Religious Symbols and State Regulation

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Abstract

Religious symbols are historically significant and socially powerful. They have many forms and functions. Their legal regulation presents difficult challenges for courts, particularly international courts. This article examines how the European Court of Human Rights has approached the regulation of the regulation of religious symbols by national jurisdictions. It submits that the fundamental touchstone of the Court's jurisprudence lies in its approach to secularism. It has accepted secularism as consistent with the values underpinning the Convention. This is a strategic and sensible approach. There are limits imposed by the prohibitions on discrimination and indoctrination. Beyond secularism there have been tentative steps towards a balancing / reasonable accommodation approach but the Court appreciates that the balances are difficult ones on which reasonable people, and even reasonable states, may legitimately disagree.

Keywords

Religion – religious symbols – religious dress – secularism – discrimination – margin of appreciation – European Court of Human Rights – European Convention on Human Rights

1 Introduction

Religious symbols are historically significant and socially powerful. They can take many forms, for example, dress, objects or structures. They can at once be both simple in form yet complex in meaning. They can expressly or implicitly communicate messages. The messages can be subtle or rather unsubtle. They can be intended to be, or perceived to be, inclusive and

positive, or exclusive and negative. They can change the nature and charachter of a particular social, communal or public space. Religious symbols can signify status or identity or the lack thereof. They also serve the broader role of chronicling the evolving histories and traditions of religious communities and broader societies.

2 The Role of the European Court of Human Rights in Regulating the Regulation of Religious Symbols

It is not the role of the European Court to regulate the use of religious symbols (including religious dress). Its role is to regulate their regulation by States parties. Regulating symbols that have such complex and contested meanings is challenging for any national legal system.[1] In some contexts, the insertion of what can only be described as a very strong "political dimension" into the legal regulation of such symbols has only added to the challenges. It is beyond question that the motivation for the legal regulation of symbols, even if framed to apply in a non-discriminatory manner,[2] can be to reflect or further a particular political ideology. It can also be implicitly rejecting an alternative political or religious ideology.[3] Given its subsidiary role it was perhaps natural that the Court would be reluctant to find violations of the ECHR with respect to religious symbols except where it was convinced that that was the appropriate course.[4]

Looking back over the period from *Kokkinakis* in 1998 through to 2017, the jurisprudence of the European Court on religious symbols in the widest sense has taken something of an evolutionary course.[5] There have been some significant changes in the reasoning though this has not necessarily changed the outcome.[6] However, particularly through a number of seminal Grand Chamber judgements, the faultlines in that jurisprudence have become clearer and sharper. The general approach of the Court is founded on (i)

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[1] *See* Peter Cumper and Tom Lewis, 'Taking Religion Seriously? Human Rights and Hijab in Europe - Some Problems of Adjudication', 24 *Journal of Law and Religion* (2009), p. 599.
[2] So as to avoid falling foul of Article 14 ECHR. See section 6 *infra*.
[3] Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (New York: Oxford University Press, 2012) described the *Şahin* judgment as a 'political symbol of opposition to Islam in Europe', p. 29.
[4] *See* Teresa Sanader, 'Religious Symbols and Garments in Public Places – A Theory for the Understanding of *S.A.S. v France*', 9 *Vienna Journal on International Constitutional Law* (2015), p. 186. As of the end of 2016 there had only been 65 violations of Article 9 ECHR.
[5] *See* Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Oxford: Routledge, 2012); Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Abingdon: Routledge, 2012), pp. 42-50.
[6] See *Eweida* and *S.A.S.* cases *infra*.

accommodating the significant variety of Church-State relationships that exists among the now 47 States parties; (ii) the absence throughout Europe of a uniform conception of the significance of religion in society; (iii) the affirmation to the importance of protection of freedom of religion and belief in a pluralist democracy set out in *Kokkinakis* (which continues to be of critical importance in an era in which protection of religious believers seems to be in decline); (iv) the role of the State as the organiser (not the suppressor) of the religious and belief protection regime; and (v) the existence of both negative and positive obligations on States. In applying these elements to religious symbols the Court has had to address major systemic issues. These are considered in turn.

