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Still Fighting God in the Public Arena: Does Europe Pursue the Separation of Religion and State Too Devoutly or Is It Saying It Does Without Really Meaning It?

*Vanja-Ivan Savić **

I. INTRODUCTION

Some scholars argue that whereas the United States is religious, Europe is secular. Peter Berger, Grace Davie, and Effie Fokas argue that while religion in America has its own special and important role, political Europe (Western Europe in particular) seeks a secular environment, but in reality is actually anti-religious.¹ It is paradoxical that the cradle of Christianity has sought to become its funeral home, at least as it relates to public manifestations of religious identity.² At the same time, Christianity, which was exported to the New World, flourished, at least in the formal sense. Political systems in Europe are developing a more secularist approach and have begun framing their legal systems based on this developed secularism.³ Some European governments found that secularism can be a great

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1. PETER BERGER, GRACE DAVIE & EFFIE FOKAS, RELIGIOUS AMERICA, SECULAR EUROPE? 9–21 (2008).

2. The idea that there should be “no religion in the public square” is present in movements which define separation of church and state as a complete absence of religious life in public life and institutions; this becomes an absence of spiritual life in everyday life, which is a form of aggressive secularism that does not recognize that religion and its morals are integral part of society’s existence. For example, in France, the Christian identity of the nation is neglected when laws are made. In fact, many churches are considered state-owned, such that church authorities are just “using” the facilities. The key of the church is in the hands of the village mayor, not the priest.

3. Jean-Paul Willaime, *Towards a Recognition and Dialogue Secularism in Europe*, 2015 BYU L. REV. 779, 782–87.

mechanism for defending against the “other” and the “different” while also keeping the idea of human rights alive—human rights, but without any religious, and sometimes ethnic, flavor.

The latter is particularly the case in France, with the recent bans on religious clothing.⁴ The stubborn insistence for such bans did not result so much from a desire to preserve the secular identity of the French Republic as it did from fear of the growing Muslim population.⁵ Banning public displays of crucifixes and Jewish *kippas* were just side effects of the religious clothing ban.⁶

The issue is complicated. On the one hand, protecting human rights is necessary, and on the other, protecting the public morals and public order of the system in which we live requires protecting some traditional values since these values shape the system itself. By accepting an ideology of absolute freedom, that freedom will challenge the rules of the society in which we live. Society is tasked with seeking a path to coexistence. This coexistence should be a thoughtful balance of human rights and individual freedoms on one hand (including religious freedoms), and the majority’s personal morals coupled with the *de facto* morals of the state on the other. Human rights do not entail rule by the minority. However, the governing majority should, by virtue of its power and position, do everything it can to protect the minority and its continued existence. This Article does not assert that states should be religiously driven, but that states should be religiously aware.

With the use of three European cases (Italy, France, and Croatia), this Article will prove three things. First, there is a perpetual fight against the sacred in the public sphere. Secularist states are too aggressive in their approach toward religion. Secularism’s unwillingness to respect the religious components of citizens could produce serious problems within the functioning of

4. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 on Forbidding Concealing the Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18, 344. See *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R.

5. See Saïla Ouald Chaïb, *S.A.S. v. France: A Short Summary of an Interesting Hearing*, STRASBOURG OBSERVERS, Nov. 29, 2013, <http://strasbourgobservers.com/2013/11/29/s-a-s-v-france-a-short-summary-of-an-interesting-hearing/>.

6. See *French Scarf Ban Comes into Force*, BBC NEWS, Sept. 2, 2004, <http://news.bbc.co.uk/2/hi/europe/3619988.stm>.

the state system and cause unwanted public response. Second, religion is important for public morals and orders. In spite of this fight, courts, and therefore states, are not in a position to reject the spiritual elements of their nations, at least for that tiny part that is connected with culture and tradition and therefore desirable. Finally, there is a way to prevent secularism from driving religion out entirely while still achieving its goal of preserving minority rights.

The Article will accomplish this in the following way. Part II of this Article addresses each of the problems caused by a disrespect for religion. Part III proposes a solution to these problems. Part IV then addresses three examples that show these problems as well as how the proposed solution can fix them: *Lautsi v. Italy*, *S.A.S. v. France*, and the Croatian Constitutional Marriage Amendment. Part V concludes by summarizing how Europe can find a balance between fulfilling the demands for human rights and preserving the majority's morals.

II. PROBLEMS CAUSED BY SECULARISM

Secular states that ban public religiosity have four major issues. First, they forget that religious norms are part of the state's public and legal existence. Second, they are removing religion from the legal system. Third, they do not understand the role of religious concepts and traditions in the lives of their citizens. Fourth, they lose the ability to discourage behavior that is outside the acceptable norm.

