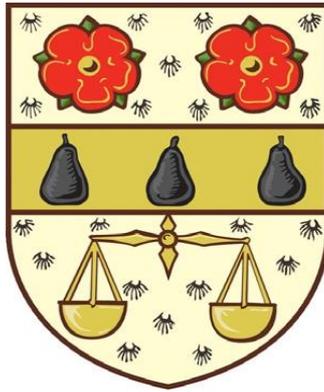


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**The Wearing of Religious Symbols under
the European Convention of Human Rights**

Dr Armin Steinbach
Gwilym Gibbon Fellow, Nuffield College, Oxford;
Senior Research Fellow, Max-Planck Institute
for Research on Collective Goods, Bonn

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

Armin Steinbach

Gwilym Gibbon Fellow, Nuffield College, Oxford University

Senior Research Fellow, Max-Planck Institute for Research on Collective Goods (Bonn)

Senior official, German Ministry of the Economy, Berlin

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Abstract

The wearing of religious symbols has been subject to more or less restrictive national regimes. In Europe, the 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 an indispensable requirement of “living together” that qualifies as “rights and freedoms of others” within the meaning of Article 9 para. 2 ECHR. In *S.A.S. 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 para. 2 ECHR.

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 become imminent as in the case of religious freedom.³ In the jurisprudence of the European Court of Human Rights (ECHR)⁴, the focus of adjudication has not been so much the question of internal freedom of religion (i.e. the right to believe or not believe)⁵, but rather the freedom of religious expression. In particular, the wearing of religious symbols has been subject of adjudication before the ECHR on many occasion and not limited to the wearing of the famous headscarf.⁶ The question of lawfulness of a ban of the wearing of religious symbols has been ruled on in different contexts allowing distinctions between the addressee of the ban (teachers⁷, pupils⁸ or students⁹), the place of religious expression (public place¹⁰, state-run educational institution¹¹ or

¹ A. Levade, Epilogue d'un débat juridique: l'interdiction de la dissimulation du visage dans l'espace public validée!, *Semaine juridique*, Éd. Générale, 25 October 2010, No. 1043, at 1978; P. Weil, Lifting the Veil of Ignorance, *Progressive Politics* 3, 2004, at 2; G. van der Schyff / A. Overbeeke, Exercising Religious Freedom in the Public Space: a Comparative and European Convention Analysis of General burqa Bans, *European Constitutional Law Review* 7, 2011, at 424; M. Vink, Dutch "Multiculturalism" Beyond the Pillarisation Myth, 5 *Political Studies Review*, 2007, at 337.

² E. Howard, *Law and the Wearing of Religious Symbols*, 1st edn (London: Routledge, 2012); A. Vakulenko, Islamic Headscarves and the European Convention on Human Rights: an Intersectional Perspective, 16 *Social and Legal Studies*, 2007, at 183; for the French situation see M. Hunter-Henin, Why the French Don't Like the burqa: Laïcité, National Identity and Religious Freedom, *International and Comparative Law Quarterly*, 2012, at 613; for the Italian situation see P. Ronchi, Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*, *Ecclesiastical Law Journal* 13, 2011, at 287; for the German situation see J. Thielmann, Burqa in Germany – Not really an Issue: A Short Note, in: A. Ferrari/S. Pastorelli, *The burqa Affair Across Europe*, 2013, (Dorchester: Ashgate, 2013), at 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/S. Pastorelli, *ibid*, at 77.

³ M. Schefer, Religionsfreiheit aus gemeineuropäischer Sicht, in B. Ehrenzeller et al. (eds), *Religionsfreiheit im Verfassungsstaat*, 2011 (Zürich: Dike und Schulthess, 2011), at 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, 13 September 2013 (No. 6 C 25.12); in Italy related to crucifixes in schools in 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*, (Cambridge University Press, 2005), at 204.

⁶ See the assessment by A. Ferrari / S. Pastorelli, in: A. Ferrari / S. Pastorelli (supra n 2), at 225; D. McGoldrick, Religion in the European Public Square and in the European Public Life – Crucifixes in the Classroom?, *Human Rights Law Review* 11:3, 2011, 451; L. Garlicki / M. Jankowska-Gilberg, Religiöse Aspekte im öffentlichen Schulsystem vor dem Hintergrund der Rechtsprechung des EGMR, in: B. Ehrenzeller (supra n 3), at 121; E. Howard (supra n 2), at 30.