3 Secularism and its Relationship(s) with Neutrality

It is notable that the great majority of cases on religious clothing have concerned France, Turkey and Switzerland, all of which are, in constitutional terms, secular States.[7] Secularism exists along a spectrum in most ECHR states parties.[8] It is submitted that what was critical to the outcome in all of the cases on religious clothing was the European Court's approach to secularism.[9] Thus even if some of the Court's comments that have attracted criticism, such as on gender equality or the power of symbols, were omitted, the results would have been the same.

In *Şahin* v. *Turkey*[10] the European Court held Turkey's notion of secularism to be 'consistent with the values underpinning the Convention ... upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey.'[11] The Court thereby essentially accepted Turkey's argument that the only way it would be able to ensure compliance with the ECHR, given its predominantly Muslim population and fears of a political radicalisation of Islam, was to

[7] *See* the comparative practice considered in Dominic McGoldrick, *The Islamic Headscarf Debate in Europe* (Hart: Oxford, 2006).
[8] *See* Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: *Laïcité*, National Identity and Religious Freedom', 61 *International and Comparative Law Quarterly* (2012), p. 1.
[9] *See* Ian Leigh and Rex Adhar, 'Post-Secularism and the European Court of Human Rights', 75 *Modern Law Review* (2012), p. 75.
[10] European Court of Human Rights [GC], *Şahin* v. *Turkey*, Application No. 44774/98, judgment of 10 November 2005.
[11] *Ibid.*, para. 114.

operate as a secular State.[12] Notwithstanding liberal concerns at the political significance of the military's role in Turkey in upholding secularism, for a Court concerned with the practical existence and exercise of Convention rights, it would have been difficult to reject that argument outright.[13] The same approach was applied to the prohibition for students of religiously-oriented public secondary schools to wear the Islamic head-scarf within the limits of the school in *Köse and 93 Others* v. *Turkey*[14] and to the prohibition on a University Professor wearing a headscarf in *Kurtulmuş* v. *Turkey*.[15] *Kurtulmuş* was significant because Kurtulmuş was an adult. France does not apply its prohibition on headscarves to adults in Universities.

Many of the French cases including *Dogru* v. *France*, *Kervanci* v. *France*,[16] and *Aktas* v. *France*,[17] have also been based on the same kind of reasoning related to the secular system. All of the cases arose in an educational context. However, in *Ebrahimian* v. *France*[18] the Court applied the same approach to the whole of the public sector workspace (which covers more than 21% of all potential jobs).[19] In its reasoning, the Court strongly relied on its previous case law on headscarf bans, in particular *Şahin* and *Kurtulmuş*, to apply beyond the educational environment. Again the dominant theme of the judgment was France's secular system. *Dahlab* v. *Switzerland*[20] was technically an admissibility decision but in substance it was a judgment on the merits. The European Court gave significant weight to the Federal Court's view that the interference with the Dahlab's freedom to manifest her religion was justified by the need, in a democratic society, to protect the right of State school pupils to be taught in a context of 'denominational neutrality'.

These cases have attracted great international attention, often critical. However, it is important to note that, inasmuch as acceptance of measures to defend secularism was

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[12] *See* Karime Bennoune, 'Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law', 45 *Columbia Journal of Transnational Law* (2006-7), p. 367.
[13] *Şahin*, para. 122.
[14] European Court of Human Rights, *Köse and 93 Others* v. *Turkey*, Application No. 26625/02, decision on admissibility of 24 January 2006.
[15] European Court of Human Rights, *Kurtulmuş* v. *Turkey*, Application No. 65500/01, decision on admissibility of 24 January 2006.
[16] European Court of Human Rights, *Kervanci* v. *France*, Application Nos. 31645/04 and 27058/05, 4 December 2008, paras. 68-72.
[17] European Court of Human Rights, *Aktas* v. *France*, Application No. 43563/08, decision on the admissibility of this and five other cases of 30 June 2009.
[18] European Court of Human Rights, *Ebrahimian* v. *France*, Application No. 64846/11, 26 November 2015 (by six votes to one).
[19] *See* Sabrina Garahan, 'A Right to Discriminate? Widening the Scope for Interference with Religious Rights in Ebrahimian v France', 5 *Oxford Journal of Law and Religion* (2016) 352.
[20] European Court of Human Rights, *Dahlab* v. *Switzerland*, Application No. 42393/98, 15 February 2001.

