a minor case about a little girl who wants to wear a head scarf in gym class into a major case that implicates a founding principle of the French Republic. The Court introduces its reasons by somberly noting that “in France, the exercise of religious freedom in public society, and more particularly the issue of wearing religious signs at school, is directly linked to the principle of secularism on which the French Republic was founded.”

The concept of secularism,” the Court notes, arose “out of a long French tradition,” and was enshrined in the 1905 Law on the Separation of Church and State, “which marked the end of a long conflict between the republicans, born of the French Revolution, and the Catholic Church.” France’s “secular pact,” according to the Court, authorizes religious pluralism, requires state neutrality toward religions, and obligates citizens of faith to “respect the public arena that is shared by all.”

The Court’s reasons also refer to domestic legal developments that occurred after the dispute in question to underscore the significance of France’s “secular pact” to the case at hand. In 2003, the President of the Republic established a commission to inquire into the role of secularism in France. Known as the “Stasi Commission,” it presented some of its conclusions in stark terms, in a passage quoted by the Court:

instances of behaviour and conduct that run counter to the principle of secularism are on the increase, particularly in public society. ... The reasons for the deterioration in the situation ... [are the] difficulties in integrating experienced by those who have arrived in
France during the past decades, the living conditions in many suburbs of our towns, unemployment, the feeling experienced by many people living in France that they are the subject of discrimination, or are even being driven out of the national community; these people explain that they thus lend an ear to those who incite them to fight what we call the values of the Republic. .... In this context it is natural that many of our fellow citizens demand the restoration of Republican authority and especially in schools. It is with these threats in mind and in the light of the values of our Republic that we have formulated the proposals set out in this report. ... [Regarding the head scarf, the report states that] for the school community ... the visibility of a religious sign is perceived by many as contrary to the role of school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes the principles and values that schools are there to teach, in particular, equality between men and women.  

In light of these “threats” to “the values of the Republic,” the Stasi Commission’s report led to legislation in 2004 banning students from wearing head scarves in primary and secondary schools.  

Duly noting the 2004 legislation, the Court went on to characterize secularism as “a constitutional principle” in France, and “a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools.” The Court then quoted a passage from Refah – one overlooked by many commentators no doubt due to the fact that it was addressing freedom of religion when the main thrust of the decision was in relation to freedom of association. In rejecting Refah Party’s subsidiary claim that the party ban violated religious freedom, the Court had held that “an attitude which fails to respect that principle [of secularism] 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.” In Dogru, the Court reiterated this holding, concluding that “religious freedom thus recognized and restricted by the requirements of secularism appears legitimate in light of the values underpinning the Convention.”

With this conclusion, the Court offers a very different justification for upholding the school’s rule that head scarves not be worn in physical education classes. Instead of a holding that defers to local authorities’ assessment that the headscarf was
“incompatible with sports classes for reasons of health or safety” in light of the fact that it was closely tailored to permit students to wear the head scarf in other classes, the Court asserts instead that wearing the head scarf constitutes “an attitude” that fails to respect France’s constitutional commitment to secularism. If secularism is the touchstone, prohibiting the wearing of head scarves in physical education classes in primary and secondary schools constitutes a preemptive measure to guard against threats to the secular nature of France. A mere “attitude” that fails to respect secularism, *Refah* tells us, falls outside the protection of Article 9. If mere attitudes – such as the wearing of a head scarf in a physical education class – fall outside the scope of Article 9, then more proximate “threats” – such as the wearing of head scarves in the school system writ large and, indeed, in the broader public sphere itself – by definition also fall outside the scope of Article 9. What this aspect of the Court’s reasons in *Dogru* is saying, in other words, is that, to protect the Republic, France can enact militant measures that shield the secular nature of the public sphere from the exercise of religious freedom. The boundary of the democratic character of the political community is the boundary between religion and the public sphere. Unlike *Şahin*, where liberalism is nested within secularism, in *Dogru*, secularism is republicanism’s perimeter. A threat to secularism is a threat to the republic. *Dogru* authorizes militant measures against the exercise of religious freedom that threatens a democracy’s continued existence as a secular republic.

