**Reconciling Pluralistic Democracy and Religious Freedom in European Human Rights Law: A Jurisprudential Balance in Search of Principles**

**Abstract**

This article examines some of the structural and systemic issues associated with the relationship between pluralistic democracy and religious freedom within the jurisprudence of the European Court of Human Rights. These include the problematic aspects of the doctrine of State neutrality, and the function of secularism in the understanding of 'democratic society'. It assesses the principal jurisprudential mechanisms utilised in religious freedom cases – namely, the notion of ‘public order’, the association of secularism with gender equality, the principles of the ‘minimum requirements of life in society’, and the margin of appreciation in the context of democratic legitimation. As the article demonstrates, the Court’s approach to negotiating the appropriate balance between pluralistic democracy and religious rights is marred by a reluctance to clearly elucidate the principles involved in the implementation of democratic values under the Convention when considering the means of protecting and limiting the freedom of religion.

**Keywords**

religious freedom - pluralistic democracy - European Court of Human Rights – secularism - State neutrality - public order - gender equality - living together

**1 Introduction**

Religious freedom stands in a precarious juridical position within the framework of rights and freedoms in the European Convention on Rights and Fundamental Freedoms (the ‘Convention’). On the one hand, it exists in symbiotic relationship with certain other freedoms – in particular, freedom of expression, whose subject matter includes religious expression, and freedom from discrimination, which protects against discrimination on the grounds of religious belief, among others. On the other hand, it provides for a set of rights that often come into conflict with the other freedoms, and which accordingly necessitates intervention to resolve the conflicts, both on the part of member State institutions and, in the last instance, the European Court of Human Rights (the ‘ECtHR’ or the ‘Court’). Importantly, the permissible limitations on the manifestation of religious freedom within the Convention are framed in terms of whether they are necessary in a ‘democratic society’, adding a further qualification to the exercise of the freedom, and a further point of potential conflict.

A presupposition of this article is that ‘pluralist democracy’, rather than being a homogenous doctrine or principle guiding the application of Convention rights, is itself the designation of the terms for reconciling two competing concepts, one of pluralism and the acceptance of difference, the other of setting the conditions for democracy as a principle of social interaction and public participation. Religious freedom complicates this relationship by introducing into the broad objective of pluralism a certain degree of cultural particularity that cuts across a number of facets of society, implicating multiple rights and freedoms. The balance required in this domain, arguably among the most challenging of those raised by the Convention, is one which the ECtHR has approached in a somewhat extemporaneous manner, largely due to the fact that it has failed to establish an appropriate juridical framework for reconciling pluralistic democracy and religious freedom. This article explores the basis of this jurisprudential deficiency, with the aim of proposing some fundamental parameters for a coherent juridical approach to the conflicts raised in religious freedom cases.

**2 The Unstable Foundation of Pluralistic Democracy**

***2.1 The Pluralistic Element in Religious Difference***

Before analysing the more specific issues that arise in ECtHR jurisprudence, it may be worthwhile considering, if only schematically, some broader questions about the construct of pluralistic democracy that should help to frame the matters at stake in the jurisprudence on religious freedom.

The ECtHR has frequently noted that ‘there can be no democracy without pluralism’. Of course, pluralism is an entirely relational concept, the meaning of which is determined according to the context of the rights at issue. When dealing with the freedom of expression under Article 10 of the Convention, for example, pluralism entails allowing ‘diverse political programmes to be proposed and debated’, always ‘provided that they do not harm democracy itself’.[[1]](#footnote-1) When the integrity of an educational curriculum is at stake, pluralism envisages an open and non-indoctrinatory approach to the imparting of knowledge and information.[[2]](#footnote-2) In the context of freedom of thought, conscience and religion under Article 9, the ECtHR has stated that the pluralism indissociable from a democratic society depends upon this freedom, which, in its religious dimension, is ‘one of the most vital elements that go to make up the identity of believers and their conception of life’.[[3]](#footnote-3) Apart from the indeterminacy inherent in the notion of pluralism, the fact that an alleged violation of a Convention right may invoke a conflict or tension between two or more such freedoms renders the requirements of pluralism subject to value judgments regarding the relative importance of the respective rights to ‘democratic society’.

The relationship between pluralistic democracy and religious freedom is underscored by three related structural phenomena: the construction of religion as a social and political problem; the governance of religious beliefs and manifestations; and the dominant secular discourse prescribing the place of religion in society. The first concerns the fact that the recognition and interpretation of freedom of religion, whether on the part of the State or the ECtHR, necessarily makes religion both a facet of social difference – an instigator of social discord – and its own solution through the institutionalisation and legal regulation of inter-faith cooperation. This double movement formalises religious difference and stabilises collective identity in religious terms, while investing defined groups with legal personality as bearers of rights and freedoms, often at the expense of other social identities and sectarian differences.[[4]](#footnote-4) The second concerns the fact that, in determining the scope for religious freedom and its application in concrete situations, the State (and the ECtHR in certain cases) invariably assumes the function of governing religion in its manifold forms. This includes identifying theistic tenets, sects and authorities to represent official religions, and supervising the arrangements for implementing harmonious relations amongst different faiths and between the religious and non-religious segments of society. The third concerns the role of secular ideology in the separation of religion from politics and the regulation of religious freedom. The discourse on secularism pervades national policies and laws with regard to the legitimacy and treatment of religious communities and expression, especially in the public sphere, as well as the juridical rationalisation of permissible limitations on freedom of religion.

Recent literature on the politics of religious difference has examined the detrimental implications, especially for minority religions, of the legal governance of religion within the paradigm of the secular-democratic State. For example, Elizabeth Hurd argues that the Turkish State’s approach in classifying the Alevi faith with minority status as non-Muslims has effectively excluded its followers ‘from dominant renderings of Turkish citizenship’ and potentially subjected them ‘to increased social marginalization and discrimination’. At the same time, she notes, the ECtHR’s construction of Alevism as a non-Sunni Muslim minority sect in need of legal protection merely ‘reinforces the distinction between Alevis and non-Alevi Turkish citizens in religious terms’. In turn, this ignores the complex nature of religious identities, practices and affiliations, and reinforces ‘the exclusionary connection forged by the Turkish state between governed Sunni Islam and Turkish nationalism’.[[5]](#footnote-5) Saba Mahmood’s study of religious minority rights in modern Egypt (including the sympathetic approach of the ECtHR) has elicited findings along the same lines. She notes that the case examples, both where the identity of the State is Islamic and where it is secular, all affirm ‘the prerogative of the modern secular state to define national norms in accord with majoritarian religious sensibilities, while at the same time declaring religion to be immune from state intervention’.[[6]](#footnote-6) These perspectives offer a stark reminder that the juridical determination of the scope of religious freedom does not occur from a politically neutral starting point. They suggest that both religious and secular ideological positions inform the understanding of critical concepts in the realisation of freedom of religion, including what constitutes religion and its manifestation, the notion of ‘public order’, and the requirements of a ‘democratic society’.

***2.2 Religion's Compatibility with Democracy***

Given the vast differences among the Convention member States regarding the political place of religion, the constitutional recognition of established churches, and the extent of the social and legal integration of minority religions, it is not surprising that the ECtHR has avoided specifying the precise relationship between religion and democracy. Eschewing a purely majoritarian notion of democracy, the Court has often stated that a pluralistic and genuinely democratic society should respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority. Moreover, it should create the conditions for the expression and development of this identity, on the premise that the ‘harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion’.[[7]](#footnote-7) There are a couple of significant implications arising from these formulations. Firstly, recognition of the importance of maintaining religious minorities (and minority cultures more generally) for democratic society implies a notion of democracy that extends beyond the purely political realm. It draws a connection between democracy as rule by the people and participation in civic and social life, the latter depending upon a degree of tolerance, acceptance and fostering of plural cultural identities. Secondly, it presupposes certain limits upon the exercise of majoritarian will and influence, implying some restriction on the dominant religion where it would otherwise impede upon the expression of minority religious identities and obstruct ‘harmonious interaction’. However, neither of these implications suggest clear and stable legal solutions to managing religious difference within a democratic society. It is not obvious in what sense the protection of religious minorities determines the vitality and functioning of democracy, and therefore where precisely to draw the limits between the sanctioned expression of religious identity and the social space reflecting the democratic will. Similarly, noting that both ‘minorities’ and the ‘majority’ are essentially political constructs lacking defined, fixed boundaries, the approach in human rights law to balancing the rights of the former with the interests of the latter does not necessarily conform to verifiable principles of democratic participation. This is exacerbated by the fact that the ultimate objective of ‘harmonious interaction’ is neither a self-evident nor a homogenous idea.

Perhaps the most problematic aspect of the regulative concept of pluralistic democracy is the question of the importance of secularism in the Convention’s understanding of democratic principles. The ECtHR has consistently stated that democracy is a fundamental feature of the European public order, indeed the only political model contemplated by and thus compatible with the Convention. Furthermore, it considers one of its principal characteristics to be ‘the possibility of resolving a country’s problems through dialogue’, thus thriving on the freedoms of expression and association.[[8]](#footnote-8) On this basis, it found violations by the Turkish State with regard to its dissolution of Communist and Socialist political parties, even when such parties pursued an agenda that provided for political self-determination of the Kurdish minority, potentially disrupting the political integrity and unity of the extant State.[[9]](#footnote-9) At the same time, the Court has promoted secularism as being consistent with the democratic values of the Convention, and indeed suggested that secularism may be necessary to protect a democratic system.[[10]](#footnote-10) Thus, in the case of Turkey’s dissolution of an Islamist political party whose spokespersons advocated for a political arrangement inimical to secular principles, the Court was prepared to accept that the prohibition of a plurality of private-law systems based on religious distinctions was justified to preserve public order and the values of democracy. Its argument was that a legal plurality would undermine the State’s role as the ‘impartial organiser of the practice of the various beliefs and religions in a democratic society’, as well as infringe the principle of non-discrimination between individuals exercising their public freedoms.[[11]](#footnote-11) The latter decision has been criticised especially for its unvalidated assumptions of the rigid and intolerant nature of Shari’a law, and its characterisation of the Refah party as representative of the general Islamist threat to the democratic system. The Court effectively sanctioned the State’s circumscribed understanding of Islam and its treatment of conservative political positions and public Islamic ’lifetsyles’, which has been characterised as a ‘politicisation of Islam’.[[12]](#footnote-12) Nonetheless, accepting the Court’s assertion that the principle of secularism is one of the fundamental principles of the State in harmony with the rule of law, human rights and democracy, it remains unsettled in what circumstances secularism is necessary to protect democracy. This is particularly the case where such protection comes at the cost of restricting the freedoms of religion, expression and association, which are similarly seen as fundamental to the functioning of a democratic society. In other words, how should States and the Court settle the balance of freedoms and interests each of which serves the values of a democratic society?