⁷ *Dahlab v Switzerland*, (No 42393/98), 15 January 2001; this can be different at institutions for higher education, e.g. professors at university, see *Kurtumulus v Turkey*, (No 65500/01), 24 January 2006; see also *Köse v Turkey*, (No 26625/02), 24 January 2006.

⁸ *Dogru v France*, (No 27058/05), 4 December 2008; *Kervanci v France*, (No 31645/04), 4 December 2008; *Aktas v France*, (No 43563/08), 30 June 2009; *Bayrak v France*, (No 14308/08), 30 June 2009; *Gamaleddyn v France*, (No 18527/08), 30 June 2009; *Ghazal v France*, (No 29134/08), 30 June 2009; *J. Singh v France*, (No 25463/08), 30 June 2009; *R. Singh v France*, (No 27561/08), 30 June 2009.

⁹ *Leyla Sahin v Turkey*, (No 44774/98), 2005, 41 EHRR 8 (Chamber), (2007) 44 EHRR 5 (Great Chamber), 10 November 2005, para. 53; see also *Karaduman v Turkey*, (No 16278/90) (1993), 74 DR 93 (Commission); *Bulut v*

working place¹²) as well as the cultural and religious character of state principles^{13, 14}

The jurisprudence on the wearing of religious symbols has reached a new stage in the latest judgement of the ECtHR, *S.A.S v France*¹⁵, in which the Court upheld France's ban on full-face veil in public.¹⁶ The applicant, S.A.S, was a practicing Muslim living in France who at times elects to wear religious clothing that conceals 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 argument that French citizens reject practices that question the possibility of open and interactive relationship and that open-face communication would constitute an indispensable requirement of the "living together" of society. The ECtHR found that

"... 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 dogmatic reasoning by the Court to what extent the term "freedoms and rights of others" would allow to capture notions about the "living together". Instead of establishing a link between these notions and the individual rights of others, the Court confines itself to demonstrate its comprehension for citizens' unease when communicating with face-covered women.

Turkey, (No 18783/91) (1993), 74 DR 93 (Commission).

¹⁰ *S.A.S. v France*, (No 43835/11), 26 June 2014; *Ahmet Arslan v Turkey*, (No 41135/98), 23 February 2010; due to security reasons see *Phull v France*, (No 35753/03), 11 January 2005, at security checkpoints the airport; *El Morsli v France*, (No 15585/06), 4 March 2008, regarding access to consulate; *Mann Singh v France*, (No 24479/94), 13 November 2008 for the making of pictures; pending procedures before the Court *Barik Edidi v Spain*, (No 21780/13).

¹¹ See *Aktas v France*, (No 43563/08), 25 May 2010; *Lautsi v Italy*, (No 30814/06), 3 September 2009 (Chamber), 18 March 2011 (Gr. Chamber).

¹² *Eweida et al. v United Kingdom*, (No 48420/10), (No 59842/10), (No 51671/10), (No 36516/10), 15 January 2013; pending procedure *Ebrahimian v France*, (No 64846/11).

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

¹⁴ L. Garlicki / M. Jankowska-Gilberg (supra n 6), at 131.

¹⁵ *S.A.S. v France* (supra 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, 122 *Yale Law Journal* (2013), at 1089; G. van der Schyff / A. Overbeeke (supra n 1), 436; M. Hunter-Henin (supra n 2), 634; P. Hector, Zur Religionsfreiheit in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in: Meng/Ress/Stein (eds), *Europäische Integration und Globalisierung, Festschrift zum 60-jährigen Bestehen des Europa-Instituts*, (Baden-Baden: Nomos, 2011), at 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 mars 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 mars 2011.

¹⁸ *S.A.S. v France* (supra n 10), para. 121.

“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 in previous case-law, this judgement thus does not concern questions of public security or public order, nor whether the ban is required by secular principles of a state. Also, the judgement 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 wearing customs.²⁰

The central thesis of this contribution addresses precisely the Court's recent expansion of grounds for justification. By recognizing indispensable requirements of “living together” as valid ground for interference with the freedom of religion, the ECHR creates a new category of justification which goes beyond the ones previously recognized, thereby extending the ground of justification to general public interest considerations. Hitherto the justification of interference with Article 9 para. 2 ECHR has been confined to the grounds of justification exhaustively enumerated in this provision. 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 para. 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 para. 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 of appreciation granted to Member States of 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-a-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

¹⁹ *S.A.S. v France* (supra n 10), para. 122.