As noted, the Court in *Dogru* made reference to the broader head scarf ban introduced into law in 2004, prohibiting students from wearing head scarves on school property. If *Dogru* is a decision that tests the school’s rule according to Article 9 jurisprudence that emphasizes the need to reconcile the interests of religious believers with the competing interests of others, then it makes little sense to refer to the 2004 French ban, given that it was enacted fifteen years after the facts that gave rise to the dispute. Understood as a decision that identifies militant measures available to a constitutional democracy to combat the exercise of religious freedom that threatens its
secular republican existence, however, Dogru’s reference to the 2004 law assumes a more programmatic quality. That is, the militant theme in Dogru suggests that the Court’s reference to the 2004 law is a clear signal to France that the 2004 law would not violate Article 9. Indeed, the militant theme in Dogru suggests that the Convention does not constrain France’s capacity to introduce even more stringent restrictions on Muslim dress – restrictions that extend well beyond the confines of schools and reach more directly into the heart of the public sphere.

France seems to have taken this suggestion implicit in Dogru to heart. In January 2010, a French parliamentary committee recommended legislation imposing a ban on women wearing face veils in hospitals, schools, government offices and on public transport. It also recommended that anyone showing visible signs of "radical religious practice" should be refused residence cards and citizenship. The MPs almost failed to agree on these proposals because a majority of those from President Sarkozy’s Union for a Popular Movement and several from the opposition Socialist party wanted a complete rather than partial ban. They finally stopped short of calling for legislation that would also outlaw the full veil in streets, shopping centres, parks and other public spaces. The National Assembly of the Canadian province of Quebec is entertaining a similar proposal, which would prohibit women from covering their faces when accessing public services. Belgium has gone even further, proposing legislation that provides for a fine or punishment of up to seven days in prison for wearing the burqa or niqab in public.

V. Militant Conservatism

The head scarf issue also arose recently in England, again in the context of school regulations concerning religious attire. The student population of Denbigh High School is overwhelmingly Muslim; in 2006, approximately 79 percent of its students were Muslim. In recognition of this fact, female students were given the option of wearing a shalmar
kameeze, a smock like dress combined with loose trousers, as well as a head scarf of a specified colour and quality. Shabina Begum was a 14 year old student who had worn the shalmar kameeze to school for two years, but, at the start of a new school year, had requested that she be allowed to wear a more modest coat-like garment known as the jilbab, which concealed, to a greater extent than the shalmar kameeze, the contours of her body. The school refused her permission, and eventually she sought judicial review of the school’s decision, alleging that it was in breach of Article 9. The Court of Appeal agreed, finding that she held a sincere belief that her religion required her to wear a jilbab on attaining puberty and that the school’s rules were not “necessary in a democratic society” as required by Article 9 of the Convention.80

The House of Lords overturned the Court of Appeal’s decision.81 Lords Bingham, Hoffman and Scott, in separate reasons, held that the regulation did not interfere with Begum’s religious freedom, given that she could have attended other schools that permitted the wearing of the jilbab. Lord Hoffman, in particular, ruled that Article 9 “does not require that one should be allowed to manifest one’s religion at any time and place of one’s choosing.”82 Lord Nicholls and Baroness Hale disagreed, reasoning, respectively, that changing schools was disruptive of her education and was a decision not for her but for her parents to make. All judges, however, agreed that had there been an interference with her right to manifest her religion, the school’s policy would have been justified under Article 9(2).

The reasons offered by the House of Lords echo the European Court’s traditional approach to Article 9 that emphasizes reconciliation, albeit with adjustments that factor out the margin of appreciation that the European Court extends to domestic judicial review.83 Citing the “valuable guidance” of the European Court’s decision in Şahin, Lord Bingham’s reasons refer to:

The need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the variation of practice and tradition among member states; and the permissibility in some contexts of
restricting the wearing of religious dress.

Baroness Hale strikes a different tone, exhibiting sympathy to Judge Tulkens’ dissenting decision in Şahin, and arguing that “if a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her.”84 “But,” Baroness Hale reasons, “schools are different. ... The school’s task is to promote the ability of diverse races, religions and cultures to live together in harmony.”85 Denbigh High School’s uniform dress code, in her view, is a justifiable limitation on religious freedom because it pursued the legitimate aim of “fostering a sense of community and cohesion” and “smoothing over ethnic, religious and social divisions.”86

Unlike Şahin, the House of Lord’s decision in Begum reveals no underlying theme of militant secularism. And unlike Dogru, it reveals no underlying theme of militant republicanism. But one of the potential risks of Begum – and indeed all of the European Court decisions addressing the subject – is that it legitimates militant conservatism: a political agenda deeply antagonistic toward the very idea of religious pluralism. Militant conservatism identifies the democratic boundary of a political community by reference to membership, and excludes from membership individuals who represent threats to its cultural and religious traditions. Although the European Court has yet to address whether militant conservatism is consistent with the Convention, its jurisprudence to date, viewed in light of Begum, can be easily marshalled to validate measures that exclude individuals from a political community solely on account of their religious beliefs.

