Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights

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Abstract

The wearing of religious symbols has been subject to more or less restrictive national regimes. In Europe, the European Convention of Human Rights sets transnational conditions in this regard and has recently been interpreted to give great leeway to national states. Open-face communication is now being accepted as an indispensable requirement of 'living together' that qualifies as 'rights and freedoms of others' within the meaning of article 9(2) ECHR. In *SAS v France*, the ECHR created a new ground to justify interference with the freedom of religious expression. This article questions the Court's expansion of existing grounds of justification as no sufficient legal basis exists and sociocultural considerations do not protect individual rights as required under the term 'rights and freedoms of others'. To that end, the basis for grounds of justification is examined in light of the evolution of the Court's jurisprudence on the wearing of religious symbols. While public security and order, health and improper proselytism are well-established reasons for interference, the Court's acceptance of secular orders highlights the ambiguity of the terms 'pluralism' and 'tolerance' as referred to in case law. The article finds that this jurisprudence has given significant leeway to Member States in regulating religious expression and paved the way for the Court's new approach under which behavioural social norms may be used to ban face-covering religious cloth. In addition, the doctrine of the margin of appreciation does not justify the expansion of the legitimate aims pursued under article 9(2) ECHR.

Keywords

European Convention of Human Rights, Article 9, Religious Symbols, Margin of Appreciation

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1 Introduction

The wearing of religious symbols has been controversially discussed both from a socio-political¹ as well as legal² perspective. There is rarely any area in which the tension between cultural context and legal requirements becomes as prominent as in the case of religious freedom.³ In the jurisprudence of the European Court of Human Rights (ECtHR),⁴ the focus of adjudication has not been so much the question of internal freedom of religion (ie the right to believe or not believe),⁵ but rather, the freedom of religious expression. In particular, the wearing of religious symbols has been the subject of adjudication before the ECtHR on many occasions, which are not limited to the wearing of the famous headscarf.⁶ The question of the lawfulness of a ban on the wearing of religious symbols has been ruled on in different contexts allowing distinctions to be

- 1 A Levede, 'Epilogue d'un Débat Juridique: l'Interdiction de la Dissimulation du Visage dans l'Espace Public Validée!' (2010) *Semaine Juridique*, Éd. Générale, No 1043, 1978; P Weil, 'Lifting the Veil of Ignorance' [2004] *Progressive Politics* 3, 2; G van der Schyff and A Overbeeke, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans' (2011) 7 *European Constitutional Law Review* 424; M Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth' (2007) 5 *Political Studies Review* 337.
- 2 E Howard, *Law and the Wearing of Religious Symbols* (Routledge 2012); A Vakulenko, 'Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183; for the French situation see M Hunter-Henin, 'Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom' (2012) 61 *ICLQ* 613; for the Italian situation see P Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13 *Ecclesiastical Law Journal* 287; for the German situation see J Thielmann, 'Burqa in Germany—Not really an Issue: A Short Note' in A Ferrari and S Pastorelli (eds), *The Burqa Affair Across Europe* (Ashgate 2013) 189; for the situation in the UK see M Hill, 'Legal and Social Issues Concerning the Wearing of the Burqa and Other Head Coverings in the United Kingdom' in A Ferrari and S Pastorelli (eds), *The Burqa Affair Across Europe* (Ashgate 2013) 77.
- 3 M Schefer, 'Religionsfreiheit aus gemeineuropäischer Sicht' in B Ehrenzeller and others (eds), *Religionsfreiheit im Verfassungsstaat* (Dike und Schulthess 2011) 106.
- 4 Religious symbols have frequently been contested before national courts. See for Germany Bundesverfassungsgericht 93, 1—*Kruzifix*: more recently in relation to wearing a 'Burkina' during co-educative swim classes, Bundesverwaltungsgericht, No 6 C 25.12, 13 September 2013; in Italy related to crucifixes in schools, Tribunale Amministrativo Regionale Veneto, No 1110/2005, 17 March 2005, para 16.1; in Spain related to crucifixes in schools, Tribunal Superior de Justicia de Castilla y León, No 3250/2009, 14 December 2009.
- 5 For the scope of protection of religious belief under the ECHR see the overview of the jurisprudence provided by P Taylor, *Freedom of Religion* (CUP 2005) 204.
- 6 See the assessment by A Ferrari and S Pastorelli in Ferrari and Pastorelli (n 2) 225; D McGoldrick, 'Religion in the European Public Square and in the European Public Life—Crucifixes in the Classroom?' (2011) 11(3) *Human Rights Law Review* 451; L Garlicki and M Jankowska-Gilberg, 'Religiöse Aspekte im öffentlichen Schulsystem vor dem Hintergrund der Rechtsprechung des EGMR' in Ehrenzeller (n 3) 121; Howard (n 2) 30.

placed on the addressee of the ban (teachers,⁷ pupils,⁸ or students⁹), the place of religious expression (public place,¹⁰ state-run educational institution,¹¹ or work place¹²) as well as the cultural¹³ and religious character of state principles.¹⁴

The jurisprudence on the wearing of religious symbols has reached a new stage in the latest judgment of the ECtHR, *SAS v France*,¹⁵ in which the Court upheld France's ban on full-face veils in public.¹⁶ The applicant, SAS, was a practising Muslim living in France who from time to time wore religious clothing to conceal her face, such as a burqa or a niqab. In April 2011, a law prohibiting the concealment of a person's face in public entered into force in France.¹⁷ The applicant claimed that the law prohibited her from wearing religious clothing of her choosing and violated her rights, particularly under article 9 of the ECHR. The Court, however, accepted the French Government's argument that French citizens reject practices which question the possibility of open and interactive relationship and that open-face communication constitutes an indispensable requirement of 'living together' in society. The ECtHR found that

⁷ *Dahlab v Switzerland* App no 42393/98 (ECtHR 15 February 2001); this can be different at institutions for higher education, eg professors at university: see *Kurtulmuş v Turkey* App no 65500/01 (ECtHR 24 January 2006); *Köse v Turkey* App no 26625/02 (ECtHR 24 January 2006).

⁸ *Dogru v France* (2009) 49 EHRR 8; *Kervanci v France* App no 31645/04 (ECtHR 4 December 2008); *Aktas v France* App no 43563/08 (ECtHR 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR 30 June 2009); *Gamaled딘 v France* App no 18527/08 (ECtHR 30 June 2009); *Ghazal v France* App no 29134/08 (ECtHR 30 June 2009); *Jasvir Singh v France* App no 25463/08 (ECtHR 30 June 2009); *Ranjit Singh v France* App no 27561/08 (ECtHR 30 June 2009).

⁹ *Leyla Sahin v Turkey* (2005) 41 EHRR 8, *Leyla Sahin v Turkey* (2007) 44 EHRR 5, para 53. See also *Karaduman v Turkey and Bulut v Turkey* (1993) 74 DR 93.

¹⁰ *SAS v France* (2015) 60 EHRR 11; *Ahmet Arslan v Turkey* App no 41135/98 (ECtHR 23 February 2010); due to security reasons see *Phull v France* App no 35753/03 (ECtHR 11 January 2005), security checkpoints at the airport; *El Morsli v France* App no 15585/06 (ECtHR 4 March 2008) regarding access to a consulate; *Mann Singh v France* App no 24479/94 (ECtHR 13 November 2008) for the making of pictures; pending procedures before the Court: *Barik Edidi v Spain* App no 21780/13 (ECtHR 12 March 2013).

¹¹ See *Aktas v France* App no 43563/08 (ECtHR 25 May 2010); *Lautsi v Italy* (2012) 54 EHRR 3; *Lautsi v Italy* (2010) 50 EHRR 42.

¹² *Eweida and Others v United Kingdom* (2013) 57 EHRR 8; pending procedure *Ebrahimian v France* App no 64846/11.

¹³ This refers to cases where the safeguarding of secular principles is at stake, see *Leyla Sahin v Turkey* (2007) (n 9) para 115; *Dogru v France* (n 8) para 72.

¹⁴ Garlicki and Jankowska-Gilberg (n 6) 131.

¹⁵ *SAS v France* (n 10).