²⁰ A. Posener, Gericht für Menschenrechte stärkt Diktatur des Wir, *Die Welt*, 2.7.2014.

freedom of religion (i.e. 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 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 background, the structure of this paper is as follows: Chapter II addresses the system of justifications under Article 9 para. 2 of the Convention and examines the extent and limitations of possible grounds to ban the wearing of religious symbols. In particular, the categories of improper proselytism and secularism are discussed 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, Chapter III focuses on the justification based on the "protection of rights and freedoms of others" as ground invoked by the Court to use socio-cultural 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, the doctrine of the margin of appreciation will be considered as potentially leaving 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 para. 2 ECHR, the freedom of religion is a qualified right, i.e. it can be subject to limitations prescribed by law and pursuing legitimate aims. In that sense, the provision has similar qualifications as Article 8, 10 and 11 ECHR. However, Article 9 para. 2 ECHR enumerates only a limited number of grounds restricting the legitimate aims for interference („...shall be subject *only* to such limitations...") and uses restrictive wording.²¹ Legitimate aims under Article 9 para. 2 ECHR are the interests of public safety, the protection of public order, health or morals, or the protection of

²¹ C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, (Oxford: Oxford. University Press, 2001); K. Sahlfeld, *Aspekte der Religionsfreiheit*, (Zürich: Schulthess, 2004), at 205; Article 9 para. 2 ECHR refers to the „the protection of public 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 in time before reactive measures; there is a similar ground for justification laid down in Article 18 para. 3 of the International Covenant on Civil and Political Rights. 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 para. 3 are „public safety, order, health, or morals or the fundamental rights and freedoms of others“.

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

A. 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 with the term of 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 state and its institutions as well as the protection of life and health of its population. Concerning the term public order, the Court stated in an *obiter dictum* this term to be defined as “ordre public”.²⁵

In relation to the wearing of religious symbols, the public security has been relevant as ground of justifications 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 checkpoints²⁶, 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 against the Convention and stressed that such security checks are part of public security.²⁷ In this vein, the suit 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

²² Previously, it had been argued that the legitimate aims under Article 9 para. 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*, (Berlin: Duncker Humblot, 1976), at 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*, (Oxford: Oxford University Press, 1980), at 196; N. Blum, *Die Gedanken-, Gewissens- und Religionsfreiheit nach Article 9 der Europäischen Menschenrechtskonvention* (Berlin: Duncker Humblot, 1990) at 114.

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

²⁴ While Article 8 para. 2, Article 10 para. 2 and Article 11 para. 2 ECHR refer to „national security“ / „Sécurité nationale“ and „public safety“ / „sécurité nationale“ as legitimate aims, Article 9 para. 2 ECHR mentions „interests of public safety“ / „sécurité publique“, see C. Grabenwarter (supra n 23), Article 9, para.83.

²⁵ *Engel u.a. v Netherlands*, 8 June 1976, Ser. A Nr. 22, at 41 para. 98; see W. J. Ganshof van der Meersch, Fragen von allgemeinem Interesse, die sich für einen Gedanken- und Informationsaustausch eignen, *Europäische Grundrechte-Zeitschrift*, 1978, at 37, 39.

²⁶ See E. Howard (supra n 2), at 107; see also G. van der Schyff / A. Overbeeke (supra n 1), at 446.

²⁷ *El Morsli v France* (supra n 10).

interests.²⁸

While the above cases concerned sensitive security areas in which citizens are commonly subjected to measures in an indistinctively 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 *S.A.S. v France*, the Court viewed the ban of the wearing of religious symbols to be unjustified in public areas without a sensitive security situation. In the only case in the Court's jurisprudence prior to *S.A.S. v France* which concerned public sphere outside from 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 *S.A.S. v France*, as in *Ahmet Arslan v Turkey* there was no covering of the face, that is, no barrier to identify 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-a-vis public security as ground 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 to outweigh 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 defer a generally restrictive application of public security as grounds for encroaching on people's freedom to religion. A general ban of religious symbols from 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 immanent threats.³²

²⁸ *Mann Singh v France* (supra n 10); the same plaintiff was later successful before the UN Human Rights Committee which found a violation of Article 18 para. 2 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* (supra n 10); see G. van der Schyff / A. Overbeeke (supra n 1), at 447; M. Hunter-Henin (supra n 2), at 636.

³⁰ *S.A.S. v France* (supra n 10), para. 136, 151.

³¹ G. van der Schyff / A. Overbeeke (supra n 1), para. 139.

³² Different view P. Hector (supra n 16), at 262, arguing that the French ban of the burqa may well be justified for reasons of public security.