fundamental to the outcome of those cases, then the vast majority of ECHR states parties would not be able to rely on that approach in the same way because they are distinctly less secular or not secular at all. For example, if the UK adopted the French prohibition the wearing of religious clothing it would be unlikely to withstand the European Court's scrutiny.

4 Religious Symbols: Manifestations and the Non-interference Doctrine

In these two areas there has been a discernible evolution in jurisprudence dealing with religious symbols. By the time of *Eweida and Others* v. *UK*[21] in 2013 (concerning the wearing of small Christian crosses) the Court made it clear that to determine whether there was a 'manifestation of religion or belief' the existence of a sufficiently close and direct nexus between the act and the underlying belief had to be determined on the facts of each case. In particular, there was no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question. Visibly wearing a cross in order to 'bear witness' to Christian faith met the test in the *Eweida* and *Chaplin*, as did objection to counselling same-sex partners in *McFarlane* and objection to participating in the creation of same-sex civil partnerships in *Ladele*.[22] In *S.A.S.* v. *France*[23] in 2014 the Court held that it could not be required of *S.A.S.* either to prove that she was a practising Muslim or to show that it was her faith which obliged her to wear the full-face veil.[24] Her statements sufficed in this connection, since there was no doubt that this was, for certain Muslim women, a form of practical observance of their religion and could be seen as a 'practice' within the meaning of Article 9(1) ECHR.[25] The fact that it was a minority practice had no effect on its legal characterisation.

For a long period there was also clear and constant jurisprudence on a non-interference doctrine. In *Eweida* that line of jurisprudence was effectively reversed. By shifting the analysis from the interference stage to the justification stage some individuals will succeed who would not have done so before because they establish that the balance was not fair. *Eweida* was one of them. It is interesting to compare the approach of the European Court in *Eweida*'s case to that of the Grand Chamber of the European Court of Justice.

[21] European Court of Human Rights, *Eweida and Others* v. *UK*, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, para. 82.
[22] *Ibid.*, paras. 89, 97, 103 and 108.
[23] European Court of Human Rights, *S.A.S.* v. *France*, Application No. 43835/11, 1 July 2014.
[24] *Ibid.*, para. 56.
[25] *Ibid*.

Although some had hoped that the latter court would adopt a very progressive approach to protecting religious rights in the EU,[26] in two cases decided on the same day it was rather more restrictive.

Although the focus has been shifted to the justification stage, in many cases the balance may still fall against the individual. This was the case in relation to the three other applicants in the *Eweida and Others* case. For *Chaplin*, concerning a nurse who wished to wear a cross at work, the 'health and safety issues' in a hospital, a public authority, were 'was inherently of a greater magnitude' than the corporate image reasons in *Eweida*, and so weighed heavily and decisively in the balance.[27] For *Ladele*, although the requirement to participating in the creation of civil partnerships was introduced by her employer after she began her employment, the local authority's policy aimed to secure the rights of others which were also protected under the Convention, that is, not to be discriminated against on grounds of sexual orientation. The Court specifically stated that, 'the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination'.[28] The national authorities had not exceeded the wide margin of appreciation afforded to them when it came to striking a balance between competing Convention rights.[29] Ladele's was a difficult case because her job had changed factually and the public authority employer had been able to make what in other contexts would be termed a 'reasonable accommodation' for her.[30] However, ultimately the European Court was not willing to undermine the growing strength of the prohibition on non-discrimination on grounds of sexual orientation, an area in which the UK, the Council of Europe and the EU are very much on the forefront of developments.[31] Modern equality legislation such as the UK's Equality Act 2010 is often a very carefully crafted package deal that encompasses degrees of accommodation, for example, for religious organisations. The Court was not willing to take it upon itself to extend those exemptions to accommodate individuals.[32] It is hard to disagree with that reticence.[33] In terms of balancing *McFarlane*'s