¹⁶ For a legal assessment on the basis of the ECHR see S Pei, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2013) 122 Yale Law Journal 1089; Van der Schyff and Overbeeke (n 1) 436; Hunter-Henin (n 2) 634; P Hector, 'Zur Religionsfreiheit in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in W Meng, G Ress and T Stein (eds), *Europäische Integration und Globalisierung, Festschrift zum 60-jährigen Bestehen des Europa-Instituts* (Nomos 2011) 260.

¹⁷ The basis was the French law, Loi No 2010-1192 du 11 Oct. 2010 interdisant la dissimulation du visage dans l'espace public, Journal Officiel (JORF) 12 Oct. 2010. More provisions in Circulaire du 2 Mar. 2011 relative à la mise en oeuvre de la loi no 2010-1192 du 11 Oct. 2010 interdisant la dissimulation du visage dans l'espace public, JORF 3 Mar. 2011.

under certain conditions the ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together’, as stated in the explanatory memorandum accompanying the Bill (...)—can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’.¹⁸

Surprisingly, there is no analysis by the Court as to how the term ‘freedoms and rights of others’ captures notions about ‘living together’. Instead of establishing a link between these concepts and the individual rights of others, the Court confined itself to one example, that of the citizens’ unease when communicating with face-covered women.

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.¹⁹

Unlike previous case law, the rationale behind the judgment does not concern questions of public security or public order, nor whether the ban is required by secular principles of a state. Also, the judgment does not concern the case law of improper proselytism through the wearing of the burqa. The main issue is about a state’s right to make obligatory for its citizens a certain behaviour that it deems an element of an essential consensus of society and, on that basis, to declare illegal religiously-motivated dressing customs.²⁰

The central thesis of this article addresses precisely the Court’s recent expansion of grounds for justification. By recognising indispensable requirements of ‘living together’ as a valid ground for interference with the freedom of religion, the ECtHR creates a new justification which goes beyond those previously recognised, thereby extending the ground of justification to general public interest considerations. Hitherto, the justification for interference with article 9(2) ECHR has been confined to the grounds of justification exhaustively enumerated therein. The Court considers the new category of indispensable requirements to fall under the established ground of justification, namely the ‘protection of rights and freedoms of others’ under article 9(2) ECHR. This approach is not convincing, as it abandons the requirement of rights granting individual protection and instead extends this notion to capture mere sociocultural norms rooted in considerations of the general public interest which, in turn, is not covered by the ‘rights of others’ in the sense of article 9(2) ECHR as argued by the Court. The subject of protection within the meaning of the ‘rights of others’ are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify. Finally, the well-established jurisprudence on the margin

¹⁸ *SAS v France* (n 10) para 121.

¹⁹ *ibid* para 122.

²⁰ A Posener, ‘Gericht für Menschenrechte stärkt Diktatur des Wir’ (*Die Welt* 2 July 2014) <<http://www.welt.de/kultur/article129709143/Gericht-fuer-Menschenrechte-staerkt-Diktatur-des-Wir.html>> accessed 4 May 2015.

of appreciation granted to states parties to the Convention does not allow the expansion of the grounds of justification under the ECHR.

The Court's recent extension of grounds of justification can be seen as the next step of an evolutionary process. There is a well-established line of jurisprudence reflecting the Court's defensive stance vis-à-vis the impact religious expression has on other persons. At its origin, the ECtHR developed the category of 'improper proselytism' under which it shields the negative freedom of religion (ie the right to remain unaffected by religious influences) against religious expressions. Further, case law on secularism suggests that the Court generously accepts national concepts of secularism prohibiting various forms of religious expression on behalf of separation of state and religion and thereby precluding religious expression from the public sphere. The jurisprudence on improper proselytism and secularism thus provides the ground for the recent recognition of notions of living together as legitimate aim for interference with freedom of religion.

Against this backdrop, the structure of this paper is as follows. Part II addresses the system of justifications under article 9(2) of the Convention and examines the extent and limitations of possible grounds for banning the wearing of religious symbols. In particular, it considers the categories of improper proselytism and secularism with a view to highlighting the evolutionary process and the difficulties in applying these grounds of justification. Indeed, the origins of the recent expansion of grounds of justification can be traced in the Court's prohibition of improper proselytism and the recognition of secular order of society. On that basis, Part III focuses on the justification based on the 'protection of rights and freedoms of others' as ground invoked by the Court to use sociocultural considerations for the justification of interventions against religious expression. The article explores the compatibility of the mandatory character of sociocultural behavioural rules with the concept of freedoms protecting individual rights of others. Finally, Part IV considers how the doctrine of the margin of appreciation will potentially leave wide discretion to Member States to interfere with the freedom of religion.

2 The grounds of justification for interferences with the freedom to wear religious symbols under the ECHR

Under article 9(2) ECHR, the freedom of religion is a qualified right—it can be subject to limitations prescribed by law and pursuing legitimate aims. In that sense, the provision has similar qualifications to articles 8, 10 and 11 of the ECHR. However, article 9(2) ECHR enumerates only a limited number of grounds restricting the legitimate aims for interference and expressly stipulates that the article 'shall be subject only to such limitations'. The wording is restrictive.²¹ Legitimate aims under article 9(2) ECHR are

²¹ C Evans, *Freedom of Religion Under the European Convention on Human Rights* (OUP 2001); K Sahlfeld, *Aspekte der Religionsfreiheit* (Schulthess 2004) 205; article 9(2) ECHR refers to 'the protection of public

the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. In addition, article 18 ECHR stipulates the exclusive character of the legitimate reasons to restrict the freedoms of the ECHR.²²

2.1 Public security and public order

Interferences with the freedom of religion can be justified on grounds of interests of public security and public order. Public security does not have a uniform scope throughout all provisions of the ECHR.²³ It is understood not to be identical to the term public security commonly referred to under police law, nor can a uniform meaning be deduced from the various language versions of the Convention.²⁴ Generally, however, public security can be defined to cover the security of the state and its institutions as well as the protection of the life and health of its population. Concerning the term public order, the Court stated in *obiter* that this term should be defined as '*ordre public*'.²⁵

In relation to the wearing of religious symbols, public security has been a relevant ground of justification on various occasions. In the public space, interference can be permitted where sensitive security interests are at stake and thus a person must be easily identifiable. In this category fall the cases *Phull v France*, where a religious Sikh was obliged to remove his turban at airport security checkpoints,²⁶ and *El Morsli v France*, where a woman was denied access to the French consulate when refusing to take off the veil covering her face. The Court could not identify any violation of the Convention and stressed that such security checks are part of public security.²⁷ In this vein, the suit

order' in a reactive sense, while other provisions refer to 'the prevention of disorder' in a preventive sense. The latter meaning is more extensive as preventive measures apply at a time before reactive measures; there is a similar ground for justification laid down in article 18(3) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. According to article 18, an interference is justified if it is 'prescribed by law' and 'in pursuance of one of the listed legitimate aims'. Legitimate aims within the meaning of article 18(3) are 'public safety, order, health, or morals or the fundamental rights and freedoms of others'.

²² Previously, it had been argued that the legitimate aims under article 9(2) ECHR should be interpreted to cover a general caveat to the protection of general public interest, see U Hoffmann-Remy, *Die Möglichkeiten der Grundrechtseinschränkung nach den Article 8–11 Abs. 2 der Europäischen Menschenrechtskonvention* (Duncker Humblot 1976) 32. Against this view one can put forward the clear wording of article 18 ECHR, see F G Jacobs, *The European Convention on Human Rights* (OUP 1980) 196; N Blum, *Die Gedanken-, Gewissens- und Religionsfreiheit nach Article 9 der Europäischen Menschenrechtskonvention* (Duncker Humblot 1990) 114.

²³ See C Grabenwarter, 'Article 9' in K Pabel and S Schmahl, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Carl Heymanns Verlag 2012) para 83.

²⁴ While articles 8(2), 10(2) and 11(2) ECHR refer to 'national security' ('*sécurité nationale*') and 'public safety' ('*sûreté nationale*') as legitimate aims, article 9(2) ECHR mentions 'interests of public safety' ('*sécurité publique*'), see Grabenwarter (n 23).