B. Preventing improper proselytism

From the perspective of the protection of others (i.e. 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 secular order of society. The jurisprudence reflects the defensive stance the Court adopts vis-a-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 duties of the believers.³³ It is obvious that this can generate conflicts with the freedom of others, namely with the negative freedom of religion, i.e. the freedom *not* to have a religion. The line between legitimate and acceptable attempts to convert others and the improper proselytism are thus thin and blurry.³⁴ 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 belief of others is a "right of others" within the meaning of Article 9 para. 2 ECHR.³⁵ In *Dahlab v Switzerland*, the ECtHR identified the right of pupils to remain unaffected by the proselytizing 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 recognized the difficulties to determine 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 proselytizing 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 step back.³⁷ Therefore, the religious feelings of children and their parents as element 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 belongs to one religion and

³³ *Kosteki v the Former Yugoslav Republic of Macedonia*, (No 55170/00), 13 April 2006, (2007) 45 EHRR 712.

³⁴ Dissenting vote by judge Howard in *Kokkinakis v Greece*, (No 14307/88), (1994) 17 EHRR 397, para. 15.

³⁵ See *Buscarini et al. v San Marino*, (24645/94), 18.2.1999, (2000) 30 EHRR 208, ECHR 1999-I; *Dimitras v Greece*, (42837/06), 3.6.2010; *Sinan Isik v Turkey* (21924/05), 2.2.2010, ECHR 2010.

³⁶ *Dahlab v Switzerland* (supra n 7), RJD 2001-V, at 13.

³⁷ E. Howard (supra n 2), at 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.

that the university consequently had to take measures aiming at reducing the influence that fundamental religious groups could possibly exert on non-religious students. In such situations, the ban of religious symbol would pursue the goal of peaceful coexistence between students of distinct beliefs.³⁹

The Court's jurisprudence concerning the proselytizing 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 characterize these women as fundamental and attempting to proselytize others.⁴⁰ In this vein, judge Tulkens refers in her dissenting vote to *Leyla Sahin v Turkey* to a judgement of the German Constitutional Court of 24 September 2003⁴¹, 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 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 proselytizing effect of the headscarf, there were no sufficient indicators supporting this view. Neither in *Dahlab v Switzerland* nor in *Leyla v Turkey*, it was 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 the 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 *S.A.S. v France* the Court adopted a more cautious stance on this issue. Unlike in *Dahlab v Switzerland* nor in *Leyla v Turkey* where the Court stressed the negative influence of the religious symbols, in *S.A.S. v France* the Court observes „that it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others“.⁴⁴ This statement reflects more reluctance in giving religious symbols a meaning that is empirically not sufficiently supported.

From the above, it can be deduced that has been a general inclination in the Court's jurisprudence to

³⁹ *Leyla Sahin v Turkey* (supra n 9) (Chamber), 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 (supra n 1), at 19. Similarly, in the case *Begum*, 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, *Feminist Legal Studies* 14, 2006, at 379.

⁴⁰ C. Evans (supra n 21), at 15

⁴¹ Bundesverfassungsgericht 108, 282 – *Neue Juristische Wochenschrift* 56 (2003), at 3111.

⁴² E. Howard (supra n 2), at 44.

⁴³ C. Evans (supra n 21), at 11; E. Howard (supra n 2), at 44; see also B. Rainey / E. Wicks / C. Ovey, *The European Convention on Human Rights*, 6 eds (Oxford: Oxford University Press, 2014), at 418.

⁴⁴ *S.A.S. v France* (supra n 10), para. 120.

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 that sufficient evidence had been supported. This supports the view that there is kind of “presumption of indoctrination”⁴⁵ associated with the religious symbols. However, while this may explain the Court’s bias to the favour of shielding non-religious persons from religious influence, the Court’s approach seems still compatible with the notion of protecting the “rights of others” within the meaning of Article 9 para. 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 often is 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 “extravert”) religious freedom on the one hand and the negative (or “introvert”) religious freedom on the other hand. One can view a horizontal application of the freedom of religion as only the relation 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.

C. 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 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 socio-cultural 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.

⁴⁵ P. Ronchi (supra n 2), at 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* (supra n 39), 17 EHRR 397.

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

⁴⁸ *Dink v Turkey*, (Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), 14.9.2010; *Marckx v Belgium*, (No 6833/74), Serie A-31; *X & Y v Netherlands*, (No 8978/80), Serie A-91.