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[26] *See* Eugenia Relaño Pastor, 'Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational European Courts, Two Different Approaches', 5 *Oxford Journal of Law and Religion* (2016), p. 255.
[27] *Eweida and Others*, para. 99.
[28] *Ibid.*, para. 109.
[29] *Ibid.*, para. 106.
[30] *See* Emanuelle Bribosia, Julie Ringelheim, & Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities', 7 *Maastricht Journal of European and Comparative Law* (2010), p. 147.
[31] *See* Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law', *Human Rights Law Review* (2016), p. 613.
[32] *See* Carl Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere', 29 *Oxford Journal of Legal Studies* (2009), p. 1.

was undoubtedly the weakest case on the facts. However, as in *Ladele*, the most important factor to be taken into account was that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination.

The shifting of the analysis in religious dress / symbols cases to the justification stage is undoubtedly a positive development in terms of the protection of Article 9, and has been widely welcomed. Some individuals will win when they would have lost. Some will lose but here will be a more reasoned and principled justification for them losing.[34] There is a greater possibility for religious beliefs to be given more weight when placed against the pursuit of 'communal secular goods'.[35] Looking forward, it also creates more room for the evolution of something resembling a doctrine of reasonable accommodation.[36] When such doctrines have been developed then in some jurisdictions, a good example of which is Canada, their application has become stricter over time, thus giving stronger protection to the manifestation of religious rights.

5 The Margin of Appreciation

Another major systemic issue raised in the religious symbols cases has been the appropriate scope of, and the application of, the margin of appreciation (MoA).[37] Almost every critic of the jurisprudence argues that the MoA afforded too states is too wide and the Court's standard of review is too limited.[38] The MoA dominates almost all of the major cases. Indeed, its influence is growing. Consensus is normally relied upon to expand the scope of rights and restrict the scope of limitations. However, legal and social experimentation is possible within limits. It is clear that it is open to states to impose new restrictions on rights and these may fall within the MoA even if other states have not imposed them. A striking illustration is the ban on the wearing in public places of clothing that is designed to conceal the face (the so-

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[33] *See* Julie Maher, 'Eweida and others: A New Era for Article 9?,' 63 *International and Comparative Law Quarterly* (2014), at pp. 231-232.
[34] *Cf.* Dominic McGoldrick, 'Religion and Legal Spaces: in Gods we Trust; in the Church we Trust, but need to verify', 12 *Human Rights Law Review* (2012), p. 759.
[35] *Cf.* Julian Rivers, 'Promoting Religious Equality', 1 *Oxford Journal of Law and Religion* (2012), p.1.
[36] *Cf.* Ann Power-Forde, 'Freedom of Religion and "Reasonable Accommodation" in the Case Law of the European Court of Human Rights', 5 *Oxford Journal of Law and Religion* (2016) 575.
[37] *See* Dominic McGoldrick, 'Religious Rights and the Margin of Appreciation', in: P. Agha (ed.) *Human Rights Between Law and Politics - The Margin of Appreciation in Post-National Contexts* (Oxford: Hart, 2017), p. 145. See also the contribution to this special issue by Stephanie Berry.
[38] *See* the literature cited in Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee', 65 *International and Comparative Law Quarterly* (2016), p. 21.

called *Burqa*-ban).[39] Of the 47 member states of the Council of Europe, only France and Belgium had actually imposed such bans.[40] Nonetheless, in *S.A.S.* v. *France*[41] in 2014 the ECtHR considered that there was no European consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.[42] The ECtHR held that having regard in particular to the breadth of the MoA accorded to France, the ban could can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' (*vivre ensemble*) as an element of the 'protection of the rights and freedoms of others'.[43] However, even when judges accept the concept of looking for consensus in determining the MoA, there have been cases in which there were significant and often very critical dissents on how it should be assessed.[44]