²⁵ *Engel and Others v Netherlands* (1976) Series A no 22, para 98; W J Ganshof van der Meersch, 'Fragen von allgemeinem Interesse, die sich für einen Gedanken- und Informationsaustausch eignen' (1978) *Europäische Grundrechte-Zeitschrift* 37, 39.

²⁶ See Howard (n 2) 107; van der Schyff and Overbeeke (n 1) 446.

²⁷ *El Morsli v France* (n 10).

brought by *Mann Singh v France* was rejected too. He claimed a violation of his freedom of religion as he was required to remove his turban for taking a picture. The ECtHR found this requirement to be a proportionate interference to protect legitimate public security interests.²⁸

While the above cases concerned sensitive security areas in which citizens are commonly subject to measures in an indiscriminate manner, the ECtHR applied more restrictive standards where security interests in the public space are concerned. Outside of selective security zones the Court sets higher requirements for a situation to constitute a risk to public security. In line with this restrictive standard, in its recent decision in *SAS v France*, the Court viewed the ban on the wearing of religious symbols to be unjustified in public areas although this did not involve a sensitive security situation. In the only case in the Court's jurisprudence prior to *SAS v France* which concerned the public sphere outside of sensitive security zones, *Ahmet Arslan v Turkey*, the Court found an infringement of article 9 ECHR. Turkey had not produced sufficient evidence for a risk to public security that could justify the prohibition of a parade of religious persons wearing religious clothes which, in addition, did not hinder the identification of persons.²⁹ This case was distinct from the more recent *SAS v France*, as in *Ahmet Arslan v Turkey* there was no covering of the face, that is, no barrier to identifying the person and because Turkey's prohibition was 'expressly based on the religious connotation of the clothing in question'.³⁰ However, the Court confirmed its restricted stance vis-à-vis public security as grounds for permitting interferences by stressing the significant encroachment on the freedom of the woman resulting from the obligation to cover her face for religious purposes. Therefore, a *general* ban of covering the face can only be justified if it creates a *general* threat to public security. The ECtHR viewed the interests of the woman as outweighing security interests. Otherwise, she would be forced to give up an essential element of her religious identity, while the Member States could request the uncovering of the face on individual basis whenever a threat to public security exists.³¹

Consequently, one can infer a generally restrictive application of public security as grounds for encroaching on people's freedom to religion. A general ban of religious symbols from the public sphere is impermissible, as the wearing of clothes covering the face does not constitute a source of threat to public security. Accordingly, the banning of such clothes may only be proportionate in cases of concrete and imminent threats.³²

²⁸ *Mann Singh v France* (n 10). The same plaintiff was later successful before the UN Human Rights Committee which found a violation of article 18(2) of the International Covenant on Civil and Political Rights. See Human Rights Committee, *Shingara Mann Singh v France*, Communication No 1928/2010, Views of 19 July 2013.

²⁹ *Ahmet Arslan and Others v Turkey* (n 10). See van der Schyff and Overbeeke (n 1) 447; Hunter-Henin (n 2) 636.

³⁰ *SAS v France* (n 10) paras 136, 151.

³¹ Van der Schyff and Overbeeke (n 1) para 139.

³² For a different view see P Hector (n 16) 262, arguing that the French ban on the burqa may well be justified for reasons of public security.

2.2 Preventing improper proselytism

From the perspective of the protection of others, such as those possibly affected by the exercise of religious expression, the Court's case law on the prevention of improper proselytism is highly relevant and needs to be discussed in order to illustrate the Court's concern about the negative freedom of religion. Indeed, the origins of the recent expansion of grounds of justification can be traced in the Court's prohibition of improper proselytism and the recognition of a secular order of society. The jurisprudence reflects the defensive stance the Court adopts vis-à-vis the impact religious expression has on other persons.

Converting others to his or her own belief is an essential element of the freedom of religion. Many religions consider active conversion of others to be a duty of believers.³³ It is obvious that this can generate conflicts with the freedom of others, namely with the negative freedom of religion, namely, the freedom *not* to have a religion. The line between legitimate and acceptable attempts to convert others and improper proselytism are however thin and blurry,³⁴ and this makes it even more important to seek delineations between these two aspects of freedom of religion.

The negative freedom of religion in terms of the freedom to remain unaffected from the beliefs of others is a 'right of others' within the meaning of article 9(2) ECHR.³⁵ In *Dahlab v Switzerland*, the ECtHR identified the right of pupils to remain unaffected by the proselytising impact of the teacher's headscarf. Consequently, the Court affirmed the ban of the headscarf in that context, as the ban protected the children's right in a proportionate manner, although the ECtHR recognised the difficulties in determining the influence resulting from an external symbol on the freedom of religion and conscience of the children.³⁶ However, for the Court it was decisive that wearing a headscarf *could* potentially have a proselytising effect which, according to the Court, would hardly be compatible with values such as tolerance, equality and the rights of others. The teacher's freedom of religion thus had to be subrogated.³⁷ Therefore, the religious feelings of children and their parents as elements of the negative freedom of religion prevailed over the teacher's positive freedom of religion. Similarly, the alleged negative influential power inherent in the wearing of religious symbols were also at stake in *Leyla Sahin v Turkey*.³⁸ In this case, the Court accepted Turkey's argument that in Turkey a large proportion of the population belonged to one religion and that the university consequently had to take measures aimed at reducing the influence that fundamental religious groups could

³³ *Kosteski v the Former Yugoslav Republic of Macedonia* (2007) 45 EHRR 31.

³⁴ Dissent of Judge Howard, *Kokkinakis v Greece* (1994) 17 EHRR 397, para 15.

³⁵ See *Buscarini and Others v San Marino* (2000) 30 EHRR 208; *Dimitras and Others v Greece* App no 42837/06 (ECtHR 3 June 2010); *Sinan Isik v Turkey* App no 21924/05 (ECtHR 2 February 2010).

³⁶ *Dahlab v Switzerland* (n 7).

³⁷ Howard (n 2) 60.

³⁸ In that case a female student was banned from taking the exam because she ignored the ban on wearing a headscarf imposed by the university.

possibly exert on non-religious students. In such situations, the ban on religious symbol would pursue the goal of peaceful co-existence between students of distinct beliefs.³⁹

The Court's jurisprudence concerning the proselytising effect of the wearing of headscarves has been subject to criticism, because it rests on a certain stereotype of headscarf-wearing women. This stereotype would characterise these women as fundamental and attempting to proselytise others.⁴⁰ In this vein, Judge Tulkens refers in her dissenting opinion in *Leyla Sahin v Turkey* to a judgment of the German Constitutional Court of 24 September 2003,⁴¹ in which the German Court stated that the wearing of a headscarf does not have a uniform and clear meaning and should be perceived rather as a neutral object.⁴² Moreover, the Court bases its findings regarding the religious proselytism on empirical arguments without offering the necessary evidence. Although the Court identified a potentially proselytising effect of the headscarf, there were no sufficient indicators supporting this view. In neither *Dahlab v Switzerland* nor in *Leyla Sahin v Turkey*, was it established that the claimants sought to influence others of their belief, nor was there an indication that they would be a threat to gender equality or secularism. However, statements regarding the impact of religious symbols are always empiric by nature because they imply an assessment of reality. The evidence supporting the Court's statement on the adverse impact of the claimants on others persons can only be considered as insufficient.⁴³ By contrast, in *SAS v France* the Court adopted a more cautious stance on this issue. Unlike in *Dahlab v Switzerland* and in *Leyla Sahin v Turkey* where the Court stressed the negative influence of the religious symbols, in *SAS v France* the Court observed 'that it did not have any evidence capable of leading it to consider that women who wear the full-face veil were seeking to express a form of contempt against those they encounter or otherwise to offend the dignity of others.'⁴⁴ This statement reflects more reluctance in giving religious symbols a meaning that is not sufficiently supported by empirical evidence.

From the above, it can be deduced that there has been a general inclination in the Court's jurisprudence to view religious symbols as a threatening element to the freedoms of others. There seems to be a presumption of improper influence originating in these symbols without sufficient supporting evidence. This supports the view that there is a

³⁹ *Leyla Sahin v Turkey* (2005) (n 9) para 99. Another relevant aspect of the Court's reasoning is the potential effect that wearing religious symbols may have not only on other non-religious persons but also on believers of the same religion, which may even push the latter to adapt the religious wearing habits: P Weil (n 1) 19. Similarly, there was the concern that other Muslim girls would be pushed to wear headscarves as well, see L Gies, 'What not to Wear: Islamic Dress and School Uniforms' (2006) 14 Feminist Legal Studies 377, 379.