**3 The Problem of Neutrality as a Framework for Pluralism**

Secularism creates two broad concerns for pluralistic democracy. The first is how it can ensure that all religions are fairly situated in the public space given the existence of dominant religions that may be historically and institutionally tied to public powers. The second is the question of how the public sphere is to be separated from the private in a way that is not informed by religious bias or influence. The principal mode of secularism has been the State’s adoption of a religiously neutral approach to the public space and the exercise of public powers. The ambiguity surrounding the meaning of neutrality and the question of whether it is fixed or tailored to the social and political context in which it is employed, however, renders the equation of secularism with State neutrality problematic. There is a line of argument which suggests that ‘neutrality’ should not be considered a belief or ideology that would be an end in itself, which would inevitably require protection and enforcement[[13]](#footnote-13) and risk inciting the claim for ideological precedence over freedom of religion. Rather, as Bielefeldt argues, neutrality should be seen as a ‘second order principle deriving its normative force from a higher principle, freedom of religion or belief in connection with non-discriminatory implementation’.[[14]](#footnote-14) This would present ‘neutrality’ as an instrumental rather than doctrinal concept, a mechanism for exercising and institutionalising self-restraint by deliberately avoiding identifying with a particular religion or belief, using religion as a source of legitimacy, and privileging one particular religious tradition.[[15]](#footnote-15) We can examine the instrumental utility of ‘neutrality’ through two broad enquiries: the State’s adoption of a neutral position in the acts of its own institutions and in public spaces; and the State's reaction to religious plurality, both through its treatment of minority religions and the extent of its interference in the autonomy of religious authorities.

***3.1 Neutrality in State Acts and Public Spaces***

The political adoption of a neutral position has both positive and negative facets. In its negative role, the State would be tasked to avoid partiality that would create religious inequality; in its positive role, the State would be involved in promoting pluralism so as to create the conditions for religious equality. What is less clear is how the State should achieve such neutrality where it has a discernible historical affiliation with a particular religion or institutional Church, or indeed a non-religious ideology. Whilst the argument that the modern European State can never achieve complete neutrality – given the hegemonic presence of religion in its historical development – has undeniable cogency, the human rights’ requirement to protect religious freedom has been understood as demanding a certain degree of State neutrality, even if the precise conditions of this neutrality remain to be worked out. The jurisprudence of the ECtHR on the issue of State-authorised religious symbols and practices illustrates some of the difficulties with this task.

In *Buscarini and Other v San Marino*[[16]](#footnote-16) the Court considered the question of the compatibility of a compulsory religious oath with the freedom to manifest religion, noting that the latter includes the negative aspect of the freedom, that is, to not hold religious beliefs or practise a religion, as pertained to the applicants in the case. Whereas the government argued that over time the oath had acquired historical and social significance based on tradition and accordingly lost its religious character, the Court found that the requirement to swear allegiance to a particular religion on pain of forfeiting parliamentary seats did constitute a limitation on the freedom to manifest religion in Article 9(2). Regarding the legitimacy of the limitation, namely whether it pursued a legitimate aim and was ‘necessary in a democratic society’, the Court held that the limitation was not necessary in a democratic society since compelling political representatives, who exercise a mandate intended to represent different views of society in parliament, to declare a commitment to a particular set of beliefs is manifestly incompatible with democratic principles. This decision represents the most straightforward example of the exercise of neutrality in terms of State restraint, given that the religious partiality mandated by governmental authorities in this case potentially interfered with the integrity of parliament, the public institution most representative of the democratic system. However, even where a State-endorsed religious preference does not directly threaten the functioning of democracy as such but merely interferes with an individual’s personal convictions, the Court has taken a relatively strict approach to the standard of neutrality expected from public authorities. Thus, it upheld a complaint against a provision under a criminal procedure code that presumed that all witnesses were Orthodox Christians and willing to take the oath. The effect of the presumption, requiring disclosure by witnesses of their religious convictions prior to testifying in criminal proceedings, was considered to interfere with the individual’s right not to reveal his or her faith as part of the freedom to manifest religious beliefs, and was neither justified nor proportional to the aim pursued.[[17]](#footnote-17)

Whilst it is clear from these and other examples that in matters involving public authorities and public space the State is expected to avoid privileging or preferencing one religious tradition over others, two outstanding questions remain. Firstly, how narrowly or broadly should the notions of ‘public authorities’ and ‘public space’ be construed, a question which has particular salience in light of laws in some member States banning religious symbols in schools and indeed head-covering in all public places? Secondly, does neutrality require the State to merely refrain from prescribing some affiliation with or according preferential treatment to a religious tradition, or alternatively to promote all religions equally in the public sphere, or rather, does it legitimate the State’s removal of all aspects of religions and religious traditions from the visibility of public spaces? The latter question, in particular, has received inconsistent treatment and sparse reasoning from the ECtHR. In *Dahlab v Switzerland*[[18]](#footnote-18) the Court accepted in principle, as a legitimate aim justifying the prohibition of a primary school teacher’s wearing a Muslim headscarf while teaching, the maintenance of denominational neutrality in the State education system. The decision seems to conflate the issue of denominational neutrality with the concern over the possibility of proselytism, making specific reference to the authority of the teacher relative to the young and impressionable age of the pupils. As such, it does not provide definitive guidance on the extent to which a State is permitted to infringe upon the freedom to manifest religion within the public education system generally (that is, just because it is equated with public service or the authority of the State) even absent the risk of proselytism. However, the Court’s approach in *Leyla Şahin v Turkey* (which will be further examined later in the article) suggests that, at least in certain contexts, the secular requirement of neutrality may not necessarily be limited to neutrality on the part of public representatives or authorities in circumstances where there is a verifiable risk of religious influence. Moreover, in its later decision in *Dogru v France*,[[19]](#footnote-19) the Court relied heavily on the constitutional enshrinement of the principle of secularism in the French Republic, as endorsed by the French *Conseil d’Etat*, to justify the restriction on the wearing of the Islamic headscarf by a pupil during sport classes. It affirmed its earlier position in the case of *Köse and Others v Turkey*[[20]](#footnote-20) that the principles of secularism and neutrality at school and respect for the principle of pluralism were legitimate grounds justifying refusing pupils wearing the headscarf admission to classes.[[21]](#footnote-21) The reasoning suggests that State secularism and neutrality in their most general sense would suffice to authorise a non-religious treatment of the educational space, without the need for specific facts demonstrating the State’s preferencing of a religion or the exercise of undue religious influence.

We can compare this with the Grand Chamber’s decision in *Lautsi and Others v Italy,*[[22]](#footnote-22)in whichthe Court overturned the Chamber’s finding in support of the applicant’s argument that by displaying the crucifix in public schools the Italian State was giving a preference to Christianity and hindering other religious perspectives among children. In so doing, the Grand Chamber effectively interrupted the line of case law asserting the duty to uphold confessional neutrality in public education, or at least inserted certain qualifications into the assumption that secularism and educational pluralism, as hallmarks of a democratic society, demand strict religious neutrality in the educational space. Given the Grand Chamber’s deference to the State’s position via the application of a wide margin of appreciation, we can best appreciate this jurisprudential reversal by noting three themes prevalent in the government’s case.

*Religion as cultural-historical identity.* Although the Grand Chamber did not go so far as to agree with the government’s argument that the crucifix is less a religious symbol than a historical one, in affirming that the decision as to whether to perpetuate a tradition falls in principle within the margin of appreciation of the State the Court gave credence to the argument that the Christian religion is a crucial aspect of the cultural-historical identity of the Italian State and integrally bound up with its historical development. Further, it accepted, by implication, that this legacy is relevant to determining the scope for limiting the individual’s freedom of religion. Joseph Weiler, who represented some of the States intervening on behalf of Italy in the case before the Grand Chamber, has suggested that accounting for the cultural-historical identity of each State (its ‘symbology’), including its worldview, whether religious or secular, is essential to respecting the diversity of the European constitutional landscape and critical to the determination of religious freedom. Since a wall from which a crucifix has been removed is no less neutral or indifferent to religion than one with a religious symbol (secularism being a ‘faith’ in its own right), he argues, freedom of religion should not demand the cleansing of public space from all religious symbols but rather the understanding of and respect for the State’s own identity, whether religious or laic, as an aspect of its own self-determination.[[23]](#footnote-23) Weiler’s position, which may have influenced the Court’s thinking, raises a number of concerns. Firstly, while he is quite correct to suggest that in religious freedom cases the courts need to realistically take into account the relationship between a State’s constitutional make-up and the society’s religious or secular traditions, the presentation of the State’s collective ‘identity’ as a fact (a society-wide and uniform attribute) effectively ignores the multiplicity of political, social and cultural tensions that underlie relationships in the modern European State and contribute to its dynamics as a living, changing and often conflicted social organism. Secondly, the manner of resolving the contest between the State’s identity and the individual’s rights and freedoms implicitly presents the former as a historical reality (an enduring national legacy) and the latter as a purely legal, ahistorical designation. This effectively sidesteps the fact that individual human rights are as much a part of the historical legacy of the modern European State as its religious or secular traditions. Weiler’s reasoning may be categorised as conforming to the ‘benevolent neutrality’ thesis, which encourages the State to promote an open and tolerant public arena without at the same time losing or ignoring its historical and cultural heritage. It is a thesis which has found favour in US Supreme Court jurisprudence regarding its Constitutional anti-establishment clause, but has been largely discredited by the Canadian Supreme Court with respect to freedom of religion under its Charter of Rights and Freedoms.[[24]](#footnote-24) On a more polemical note, Weiler’s analysis does little to resolve the conflicts which underpin the secular-religious divide. If we simply allow the State to assert its alleged national identity, how do we then deal with the situation where national identity is associated with denominational bias, or even overtly xenophobic attitudes? It may be suggested, for example, that the principle of *laicite* in France, which has rarely served to enforce a separation of Church and State but rather signifies a particular approach to the interference of public authorities in religious affairs,[[25]](#footnote-25) has in contemporary public discourse been largely associated with nationalism, anti-immigration policies and anti-clerical intolerance in general. To some extent, Judge Bonello, in his concurring opinion in *Lautsi*, attempts to avoid the contest between national identity and individual rights by noting that, while laudable values such as secularism, pluralism, the separation of Church and State, religious neutrality and religious tolerance have evolved parallel to freedom of religion within civilised societies, none of the former are actually values protected by the Convention.[[26]](#footnote-26) However, what neither Weiler nor Judge Bonello explicitly account for in their respective arguments is the extent to which these other values nonetheless inform the Court’s understanding of the requirements of a democratic society. They therefore underplay the contextual and instrumental significance of such values in defining the permissible scope of the freedom to manifest religion in light of its legitimate restriction. Of course, there is also the competing argument that the judgments of both the original and appeal judgments in *Lautsi* suffered from a false identification of secularism as a personal conviction, which would place it in direct competition with religious convictions. This may be considered a symptom of the historical construct of secularism as a social ideology, whose task is to relegate religion to the private sphere as part of regulating the public sphere.[[27]](#footnote-27)