A particular criticism relates to the framing or formulation of the issue or question relating to religious rights to which consensus does or does not attach. The answer can vary depending on the formulation. In *Şahin* v. *Turkey* the narrow factual issue was the regulation of religious clothing in a university. There was no uniform European conception of the significance of religion in society or the wearing of religious symbols in educational institutions but there was a virtual consensus on whether adult women in universities could wear religious clothing. Alongside Turkey only two other European states prohibited the wearing of religious clothing in Universities. The ECtHR chose the first formulation of the consensus issue. The different outcomes of the Chamber and the Grand Chamber in *Lautsi* v. *Italy*, concerning the display of crucifixes in classrooms, can also be explained by how the issue was framed.[45]

There will usually be a wide MoA if the State is required to strike a balance between competing private and public interests or competing rights and interests that are protected under the ECHR. Many religious rights cases are of this type.[46] Again much turns on how the ECtHR frames or conceptualises the issues. The more abstract the framing the wider the

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[39] *See* Alessandro Ferrari and Sabrina Pastorellivi (eds.), *The Burqa Affair Across Europe* (Farnham: Ashgate 2013); Eva Brems (ed.), *The Experiences of Face Veil Wearers in European and the Law* (Cambridge: Cambridge University Press, 2014).

[40] Since then Bulgaria has imposed a ban, as has a region of Switzerland. A ban has also been approved by the lower house of the Dutch Parliament.

[41] *S.A.S.* v. *France*, paras. 106-159.

[42] *Ibid*., para. 156.

[43] *Ibid*., para. 157.

[44] *See* the Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom in the *S.A.S.* case.

[45] European Court of Human Rights [GC], *Lautsi* v. *Italy*, Application No. 30814/06, 18 March 2011. *See* Guilio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case', 13 *Human Rights Law Review* (2013) 287.

[46] *See* Saila Ouald Chaib, 'Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court', 16 *Human Rights Law Review* (2016), p. 511.

MoA and vice versa. In *Eweida and Others* v. *UK*,[47] the ECtHR only found a violation in one of the cases, *Eweida*, in which it framed the issue as a balance between an individual's right to manifest their religion and the employer's wish to project a certain corporate image.[48] This framing made it more likely that the ECHR right would weight more heavily in the balance and result in a violation, and so it did. In the other cases it found no violation where the balancing interest was the protection of the health and safety of nurses and patients (*Chaplin*),[49] providing a public service which was effective in terms of practicality and efficiency and which complied with the overarching policy of not discriminating on grounds of sexual orientation (*Ladele*),[50] and action by a private employer which was intended to secure the implementation of its policy of providing a service without discrimination (*McFarlane*).[51] The framings in the latter three cases made the likelihood of a finding of non-violation much greater, and indeed that was the result in each case.

In has been argued that in some cases the ECtHR has too readily accepted the interests being balanced against religious rights.[52] Such an approach places great weight on the individuals' rights against those of the wider community represented by the State. However, that is too individualistic an approach and would fail in the vast majority of cases. The State's argument is that the threat to secularism comes not from the single individual but from the combined effect of all the religious individuals concerned. There does not need to be evidence that any particular individual is a victim of patriarchy, oppression or gender inequality or that their choice or agency has been restricted.[53]

6 Discrimination on the Basis of Religion

Although the European Court has afforded States, whether at the secular or religious end of the spectrum, a wide MoA to regulate religious symbols and dress, the prohibition on discrimination in Article 14 can be seen as something of significant backstop or limit. In many of the leading cases – *Şahin*, *Dogru*, *Aktas*, *Eweida and Others*, and *S.A.S.*, Article 14

[47] *Eweida and Others*, para. 109.
[48] *Ibid.*, paras. 94-95.
[49] *Ibid.*, paras. 98-100.
[50] *Ibid.*, paras. 102-106.
[51] *Ibid.*, 107-110.
[52] *See* Stephanie Berry, 'A "Good Faith" Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee', 37 *Legal Studies* (2017, forthcoming).
[53] *See* Cécile Laborde, 'Female Autonomy, Education and the Hijab', 9 *Critical Review of International Social and Political Philosophy* (2006), p. 365.