⁴⁰ Evans (n 21) 15.

⁴¹ Bundesverfassungsgericht 108, 282, in (2003) 56 Neue Juristische Wochenschrift 3111

⁴² Howard (n 2) 44.

⁴³ Evans (n 21) 11; Howard (n 2) 44; B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) 418.

⁴⁴ *SAS v France* (n 10) para 120.

kind of ‘presumption of indoctrination’⁴⁵ associated with religious symbols. However, while this may explain the Court’s bias in favour of shielding non-religious persons from religious influence, the Court’s approach still seems compatible with the notion of protecting the ‘rights of others’ within the meaning of article 9(2) ECHR. The negative freedom of religion is one core right, as it shields the individual from religious influences.⁴⁶ The negative freedom of religion is often relevant in the relationship between state and citizens, particularly within state-owned institutions. Similarly important though is the public space in which individuals encounter each other and thus call for striking a balance between the positive (or extroverted) religious freedom on the one hand and the negative (or introverted) religious freedom on the other hand. One can view a horizontal application of the freedom of religion as only the relations between private persons is concerned. Assigning horizontal effect to the negative freedom of religion implies the protection from improper proselytism.⁴⁷ In that sense, the jurisprudence on improper proselytism is connected to the established state obligation to protect against infringements of freedoms committed by other individuals.⁴⁸ The state actively protects the rights and freedoms of others against the impermissible invocation of freedoms.⁴⁹ On that basis, a link can be established to a further line of the Court’s jurisprudence on justification grounds which is secularism and the safeguard of secular society to be discussed in the next section.

2.3 The safeguard of a secular society

The Court’s general line of shielding persons possibly affected by religious expression is also reflected in its recognition of secularism as a ground to encroach on religious freedoms. Accepting wide notions of secularism permitting states to intervene and ban religious expressions from public space is the conceptual basis to even accept sociocultural considerations as ground for justification. The notion of secularism as applied by the Court is thus essential for understanding the Court’s recent case law.

The Court’s jurisprudence on secularism as valid ground for justifying infringements of religious freedom lies at the gateway between protecting negative religious freedom and protecting public order.⁵⁰ Bans on the wearing of religious symbols can be necessary to safeguard the secular order of states. For example, in *Leyla Sahin v Turkey*, the Court

⁴⁵ Ronchi (n 2) 294, in relation to the Muslim headscarf.

⁴⁶ The Court previously stated that the protection of the ‘rights of others’ also serves the protection of the negative freedom of religion: see *Kokkinakis v Greece* (n 34).

⁴⁷ R A Lawson and H G Schermers, *Leading Cases of the European Court of Human Rights* (2nd edn, Nijmegen Ars Aequi Libri 1999) 535.

⁴⁸ *Dink v Turkey* App nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR 14 September 2010); *Marckx v Belgium* (1975) Series A no 31; *X & Y v Netherlands* (1980) Series A no 91.

⁴⁹ For the state’s duty to protect from aggressive proselytism see also C Grabenwarter, *European Convention on Human Rights, Commentary* (Hart 2014) para 41.

⁵⁰ Hunter-Henin (n 2) 635; van der Schyff and Overbeeke (n 1) 429; McGoldrick (n 6) 453.

agreed with Turkey that there were 'extremist political movements' in Turkey which sought to impose their religious symbols and notions upon the society as a whole.⁵¹ A secular state may, under such circumstances, implement prohibitions in order to ensure the rigorous separation of state and religion. The ECtHR adopted the notion of secularism of the Turkish Constitutional Court and observed that secularism played a predominant role in the Turkish constitution.⁵² The Court applied a similar reasoning in *Dogru v France* where the French ban of headscarves worn by pupils was confirmed. According to the Court's view, the French ban is rooted in the specificity of the French constitution, namely the high priority of secularism.⁵³ The ECtHR underscored that secularism—similar to Turkey and Switzerland—constitutes a constitutional principle recognised by French citizens, the protection of which enjoys a high value. However, the Court failed to examine the characteristics of secularism and the criteria it has to meet in order to be a valid ground to interfere with religious expressions.

After all, secularism as ground for justification lacks clarity in its concept and, consequently, produces legal uncertainty in its application. This is rooted in the protean nature of the term secularism. Generally, two distinct and opposing notions of secularism can be distinguished. This distinction is necessary for the purpose of this analysis because the ban on religious symbols appears to be compatible with only one of the notions of secularism. First, secularism can be interpreted as passive imperative of neutrality or non-intervention of the state. Thus, when interpreting secularism as 'passive neutrality',⁵⁴ there is no room for an active role of the state as long as it acts without discriminating between religions. In this vein, secularism only requires neutrality from the state but not from its citizens.⁵⁵ In line with this reasoning, the Court's decisions against Greece⁵⁶ and Moldova⁵⁷ show that national systems giving preference and privileges to one group of religion can be in conflict with the Convention.⁵⁸

In contrast to this understanding, secularism can also be interpreted as active secularism, according to which all aspects of political and public life must be free from any religious influence. Under this concept, the notion of *ordre public* allows the

⁵¹ *Leyla Sahin v Turkey* (2005) (n 9) para 108, *Leyla Sahin v Turkey* (2007) (n 9) para 155.

⁵² *Leyla Sahin v Turkey* (2007) (n 9) para 99.

⁵³ *Dogru v France* (n 8) para 72; for a discussion of the French notion of secularism see Hunter-Henin (n 2) 613, making clear that initially this notion was confined to ensuring state neutrality and has been widened through the recent ban on face-covering. See also J Rivero, *La Notion Juridique de Laïcité* (Dalloz 1949) 137; van der Schyff and Overbeeke (n 1) 430; Conseil d'État, 'Étude Relative aux Possibilités Juridiques d'Interdiction du Port du Voile Intégral', 25 March 2010, 18. The Italian interpretation of secularism allows for a privileged role of Christianity, see Ronchi (n 2) 290.

⁵⁴ S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17(1) *Oxford Journal of Legal Studies* 43, 50; N Nathwani, 'Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights' (2007) 25(2) *Netherlands Quarterly of Human Rights* 221, 229.

⁵⁵ Howard (n 2) 48.

⁵⁶ *Kokkinakis v Greece* (n 34) para 31.

⁵⁷ *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13, para 10.

⁵⁸ Pabel and Schmahl (n 23) 15.

minimisation of religious influences.⁵⁹ This notion of an ‘irreligious neutrality’⁶⁰ or ‘active secularism’⁶¹ creates a wide margin of state intervention, in particular for public institutions including schools and universities.⁶² The cases *Dogru v France* and *Leyla Sahin v Turkey* appear to be compatible with this wide concept of secularism. The French notion of secularism seems to rest on the principle that the state should not only be prevented from being religiously influential itself and act without discrimination but should also ensure that religion remains out of the public space.⁶³ In accordance with this concept of secularism, the Court accepted the active intervention of the state against certain form of religious expression.⁶⁴ In *Leyla Sahin v Turkey*, the Court adopted the Turkish concept of active secularism by considering the Turkish measures as proportional instrument safeguarding the secular basic order of the Turkish state.⁶⁵

The fact that the ECtHR considers the French and Turkish characteristics of active secularism to be compatible with the freedom of religion does not exclude other—possibly more passive—forms of secularism to be in conformity with the Court’s wide notion of secularism.⁶⁶ But how can the compatibility of secularism with the Convention be assessed? In this regard, the Court limits its assessment of compatibility to vague criteria. The central parameter is ensuring pluralism.⁶⁷ According to the Court, the state has the obligation to maintain a climate of plurality and tolerance between the various religions.⁶⁸ The relevance of tolerance has been reiterated in the Court’s jurisprudence by stating that

the role of the authorities (...) is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.⁶⁹

⁵⁹ Poulter (n 54) 50; C Rumpf, ‘Das Laizismusprinzip in der Rechtsordnung der Republik Türkei’ (1987) 36 *Jahrbuch des Öffentlichen Rechts* 179, 183. There are two distinct meanings of state neutrality in public schools. First, neutrality can be understood as inclusive neutrality implying that symbols of all religions would be allowed in schools as expression of pluralism and tolerance. Second, neutrality can be understood in schools as irreligious neutrality, which strictly separates religion and education in order to avoid conflicts, see Nathwani (n 54) 228.