*Christian universalism as the foundation of the secular, democratic State*.A related argument in the Government case was that Christianity is not only part of the cultural-historical legacy of the State, but also the foundation of the modern secular democratic State. The ECtHR refers to the Italian administrative Court’s assertion that in Italy the crucifix symbolised the religious origin of values (such as tolerance, mutual respect, and non-discrimination) which characterised Italian civilisation. In that sense, when displayed in classrooms, the crucifix could fulfil, even in a ‘secular’ perspective, ‘a highly educational symbolic function, irrespective of the religion professed by the pupils’.[[28]](#footnote-28) In other words, when displayed in a Church, the crucifix clearly has a religious function, but when displayed in a non-religious context such as a school, its display possesses a non-discriminatory meaning since it is capable of representing the values of civil society which also underpin the Italian constitutional order. While this particular argument is not explicitly endorsed by the Court, given the importance of the ‘democratic society’ proviso in determining the legitimacy of restrictions on religious freedom it is possible that the connection of Christianity with democratic values may have influenced the extent of the margin afforded to the State.

*The distinction between active and passive symbols*. Arguably, the most significant obstacle the government had to overcome in light of the previous rulings regarding the role of religion in the education system was the concern regarding indoctrination, proselytism or religious influence. How does one avoid the fact that the crucifix on the wall may influence impressionable children? In fact, the original chamber found that in the context of public education, the crucifix, which it is impossible not to notice in classrooms, was necessarily perceived as an integral part of the school environment and could therefore be considered a ‘powerful external symbol’, as was the case with the Muslim veil in the previous decisions. The Grand Chamber disagreed on this point, relying on a distinction between ‘active’ and ‘passive’ religious symbols. Whereas the headscarf worn by a teacher (in *Dahlab*), and indeed as worn by a mere university student (in *Leyla Şahin*), could be considered an active religious symbol, the crucifix in the classroom is essentially a passive symbol – by simply hanging on a wall it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities. In the words of Judge Bonello, it is ‘the mere display of a voiceless testimonial of a historical symbol’.[[29]](#footnote-29) This attempt to distinguish the ‘headscarf’ cases based on a questionable distinction – after all, it could be said that the presence of a crucifix on a classroom wall is even less ‘passive’ than religious clothing, asserting its obviousness and naturalness precisely through its silence and symbolic weight – betrays the imprecise and largely hypothetical reasoning in the headscarf cases. As judge Malinverni (joined by Judge Kalaydjieva) points out in his dissenting opinion, a more pertinent distinction could be made on the basis that whereas the Muslim schoolteacher could invoke her own freedom of religion to justify wearing the headscarf, which the State would need to respect, the same justification could not be raised for the school’s display of the crucifix, since public authorities cannot invoke such a right.[[30]](#footnote-30) This would also serve as a rejoinder to Weiler’s position, which gives significant weight to the State’s collective identity and its claimed ‘right’ to self-determination, neither of which are reflected in the Convention system of rights.

* 1. ***State Neutrality in the Context of Religious Plurality and Autonomy***

If determining the extent to which the State’s involvement with religion breaches its obligation of neutrality is, at its core, a balancing exercise, there remains the question of the weight to be afforded respectively to the State to foster its collective identity, to the affected religious groups to manifest their beliefs and practices, and to the individual whose rights may be interfered with in the process of either of the former. In this assessment, the degree of scrutiny of neutrality will apply differentially as between the State and private parties. There are instances and contexts in which religious influence or discrimination in the private arena, or even in the public arena by private persons, is permissible, whereas the State’s involvement in the same would render it a breach of its obligation of neutrality. The Supreme Court of the United States encapsulated this point in its landmark *Obergefell v Hodges* decision.On the question of the permissibility of state exclusions of same-sex couples from civil marriage, the Supreme Court stated that ‘when sincere, personal opposition [based on decent and honourable religious or philosophical premises] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied’.[[31]](#footnote-31) The ultimate concern regarding the risk of at least implicit endorsement by the State of a particular religious doctrine or ideology that may be discriminatory or tend to partiality is the potential to exacerbate the discrimination and exclusion experienced by the affected group.

It may be, then, that the question of State neutrality is so intertwined with the problem of discrimination that the most fruitful approach is to enquire into the level of neutrality required to give effect to the principles of equality and non-discrimination. In a leading Canadian case on the issue of the human rights implications of the practice of offering a prayer at municipal council meetings, Supreme Court Justice Gascon reoriented the question of neutrality in the public sphere through the prism of discrimination. He presented three pertinent arguments. Firstly, neutrality presupposes that the State abstain from taking a position on questions of religion, which does not equate with taking a stand in favour of atheism or agnosticism. Secondly, neutrality is required of States, not individuals, and indeed the State’s duty of neutrality is based upon a democratic imperative, that of fostering a free and democratic society, which includes promoting diversity and multiculturalism. Thirdly, the problem with a non-neutral space is less that it prevents people from expressing their beliefs and more that it creates a hierarchy of beliefs, ranking individuals who hold such beliefs and casting doubt on the values of those it does not share.[[32]](#footnote-32) This focus on the duty of State neutrality – as an obligation solely on the State of ensuring the absence of discrimination or disparate treatment based on religious or ideological beliefs – is not without its own complexity, but does tend to avoid the direct conflict between the State’s manifestation of cultural traditions and the individual’s rights which underscored the ECtHR’s decision in *Lautsi*.

In fact, it has been argued that the strictness of the ECtHR’s review of the prohibitions of religious manifestation by member States has been and should be guided by the principle of equal treatment. Strand suggests that democratic pluralism implicates the equal treatment of religions: it ‘pulls in the direction of limiting religious manifestations where all religious manifestations are prohibited (and therefore treated equally)’ while pulling in the direction of accommodating religious manifestations where different religious manifestations are treated unequally (that is, where some are accepted while others prohibited).[[33]](#footnote-33) Thus, in *Folgerø* the Court found that the school curriculum favoured the majority religion, in the sense that the quantitative and qualitative favouring of Christianity established an imbalance in the curriculum that amounted to indoctrination, which the pupils’ rights to be exempted from teaching did not adequately counter. This created an imbalance between different religious and non-religious manifestations which accordingly resulted in stricter scrutiny. By contrast, the Court in *Lautsi* noted the absence in the Italian school system of restrictions on religious minority groups wearing religious clothing as well as examples of religious practices being facilitated by the schools, suggesting ‘that the presence of crucifixes in classrooms did not create a school environment with qualitative differences between the Catholic religion and other religions and philosophies of life’.[[34]](#footnote-34) According to Strand, a similar assessment of what may be termed a ‘religious level playing field’ was undertaken in *Eweida and Others v United Kingdom.* In its conclusion that the domestic authorities had failed to strike a fair balance when weighing the applicant’s desire to manifest and communicate her religious belief by wearing a crucifix against British Airways’ wish to project a certain corporate image, the Court commented on the fact the company had previously authorised employees to wear items of religious clothing, such as turbans and hijabs, thereby resulting in unequal treatment in Eweida’s case.[[35]](#footnote-35) It should, however, be noted that the Court may have been persuaded more by the lack of evidence of a negative impact from the former allowances than by the alleged unequal result.

If we turn to the treatment of religious minorities, we find that the Court has tended to adopt a relatively ad hoc approach to State neutrality, without relying upon a common thesis or logic. The issue of the treatment of Alevis as a minority group within Turkey has served as a useful heuristic tool for analysing freedom of religion because it involves the intersection of three politico-juridical issues: how religion is classified, and who has the authority to classify; the nature of the State’s obligation towards minority religions; and the ECtHR’s role in promoting religious pluralism through the adjudication process. The issue is further complicated by two conditions associated with Alevis. One is the ambivalent status of the Alevi ‘faith’ or way of life – it defies definitive classification under the strict distinctions between religion and culture, as well as within the recognised sectarian divisions of Islam. The other is the fact that it is caught within a religious-secular conflict that remains a permanent feature of the politics of the Turkish State and critical to its national identity. In *Hasan and Eylem Zengin v Turkey*[[36]](#footnote-36) the ECtHR ruled on the compatibility of compulsory public religious education with Convention rights, finding that, notwithstanding the legitimacy of the secular and multicultural intentions of the Turkish syllabus, the curriculum in question did not meet the criteria of pluralism and objectivity enshrined in Article 2 of Protocol 1, nor were there appropriate means by which the parents’ convictions could be respected. By relying upon the right to pluralism in education provided for in Article 2 of Protocol 1 – sustained by a more specific methodology and a correspondingly less controversial body of case law – the Court was able to avoid ruling on the freedom of religion claim under Article 9. As a consequence, the Court did not consider the precise role of national authorities under an avowedly secular constitution with regard to the regulation of religious minorities. Given that the Turkish authorities have generally justified the ‘nonrecognition of Alevi difference with the argument that special rights for the Alevis would mean favouritism over other practices of Islam that are also not recognised’,[[37]](#footnote-37) thereby promoting a selective version of neutrality dependent upon its own interpretation of majority and minority faiths, the broader question of the State’s approach to Alevi representation and discrimination in Turkish society was justifiably ripe for consideration. Nonetheless, the judgment did necessitate that the Court effectively define Alevism, as a factual basis for the assessment of the applicant’s claims, which it classified as a branch of Islam distinct from the majority Sunni faith. On this point, Hurd has argued that the Court was effectively torn between classifying Alevism as a ‘religious minority’ deserving of special dispensation with regard to compulsory religious education, and regarding it as part of Islam, as promoted by the Turkish authorities. Crucially, both approaches are ‘indebted to the criteria of assessment used by the Turkish State in matters of religion’.[[38]](#footnote-38) The Court’s compromised position of attributing minority status within the Muslim religion nonetheless risks fixing Alevi identity – producing a ‘perception of stable and nonnegotiable differences among Alevis, other minorities and Sunni Turkish citizens’[[39]](#footnote-39) – and reifying the homogenous interpretation of the politically-endorsed Sunni practice of Islam. Somewhat ironically, the latter is protected through the statist tradition of Turkish secularism.