⁴⁹ For the state’s duty to protect from aggressive proselytism see also C. Grabenwarter, *European Convention on Human Rights, Commentary*, (Oxford: Hart Publishing, 2014), Article 9, para. 41.

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 *Sahin v Turkey*, the Court 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 recognized by the French citizens, the protection of which enjoys a high value. However, the Court fails 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 ambivalence 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 of 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

⁵⁰ M. Hunter-Henin (supra n 2), at 635; G. van der Schyff / A. Overbeeke (supra n 1), at 429; D. McGoldrick (note 6), 453.

⁵¹ *Leyla Sahin* (supra n 9) (Chamber), para. 108, (Great Chamber), para. 155.

⁵² *Leyla Sahin* (supra n 9), para. 99

⁵³ *Dogru v France* (supra n 8), para. 72; for a discussion of the French notion of secularism see M. Hunter-Henin (supra n 2), at 613, making clear that initially this notion was confined to ensuring state neutrality and has been widened through the recent ban of face-covering; see also J. Rivero, La notion juridique de laïcité, *Recueil Dalloz*, 1949, at 137; G. van der Schyff / A. Overbeeke (supra n 1), at 430; Conseil d'État, Étude relative aux possibilités juridiques d'interdiction du port du voile intégral, 25 March 2010, at 18. The Italian interpretation of secularism allows for a privileged role of Christianity, see P. Ronchi (supra n 2), at 290.

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

⁵⁵ E. Howard (supra n 2), at 48.

⁵⁶ *Kokkinakis v Greece* (supra n 39), para. 31.

Moldavia⁵⁷ 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 to roll back 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 *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 himself and act without discrimination but should also ensure that religion remains out of public space.⁶³ In accordance with this concept of secularism, the Court accepted active intervention of the state against certain forms of religious expression.⁶⁴ In *Sahin v Turkey* the Court adopted the Turkish concept of active secularism by considering the Turkish measures as proportional instruments 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

⁵⁷ *Eglise Metropolitaine de Bessarabie v Moldavia*, 13 December 2001, RUDH 2002, at 10.

⁵⁸ K. Pabel (supra n 9), at 15.

⁵⁹ S. Poulter (supra n 59), at 50; see also C. Rumpf, *Das Laizismusprinzip in der Rechtsordnung der Republik Türkei*, *Jahrbuch des Öffentlichen Rechts* 36 (1987), at 179, 183. In *Ludin II* (supra n 46), the German Federal Constitutional Court has distinguished between 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 expressions 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 N. Nathwani (supra n 59), at 228.

⁶⁰ N. Nathwani (supra n 59), at 229.

⁶¹ S. Poulter (supra n 59), at 50; see also D. McGoldrick (note 6), 457.

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

⁶³ M. Mazher Idriss (supra n 67), at 261.

⁶⁴ E. Howard (supra n 2), at 38.

⁶⁵ *Leyla Sahin* (supra 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 / F. Jankowiak (eds), *Le Droit ecclésiastique en Europe et à ses marges XVIIIe–XXe siècles*, 2009, at 333–45; M. Troper, *Sovereignty and Laïcité*, 30 *Cardozo Law Review*, 2009, at 2561.

⁶⁷ See also M. Hunter-Henin (supra n 2), at 620.

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

By referring to the rather vague terms of pluralism and tolerance, the Court refrains from defining by what means a secular system has to ensure pluralism. It only generally presupposes that every state would choose on its 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 granting 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 at the central to this notion of secularism. The positive role of a state would lie in rolling back 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

⁶⁸ *Refah Partisi u.a. v Turkey*, (41340/98), 13.2.2003, para. 91; *Otto-Preminger-Institut v Austria* (13470/87), 20.9.1994, Serie A No. 295-A, para. 47.

⁶⁹ *Serif v Greece*, (38178/97), § 53, ECHR 1999-IX.

⁷⁰ *Refah Partisi et al v Turkey* (supra n 73), para. 93, supra n 17.

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

state-owned institutions⁷²) 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-a-vis religious expressions which are in conformity with social standards, but also if they are challenging and disturbing for state and society.⁷⁴ This line of reasoning has also been alluded to in the Court's recent judgement *S.A.S. v France* in relation to religious symbols. The Court views the wearing of religious symbols as expression of cultural identity, which is part of a pluralistic system within a democratic society. Even if religious clothes may be perceived by some with strange feeling, precisely 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 conceptualization 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 recognizes the negative freedom of religion of the individual

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

⁷³ *Handyside v United Kingdom*, (No 5493/72), 1979-1980 1 EHRR 737, para. 49.