⁶⁰ Nathwani (n 54) 229.

⁶¹ Poulter (n 54) 50; McGoldrick (n 6) 457.

⁶² M Mazher Idriss, ‘Laïcité and the Banning of the “Hijab” in France’ (2005) 25(2) *Legal Studies* 260, 262; Howard (n 2) 48.

⁶³ Mazher Idriss (n 62) 261.

⁶⁴ Howard (n 2) 38.

⁶⁵ *Leyla Sahin v Turkey* (2007) (n 9).

⁶⁶ For different concepts of secularism see A Ferrari, ‘De la Politique à la Technique: Laïcité Narrative et Laïcité du Droit. Pour une Comparaison France/Italie’ in B Basdevant-Gaudemet and F Jankowiak (eds), *Le Droit ecclésiastique en Europe et à ses Marges XVIIIe–XXe Siècles* (Peeters 2009) 333–45; M Troper, ‘Sovereignty and Laïcité’ (2009) 30 *Cardozo Law Review* 2561.

⁶⁷ See also Hunter-Henin (n 2) 620.

⁶⁸ *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1, para 91; *Otto-Preminger-Institut v Austria* (1994) Series A no 295, para 47.

⁶⁹ *Serif v Greece* (2001) 31 EHRR 20, para 53.

By referring to the rather vague terms of pluralism and tolerance, the Court refrains from defining what is meant by a secular system which it has to employ to ensure pluralism. It only generally presupposes that every state would independently choose the secular principles it deems appropriate and identify the measures suitable to attain them.⁷⁰ Since one purpose of secularism is to protect freedom of religion, the ECtHR considers secularism to be compatible with the principles of the Convention.⁷¹ This highlights the Court's reluctance in carefully reviewing whether and to what extent the secular system of the respective state does actually meet these standards. Not surprisingly, the restraint has led to the granting of wide leeway to French and Turkish authorities in intervening in public space on behalf of the secular order. The notion of active secularism is thus used in a fashion similar to the above ban of improper proselytism.

Against this background, the question is whether acceptance of the national notion of secularism without judicial scrutiny sufficiently accounts for those wearing religious symbols in exercise of the freedom of religious expression. Put differently: whose freedom of religion would ultimately be protected?

If an active secularism pursued by the state is being accepted by the Court, this would eventually imply an absence (or at least reduction) of religious expressions in the public sphere. Based on this understanding, it is no longer the freedom of religion of the individual which is at the core of the active secularism, but rather the attempt to free the public sphere from all possible religious symbols and connotations. However, this would ultimately decouple the freedom of religion from the individual, and absence of religious symbols in the public sphere would be central to this notion of secularism. The positive role of a state would lie in curbing those forms of religious expression that seek to penetrate the public space.

A notion of secularism accepting bans of religious symbols in the public sphere (and beyond bans in state-owned institutions)⁷² evokes criticism from the view of 'pluralism'. Based on the standards set out by the French *Conseil d'État*, secularism rests on three basic principles: state neutrality, religious freedom and the respect for plurality. On this line, the ECtHR states 'that a society cannot be a democratic society without pluralism, tolerance and broadmindedness.'⁷³ Is pluralism thus sufficiently accounted for in a public sphere freed from religious symbols? As has been stipulated by the Court under article 10 ECHR, a democratic society exercises tolerance not only vis-à-vis religious expressions which are in conformity with social standards, but also if they are challenging and disturbing for the state and society.⁷⁴ This line of reasoning has also been alluded to in the Court's recent judgment *SAS v France* in relation to religious symbols. The Court views the wearing of religious symbols as an expression of cultural identity, which is part of a

⁷⁰ *Refah Partisi et al v Turkey* (n 68) para 93.

⁷¹ *Leyla Sahin v Turkey* (2007) (n 9) para 105.

⁷² See the cases referred to in n 7–9 concerning pupils, students and teachers who are strongly connected with the state's obligation to neutrality.

⁷³ *Handyside v United Kingdom* (1979–80) 1 EHRR 737, para 49.

⁷⁴ *ibid*; van der Schyff and Overbeeke (n 1) 443.

pluralistic system within a democratic society. Even if religious clothes may be perceived by some with strange feeling, this would demonstrate the variability of cultural norms and notions.⁷⁵ Would not such reasoning suggest granting religious values incorporated in the wearing of religious clothes access to public space, even if this may deviate from the strict notion of active secularism? And would not tolerating religious symbols in the public sphere rather than banning them correspond to the notion of an open and pluralistic society?⁷⁶ In this vein, the Court had found in *The Moscow Branch of the Salvation Army v Russia* that ‘pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of (...) religious beliefs.’⁷⁷ Likewise, on a number of occasions, the Court has underscored that it is the genuine obligation of states to foster respect and tolerance between confessions and must not diminish plurality as source of potential conflicts.⁷⁸ Tolerating religious symbols in the public sphere corresponds to recognition and respect for diversity and tolerance.⁷⁹

In spite of the foregoing, there is no doubt that secularism both in its active and passive conceptualisation has a connection to protecting individual rights. Reducing the prevalence of religious symbols in the public sphere does not only serve an abstract and vague public goal of secularism seeking to delineate the public and religious spheres. In addition, secularism has an individual-oriented dimension and recognises the negative freedom of religion of the individual who is part of the public sphere where individuals bear both positive and negative freedom of religion. The concept of active secularism is not limited to minimising religious influences originating in state conduct (such as the wearing of headscarf by teachers in school). It also identifies the need to apply secularism in a horizontal fashion between private persons requiring the public sphere to remain free of religious symbols.⁸⁰

On balance, the Court’s approach towards accepting secularism as a ground for justification raises doubts as it subjects national claims of secularism to hardly any judicial scrutiny. In particular, the Court refrains from examining whether the central requirement of pluralism is sufficiently accounted for in the secular order at stake. The Court’s restraint has led to the recognition of concepts of secularism, in which the balance between positive and negative freedom of religion is tilted towards the latter and at the detriment of religious expression in the public sphere. The consequence is vagueness and ambiguity of secularism as ground of justification. However, a connection

⁷⁵ *SAS v France* (n 10) para 120.

⁷⁶ For the critics that the Court fails to sufficiently determine the scope of secularism see Rainey, Wicks and Ovey (n 43) 418.

⁷⁷ *The Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46, para 49.

⁷⁸ *Fáber v Hungary* App no 40721/08 (ECtHR 24 July 2012) para 37. See Grabenwarter (n 23) 301.

⁷⁹ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 14: ‘By banning the full-face veil, the French legislature has done the opposite. It has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension.’

⁸⁰ See also *Refah Partisi v Turkey* (n 68) para 103; however, the Court has been reluctant to accept a positive state obligation to protect: D Ottenberg, *Der Schutz der Religionsfreiheit im internationalen Recht* (Nomos 2009) 131.

to the justification based on ‘rights of others’ within the meaning of article 9 persists as secularism also intends to protect the individual’s negative freedom of religion.

3 Notions of ‘living together’ considered as ‘rights of others’ within the meaning of article 9(2) ECHR

Based on the foregoing and the Court’s stance on how to balance the interests between positive and negative freedom of religion, different considerations may apply to the newly developed category of justification put forward by the Court in *SAS v France*. The ground for justification invoked by the Court for banning the wearing of religious symbols is the ‘protection of the rights and freedoms of others’ within the meaning of article 9(2) ECHR. The argument of this article is that, while the Court’s line of reasoning concerning secularism and improper proselytism upholds—as we have seen above—a connection to individual rights, this connection vanishes when accepting notions of ‘living together’ to justify violations of the freedom of religion.

Therefore, first, we give account of how the Court arrived at its finding and, second, shed light on the conditions to be fulfilled under the term ‘rights of others’ and, on that basis, demonstrate that the Court’s finding goes beyond the boundaries of article 9 ECHR. Third and finally, even a wide margin of appreciation for Member States does not allow the creation of grounds of justification not provided for in the Convention.