More recently, the ECtHR has had the opportunity to examine the rights of the Alevi minority directly in terms of freedom of religion. In *Doğan and Others v Turkey*[[40]](#footnote-40) the Court found that the State’s refusal to recognise the services connected with the practice of the Alevi faith to constitute a public service was an interference with the applicants’ freedom of religion. It chose to focus on the attitude of the State authorities, which included a law under which Alevis were categorised and which prescribed significant prohibitions on religious practices. This law made no allowance for the specific characteristics of the Alevi community, and its resulting prohibitions violated the State’s duty of neutrality and impartiality and the right of religious communities to an autonomous existence. The decision has been criticised for not applying a positive obligation on the State that could be derived from Article 9 (which arguably would have responded more closely to the applicants’ claims).[[41]](#footnote-41) Nonetheless, the Court did clarify that the secular nature of the State did not necessitate denying the religious character of the Alevi faith, and indeed that the duty of neutrality and impartiality excluded any power on the State to determine whether religious beliefs or means of expression were legitimate, which otherwise would render Article 9 highly theoretical or illusory.[[42]](#footnote-42) More revealingly, the Court found that a blanket exclusion of the Alevi faith from a service which benefited adherents of the majority understanding of Islam (that is, unequal treatment in fact) constituted discrimination. Such a finding reinforces the argument that the requirements of State neutrality with regard to religious pluralism are more easily induced through the prism of equality than from any principles intrinsic to the practice of secularism and the place of religion in the public sphere.

In other cases specifically concerned with the autonomy of religious groups, the Court has tended to strictly construe the expectation of non-interference as a precept of neutrality. For example, it has taken the position that the State’s function as the ‘neutral and impartial organiser’ of the exercise of various religions and beliefs is one that is ‘conducive to public order, religious harmony and tolerance in a democratic society, particularly between opposing groups’.[[43]](#footnote-43) Of course, the very reference to the State as an ‘organiser’ of the exercise of religions obscures the very problem that it seeks to pronounce upon, which is the question of what degree of involvement in religion is permissible under the cloak of ‘organisation’. In the Alevi cases, the religious community’s rights to pluralistic education and equal access in the public domain revealed the non-neutral behaviour of the national authorities. In situations where impartiality is less evident, however, the nature of the State’s organisational role is less clear. For example, in *Hasan and Chaush v Bulgaria*[[44]](#footnote-44) the State’s interference with the organisational life of the Muslim community by replacing its religious leader was considered a violation of Article 9. The Court drew a direct connection between the organisational structure of a religious community and the individual believer’s freedom of religion, even if this connection is perhaps not so opaque or self-evident (especially given the lack of uniformity in religious institutions across different faiths) and in any case is never sufficiently explained in the case law.

Indeed, even when the individual’s rights claims have confronted State-sanctioned religious autonomy, the Court has remained committed to its deference towards the integrity of the religious organisation. Thus, when ruling on the appropriate balance between an individual’s right to private and family life and the right of a religious organisation to autonomy, the Court was prepared to provide a wide margin of appreciation for the State to determine the proportionality of its interference with the individual’s right (an interference largely justified by State respect for the autonomy of the Catholic Church). It emphasised that respect for religious autonomy implies acceptance of the religious community’s right to deal with dissident movements or threats to its cohesion. The Court’s approach effectively sacrificed the individual’s rights to the freedom (autonomy) of the religious community – a freedom which ipso facto belongs to each adherent to that religion – by the rationalisation that the individual in conflict with his or her community always retained the option to exercise his or her freedom of religion by leaving the community.[[45]](#footnote-45) This, perhaps, is consistent with the Court’s acceptance of the authority of recognised ecclesiastical bodies to exercise the rights under article 9 on behalf of their individual adherents.[[46]](#footnote-46) The strong dissenting opinion in this case (which reflected the fact that there was a marginal majority) did, however, suggest some firmer limitations on the scope of religious autonomy, including the power of State courts to review a decision of the religious community to ensure that it is duly reasoned, not arbitrary and not unrelated to the exercise of autonomy.[[47]](#footnote-47) Interestingly, in prescribing purely procedural qualifications to the exercise of religious autonomy and decision-making, even the dissenting judges implicitly endorsed the significance of communal religious freedom. In the process, they effectively ignored the paradox of the communal facet of the freedom potentially forcing the individual to forego his or her religious membership.

**4 Jurisprudential Mechanisms for Regulating Religious Freedom**

***4.1 Publicness and ‘Public Order’***

One of the most frequently argued grounds justifying State interference with freedom of religion is that of public order. As a concept, it is semantically and contextually flexible, requiring consideration not only of the nature of ‘order’ (that is, the rules, practices and understandings that are necessary for social cohesion) that is assumed as the basic normative foundation for a society, but also of the expressions or manifestations that are assumed to pertain to the ‘public’ realm of life. For the most part, however, the exception of ‘public order’ appears within the ECtHR’s jurisprudence as an axiomatic and self-evident principle. In other words, it tends to be utilised as the rationale for the necessity and proportionality of an interference with the individual’s freedom, rather than itself explained in the context of the alleged aim and the social, political and legal environments which it addresses. In this regard, we can identify three predominant deficiencies in the Court’s reliance on the notion of ‘public order’.

The first is that the Court is usually prepared to accept secularist arguments based on the requirements of public order without examining the alleged connection between the two, instead accepting at the broad structural level the importance of secularism for public order. It is therefore difficult to extrapolate the precise meaning of ‘public order,’ whether as a wholistic premise or relative to the circumstances raised in each case. It is not even obvious whether there is a single pan-European ‘order’, or instead multiple versions reflecting local conditions. Generally speaking, the relatively frequent references to the ‘European public order’[[48]](#footnote-48) would suggest that there is a Convention-wide concept that animates the prescribed limitations, at least as a minimal, fundamental basis for divergent State approaches. This would align with the Convention’s notion of a ‘democratic society’ against which all limitations are tested. On the other hand, the implication in some of the rulings is that ‘public order’ is specific to the member State’s situation, including its constitutional arrangement and temporary political climate. Thus, in the Turkish cases in which the State sought to rely on its secular political position, the Court made pointed and strategic references to the constitutional enshrinement of secularism in the Turkish State – as part of its historical development and national aspirations – as well as to the connection between Turkey’s secular character and the functioning of democracy. Such references imply that consideration of the parochial political framework is essential to whether the public order ground can be made out, and by corollary that a different political arrangement might invoke a different construction of ‘public order’.

A second and related deficiency is the extent to which the Court is prepared to make assumptions about the threat to public order without discrete evidence on the matter. This raises broader questions about the Court’s judicial role, and the extent to which its lack of a formal fact-finding function hampers its ability to effectively rule on human rights violations in cases where the facts are contested. It also raises the question of the appropriate standard of proof in such cases. While these broader questions are beyond the scope of this analysis, it is important to note that the cumulative effect of the two deficiencies is to render the application of the ‘public order’ exception unstable and potentially arbitrary in the context of incursions on freedom of religion.

A third deficiency is the lack of clarity concerning the assessment of the grounds of legitimacy, with the ‘public order,’ ‘public safety’ and the ‘protection of the rights and freedoms of others’ aims all being considered relevant to the principles of State secularism, sometimes without distinction. In *Dahlab* the ECtHR made reference to the principle of denominational neutrality, the risk of proselytism and the need to protect pupils by preserving religious harmony, before arriving at the conclusion that the impugned measure was ‘justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety’. It offered no explanation as to how each of these aims individually was connected with the noted concerns, or indeed whether the aims had been addressed cumulatively. By contrast, in *Ebrahimian v France* the Court approached the legitimacy assessment with greater specificity. It found that, in the context of an employer’s policies to promote equality of opportunity and avoid any discriminatory conduct as against other persons, a ban on an applicant’s manifesting religious beliefs while carrying out her duties pursued the legitimate aim of the protection of the rights of others, without the need to be additionally justified by considerations of the protection of public order.[[49]](#footnote-49) In arriving at this conclusion, however, the Court uncritically accepted the claims of the domestic authorities that the principle of equality is a corollary of the principle of neutrality, which in turn is a fundamental principle of the public service. Further, it pronounced that the restriction on the applicant’s ‘ostentatious manifestation of her religion’ was necessary to protect hospital patients from ‘any risk of influence or partiality’ that might arise from her appearance whilst carrying out her employment duties.[[50]](#footnote-50) There are three distinct conceptual leaps contained within this conclusion: the link between secularism and equality; the understanding that neutrality in the public service demands that employees forgo any aspect of their appearance that might suggest their religious beliefs; and, the assumption that the mere manifestation of religious belief (as distinct from the religious belief itself) could pose a risk of influence or partiality as regards patients treated by the employees, whom the Court describes as thereby ‘vulnerable’. Unfortunately, none of these assumption are theoretically justified or supported with evidence within the judgment.