⁷⁴ *Handyside v United Kingdom* (supra n 78), para. 49; G. van der Schyff / A. Overbeeke (supra n 1), at 443.

⁷⁵ *S.A.S. v France* (supra n 10), para. 120.

⁷⁶ For the critics that the Court fails to sufficiently determine the scope of secularism see B. Rainey / E. Wicks / C. Ovey (supra n 65), at 418.

⁷⁷ *The Moscow Branch of the Salvation Army v Russia*, (No 72881/01), 5 October 2006, para. 49.

⁷⁸ *Fáber v Hungary*, (No 40721/08), 24.7.2012, §§ 37; see C. Grabenwarter (supra n 54), at 301.

⁷⁹ Dissenting votes judges Nußberger and Jägerblom, *S.A.S. v France* (supra 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.“

who is part of the public sphere where individuals bearing both positive and negative freedom of religion. The concept of active secularism is not limited to rolling back religious influences originating in state conduct (e.g. the wearing of headscarf by teachers in school). It also identifies the need to apply secularism in a horizontal fashion between private persons requiring public sphere to remain free of religious symbols.⁸⁰

In balance, the Court's approach towards accepting secularism as 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 religions is biased 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 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 para. 2 ECHR

Based on the foregoing and the Court's stance 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 *S.A.S. 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 para. 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 (a) we give account of how the Court arrived at its finding and, second (b), 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. Finally, even a wide margin of appreciation for Member States (c) does not allow the creation of grounds of justification not provided for in the Convention.

⁸⁰ See also *Refah Partisi v Turkey* (supra n 73), § 103; however, the Court has been reluctant in accepting positive state obligation to protect, see D. Ottenberg, *Der Schutz der Religionsfreiheit im internationalen Recht*, (Baden-Baden: Nomos, 2009), at 131 mwN.

A. *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 para. 2 ECHR. The Court shows comprehension for 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 the "living together". The main critic 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 para. 2 ECHR.⁸²

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 way argument could be found in the role of 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 recognizes that a faceless communication would be tantamount to a violation of the "right" to live in an environment facilitating the living together.⁸⁵ This implies an active role for the state:

⁸¹ *S.A.S v France* (supra n 10), para. 121. The debate in the Belgian parliament showed that there is a majority viewing 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, 9.4.2010, at 6.

⁸² See also dissenting vote judges Nußberger and Jägerblom, *S.A.S. v France* (supra n 84), para. 5.

⁸³ See M. Hunter-Henin (supra n 2), at 630, who refers to a new „social ordre public“ interfering with fundamental freedoms; similarly G. van der Schyff / A. Overbeeke (supra n 1), at 430.

⁸⁴ *S.A.S. v France* (supra 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 14.9.2010, at 6732.

“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 of 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.

B. 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 para. 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 accruing from the ECHR⁸⁸; 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 *S.A.S. 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 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 para. 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

⁸⁶ *S.A.S. v France* (supra n 10), para.141 and 153 (accentuation by the author).

⁸⁷ *S.A.S. v France* (supra n 10), para. 142.

⁸⁸ C. Grabenwarter (supra n 21), para.86; A. von Ungern-Sternberg, in: U. Karpenstein / F. Mayer, *EMRK: Kommentar zum Schutz der Menschenrechte und Grundfreiheiten*, (München: Beck, 2011), Article 9, para.37.

⁸⁹ A. von Ungern-Sternberg (supra n 93), para.37.

⁹⁰ N. Blum (supra n 20), at 114.

⁹¹ *S.A.S. v France* (supra n 10), para. 113 with reference to *Svyato-Mykhaylivska Parafiya v Ukraine*, (No 77703/01), § 132, 14 July 2007.

⁹² See also F.G. Jacobs (supra n 20), at 196.

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 to do so.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 para. 2 ECHR. We have highlighted above 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-a-vis religious symbols placed and worn in the public sphere. The Court's reasoning suggests the contrary view though. The Court invokes pluralism 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 para. 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 the 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 dissenting vote to *S.A.S. 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

⁹³ N. Blum (supra n 20), at 114.

⁹⁴ According to Article 8 para. 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 / S. Breitenmoser, in: K. Pabel / S. Schmahl, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, (Köln: Carl Heymanns Verlag, 2012), Article 8, para. 650; I. Fahrenhorst, *Familienrecht und Europäische Menschenrechtskonvention*, (München: Ferdinand Schönigh, 1994), at 119. The protection of youth and children can justify the deprivation of child custody (*Eriksson*, 22 June 1989, A/156 §§66-67); a blood test may be commanded from a person being suspected to be drunk (*X v Netherlands*, (No. 8239/78), 4 December 1978, DR 16, 184).