3.1 The Court’s reasoning on ‘rights of others’ and requirements of living together

The starting point of the Court’s new line of jurisprudence is the argument put forward by France to justify the ban of face covering to which the Court referred to as ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together’.⁸¹

There is no explanation provided by the Court on how such minimum requirements may be rooted in general public interest and how they result from the ‘rights of others’. Instead, the ECtHR simply asserts that such values could, under certain circumstances, constitute a ground of justification under article 9(2) ECHR. The Court shows comprehension of the view that some citizens would reject practices in the public space which could question the relationships between persons and are an indispensable element of ‘living together’. The main critique towards this reasoning is that, unlike the justification grounds discussed above, reference to social considerations lack a connection to the ‘rights of others’ as required under article 9(2) ECHR.⁸²

⁸¹ *SAS v France* (n 10) para 121. The debate in the Belgian parliament showed that there is a majority view that the covering of the face creates barriers for usual communication and should thus not be allowed, see Chambre des Représentants de Belgique, Proposition de Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage, DCO 52 2289/005, 9 April 2010, 6.

⁸² See also dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 5.

The Court seems to accept views on social behaviour somehow linked to the general interest but does not investigate the link to the individual right concerned.⁸³ Which social considerations could justify the interferences with the wearing of religious clothes? One possible argument could be found in the role of the face in social interactions:

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.⁸⁴

The Court thus recognises that a faceless communication would be tantamount to a violation of the 'right' to live in an environment facilitating living together.⁸⁵ This implies an active role for the state:

Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places. (...) From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (...). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.⁸⁶

On that basis, the Court views the ban on face covering as justified provided that it aims at facilitating and ensuring the conditions of 'living together'.⁸⁷ It accepts the alleged protection of 'rights of others' without having analysed what this term would require in the sense of what kind of nature the protected right must have.

3.2 Notions of living together lack the protection of 'rights of others'

Is the Court's reasoning compatible with the requirements of 'rights of others' within the meaning of article 9(2) ECHR? The 'rights of others' protect rights and positions conflicting with the freedom of religion. These rights of others include rights granted by national legal norms (both constitutional and other norms of lower rank) and rights

⁸³ See Hunter-Henin (n 2) 630, who refers to a new 'ordre public social' interfering with fundamental freedoms; similarly van der Schyff and Overbeeke (n 1) 430.

⁸⁴ *SAS v France* (n 10) para 122.

⁸⁵ The view of parts of French society is illustrated by the words of the French Minister of Justice that 'le port volontaire du voile intégral revient à se retrancher de la société nationale, à rejeter l'esprit même de la République, fondée sur le désir de vivre ensemble': Session of Senate, 14 September 2010, 6732.

⁸⁶ *SAS v France* (n 10) paras 141, 153 (emphasis added).

⁸⁷ *ibid* para 142.

accruing from the ECHR,⁸⁸ they must be stipulated by law.⁸⁹ There is thus no caveat for considerations rooted in general public interest⁹⁰ making a restrictive interpretation of the grounds of justification necessary. In this vein, the ECtHR stressed even in *SAS v France* 'that the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in article 9(2), is exhaustive and that their definition is restrictive'.⁹¹ It can thus be deduced that in order for a measure to be compatible with the Convention the pursued aim of interference must be in line with one of the grounds enumerated in article 9(2) ECHR.

The subject of protection within the meaning of the 'rights of others' are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify. Are grounds for interferences with the freedom of religion thus limited to individual rights? The clear and restrictive wording of article 18 ECHR is a strong argument in the affirmative.⁹² In addition, the evolutionary history of these norms suggest that the specific design of justifications grounds assigned to individual freedoms sought to prevent a role for the general public interest.⁹³ This finding is confirmed by a systematic comparison of the jurisprudence regarding article 8 ECHR which provides for the same ground of justification.⁹⁴ The case law of article 8 ECHR concerning 'rights of others' rests on the assumption that encroachments on the freedom can only be justified where the protection of predominant individual rights require this.⁹⁵

This raises the question whether and to what extent in the above cases there is a sufficiently strong link to individual rights as required under the notion of 'rights of others' or, if not, whether this would constitute a new category of justification developed by the ECtHR going beyond the borders of article 9(2) ECHR? The foregoing has highlighted the ambivalence of different notions of secularism allowing a variety of interpretations ranging from active to passive secularism. In addition, we can now observe a similar vagueness as regards the concept of pluralism. One possible interpretation of pluralism is to exercise tolerance vis-à-vis religious symbols placed and worn in the public sphere. The Court's reasoning suggests the contrary view though. The Court invokes pluralism

⁸⁸ Grabenwarter (n 23) para 86; A von Ungern-Sternberg, 'Article 9' in U Karpenstein and F Mayer (eds), *EMRK: Kommentar zum Schutz der Menschenrechte und Grundfreiheiten* (Beck 2011) para 37.

⁸⁹ Von Ungern-Sternberg (n 88) para 37.

⁹⁰ Blum (n 22) 114.

⁹¹ *SAS v France* (n 10) para 113, with reference to *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR 14 June 2007) para 132.

⁹² See also Jacobs (n 22) 196.

⁹³ Blum (n 22) 114.

⁹⁴ According to article 8(2) ECHR, the right to respect for private and family life, home and correspondence can be interfered with for the 'protection of the freedoms and rights of others.'

⁹⁵ See L Wildhaber and S Breitenmoser, 'Article 8' in Pabel and Schmahl (n 23) para 650; I Fahrenheitst, *Familienrecht und Europäische Menschenrechtskonvention* (Ferdinand Schönigh 1994) 119. The protection of youth and children can justify the deprivation of child custody (*Eriksson v Sweden* (1990) 12 EHRR 183); a blood test may be required from a person being suspected to be drunk (*X v Netherlands* (1978) DR 16, 184).

and tolerance as being enshrined in ‘face to face’ communication. Society’s preference for a communication based on ‘open face’ where identification of the face is an indispensable element for a pluralistic society can, according to the Court’s view, constitute a ‘right of others’ in the sense of article 9(2) ECHR.

This reasoning raises doubts, as a choice of society in favour of open-face communication can barely qualify as an individual right as argued by the Court. There is no indication that an individual or subjective element is able to support the requirement of an open-face communication. Identifiability of one’s face is not a precondition for the functioning or the exercise of communicative basic rights such as the freedom of speech. Availing of rights of communication does not require the identification or open face of the subject of communication. In this connection, Judges Nußberger and Jägerblom argue in their dissents in *SAS v France*:

Even if it [the concept of ‘living together’] could arguably be regarded as touching upon several rights, such as the right to respect for private life (Article 8) and the right not to be discriminated against (Article 14), the concept seems far-fetched and vague.⁹⁶

There is no right of communication that would establish the necessity of open-face communication as a right to be invoked by one of the individuals participating in communication. And if no connection can be made between the need for open-face communication and the individual rights of the participants of communication, there cannot be any ‘rights of others’ allowing the violation of freedom of religion.

Furthermore, it remains doubtful whether an open-face communication constitutes an indispensable requirement of living together in European society. This claim must rest on an empirical observation of a society’s choice. Such societal choices requiring the visibility of the subject’s face can hardly be considered to exist. It can be conceded that clothes covering the face can create a barrier to communication as non-verbal signal cannot be transferred and verbal signals might be less clearly pronounced.⁹⁷ It should also be recognised that living together depends on the possibilities of interpersonal communication. Indeed, communicative barriers in relation to the wearing of religious symbols have played a role in the past on various occasions. In the Netherlands, the Commission for gender equality (Commissie Gelijke Behandeling, CGB) accepted a ban on students wearing veils covering the face (niqab) on the basis that the open face would improve communication.⁹⁸ Similarly, veils covering the face were at stake in the British case *Azmi*⁹⁹ where a language teacher had worn a niqab. It was observed that when the pupils sought to receive visual signals from Ms Azmi’s face, this was complicated by the covered face. Also, the pronunciation of the teacher was found to be less clear,

⁹⁶ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 5.

⁹⁷ *Chambre des Représentants de Belgique* (n 81) 6.