A further problematic aspect of public neutrality arguments concerns the status of the individuals whose freedom is curbed. For example, while the Court has often emphasised the public and authoritative role of individuals involved in certain forms of public service,[[51]](#footnote-51) it is not always clear whether the nature of the role alone is sufficient, based on its formal classification, to establish the threat to secularism, nor whether the concerned individual’s acts are at all pertinent to the enquiry. In *Dahlab* the Court described the applicant, a primary school teacher appointed by the Geneva cantonal government, as ‘a representative of the State’, a designation that was relevant to the legitimate aim of ensuring the neutrality of the State’s primary education system. It appeared to endorse the Swiss Federal Court’s conclusion that the applicant ‘participates in the exercise of educational authority and personifies school in the eyes of her pupils’. A similar assumption was made in *Kurtulmuş v Turkey*,[[52]](#footnote-52) in which the Court concluded that a university lecturer is a person in authority and a representative of the State, a status which the applicant accepted of her own free will. While the assumption that a public service role would entail religious neutrality could perhaps be justified in the case of certain official positions that directly reflect upon the functioning of government, it is less obvious how a school teacher or university lecturer represents the State in a generic sense, so as to require a neutral dress code to ameliorate the risk to the integrity of its secular system. Moreover, while it is obvious that the Court is making a distinction between public and private educational institutions – indeed, the government in *Dahlab* argued in defence of its secular dress requirement that the applicant could seek employment in a private school which would not be bound by secular requirements – whether such a distinction is a rational basis for determining the legitimacy of a prohibition in otherwise similar circumstances is a question worthy of some debate. This is particularly the case in light of the evolving ECtHR jurisprudence on the positive obligation to protect against violations perpetrated by private persons. The conclusion to be drawn from the Court’s approach to the connection between secularism and public order is that a private educational institution prescribing a similar restriction on the freedom to manifest religion would not activate the public order limitation, even though the concerns regarding the potential for religious conflicts and the aim of religious harmony are just as relevant in this nominally private sphere.

It has only been in rare cases that the ECtHR has scrutinised the connection between the manifestation of religious belief and the State’s public order claim, seeking appropriate evidence to establish the necessity of the restriction. In *Ahmet Arslan and Others v Turkey*[[53]](#footnote-53) the Court accepted the State’s public order justification for a criminal sanction imposed for the wearing of distinctive religious clothing in public during a religious ceremony, but was not convinced that the State had established its necessity. It noted that since the ban in question did not affect civil servants, who would be bound by a certain discretion in carrying out their duties, but merely ordinary citizens, its own jurisprudence on religious clothing relating to civil servants, and teachers in particular, did not apply.[[54]](#footnote-54) The further specific finding of a lack of evidence that the manifestation in question posed a threat to public order or a form of pressure on others could be explained by the narrower margin warranted by the fact that the prohibition applied to a public place open to all individuals.[[55]](#footnote-55) On the other hand, the Court’s distinguishing of this case in *S.A.S. v France* on grounds unrelated to the status of the applicant or the generality of the public space might mitigate against this conclusion.

The matter is further complicated in *Leyla Şahin*, in which the applicant, as a university student rather than employee of a State education system, could not be classified as a representative of the State, or indeed as having any formal public persona or function. Accordingly, the reasoning on the secularism argument, which was accepted by the Court as the principal legitimate aim motivating the restriction on the wearing of the Islamic headscarf at university, did not focus on any aspect intrinsic to the status or function of the applicant. Instead, the focus was on a general political climate within Turkey, with specific reference to extremist political movements. The Turkish Constitutional Court’s foregone conclusion, affirmed by the Chamber and Grand Chamber, was that such a climate justified the State’s regulation of a religious symbol which had ‘taken on political significance in Turkey in recent years’. Not only did the respective courts fail to draw a factually-demonstrative connection between the applicant’s act of wearing the headscarf and the actual political concerns of the government with respect to ‘extremist’ or ‘populist’ Islamic movements, the patent conversion of a religious symbol (duly acknowledged by the ECtHR as pertaining to the applicant) to a political one by the executive branch of government – with its manifest invested interest – was accepted by the courts without any effective judicial scrutiny. Judge Tulkens, in her dissenting opinion, reflected precisely on the European supervision that must accompany the margin of appreciation afforded to States, which she stated was absent in the majority’s judgment:

the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a “pressing social need”. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement.[[56]](#footnote-56)

Mahmood asserts that this politicisation of what was for the applicants a purely religious symbol, which thereby facilitated subjecting its manifestation to the limitations of public order, illustrates the national courts’ and the ECtHR’s expansion of the sovereign power to preserve a national identity forged through its majoritarian religious or ideological position.[[57]](#footnote-57) We can go further and suggest that the Court’s untested affirmation of the State’s exercise of this prerogative under the pretext of preserving the secular model of governance is an abdication of its supervisory responsibility, a responsibility that is all the more urgent when the State’s infringement of individual freedoms is apparently motivated by purely political exigencies rather than the result of a genuine balancing of the various interests within a multicultural society. As Balibar incisively diagnoses the problem, the notion of neutrality of the public space, as well as the presence of identity and difference, that operate under the pretence of self-evident and natural thresholds, are instead ‘wholly conventional, shot through with strategies and norms, with evolving relations of forces among groups, subjectivities and powers, dictating the very sense of the categories ‘public’ and ‘private’.[[58]](#footnote-58) Unfortunately, the Court’s jurisprudence for the most part ignores these conditions underpinning the categories, and reinforces a distinction between them that is largely stripped of its political nuances.

***4.2 The Association of Secularism with Gender Equality***

As a matter of strict legal reasoning, the legitimacy of a limitation under Article 9 must both qualify under one of the listed aims and be considered ‘necessary in a democratic society’, thereby presupposing a conceptual distinction between the aim and the necessity qualification. However, in a number of religious manifestation cases before the ECtHR there has been a tendency to conflate the aim of ‘the protection of the rights and freedoms of others’, under which the claim for gender equality is made, with the secular requirements of a democratic society. This conflation obscures two crucial enquiries: in what sense gender equality necessitates restrictions on the manifestation of religious belief by women; and, on what basis the principle of secularism entails equality between the sexes. In *Dahlab* the Court observed that the wearing of a headscarf ‘appears to be imposed on women by a precept which is laid down in the Koran and which…is hard to square with the principle of gender equality’.[[59]](#footnote-59) This assumption regarding the religious precept and its effect of gender discrimination has since been affirmed in a number of cases. Most recently, in *Osmanoğlu and Kocabaş v Switzerland*, the Court included ‘equality between the sexes’ as one element attached to the protection of the rights and freedoms of others or the protection of public order.[[60]](#footnote-60)

The conflation of secularism with gender equality is most patent in the majority judgment in *Leyla Şahin*. While the Court acknowledged the incompatibility between the State’s duty of neutrality and impartiality and the power to assess the legitimacy of religious beliefs or their expression, it accepted the connection between the concern for equality before the law of men and women and the preservation of the secular nature of the institution concerned. It thereby endorsed the unexamined assumption that the wearing of a headscarf constitutes discrimination against women, and explicated an instrumental association between gender equality and secularism.[[61]](#footnote-61) In effect, the Court in its majority was prepared to exercise on the State’s behalf the power the State itself was denied, namely the power to make normative judgments about religious precepts and practices. As Judge Tulkens notes in dissent, it is not the Court’s ‘role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant’.[[62]](#footnote-62) Moreover, she points out the inconsistency in presenting the ground of gender equality as the basis for prohibiting the wearing of a headscarf while limiting the prohibition to university premises; accepting the gender equality argument would logically entail a positive obligation upon the State to prohibit the religious manifestation in all places, public or private.

A similar absence of explanation for linking gender equality to secularism is found in *Serife Yigit v Turkey*, a case concerning the State’s refusal to recognise a religious marriage that was not civilly registered. The Court accepted that the difference in treatment pursued the legitimate aims of protecting public order and protecting the rights and freedoms of others. It noted that, in the context of the importance of the principle of secularism, the State introduced monogamous civil marriage as a prerequisite for religious marriage in order ‘to put an end to a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men’.[[63]](#footnote-63) Beyond these general assertions of the function of civil marriage in protecting women from being treated as inferior under religious marriage, there is no further discussion of precisely how the State’s refusal to recognise the applicant’s religious marriage gives effect to the protection of women, nor why secularism justifies the State not recognising religious marriage. Ironically, the very effect of the State’s refusal in this case was to deny the applicant the social security benefits that would otherwise have accrued to a spouse on the death of her husband, thus giving the stated aim of equality an especially hollow ring. Bielefeldt correctly identifies the need to ensure that the elimination of gender-related stereotypes ‘coincides with attempts to overcome stereotypical perceptions of religious or belief tradition, in particular essentialist views that wrongly present religious traditions as being frozen against any meaningful changes and reforms’.[[64]](#footnote-64) It is a task that is all the more vital where the stereotypes are promulgated through judicial reasoning as a basis for upholding State measures restricting women’s freedoms.

It is true that in some recent cases the Court has refrained somewhat from uncritically accepting the gender equality rationale. Strand suggests that the case of *S.A.S.* sees a shift from the more structural approach to gender inequality (evident notably in *Dahlab* and *Leyla Şahin*) to a focus on the individual dimension.[[65]](#footnote-65) While the French government had relied upon gender equality as one of its justifying aims – following a parliamentary commission report which presented the full face-veil as ‘a symbol of a form of subservience’ of women[[66]](#footnote-66) – the Court instead concluded that ‘a State party cannot invoke gender inequality in order to ban a practice that is defended by women...unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms’.[[67]](#footnote-67) It should be noted that the Court’s view on the argumentative use of gender equality as a principle justifying a ban against women did not itself specifically revoke or challenge the link between secularism and gender equality made in the earlier cases. It did, however, suggest the weakness in declaring as patently discriminatory a religious manifestation that is adopted and chosen by some women, implying that some evidence of discrimination specific to the individuals involved would be warranted.[[68]](#footnote-68)

***4.3 Expanding the Connotations of ‘Democratic Society’ – the Minimum Requirements of Life in Society***

Perhaps the most notable recent development in freedom of religion jurisprudence has been recognition of the rationale of ‘the minimum requirements of life in society’, and its correlate principle of ‘living together’. They were first raised and applied in the *S.A.S.* case in upholding the legitimacy and proportionality of the French legislative ban on wearing clothing designed to conceal one’s face in public places. The Court pronounced that ‘respect for the minimum requirements of life in society’, and specifically the value or requirement of ‘living together’, can under certain conditions be linked to the legitimate aim of the protection of the rights and freedoms of others. It accepted that the barrier created by the full-face veil could be perceived as ‘breaching the right of others to live in a space of socialisation which makes living together easier’, and noted that while the law in question did to some extent curtail the reach of pluralism, the principle of interaction (social communication) it sought to protect was itself essential for the expression of pluralism, tolerance and broadmindedness ‘without which there is no democratic society’. [[69]](#footnote-69) The principle has since been affirmed and applied in cases challenging similar restrictive laws against face-covering in Belgium.[[70]](#footnote-70) The extent to which the principle may be applied in different circumstances, however, requires some analysis. The facts that the Court in *S.A.S.* included the qualification ‘under certain conditions’ and specifically ruled on the significance of ‘living together’ for the respondent State in the context of the importance of being able to live in a space of socialisation within French society, might suggest that the principle should be limited to the factual circumstances in that case, an argument expressed in the Concurring Opinion of Judge Spano Joined by Judge Karakaş in *Dakir v Belgium*. In any case, there are number of more doctrinal criticisms that may be levelled at the Court’s adoption of this principle.