challenges were raised but failed. States are generally sensible enough not to facially discriminate in their laws even if the political context makes it clear that the intended target of the legislation was a the dress of a particular religion (for example the so-called *burqa* ban).[54]

Regulation of the building of religious premises is likely to be another area where Article 14 may provide a more fruitful ground of challenge. In *Ouardiri* v. *Switzerland*[55] and *Ligue des Musulmans de Suisse and Others* v. *Switzerland*,[56] all of the applicants submitted, inter alia, that a prohibition on building minarets amounted to a violation of religious freedom and to discrimination on the ground of religion. In two virtually identical decisions, the Court, by an unstated majority, declared their applications inadmissible on the ground that they could not claim to be the 'victims' of a violation of the Convention. The Court took a fairly strict approach to what is required to practice the Islamic religion. However, the ban is facially discriminatory (the building of minarets is prohibited).[57] It must be doubtful that the European Court would be willing to consider that the prohibition was reasonable and objectively justified, notwithstanding that it was the result of a popular referendum.[58]

7 Religious Symbolism in the Public Place and the Private Space

Increasingly important, but difficult issues are identifying where, in spatial terms, the public square or public place are? In modern societies the degree of regulation means that it seems to be ever widening and leaving less space for private individuals and private institutions (e.g. private hospital, private school, non-state employers). In a sense the modern and post-modern State is everywhere. Most religious dress / symbols cases have concerned education and the workplace. An area with a number of pending cases is the wearing of religious clothing in a courtroom.[59]

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[54] See *S.A.S.*.
[55] European Court of Human Rights, *Ouardiri* v. *Switzerland*, Application No. 65840/09, 8 July 2011.
[56] European Court of Human Rights, *Ligue des Musulmans de Suisse and Others* v. *Switzerland*. Application No. 66274/09, 8 July 2011.
[57] The official German text states that 'Der Bau von Minaretten ist verboten.'
[58] *See* Lorenz Langer, 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets', 43 *Vanderbilt Journal of Transnational Law* (2010), p. 863.
[59] *See Lachiri* v. *Belgium*, Application No. 3413/09; and *Hamidović* v. *Bosnia and Herzegovina*, Application No. 57792/15.

In terms of the wider public space, State regulation is growing. In *Ahmet Arslan and Others* v. *Turkey*[60] 127 members of a religious group known as *Aczimendi tarikatÿ,* complained of their conviction in 1997 for a breach of the law on the wearing of headgear and of the rules on wearing religious garments in public. The European Court found a violation of Article 9. The Court emphasised that in contrast to other cases, the case concerned punishment for the wearing of particular dress in public areas that were open to all, and not regulation of the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion.

The applicant in *S.A.S.* v. *France,* challenging the legislative ban on full-face veiling in all public places, relied heavily on the Court's approach in *Ahmet Arslan.* However, the Court distinguished the cases:

> while both cases concern a ban on wearing clothing with a religious connotation in public places, the present case differs significantly from *Ahmet Arslan and Others* in the fact that the full-face Islamic veil has the particularity of entirely concealing the face, with the possible exception of the eyes.[61]

France submitted a number of justifications for the prohibition. Very significantly, the Court rejected its justifications based on gender equality.[62] A State Party could not invoke gender equality in order to ban a practice that was defended by women, such as S.A.S., in the context of the exercise of the rights in Articles 8 and 9 ECHR, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.[63] The Court thereby effectively responded to the criticisms of Judge Tulkens in *Şahin* and possibly gave some weight to the limited empirical evidence of third party intervenors[64] on gender equality. It is notable that in *S.A.S.* the Court did not repeat some of the comments on Muslim women and gender relations in *Şahin* and *Dahlab* that had been criticised as based on stereotypes.[65] It also seemed to more clearly appreciate and understand the practical significance of the ban for religiously observant women, the traumatising effect