In academic commentary on Begum, for example, John Finnis recently published an essay entitled, “Endorsing Discrimination Between Faiths,” mercilessly critiquing the reasons offered by the House of Lords in Begum.87 Claiming that “Begum displays the unsatisfactory conceptual and argumentative state of contemporary human rights law,” Finnis argues that the House of Lords failed to explain why the school uniform policy was in response to a “pressing social need” and was the “least restrictive” of the right to
manifest one’s religious beliefs as required, he believes, by Strasbourg jurisprudence.88 Finnis argues further that such an explanation can be found in key passages of the European Court’s decision in Şahin. In Şahin, it will be recalled, the Court, referring to the capacity of the head scarf in Turkish schools to intimidate and pressure students, states that “there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.”89 These and other passages from Şahin that Finnis identifies comprise what I have referred to as that decision’s underlying militant theme. Finnis argues that Begum, properly understood, “tracks this line of thought.”90

Specifically, Finnis argues that, despite the “conceptual slackness” of its reasons, what Begum really does is uphold “the school’s judgment that wearing the jilbab is impermissible because permitting it would result in a threat to the rights of other children, if not of apparent volunteers such as Miss Begum herself.”91 In a remarkable passage, Finnis goes on to state that “the use of a religious symbol to manifest one’s personal belief can threaten the rights of others only if it associated with a definite and particular kind of religious culture.”92

To be the matrix for a threat of this kind, a religious culture must have one or more of a cluster of features: a disrespect for equality (here the equality of females, especially girls and young women); a denial of immunity from coercion in religious matters (including matters of apostasy from that religion or rejection of all religion), the immunity now central to Christian political teaching; a mandating, encouragement or permission of intimidation of apostates, backsliders and others; and a treatment of all arenas, educational or political, as in principle subject to threatening pressure, indeed compulsion, in the name of religious truths and precepts and of promoting adherence to them.93

Wearing Christian religious symbols in school, in other words, does not threaten the rights of others whereas wearing Muslim symbols does constitute such a threat.94

Finnis doesn’t stop here. He argues further that Şahin can only really be understood in light of Refah, and, in particular, the Court’s concern that leaders of the Refah party had called for “jihad,” which the Court defined as “holy war and the struggle to be waged until the total domination of Islam in society is to be achieved.”95 Ignoring the
yawning gulf between his premise and conclusion, Finnis links *Begum* to Şahin and Şahin to *Refah*, and concludes that “those intimidatory pressures for conformity which are a main ground for the headscarf ban in Turkey and the jilbab ban in Denbigh High School are often ... *early precursors of jihad.*” It’s not clear whether Finnis sees Miss Begum, desiring modesty, as a future holy warrior herself or merely as a grim harbinger of armageddon.

What is clear, however, is that Finnis wants people like Miss Begum and her family to leave England. For, in a final flourish, Finnis advocates what can only be described as incentive-based religious cleansing:

Confronted with the grave warnings thus issuing from courts of great pan-European authority, citizens of countries whose Muslim population is increasing very rapidly by immigration and a relatively high birth rate may ask themselves whether it is prudent, or just to the children and grandchildren of everyone in their country, to permit any further migratory increase in that population, or even to accept the presence of immigrant, non-citizen Muslims without deliberating seriously about a possible reversal – humane and financially compensated for and incentivised – of the inflow.

In other words, for Finnis, to conserve England – as England – the state is justified in adopting preemptive measures against the exercise of religious freedom to reverse the tide of not merely public displays of Muslim identity but of Muslim immigration itself. The perimeter guarded by such measures is the boundary of nothing less than the British way of life. Threats to this perimeter, for Finnis, include not only actions but actual people. The Court’s jurisprudence to date says nothing that would prevent Finnis’ grotesque proposals from becoming law. Instead, what the Court has done is authorize a perverse form of jurisdictional competition, where European states vie to become the environment most hostile to Islam.