Firstly, the link between the aim of ‘living together’ and the ‘rights and freedoms of others’ is not explicitly formulated by the Court. As the Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom in *S.A.S.* points out, it is not clear whether the ‘rights and freedoms of others’ aim has any application outside of the Convention rights and freedoms, while there is no specific Convention right corresponding to ‘living together’.[[71]](#footnote-71) Moreover, the concept is rather vague and indeterminate. The background information to the French law suggests that the principle is primarily informed by interpretations of the symbolic meaning of the full-face veil – its ‘symbolic and dehumanising violence’, resulting in women being ‘effaced’ from the public space. However, given the Court’s rejection of the gender equality argument in principle, such a basis for the requirement of ‘living together’ would effectively undermine the majority’s rationale. Moreover, the fact that living together requires the possibility of interpersonal exchange should not be used as the premise for concluding that human interaction is impossible where the face is not fully visible, the fallacy of which is demonstrated by a number of obvious examples.[[72]](#footnote-72) The lack of objective and identifiable factors underlying this aim renders its application in Article 9(2) problematic, both because of its inherent indeterminacy and because of the possibility of its malleability being exploited to justify expansive fetters on cultural conduct deemed by the majority to be socially unacceptable.

Secondly, it could be argued that the Court has endorsed the proportionality of a blanket ban without properly considering the differential approaches to pluralism and reconciling the conflicting interests required to determine the needs in a democratic society. As recognised in the dissenting opinion in *S.A.S.*, the values of ‘pluralism’, ‘tolerance’ and ‘broadmindedness’ could just as convincingly be argued in favour of a religious dress code and an integrationist approach, whereas, on the other hand, the blanket ban could be ‘interpreted as a sign of selective pluralism and restricted tolerance’.[[73]](#footnote-73) In fact, it is plausible to suggest that the Court’s willingness to accept the ‘living together’ principle, notwithstanding its limitations and capacity to severely restrict cultural pluralism, is largely due to the constructed link between the principle as a social norm of open communication and the Court’s understanding of ‘democratic society’ as dependent upon open and free expression.

Thirdly, in its decision in *Osmanoǧlu and Kocabaş v Switzerland*,[[74]](#footnote-74) a case whose facts deviate from the French and Belgium cases in which the ‘living together’ principle was applied, the ECtHR was arguably inspired by and extended the principle beyond the confines of the reasoning in *S.A.S.*. That case concerned a challenge to the legal requirement (and its corresponding penalty for non-observance) for students enrolled in a public primary school to participate in compulsory swimming lessons. The applicants, devout practising Muslims, objected to their daughters taking part in mixed swimming lessons on the basis that it conflicted with their religious convictions. While accepting that the applicants’ right to manifest religion had been interfered with, the Court agreed with the position of the Government that the objectives of integrating foreign children of different cultures and religions – thereby ensuring ‘the smooth progress of education, respect for compulsory schooling, and equality between the sexes’ - and in particular, ‘protecting foreign pupils from social exclusion’, were aims linked to the protection of the rights and freedoms of others or to the protection of public order.[[75]](#footnote-75) As Trotter observes, while the ‘living together’ principle is not explicitly mentioned in this judgment, the reasoning strongly suggests that ‘living together’ was the basis for the Court’s constructing a notion of ‘collective life’, a notion that emphasises the social integration of children, beyond the objective of social interaction that is at the heart of ‘living together’.[[76]](#footnote-76)

Notwithstanding that the objective of social integration within a State education system appears to be a relatively novel addition within the categories of the protection of the rights and freedoms of others and the protection of public order, the Court deals with this argument swiftly and minimalistically. There is no explanation of why social integration, at the cost of negating aspects of ethnicity, religion and cultural background, is necessarily a common good and required by a democratic society, nor of the significance of participation in compulsory sporting lessons for the socialisation of children. Instead, there is a very real concern that this idea of collective life through social integration, like the ‘living together’ principle, is ideologically associated with ‘some kind of societal consensus or a majoritarian morality of how individuals should act in the public space’. This would be a form of ‘Government imposed assimilation of human interaction and behaviour’, as Judges Spano and Karakaş warn in *Dakir v Belgium*.[[77]](#footnote-77) Indeed, the Court does little to mitigate the risk of majoritarianism, and there are a couple of indications in the judgment that open the normative scope of its construction of collective life to this very risk. One is its endorsement of the State’s refusal to grant exemptions from the curriculum except in very exceptional circumstances and ‘with respect for the equal treatment of all religious groups’.[[78]](#footnote-78) The apparent reference to ‘formal equality’ in the treatment of religious groups, consistent with the objective of ensuring the development of the individual as a member of the community into which she is being integrated, suggests that religious differences are to give way to a homogenous conception of social cohesion. This effectively formalises intolerance to religious particularity under the pretext of equal treatment. The other is the Court’s reference to the ‘needs and traditions’[[79]](#footnote-79) of the State, which is particularly problematic when considered in the context of the judicial consideration of the concept of ‘tradition’ in *Lautsi*. In the latter, the recognition of the freedom of States to perpetuate a tradition could be seen as granting a symbol such as the crucifix the ‘authority of continuity’, thus securing it a place in the European order. Similarly, the Court’s recognition of the State’s role in organising educational curricula according to its ‘needs and traditions’ could be seen as investing the objective of social integration with a temporal dimension,[[80]](#footnote-80) a vision of collective, homogenous activity giving rise to a common identity enforced through the claim to tradition.

The idea of ‘the minimum requirements in society’ is an expansive and potentially powerful juridical tool. The fact that the Court has been prepared to apply it without identifying specific parameters or fully rationalising its legal basis within the text of the Convention, renders its jurisprudential role uncertain and potentially pernicious. In particular, it raises the question of whether the minimum requirements are interpreted as generic to all States within the European public order, or are unique to each particular State, or indeed whether specific to particular environments within a State.[[81]](#footnote-81) More importantly, it raises the question of where the limits lie as to what concerns ‘society’ and what is required as a ‘minimum’ in order for it to function. Both questions reflect the existence of a risk of perpetuating majoritarian norms and biases, justifying the criticism that there are insufficient safeguards built into this judicial development to prevent the influence of dominant cultural norms and to effectively protect and encourage cultural pluralism.

***4.4 The Margin of Appreciation in the Context of Democratic Legitimation***

As a defining characteristic of the ECtHR’s role and status under the Convention, the principle of subsidiarity reflects the pluralistic nature of the institutional arrangement between the Court and the Convention States.[[82]](#footnote-82) Carozza observes that ‘subsidiarity remains relevant to human rights above all because of its fundamental orientation toward the structural problems of unity and difference in a multinational context.’[[83]](#footnote-83) This is all the more pertinent in cases dealing with religious freedom, where historical and social differences ingrained in social norms and institutions render the imposition of supra-national human rights obligations problematic.

The Court’s principal tool of subsidiarity is the doctrine of the ‘margin of appreciation,’ through which the Contracting States are accorded a degree of discretion to determine the precise manner of implementing Convention rights and freedoms by taking into account national, social and political conditions. Arnardottir ascribes to it two distinct functions: a systemic one concerned with the distribution of competences between the national and supranational decision-making bodies, and a normative one allowing for pluralism and flexibility in interpreting and applying the Convention as part of the Court’s review. While the systemic margin focuses on the quality of the national decision-making processes, the Strasbourg Court’s own assessment under the normative margin takes account of the character of the right at issue and the interests it seeks to protect.[[84]](#footnote-84) In practice, however, the Court’s case-by-case elaboration on the range of the margin, from narrow to wide, and the increasing list of factors that bear upon the scope,[[85]](#footnote-85) render any analytical assessment of its parameters difficult.

One of the dominant theoretical bases for the margin of appreciation is that of democratic legitimation. Democratic legitimation refers both to the way in which democratic principles inform institutional competency as between the national and supranational authorities – evoked in the precept that the State is better placed than the ECtHR to apply Convention rights and determine the necessity of a limitation – and the actual interpretation of the scope of rights and their limits. The latter comprises the subject-matter of the rights and, more specifically, the assessment of the ‘necessary in a democratic society’ condition within the limitation provisions.