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[60] European Court of Human Rights, *Ahmet Arslan and Others* v. *Turkey,* Application No. 41135/98, 23 February 2010.
[61] *S.A.S.* v. *France,* para. 136.
[62] *Ibid.*, paras. 118-119.
[63] *Ibid.*, para. 119.
[64] See *S.A.S.* v. *France,* paras. 89-105.
[65] *See* Lourdes Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising', 10 *International Journal of Constitutional Law* (2014), p.195.

of facing a prosecution and that certain Islamophobic remarks had marked the debate.[66] The Court also rejected justifications based on respect for human dignity. The clothing in question, although perceived as strange by many of those who observed it, was the expression of a cultural identity which contributed to the pluralism that was inherent in democracy.[67] Finally, it rejected a justification based on public safety.[68] However, the Court accepted a justification offered for limiting rights that was based on ensuring the observance of the minimum requirements of life in society as part of the 'protection of the rights and freedoms of others'. It found that the ban could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of 'living together',[69] and, having regard in particular to the breadth of the margin of appreciation afforded to France, the ban could be regarded as proportionate to the aim pursued. There was a very strong majority for this aspect of the decision (15-2). Although the decision attracted widespread interest, much of it focussed on the meaning and risks associated with the seemingly novel basis for restrictions, namely 'living together'[70] it accords with the intuitive view of many people in Europe that the full face veil goes too far. Islamophobic sentiments may underlie that view but so too may genuine concerns about the segregation, isolation and marginalization of Muslim women. The Court was effectively drawing a line in the European sand. The notion of 'living together' appears rather flexible but the Court openly acknowledged the 'resulting risk of abuse'.[71] It is actually difficult to think of other examples of restrictions that could credibly be based on the same approach. However, it is submitted that it is very significant that *S.A.S.* was based on the general protection of the 'rights and freedoms of others' rather than on France's secular system. Subject to their own constitutional restraints, it would open to other member States of the Council of Europe to follow France's example, irrespective of the degree to which they are secular. Applications are pending from Belgium concerning full face veiling.[72] In June 2017 it was reported that Norway was proposing to ban full-face veil in

[66] *S.A.S.* v. *France*, paras. 139-52.
[67] See *S.A.S.* v. *France*, para. 120.
[68] *Ibid.*, para. 139.
[69] *See also* Parliamentary Assembly of Council of Europe, Resolution 2076 'Freedom of Religion and Living Together in Democratic Society', 30 September 2015.
[70] *See* Ilias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law', 75 *Cambridge Law Journal* (2016), p. 580.
[71] *See S.A.S.* v. *France*, para. 122. The dissenting judges called it a 'very general concept' and criticised it as 'far-fetched and vague' (para. 5).
[72] *See Belkacemi and Oussar* v. *Belgium*, Application No. 37798/13, *Dakir* v. *Belgium*, Application No. 4619/12.

nurseries, schools and universities.[73] For this reason the *S.A.S.* judgment was arguably of much wider import and significance than the headscarf cases.

8 Concluding Reflections

It has been submitted that the fundamental touchstone of the Court's jurisprudence has been its approach to secularism. It has accepted secularism as consistent with the values underpinning the Convention. It is always possible to critique the variable operation of secularism in any particular State. It will always be uneven, imperfect and evolving. That is the very nature of constitutional evolution. The European Court has had to navigate a difficult path in addressing religious symbols and dress. Being acutely aware of this it has adopted a strategic and sensible approach. There are limits imposed by the prohibitions on discrimination and indoctrination but what is 'necessary' in a 'democratic society' is not, or at least not wholly, an objective concept. The national context and traditions have to be appreciated and understood. Beyond the hard cases involving strongly secular states there have been tentative steps towards a balancing of rights and interests and something resembling a reasonable accommodation approach. Yet the Court appreciates that such balances and accommodations are difficult ones on which reasonable people, and even reasonable States, may legitimately disagree. It knows that it does not necessarily know any better than they do.

[73] *See* http://www.bbc.co.uk/news/world-europe-40251760.