**Conclusion**

European human rights law traditionally conferred a narrow margin of appreciation toward militant state measures that protect a democracy from threats to its procedural
existence. It now also confers a wide margin of appreciation toward measures that protect substantive conceptions of democracy from the exercise of freedom of religion. The result is that states are immunized from Convention oversight when they – in the name of democracy – take preemptive measures to prevent the exercise of religious freedom. The Court has enabled this migration by abandoning the view that religious freedom is an essential property of democracy – treating it instead as a threat to democracy’s existence. As a result, it risks validating measures that take aim at Islam itself, permitting states to exclude individuals from political membership solely on account of their religious affiliation.

Notes

1 William C. Graham Professor of Law, University of Toronto. I am grateful to Courtney Jung, and to participants of the Workshop on Militant Democracy held at the Center for Human Values at Princeton University in April 2010, for their comments on a previous draft of this essay.


4 It is a “background” legal principle as courts, to my knowledge, have yet to explicitly speak its name. The closest to explicit invocation is in Refah Partisi (The Welfare Party) and Others v. Turkey, Judgment, Strasbourg, 31 July 2001 (applications nos. 41340/98, 41342/98, 41343/98, 41344/98), para. 102 (quoting the Chamber’s judgment, at para. 81), where the European Court of Human Rights refers to “the power of preventive intervention.”

5 See Paul Harvey, “Militant Democracy and the European Convention on Human Rights,” 29 European Law Review 407, 408, who also draws a distinction between procedural and substantive democracy (“the principal difficulty with [militant democracy] is that it is based in one of two contested conceptions of democracy namely the substantive rather than the procedural one”).

6 For a summary of interwar legislative antecedents in various European jurisdictions, see Lowenstein, “Militant Democracy and Fundamental Rights I, supra, at 638-52.

7 Article 18, Basic Law for the Federal Republic of Germany of 23 May 1949, as amended. The German Constitutional Court as early as 1952 was called on to determine whether a neo-Nazi political party constituted such a threat; it found in the affirmative: 2 BVerfGE 1 (1952). Six years later, the Court upheld a ban on the German Communist Party: BVerfGE 5, 85 (1958).

8 See “Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures”, adopted by the Venice Commission at its 41st plenary session (December 1999) (CDL-INF (2000))1. See Appendix I “Prohibition of Political Parties and Analogous Measures” for an overview of restrictions concerning
political party activities in national law, based on a survey of 40 countries. Online: http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp

10 Art. 37 of the Ukrainian Constitution of 28 June 1996.
17 The United Communist Party of Turkey’ Program, Chapter “Towards a peaceful, democratic and fair solution of the Kurdish problem,” quoted in ibid. at 125.
18 Ibid. at 154.
20 Ibid. at 85.
23 Ibid., para. 56.
24 Application No. 33629/06, 08 July 2008.
25 Ibid., para. 52.
26 Ibid., para. 53.
27 Ibid., para. 55.
30 Herri Batasuna and Batasuna v. Spain, supra, para. 85.

Specifically, s. 103 of Turkey’s Law on Political Parties authorizes the dissolution of a political party that is a “centre” for activities contrary to the principle of secularism enshrined in Art. 2 of the Turkish Constitution. Art. 2 declares that the Republic of Turkey is a “democratic, secular and social State based on the rule of law, respectful of human rights in a spirit of social peace.” English translation as appears in Refah case, supra note 2 at 73. Section 78 of the Law on Political Parties also prohibits political parties from seeking to “change the republican form of the Turkish State.” According to s. 103, “where it is found that a political party has become a centre of activities contrary to the provisions of sections 78 to 88 and section 97 of the present Law, the party shall be dissolved by the Constitutional Court.” For analysis on the Turkish Constitutional Court’s jurisprudence on the constitutionality of political party bans, see Dicle Kogacioglu, “Progress, Unity, and Democracy: Dissolving Political Parties in Turkey” (2004) 38 Law & Society Review 434 (arguing that the Constitutional Court has been constructing a boundary between cultural and political Islam).


Ibid, at para. 96 (“The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardizes that State’s institutions, of the right to protect those institutions”).

Para. 2 of Art. 11 of the Convention provides that “no restrictions shall be placed on the exercise of [freedom of association] other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”

Para. 102 (quoting the Chamber’s judgment, at para. 81).

Para. 104.

Art. 1 provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Refah, supra, at para. 119 (quoting the Chamber Court, at para. 70). I address the link between legal pluralism and militant democracy in greater detail in Macklem, “Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination,” supra.