In religious freedom cases, the use of the doctrine has tended to obscure the balance of interests involved in the relevant assessment by deferring to a broad ideology of democratic values and processes. In the case of institutional competence, democratic legitimation has been utilised as a directive argument for broadening the scope of the margin to give effect to the idea that national authorities have a more direct connection with domestic laws and local needs, as well as the appropriate administrative, parliamentary and judicial machinery for balancing interests. It can be accepted that a domestic law’s conformity with democratic process is a relevant indicium of the maintenance of fundamental freedoms through an ‘effective political democracy’ as envisaged in the Convention Preamble. At the same time, however, it cannot be ignored that the characteristics of a political democracy inevitably exist in a state of flux as democratic societies themselves evolve, not to mention the lack of homogeneity in democratic institutions and procedures among the Convention States. Since such characteristics are primarily revealed only in justification for a particular application of the margin, the Court is able to exercise this deferential technique with significant latitude. In manifestation of religious belief cases, the Court has been prepared to defend the laws of national authorities that restrict particular religious manifestations on the grounds of ‘direct democratic legitimation’, evidenced simply by virtue of the laws having passed through the parliamentary process.[[86]](#footnote-86) Even where the Court has been prepared to scrutinise the quality of the Convention State’s decision-making processes, in both the legislative and judicial arenas, [[87]](#footnote-87) such scrutiny remains circumscribed by a high degree of formalism that evades effective consideration of the cultural dominance of certain religious institutions and the influence of majoritarian politics. By contrast, in the context of the regulation of religious organisations, the requirements of a democratic society often dictate restraint or non-interference on the part of the State, reflecting the position that the autonomy of religious communities themselves is integral to the flourishing of democratic society.[[88]](#footnote-88)

At the normative level, the scope of the margin often depends upon an assessment of the subject-matter of a freedom and its connection to democratic principles. Such an assessment, involving as it does the identification of a ‘core’ content to rights and its relationship to the ideals of a democratic society, is inherently a qualitative exercise: distinguishing core from periphery content assumes a relative conceptual association between the space of social life protected by that aspect of the right and the conditions for political democracy.[[89]](#footnote-89) In the context of religious freedom, the Court has rarely successfully addressed how the core content reflects religious particularity within a pluralistic democracy, nor the precise method for balancing the various interests that intersect in this domain. This deficiency has been exacerbated in assessments of the interference with the right to religious freedom on the ground of protecting the ‘rights and freedoms of others’. In some cases, the margin of appreciation has been used to avoid examining the actual harm to others’ rights and freedoms, which would be a precondition to a proper exercise of the proportionality analysis.[[90]](#footnote-90)

**5 Conclusion**

Religious freedom cases before the ECtHR undeniably raise questions of a sensitive nature, and often involve competing interests, not just those of the State and the applicant but also the myriad of other interests that are broadly reflected in the category of ‘public interest’. The Court has a much-used tool at its disposal for dealing with such cases, namely the doctrine of the margin of appreciation, and it has consistently afforded the States a ‘considerable margin of appreciation concerning matters relating to the relationship between the State and religions and the significance to be attached to religion in society’.[[91]](#footnote-91) Complementarily with the margin of appreciation, the Court has had to interpret the scope of the permissible limitations on the freedom to manifest religion and other freedoms, including interpreting and applying in the given factual circumstances the concepts of ‘public order’, the rights and freedoms of others, and what is ‘necessary in a democratic society’.

As the article has sought to demonstrate, the Court’s approach to this interpretive responsibility has been marred with inconsistency and a lack of well-defined principles. In particular, its incorporation of secular ideology and a restricted understanding of State neutrality in determining the requirements of a democratic society has privileged State-centered precepts on the role of religion in society. As a result, it has failed to give due consideration to the constitutional and historical relationships between the States and religions, and thus to the possibility of bias, or unfair or discriminatory treatment due to the role of a dominant religion or secular ideology. Moreover, the tendency towards a weak scrutiny of the link between the States’ claims under pluralistic democracy and the need to restrict aspects of religious freedom has resulted in decisions that have been legitimised through vague and tenuous premises, such as the protection of gender equality and the preservation of the minimum requirements of life in society.

Given the Council of Europe’s interest in intercultural dialogue as a tool for the democratic governance of cultural diversity,[[92]](#footnote-92) and the ECtHR’s unique supervisory role ensuring compliance with the Convention as a constitutional instrument of European public order, there is scope for the Court to contribute to a more rigorous and non-discriminatory approach to cultural pluralism. It could achieve this by developing its jurisprudence in freedom of religion cases through clear and consistent principles guiding a fair balance between democratic values and the accommodation of religious sensitivities.