⁹⁸ *Commissie Gelijke Behandeling*, Judgment 2003-40, para 4.10.

⁹⁹ *Employment Appeal Tribunal, Azmi v Kirklees Metropolitan Borough Council*, 30 March 2007, EAT/0009/07, IRLR 484.

leading ultimately to a ban of the face-covering veil.¹⁰⁰ This case illustrates that in certain circumstances the effectiveness of communication must be ensured without limitations. Schools or other educative institutions where communication and comprehensibility are essential could be such cases. However, apart from that, it can hardly be argued that interpersonal communication would be hindered or deprived by a covered face. Examples such as skiing, biking, or the wearing of carnival costume illustrate that common activities do not require open faces.¹⁰¹ Likewise, common practice in the age of Internet questions the need of identifiability of persons or recognisability of faces as indispensable requirement of communication. On the Internet, recognisability is certainly not a common habit of communication, rather anonymity is the rule. It is common that communication partners are not visible nor identifiable. The use of invented synonyms and user names are a widespread phenomenon. It is not apparent why different considerations should apply only because an open-face communication is a sociocultural behavioural customs adapted in the majority part of the society. In sum, behavioural norms deduced from notions of 'living together' do not constitute an individual right as required for interference with the freedom of religion to protect the 'rights of others'. Also, there is no basis to argue that the identifiability of the face would be 'essential for the tolerance and broadmindedness'.¹⁰²

3.3 Margin of appreciation of Member States and limited judicial control

The ECtHR generally accords Member States a wide margin of appreciation both in factual and legal terms. The doctrine of the margin of appreciation¹⁰³ is based on a political philosophy, according to which decisions produced by democratic societies are in principle well suited to ensure respect for human rights. Judicial control exercised by

¹⁰⁰ Howard (n 2) 43.

¹⁰¹ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 9.

¹⁰² There is no space to delve into the discussion on whether and how the rejection of the burqa and other religious symbols generally reflects negative associations with these symbols. See dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 6:

It seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself, which—unlike perhaps certain other dress-codes—cannot be perceived as aggressive per se, but by the philosophy that is presumed to be linked to it. Thus the recurring motives for not tolerating the full-face veil are based on interpretations of its symbolic meaning. The first report on 'the wearing of the full-face veil on national territory', by a French parliamentary commission, saw in the veil 'a symbol of a form of subservience'. The explanatory memorandum to the French Bill referred to its 'symbolic and dehumanising violence'.

See also Ronchi (n 2) 294, who refers to a 'presumption of indoctrination' in the case of a Muslim headscarf.

¹⁰³ See J Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19 Human Rights Law Journal 23, 30; E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 Heidelberg Journal of International Law 240; S Koutnatzis and A Weilert, 'Fragen der menschlichen Reproduktion vor dem EGMR—Zugleich eine kritische Würdigung der Lehre vom staatlichen Beurteilungsspielraum' (2013) 51 Archiv des Völkerrechts 72, 88.

the ECtHR must give due account to measures taken as a result of democratic decision-making processes.¹⁰⁴ Respect and tolerance vis-à-vis the democratic origin of measures contested before the ECtHR require judicial restraint to a certain degree. This concept is further strengthened by the subsidiarity principle: judicial restraint can be deduced from the function of the ECtHR as an international court which by enforcing human rights performs only a subsidiary function in relation to Member States.¹⁰⁵ Finally, respect for cultural diversity is another strong argument for judicial restraint. The legal community reflects cultural and ideal diversity. In performing its task of interpreting the Convention, the Court should contribute to maintaining this diversity or, at least, not to diminish it by imposing uniform solutions applicable across all democratic societies.¹⁰⁶

There are, however, limitations to the margin of appreciation. The terms of the ECHR are generally autonomous, that is, to be interpreted independently from national legal orders.¹⁰⁷ In this vein, the Court frequently states that the margin of appreciation granted to national authorities ‘goes hand in hand with a European supervision.’¹⁰⁸ Under no circumstances must the ECtHR do away with its genuine obligation to develop criteria of interpretation for the rights of the Convention.¹⁰⁹

An important parameter for the determination of Member States’ margin of appreciation is normally the degree of homogeneity or heterogeneity of the legal situation of the dispute at stake. Legislative conformity between Member States indicates a rather limited margin of appreciation. The existence or non-existence of conformity thus determines the scope of the margin.¹¹⁰ Against this background, a comparative analysis of legal orders may help to specify the scope of margin.¹¹¹ Whenever the area of

¹⁰⁴ P Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 Human Rights Law Journal 1, 2; also *SAS v France* (n 10) para 129 with reference to *Maurice v France* (2006) 42 EHRR 42, para 117.

¹⁰⁵ *Leyla Sahin v Turkey* (2007) (n 9) para 100; C Tomushcat, ‘Individueller Rechtsschutz: Das Herzstück des “Ordre Public Européen” nach der EMRK’ [2003] EuGRZ 95, 97.

¹⁰⁶ Mahoney (n 104) 2; F Matscher, ‘Methods of Interpretation of the Convention’ in J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1994) 63, 76.

¹⁰⁷ C Grabenwarter and K Pabel, *Europäische Menschenrechtskonvention* (5th edn, Beck 2012) 5, para 9.

¹⁰⁸ *Handyside v United Kingdom* (n 73) para 48:

Article 10, para 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (...) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. (...) Nevertheless, Article 10, para 2 does not give the Contracting States an unlimited power of appreciation. The Court (...) is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.

¹⁰⁹ Koutnatzis and Weilert (n 103) 89.

¹¹⁰ W Ganshof van der Meersch, ‘Le Caractere “Autonome” des Termes et la “Marge d’Appreciation” des Gouvernements dans l’Interprétation de la Convention Européenne des Droits de l’Homme’ in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension—Studies in Honour of Gerard Wiarda* (Carl Heymanns 1988) 209; Mahoney (n 104) 5.

¹¹¹ K Pabel, ‘Die Rolle der Großen Kammer des EGMR bei Überprüfung von Kammer-Urteilen im Lichte der bisherigen Praxis’ [2006] Europäische Grundrechte-Zeitschrift 3, 4.

law relevant to the infringement of the individual right is addressed in a heterogeneous fashion, the Court exercises judicial restraints giving wide leeway to Member States.¹¹² In relation to the wearing of religious symbols in the Member States, the ECtHR has repeatedly stated that these issues have been addressed by individual Member States in very different ways, therefore not allowing a uniform European standard to be set over all national legal orders.¹¹³ The Court continued on this line of reasoning in its recent decision in *SAS v France*:

It observed that the rules in this sphere would consequently vary from one country to another 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 concluded from this that the choice of the extent and form of such rules must inevitably be left up to a point to the State concerned, as it would depend on the specific domestic context.¹¹⁴

Judicial restraint in a situation of legal heterogeneity in Member States is compatible with the general considerations supporting the margin of appreciation discussed above. Respecting decisions that were adopted in democratic societies and reflecting cultural diversity militates against the idea of imposing uniform standard and alignment, especially in cases where Member States deal in very different ways with an issue. This is plausible but also has to be seen in light of the effectiveness of the Convention. The margin of appreciation is effective only within the borders of the Convention and must not lead to an interpretation or application of the Convention that is no longer compatible with its clear wording. This implies that the grounds of justification under article 9(2) ECHR may not be loosened nor be extended.¹¹⁵ The margin of appreciation thus becomes effective especially in instances where the wording is vague or unclear. Not surprisingly, the margin of appreciation has been considered wider in cases concerning 'national security'¹¹⁶ issues related to police,¹¹⁷ which is linked to the vague legal term of 'public security' under article 9(2) ECHR.

If the borderline of the margin of appreciation is the wording of the Convention, the most convincing area of relevance of the doctrine of margin is the judgment of the proportionality of a certain measure. Under the proportionality test, a measure must be suitable to reach a legitimate aim (which is mentioned in the Convention); it must be necessary to reach this aim and ultimately proportional in light of all interests

¹¹² *Leyla Sahin v Turkey* (2007) (n 9). The judicial restraint in cases where European minimum standards are lacking played an important role in the British cases of transsexualism. See *Rees v United Kingdom* (1987) 9 EHRR 56, para 37; *Cossey v United Kingdom* (1991) 13 EHRR 622, para 40; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163.