⁹⁶ Dissenting vote judges Nußberger and Jägerblom, *S.A.S. v France* (supra n 84), para. 5.

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 to violate freedom of religion.

Furthermore, it remains doubtful whether an open-face communication does constitute an indispensable requirement of the living together in European society. This claim rests on an empirical observation of a society's choice. Such choice of society requiring the visibility of the subject's face can hardly be considered to exist. It can be conceded that clothes covering the faces 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 recognized that the 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. The surveillance of the teacher observed that pupils sought to receive visual signals from Ms Azmi's face which was complicated by the covered face. Also, the surveillance found the pronunciation of the teacher to be less clear 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, motorbike cycling or the wearing of carnival costume illustrate that common activities do not require open faces.¹⁰¹ Likewise, common practice in the age of internet question the need of identifiability of persons or recognizability of faces as indispensable requirement of communication. In the internet, recognizability is certainly not a common habit of communication, rather would anonymity be the rule. It is common that communication partners are not visible nor identifiable. The use of invented synonyms and user names are a widespread

⁹⁷ Chambre des Représentants de Belgique (supra n 86), at 6.

⁹⁸ Commissie Gelijke Behandeling, judgement 2003-40, para. 4.10.

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

¹⁰⁰ E. Howard (supra n 2), at 43.

¹⁰¹ Dissenting vote judges Nußberger and Jägerblom, *S.A.S. v France* (supra n 84), para. 9.

phenomenon. It does not appear 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

C. Margin of appreciation of Member States and limited judicial control

The ECtHR generally accords to 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 the ECHR must give due account of measures taken as a result of democratic decision-making processes.¹⁰⁴ Respect and tolerance vis-a-vis the democratic origin of measures contested before the ECHR 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 ECHR 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 to interpret 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

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 vote judges Nußberger and Jägerblom, *S.A.S. v France* (supra n 84), 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 P. Ronchi (supra n 2), at 294, who refers to a „presumption of indoctrination“ in the case of 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, *Human Rights Law Journal* 19, 1998, at 30; E. Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, *Heidelberg Journal of International Public Law*, 1996, at 240; S. Koutnatzis / A. Weilert, Fragen der menschlichen Reproduktion vor dem EGMR – Zugleich eine kritische Würdigung der Lehre vom staatlichen Beurteilungsspielraum (Margin of Appreciation), *Archiv des Völkerrechts* 51 (2013), at 72, 88.

¹⁰⁴ P. Mahoney, Marvellous Richness of Diversity or Invidious Cultural Relativism?, *Human Rights Law Journal* 19, 1998, at 1, 2; so also *S.A.S. v France* (supra n 10), para.129 with reference to *Maurice v France*, (11810/03), § 117, ECHR 2005-IX.

¹⁰⁵ *Leyla Sahin v Turkey* (supra n 9), para. 100; C. Tomuschat, Individueller Rechtsschutz durch die EMRK, *Europäische Grundrechte-Zeitschrift* 2003, 97.

¹⁰⁶ P. Mahoney (supra n 120), at 2; F. Matscher, Methods of Interpretation of the Convention, in: Macdonald/Matscher/Petzold, *The European System for the Protection of Human Rights* (Dordrecht: Martinus

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, the ECtHR must not 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 normally is 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. 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 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 ECHR repeatedly stated that these issues have been addressed by individual Member States in very different ways, therefore not allowing to set a uniform European standard over all national legal orders.¹¹³ The Court continued on this line of reasoning in its recent decision in *S.A.S. 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

Nijhoff, 1994), at 63, 76.

¹⁰⁷ C. Grabenwarter / K. Pabel, *Europäische Menschenrechtskonvention*, (München: Beck, 2012) 5th eds, § 5 para. 9.

¹⁰⁸ *Handyside v United Kingdom* (supra n 78), Series A Vol. 24, 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 S. Koutnatzis / A. Weilert (supra n 119), at 89.

¹¹⁰ W. Ganshof van der Meersch, „Le caractere „autonome“ des termes et la „marge d'appréciation“ des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme, in: F. Matscher/H. Petzold (eds), *Protecting Human Rights: The European Dimension – Studies in Honour of Gerard Wiarda*, (Köln: Carl Heymanns, 1988), at 209; P. Mahoney (supra n 120), at 5.