1. *Centro Europe 7 S.R.L. and Di Stefano v. Italy* 7, June 2007, European Court of Human Rights, No. 38433/09, para. 129. [↑](#footnote-ref-1)
2. *See, for example*, *Folgerø and others v. Norway*, 29 June 2007, European Court of Human Rights, No. 15472/02. [↑](#footnote-ref-2)
3. [*Izzettin Doğan and Others v. Turkey*](http://hudoc.echr.coe.int/eng?i=001-162697), 26 April 2016,European Court of Human Rights, No. 62649/10, paras 103, 178. [↑](#footnote-ref-3)
4. *See* Elizabeth Shakman Hurd, *Beyond Religious Freedom: the New Global politics of Religion* (Princeton, NJ and Oxford: Princeton University Press, 2015). [↑](#footnote-ref-4)
5. Ibid., pp. 93, 96. Ratna Kapur has engaged in a similar analysis of religious governance and adjudication in the context of the construction of Hinduism by the Hindu Right government and the Indian Supreme Court, in which it is characterised as a tolerant and fundamentally secular religion in contradistinction with Islam and other minority religions. She argues that this construction results in inequality within the sociopolitical field from the ‘ideological weight carried by majoritarian Hinduism in the nationalist project’: Ratna Kapur, ‘A Leap of Faith: The Construction of Hindu Majoritarianism through Secular Law’, 113 *The South Atlantic Quarterly* (2014), pp. 109, 124. [↑](#footnote-ref-5)
6. Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton NJ: Princeton University Press, 2016), p. 174. [↑](#footnote-ref-6)
7. *Gorzelik and Others v. Poland*, 17 February 2004, European Court of Human Rights, No. 44158/98, para. 92. [↑](#footnote-ref-7)
8. *United Communist Party of turkey and Others v. Turkey*, 30 January 1998, European Court of Human Rights, No. 19392/92, paras 45, 57. [↑](#footnote-ref-8)
9. *United Communist Party of turkey and Others v. Turkey*; *Socialist Party and Others v Turkey*, 25 May 1998, European Court of Human Rights, No. 21237/93.. [↑](#footnote-ref-9)
10. *Leyla Şahin v. Turkey*, 10 November 2005, European Court of Human Rights, No. 44774/98, para. 114. [↑](#footnote-ref-10)
11. *Refah Partisi (The Welfare Party) and others v. Turkey*, 13 February 2003, European Court of Human Rights, Nos 41340/98, 41342/98, 41343/98 and 41344/98, paras 128, 119. [↑](#footnote-ref-11)
12. *See* Kathleen Cavanaugh and Edel Hughes, ‘Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State’, 38 *Human Rights Quarterly*  (2016), pp. 623, 647-648, 631. [↑](#footnote-ref-12)
13. Ibid., p. 632. [↑](#footnote-ref-13)
14. Heiner Bielefeldt, ‘Misperceptions of Freedom of Religion or Belief’, 35 *Human Rights Quarterly* (2013), pp. 33, 53. [↑](#footnote-ref-14)
15. Ibid., pp. 53-56. [↑](#footnote-ref-15)
16. 18 February 1999, European Court of Human Rights, No. 24645/94, paras 36-41. [↑](#footnote-ref-16)
17. *Dimitras and Others v. Greece*, 3 June 2010, European Court of Human Rights, Nos 42837/06, 3269/07, 35793/07 and 6099. [↑](#footnote-ref-17)
18. 15 February 2001, European Court of Human Rights, No. 42393/98. [↑](#footnote-ref-18)
19. 4 December 2008, European Court of Human Rights, No. 27058/05. [↑](#footnote-ref-19)
20. 24 January 2006, European Court of Human Rights, No. 26625/02. [↑](#footnote-ref-20)
21. *Dogru v. France, supra* note 19, Para. 67. [↑](#footnote-ref-21)
22. 18 March 2011, European Court of Human Rights, No. 30814/06. [↑](#footnote-ref-22)
23. Joseph Weiler, ‘[EJIL Editorial Vol 21:1- Lautsi: Crucifix in the Classroom Redux](https://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/)', EJIL: *Talk!*, <http://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/> (accessed October 17, 2018). [↑](#footnote-ref-23)
24. *See, for example*, *R v. Big M Drug Mart Ltd* [[1985] 1 SCR 295](https://scc-csc.lexum.com/scc-csc/scc-csc/en/43/1/document.do). [↑](#footnote-ref-24)
25. Raphaël Liogier, ‘*Laïcité* on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion’, 9 *Macquarie Law Journal* (2009), p. 25. [↑](#footnote-ref-25)
26. *Lautsi and Others v. Italy*, *supra* note 22, concurring opinion of Judge Bonello, para. 2.2. [↑](#footnote-ref-26)
27. Lorenzo Zucca, “A secular Manifesto for Europe”, 10(1) *Law & Ethics of Human Rights* (2016), pp. 160-165. [↑](#footnote-ref-27)
28. *Lautsi and Others v. Italy*, *supra* note 22, para. 16. [↑](#footnote-ref-28)
29. *Lautsi and Others v. Italy*, *supra* note 22, concurring opinion of Judge Bonello, para 3.3. [↑](#footnote-ref-29)
30. *Lautsi and Others v. Italy*, *supra* note 22, dissenting opinion of Judge Malinverni joined by Judge Kalaydjieva, para. 6. [↑](#footnote-ref-30)
31. 135 S. Ct. 2584 (2015), 2602; *cited in* Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (Harvard: Harvard University Press, 2017), p. 135. [↑](#footnote-ref-31)
32. *Mouvement laïque québécois v Saguenay* (City) [2015] 2 SCR 3; for commentary on the decision, *see* ‘Indi’s *MLQ v Saguenay* review: Canadian secularism’, *Canadian Atheist,* 3 [June 2016](https://www.canadianatheist.com/2016/06/indis-mlq-v-saguenay-review-8-canadian-secularism/), http://[www.canadianatheist.com/2016/06/indis-mlq-v-saguenay-review-8-canadian-secularism/](http://www.canadianatheist.com/2016/06/indis-mlq-v-saguenay-review-8-canadian-secularism/) (accessed July 27, 2017). [↑](#footnote-ref-32)
33. Vibeke Blaker Strand, ‘Prohibitions against Religious Clothing and Symbols in Public Schools and Universities: Narrowing the Scope by Introducing the Principle of Equal Treatment of Religious Manifestations’, 10 *Religion and Human Rights* (2015), pp. 160, 171. [↑](#footnote-ref-33)
34. Ibid., p. 175. [↑](#footnote-ref-34)
35. 15 January 2013, European Court of Human Rights, Nos 48420/10, 59842/10, 51671/10, 36516/19, para. 94. [↑](#footnote-ref-35)
36. 9 October 2007, European Court of Human Rights, No. 1448/04. [↑](#footnote-ref-36)
37. Markus Dressler, ‘The Religio-Secular Continuum: Reflections on the Religious Dimensions of Turkish Secularism’, in *After Secular* Law, ed. Winnifred Fallers Sullivan, Robert A. Yelle and Mateo Taussig-Rubbo (Stanford: Stanford University Press, 2011), p. 268. [↑](#footnote-ref-37)
38. Hurd, *supra* note 4, p. 99. [↑](#footnote-ref-38)
39. Ibid., p. 103. [↑](#footnote-ref-39)
40. 26 April 2016, European Court of Human Rights, No. 62649/10. [↑](#footnote-ref-40)
41. *See* Marcella Ferri, ‘The Dogan et al. v Turkey Case: A Missed Opportunity to Recognise Positive Obligations as Regards the Freedom of Religion’, 2 *European Papers* (2017), pp. 311-319. [↑](#footnote-ref-41)
42. This is consistent with the Court’s reluctance to allow the State to assess whether a particular practice claimed by an applicant to be a manifestation of religious belief properly falls within the scope of that religion – *see, for example*, *Jakóbski v. Poland*, 7 December 2010, European Court of Human Rights, No. 18429/06, para. 45, in which the Court held that the applicant’s decision to adhere to a vegetarian diet as ‘motivated or inspired’ by his adherence to Mahayana Buddhism was not unreasonable. [↑](#footnote-ref-42)
43. *Fernández Martínez v. Spain*, 12 June 2014,European Court of Human Rights, No. 56030/07, para. 127. [↑](#footnote-ref-43)
44. 26 October 2000, European Court of Human Rights, No. 30985/96. [↑](#footnote-ref-44)
45. *Fernández Martínez v. Spain*, *supra* note 43, paras 127-128. [↑](#footnote-ref-45)
46. *See, for example*, *Cha'are Shalom Ve Tsedek v. France*, 27 June 2000, European Court of Human Rights, No. 27417/95, para. 72. [↑](#footnote-ref-46)
47. Ibid., Joint dissenting opinion of Judges Spielmann, Sajò, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz, para. 21. [↑](#footnote-ref-47)
48. *For example*, the Convention being described as a ‘constitutional instrument of European public order’, or political democracy being referred to as a ‘fundamental feature of the European public order’ – see *Al-Skeini and Others v. the United Kingdom*, 7 July 2011, European Court of Human Rights, No. 55721/07, para. 109; *Gorzelik and Others v. Poland*, *supra* note 7, para. 89. [↑](#footnote-ref-48)
49. 26 November 2015, European Court of Human Rights, No. 64846/11, paras 50-53. [↑](#footnote-ref-49)
50. Ibid., paras 62-63. [↑](#footnote-ref-50)
51. In *Ebrahimian v. France*, *supra* note 49, at para. 64, the Court referred to the status of public employees which distinguishes them from ordinary citizens who are not representative of the State. [↑](#footnote-ref-51)
52. 24 January 2006, European Court of Human Rights, No. 65500/01. [↑](#footnote-ref-52)
53. 23 February 2010, European Court of Human Rights, No. 41135/98. [↑](#footnote-ref-53)
54. Discussed in *S.A.S. v. France*, 1 July 2014, European Court of Human Rights, No. 43835/11, para. 135. [↑](#footnote-ref-54)
55. *See* Peter Crumper and Tom Lewis, ‘Empathy and Human Rights: The Case of Religious Dress’, 18 *Human Rights Law Review* (2018), pp. 61, 83-84. Strand argues that the stricter scrutiny applied in this case evidences the stronger justification required when a ban affects public space generally rather than specific arenas where security may be an issue: Strand, *supra* note 33, p. 169. [↑](#footnote-ref-55)
56. *Leyla Şahin v. Turkey*, *supra* note 10, Dissenting Opinion of Judge Tulkens, para. 5. [↑](#footnote-ref-56)
57. Mahmood, *Supra* note 6*,* pp. 171-172. [↑](#footnote-ref-57)
58. Etienne Balibar, ‘Dissonances within *Laïcité*’, 11 *Constellations* (2004), pp. 353, 356-357. [↑](#footnote-ref-58)
59. *Dahlab v Switzerland*, 15 February 2001, European Court of Human Rights, No. 42393/98. [↑](#footnote-ref-59)
60. 10 January 2017, European Court of Human Rights, No. 3976/05, para. 64. [↑](#footnote-ref-60)
61. *Leyla Şahin v Turkey*, *supra* note 10, paras 107, 116. [↑](#footnote-ref-61)
62. Ibid., Dissenting Opinion of Judge Tulkens, para. 12. [↑](#footnote-ref-62)
63. 2 November 2010, European Court of Human Rights, No. 3976/05, para. 81. [↑](#footnote-ref-63)
64. Bielefeldt , *supra* note 14, p. 64. [↑](#footnote-ref-64)
65. Strand, *supra* note 33, p. 182. [↑](#footnote-ref-65)
66. *S.A.S. v France*, *supra* note 54, para. 17. [↑](#footnote-ref-66)
67. Ibid., para. 119. [↑](#footnote-ref-67)
68. Another example is the case of *Lachiri v. Belgium*, 18 September 2018, European Court of Human Rights, No. 3413/09, para 37, in which the applicant’s exclusion from a courtroom was held to violate her freedom to express her religion, since the need to protect public order was not made out by the State. However, the Court explicitly noted that it did not have to consider the aim of protecting the neutrality of public space based on the protection of the rights of others, since the State did not argue the point. [↑](#footnote-ref-68)
69. *S.A.S. v France*, *supra* note 54,paras 121-153. [↑](#footnote-ref-69)
70. *Belcacemi and Oussar v. Belgium*, 11 July 2017, European Court of Human Rights, No. 37798/12; *Dakir v. Belgium*, 11 July 2017, European Court of Human Rights, No. 4619/12. [↑](#footnote-ref-70)
71. *S.A.S. v France*, *supra* note 54,Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, para. 5. [↑](#footnote-ref-71)
72. Ibid., para. 9. [↑](#footnote-ref-72)
73. Ibid., para. 14. [↑](#footnote-ref-73)
74. 10 January 2017, European Court of Human Rights, No. 29086/12. [↑](#footnote-ref-74)
75. Ibid., para. 64 [↑](#footnote-ref-75)
76. Sarah Trotter, ‘”Living Together”, “Learning Together”, and “Swimming Together”: *Osmanoǧlu and Kocabaş v Switzerland* *(2017)* and the Construction of Collective Life’, 18 *Human Rights Law Review* (2018), p. 157. [↑](#footnote-ref-76)
77. *Dakir v. Belgium*, *supra* note 70,Concurring Opinion of Judge Spano Joined by Judge Karakaş, para. 7. [↑](#footnote-ref-77)
78. *Osmanoǧlu and Kocabaş v. Switzerland*, *supra* note 76, para. 96. [↑](#footnote-ref-78)
79. Ibid., para. 95. [↑](#footnote-ref-79)
80. Trotter, *supra* note 76, pp. 167-9. [↑](#footnote-ref-80)
81. The ECtHR has alluded to the possibility of an argument that restricting beards for prisoners could be linked to the legitimate aim of ensuring ‘respect for social norms and standards among prisoners’, citing the ‘minimum requirements of living together’ analysis from *S.A.S.*: *Biržietis v. Lithuania*, 14 June 2016, European Court of Human Rights, No. 49304/09, para. 54. [↑](#footnote-ref-81)
82. It should be noted that the principle of subsidiarity and the doctrine of the margin of appreciation are officially recognised in a new recital to the preamble of the Convention introduced by Article 1 of Protocol 15, although the protocol is not yet in force. For commentary on the effect of this protocol, see Antonio Cassese, “Ruling Indirectly: Judicial Subsidiarity in the ECtHR”, Paper for the Seminar on *Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities*, 30 January 2015, Strasbourg. [↑](#footnote-ref-82)
83. Paolo G. Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law” 97 *The American Journal of International Law* (2003), p. 49. [↑](#footnote-ref-83)
84. ## [Oddný Mjöll](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1920809)Arnardottir, “Rethinking the two margins of appreciation”, 12 *European Constitutional Law Review* (2016), pp. 41-43.

    [↑](#footnote-ref-84)
85. For example, the subject matter of the right, the importance of the affected right, whether complex political, social or economic assessments are required, whether there are competing interests, and whether there is any common ground among the Convention States. [↑](#footnote-ref-85)
86. A notable example is the Grand Chamber’s reasoning in *S.A.S. v France*, *supra* note 54, para. 129. [↑](#footnote-ref-86)
87. *See, in particular*, Robert Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity”, 14(3) *Human Rights Law Review* (2014). [↑](#footnote-ref-87)
88. Alastair Mowbray, “Subsidiarity and the European Convention on Human Rights”, 15(2) *Human Rights Law Review* (2015), pp. 335-336. [↑](#footnote-ref-88)
89. *See* Janneke Gerards, “Pluralism, Deference and the Margin of Appreciation Doctrine”, 17(1) *European Law Journal* (2011), pp. 112-113. [↑](#footnote-ref-89)
90. *For example,* in the decision in *Ladele*, in *Eweida and Others v. United Kingdom*,15 January 2013, European Court of Human Rights, Nos 48420/10, 59842/10, 51671/10, 36516/19: Alison Mawhinney, “Claims of Religious Morality: The Limits of Religious Freedom in International Human Rights Law”, 10(2) *Law & ethics of Human Rights* (2016), p. 362. [↑](#footnote-ref-90)
91. *Osmanoǧlu and Kocabaş v Switzerland*, *supra* note 76, para. 95. [↑](#footnote-ref-91)
92. *See* Council of Europe, ‘Living together: Combining diversity and freedom in 21st-century Europe’, *Report of the Group of Eminent Persons of the Council of Europe* (2011); Council of Europe, ‘Living together: a handbook on Council of Europe standards on media’s contribution to social cohesion, intercultural dialogue, understanding, tolerance and democratic participation’, Strasbourg (April 2009); Council of Europe, ‘Living together as equals in dignity’, *White Paper on Intercultural Dialogue* (7 May 2008); Resolution 1510, *Freedom of expression and respect for religious beliefs*, Parliamentary Assembly (2006). [↑](#footnote-ref-92)