Ibid. at para. 119 (quoting the Chamber Court, at para. 70).


Ibid., para. 97.

Ibid., para. 66.

Ibid., para. 66.


Supra, para. 67.
Forthcoming in Constellations


52 Ibid., para xx.

53 Ibid., para xx.


55 Ibid., para 46.

56 Ibid., para xx.


61 Application No. 27058/05 (2008).

62 The rule also prohibited students from wearing “conspicuous signs which are in themselves of proselytizing or discriminatory effect shall be prohibited” but the school permitted the applicant to wear her head scarf when not in physical education classes.

63 27 November 1989, no. 346.893 (Conseil d’Etat).


66 Supra, para. 62.

67 Ibid.

68 Ibid., para. 63.

69 Ibid., para. 73.

70 Ibid., para. 75.

71 Ibid., para. 17.

72 Stasi Commission, Laïcité et République (emphasis added).

73 The legislation is worded in general terms, banning from schools the wearing of signs or dress manifesting a religious affiliation. For a defence of the 2004 law, see Patrick Weil, “Why the French Laïcité is Liberal,” 30 Cardozo Law Review 2699 (2009); for critique, see Joseph Carens, “Démocratie, multiculturalisme et hijab,” ESPRIT, Jan, 2005, at 54.

74 Ibid., para. 72

75 Refah, supra, para. 93.

76 Ibid., para. 72.

77 Gérin Report (January 2010). In March 2010, the Conseil d’Etat issued an advisory opinion that casts doubt on the legality of these recommendations. It concluded an outright prohibition on the wearing of the full Islamic veil would likely contravene a number of provisions of the French Constitution as well as the European Convention on Human Rights. It emphasised, however, that persons could already be required to remove the full veil in certain circumstances in accordance with generally applicable laws and regulation relating to the verification of identity, uniform requirements in the public service, and the requirement of identification for the purposes of access to places where such identification is deemed necessary to public order. The Conseil also held that the principle of laïcité could not justify any potential ban on the wearing of the full Islamic veil. It noted that the principle of laïcité applies directly to public bodies, which generates an obligation of neutrality for public agents in the exercise of their functions, but
it cannot be applied directly to society or to individuals. Furthermore, it expressed scepticism as to the
application of the principle of equality between the sexes to the wearing of the burqa, questioning
whether whether the principle “could be directed to the exercise of personal liberty, or behaviour,
voluntarily adopted, contradicting this principle.”


81 R. (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants), [2006] UKHL 15.
82 Ibid., para. 50.
place of the margin of appreciation, however, Lord Bingham extends deference to the legislative decision
“to allow individual schools to make their own decisions about uniforms.” Supra, at para. 64.
84 Ibid., para. 96.
85 Ibid., para. 97.
86 Ibid., para. 97.
87 John Finnis, “Endorsing Discrimination Between Faiths: A Case of Extreme Speech?” in Ivan Hare &
James Weinstein (eds), Speech and Democracy (Oxford: Oxford University Press, 2009). For critique, see
David Dyzenhaus, “Headscarves, Extreme Speech, and Democracy” (on file with author).
88 Ibid., at 430, 432. As noted, Lord Bingham reached this result by deferring to Parliament’s decision to
allow individual schools to make their own decisions about school uniforms. Finnis claims that the House of
Lords’ reasoning on this and other issues is “thin, conclusory, and result oriented.” Ibid., at 433. And Finnis
criticizes the trial judge for not investigating “precisely whether – and if so, why – the school judged
necessary what nearby schools judged unnecessary.” Ibid., at 433 (emphasis in original). Whether
defferece is appropriate or not in this context is debatable but Finnis offers no argument as to why
deffercence might be inappropriate. And deference, once granted, makes it unnecessary to investigate
“precisely” the merits of one school’s decision over another’s, which suggests that it is Finnis, not the
House of Lords, who is offering “thin, conclusory, and result oriented” reasoning on this issue.
89 Şahin, supra, para. xx
90 Ibid., at 434.
91 Ibid., at 433, 434.
92 Ibid., at 434-435
93 Ibid., at 435.
94 For the view that differential treatment of Christianity and Islam is also present in the jurisprudence of
Italy, Germany, and France, see Susanna Mancini, “The Power of Symbols and Symbols as Power:
95 Refah, supra, para. 130.
96 Ibid., at 439 (emphasis added).