¹¹³ *Leyla Sahin v Turkey* (2007) (n 9) para 101; *Otto-Preminger-Institut v Austria* (n 68) para 50; *Dahlab v Switzerland*, (n 7).

¹¹⁴ *SAS v France* (n 10) para 130; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, para 44.

¹¹⁵ The scope of the margin of appreciation also depends on the gravity of the interference, the nature of the protected rights that is interfered with and the kind of state obligation at stake.

¹¹⁶ *Leander v Sweden* (1987) 9 EHRR 433.

¹¹⁷ *Buckley v United Kingdom* (1997) 23 EHRR 101.

concerned.¹¹⁸ The Court undertakes only an evidence review of the proportionality.¹¹⁹ This is in line with a broader trend in the Court's case law on interpreting the subsidiarity principle which has been identified by Judge Spano as the Court's 'qualitative, democracy-enhancing approach'.¹²⁰ This approach reflects the Court's willingness to defer to the reasoned assessment by national authorities of their Convention obligations. It was particularly manifest in *Hirst*¹²¹ and *Animal Defenders*¹²² underscoring the proposition that when examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter's assessment of the necessity and proportionality of a restriction on human rights, it takes particular account of the quality of decision-making.¹²³ This implies a wide discretion granted to national parliaments if the issue at stake has been examined extensively.¹²⁴ In this vein, a violation of the Convention would then only be found if a Member State evidently exceeds the boundaries of the margin of appreciation.¹²⁵

According to the ECtHR, Member States do not enjoy a margin of appreciation in matters related to religious freedom and outside of the proportionality issue, especially where the question is whether or not an act by an individual can claim religious legitimacy or not. The legitimacy of religious belief or religious acts do not fall in the scope of the margin of appreciation.¹²⁶ This underscores the fact that the margin should indeed be limited to the proportionality judgment: the state cannot claim a judgment on the legitimacy of religious acts (and thus on the question of whether article 9 has been interfered with), nor can the margin expand the legitimate aims as enumerated under article 9(2) ECHR. Only if one of the legitimate aims can validly be claimed to be pursued, the margin of appreciation under proportionality issues offers leeway to the Member State. By contrast, if a measure cannot be convincingly based on one of the legitimate aims under article 9(2) ECHR, there is no basis to enter the proportionality questions due to the lack of a valid ground for justification.

In addition, the Court's application of the facts to the legal standards in *SAS v France* raises serious doubts. The Court refers to the above mentioned parameter for the margin

¹¹⁸ Similarly F Matscher, 'Methods of Interpretation' in MacDonald, Matscher and Petzold (n 106) 79; J Frowein 'Preliminary Remarks to Articles 8–11' in J Frowein and W Peukert (eds), *EMRK-Kommentar* (3rd edn, Beck 2009) para 13; Koutnatzis and Weilert (n 103) 91.

¹¹⁹ Pabel and Schmahl (n 23) 14; P Van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 85.

¹²⁰ R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiary' [2014] *Human Rights Law Review* 487, 487.

¹²¹ *Hirst v United Kingdom* (2006) 42 EHRR 41, paras 79–80.

¹²² *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, para 108.

¹²³ See also D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 13 December 2013, 8.

¹²⁴ Spano (n 120) 498.

¹²⁵ *Dahlab v Switzerland* (n 7); E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 *Human Rights Law Review* 359–65.

¹²⁶ *Manoussakis and Others v Greece* (1997) 23 EHRR 387.

of appreciation, according to which legal heterogeneity between Member States suggests wide leeway for Member States. According to case law, three factors are usually accounted for the legal comparison: international treaty law, comparative law and international 'soft law'.¹²⁷ Judges Nußberger and Jägerblom observe in their dissent in *SAS v France* that 45 of 47 Member States of the Council of Europe have not legislated in this area.¹²⁸ Even the ECtHR states that no consensus between legal order in Member States exists as to the banning of face covering clothes.¹²⁹ However, the Court only looks at the fact that there is a controversial debate on this issue in a number of Member States. This approach can be questioned by the Court's own standards.¹³⁰ First, the degree of homogeneity of the legal order should be determined on basis of the legal standardisation, ie whether or not states have legislated on an issue or not. This standard allows much more certainty and legal security than an approach referring to the political and public debate on a specific topic which can hardly be judged with clarity. Based on the degree of legislation, one can observe that there is a consensus between the Member States of the Council of Europe (with the exception of France and Belgium) *not* to address this issue by law and thus not to impose restrictions on the wearing of religious symbols. Hence, there is a prevalent legislative consensus *against* the banning of face covering. Consequently, one can barely argue in favour of a wide margin of appreciation but rather the margin should be limited given the overwhelming majority of countries that have not deemed it necessary to legislate on this issue.

4 Conclusions

The jurisprudence of the ECtHR on the wearing of religious symbols has been long been discussed. One reason may be the multifaceted interests at stake. The criticism commonly raised is widespread reaching from the Court's alleged misinterpretation of religious symbols, the development of female or Muslim stereotypes, an overvaluing of the negative freedom of religion and the lack of sufficient judicial review where secularism is used as ground for interference. While some of the criticism seems to be biased by ideological controversies, there is merit to the observation that the freedom of religious expression has been clearly ranked lower than the negative freedom of religion. This is partly due to the Court's generous acceptance of national secular orders. Active and intervention-

¹²⁷ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 19 with reference to *Marckx v Belgium* (n 48) para 41.

¹²⁸ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 19 with reference to *Bayatyan v Armenia* (2012) 54 EHRR 15, paras 103, 108.

¹²⁹ *SAS v France* (n 10) para 156; for a similar reasoning to that of the ECHR in *Lautsi v Italy* see Ronchi (n 2) 295 and the dissent of Judge Malinverni in *Lautsi v Italy* (n 11) para 1.

¹³⁰ See also the critical view of Koutnatzis and Weilert (n 103) 92, who point at the questionable deduction from the descriptive to the normative. They argue that a margin of appreciation should only exist for preeminent reasons. See also M O'Boyle, 'The Margin of Appreciation and Derogation Under Article 15: Ritual Incantation or Principle?' (1998) 19 Human Rights Law Journal 23, 29.

oriented notions of secularism have been accepted by the Court and thus giving leeway to Member States to adopt restrictive policies related to the wearing of religious symbols. In particular, secular orders seeking to remove religious symbols in the public sphere not only between the state and the individual but also among individuals have only vaguely been reviewed against the standard of pluralism and tolerance.

The Court's judicial restraint has resulted in the recent decision in *SAS v France*, which extends the justification under article 9(2) ECHR to an extent hardly reconcilable with the wording and objective of this provision. According to the Court's latest case law, an alleged consensus about interpersonal behavioural norms on communication may qualify as 'rights of others' within the meaning of article 9(2) ECHR. Notions such as the 'living together' are sufficient to push a specific expression of religion out of public space. This may be plausible in some instances, especially in areas where state neutrality is at stake or effective communication is essential such as the educational sphere and could be jeopardised due to the face-covering. However, in the context of the general public sphere accepting a uniform behavioural rule on the basis of considerations related to notions of 'living together' lacks sufficient legal ground. Such considerations do not meet the requirement of the 'right of others' pursuant to article 9 ECHR. The subject of protection within the meaning of the 'rights of others' are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify. In addition, doubts arise as to whether any choice of society demanding an open-face communication as an indispensable requirement of living together can be demonstrated. In any case, a vague normative concept of what communication standards in a society should apply cannot be the ground to justify infringements of the freedom of religious expression.

Finally, the doctrine of margin of appreciation has been misinterpreted in *SAS v France*. Although this doctrine plausibly accords leeway to Member States in determining the proportionality of a measure, the margin cannot be used to extend the wording of the Convention and, more specifically, create a new category of justification for violations of basic rights. Apart from that, taking the Court's previous jurisprudence on legal heterogeneity in Member States as a parameter for the margin of appreciation, there is no basis for granting the Member States a wide margin of appreciation where bans of wearing religious symbols are at stake. In sum, the recent judgment of the ECtHR implies a strong pleading in favour of Member State's leeway in regulating religious affairs in the public sphere—at the expense of the freedom of religion.