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

¹¹² *Leyla Sahin v Turkey* (supra n 9); the judicial restraint in cases where European minimum standards are lacking played an important role in the British cases of transsexualism. See *Ress v United Kingdom*, (9532/81), 17 October 1986, Series A Vol. 106, para. 37; *Cossey v United Kingdom*, (10843/84), 27 September 1990, Series A Vol. 185, para. 40; *Sheffield and Horsham v United Kingdom*, (22985/93, 23390/94), 30 July 1998, ECHR 1998-V.

¹¹³ *Leyla Sahin v Turkey* (supra n 9), para. 101; *Otto-Preminger-Institut v Austria* (supra n 88), § 50; *Dahlab v Switzerland*, (supra n 7).

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 para. 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 police¹¹⁷, which is linked to the vague legal term of “public security” under Article 9 para. 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 judgement 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 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 *Robert 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

¹¹⁴ *S.A.S. v France* (supra n 10), para. 130; *X, Y and Z v the United Kingdom*, (75/1995/581/667), 22 April 1997, § 44, Reports 1997-II.

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, see J. Künzli (supra n 128), at 344.

¹¹⁶ *Leander v Sweden*, (No 9248/81), 26.3.1987, Serie A 116.

¹¹⁷ *Buckley v United Kingdom*, (No 20348/92), 25.09.1996, Reports 1996-IV.

¹¹⁸ Similarly F. Matscher, *Methods of Interpretation*, in: R.St.J. MacDonald, F. Matscher / H. Petzold (eds), *The European System for the Protection of Human Rights*, (Dordrecht: Martinus Nijhoff, 1994), at 79; J. Frowein, in: Frowein/Peukert (eds), *EMRK-Kommentar*, 3rd eds, (München: Beck, 2009), Preliminary remarks to Articles 8-11 para. 13; S. Koutnatzis / A. Weilert (supra n 119), at 91.

¹¹⁹ K. Pabel (supra n 9), at 14; P. Van Dijk u.a., *Theory and Practice of the European Convention on Human Rights*, (Antwerp: Intersentia, 2006), at 85.

¹²⁰ R. Spano, *Universality or Diversity of Human Rights?*, *Human Rights Law Review* 2014, at 487.

¹²¹ *Hirst v United Kingdom* (No 2) 2005-XI paras 79–80.

¹²² *Animal Defenders International v United Kingdom*, ECHR Reports 2013, para 108.

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 that the margin should indeed be limited to the proportionality judgement: The state cannot claim a judgement on the legitimacy of religious acts (and thus on the question whether Article 9 has been interfered with), nor can the margin expand the legitimate aims as enumerated under Article 9 para. 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 para. 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 *S.A.S. v France* raises serious doubts. The Court refers to the above mentioned parameter for the margin 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 The judges Nußberger and Jägerblom observe in their dissenting vote in *S.A.S. 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,

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, at 8.

¹²⁴ R. Spano (supra n 120), at 498.

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

¹²⁶ *Manoussakis u.a. v Greece*, (18748/91), 26.9. 1996, Reports 1996-IV, N 47.

¹²⁷ Dissenting votes judges Nußberger and Jägerblom, *S.A.S. v France* (supra n 10), para. 19 with reference to *Marckx v Belgium* (supra n 70), § 41.

¹²⁸ Dissenting votes judges Nußberger and Jägerblom, *S.A.S. v France* (supra n 10), para. 19 with reference to *Bayatyan v Armenia*, (No 23459/03), 7.7.2011, § 103, 108, ECHR 2011.

¹²⁹ *S.A.S. v France* (supra n 10), at 156; for a similar reasoning of the ECHR in *Lautsi v Italy* see P. Ronchi (supra n 2),

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 legal order should be determined on basis of the legal standardization, i.e. whether or not states legislated 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 ban of face covering. Consequently, one can barely argue in favor 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 controversially discussed for quite long. 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-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 *S.A.S. v France*, which extends the justification under Article 9 para. 2 ECHR to an extent hardly reconcilable with the wording and

at 295 and dissenting vote by judge Malinverni in *Lautsi v Italy* (supra n 11), para. 1.

¹³⁰ See also the critical view of S. Koutnatzis / A. Weilert (supra n 119), at 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?*, *Human Right Law Journal* 19, 1998, at 23, 29.

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 para. 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 jeopardized 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 the 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 *S.A.S. 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 judgement of the ECHR 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.