First, when playing solely by secularism's rules, the state ignores that religious guidelines are more than just a part of history and tradition; they are actual living pieces of culture and, therefore, part of the state's public and legal existence.⁷ By diminishing religion,

7. If you ignore that religion even exists, you do not recognize its influence. One example of the influence of religion on states is found in the idea of the presumption of innocence, which is an old norm of Canon Law. See Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST: STUD. CHURCH L. & MINISTRY 106, 113–16 (2003). Another example is found in Alsace-Moselle, where the head of state appoints the Catholic Archbishop of Strasbourg and the Bishop of Metz by decree. NORMAN DOE, LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION 128 n.111 (2011). Monogamy in family law is the product of Christian moral thought. See Michael E. Price, *Why We Think Monogamy Is Normal: How Polygamy Became an "Exotic Exception,"* PSYCHOLOGY TODAY, Sept. 9, 2011, <https://www.psychologytoday.com/blog/darwin-eternity/201109/why-we>

states contradict themselves when dealing with human rights and religious freedom—rules initially set by the states themselves. This Article does not discuss the model upon which states should build their own attitudes towards religion, but whatever the model, the attitude of the state must be much more accepting of religion than many secular nations are for two reasons. First, religion is significant because it is an important building block of the nation's culture, on which legal systems are based.⁸ Thus, it needs to be acknowledged and supported, not ignored or torn down. Second, the religious attitudes and needs of the citizens should not be undermined, but should be protected as a principle of human rights.⁹ As this paper will show, the current attitude of many secular nations undermines these needs. These should not be undermined but should be protected. By taking care to incorporate and balance these two elements, states can work to accomplish a secularism that is aware that law is a product of both culture (a democratic principle) and minority protection (a human rights principle). Importantly, the principles of democracy and human rights are not mutually exclusive; on the contrary, they should go hand-in-hand.

Second, the current secular governments focus on detaching the legal system from religion and religious groups. This detachment, in turn, creates a “new religion,” in the form of secularism, deemed adequate for all.¹⁰ On the surface, secularism appears to give similar rights to all, regardless of religious belief. In fact, however, secularism gives greater rights to nonbelievers. Herein lies the problem—if not a moral problem, then a constitutional and legal problem. The problem is multilayered because, in legal and political

think-monogamy-is-normal. It is also thought to be a product of Judaic Ashkenazi tradition. Avraham N.Z. Roth, *On the History of Monogamy Among the Jews*, in *JEWISH STUDIES IN MEMORY OF MICHAEL GUTTMANN* 114–36 (David Samuel Löwinger ed., 1946).

8. See Willaime, *supra* note 3, at 801–03 nn.148–56.

9. Universal Declaration of Human Rights, G.A. RES. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 18 (Dec. 10, 1948) (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”). See also, Aldir Guedes Soriano, *Liberal Democracy and the Right to Religious Freedom*, 2013 *BYU L. REV.* 581 (2014).

10. See Miroslav Volf, *A Voice of One's Own: Public Faith in a Pluralistic World*, in *DEMOCRACY AND THE NEW RELIGIOUS PLURALISM* 274–75 (Thomas Banchoff ed., 2007).

theory, population is one of the crucial elements of the state, along with territory and sovereign power. If any of these elements are missing, the state does not exist.¹¹ Therefore, when numerous religious beliefs exist in the same population, the state should grant greater rights for believers according to democratic principles.¹² Additionally, European legal systems are formulated on rules derived from religious norms such as Canon Law,¹³ making it impossible to detach the legal systems from the cultural structures upon which the system is built.

Third, secular governments often do not understand the role of religious concepts and traditions in shaping the identity of its population. These governments want to expel religion from the national identity of the Nation, not only politically, but also ethnically. Secularism becomes the major “religion” which refuses to follow the free will of majority. These types of governments proclaim a secularist state in the name of human rights, requiring a complete absence of God in the public sphere. These governments do not realize that in creating this secularist state, they erase the identities of the citizens. This in turn leads to the creation of national identities without the free will of all of the states’ subjects. For example, celebrating religious holidays or displaying crucifixes in classrooms means more than the “ordinary” and “private” faith of the states’ citizens;¹⁴ religious beliefs are beliefs that constitute the values of the

11. Svetomir Skaric, *The Case of “the former Yugoslave Republic of Macedonia,”* in 22 SCIENCE AND TECHNIQUE OF DEMOCRACY: THE TRANSFORMATION OF THE NATION-STATE IN EUROPE AT THE DAWN OF THE 21ST CENTURY 318 (European Commission for Democracy through Law, 1997).

12. The rights of any particular majority group are, in a sense, “bigger” than the rights of the members of a minority. For instance, religious requests, which are transferred into law provide some specific rights reserved just for the followers of the majority group; some rights are produced to make the majority comfortable and feel “at home” and some rights are made to accommodate the majority’s desires. In that respect, it might happen that the minority’s rights would be secondary. The challenge is to find an appropriate balance between the rights of the majority and the requests of the minority.

13. For example, the presumption of innocence is a Canon Law norm and a typical example of a norm deeply rooted in public legal systems and frameworks: *Ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on he who declares, not on he who denies). See *French Scarf Ban Comes into Force*, *supra* note 6.

14. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. 47. *Lautsi* is a legendary case held in front of the European Court of Human Rights in which the majority of judges decided that crosses in the classroom of public schools in Italy did not affect parents’ right to ensure that the education and teaching of their children is “in conformity with their own

nations. In accordance with those beliefs, citizens seek a place and a government that acknowledges, respects, and follows the values by which they wish to live. By ignoring the values of the majority, state and legal systems seriously endanger democratic concepts of governance.

Finally, policy makers do not realize that by rejecting their own cultural and legal roots, they diminish their options for rejecting unwanted behavior on the basis of cultural noncompliance. Secularly driven governments usually decide to follow human rights law and proclaim that all people are equal and have the right to a particular identity. However, problems arise when the government encounters identities and behaviors that do not “fit” the government’s perceptions of living within the public body. Sometimes the government refrain from admitting these perceptions are based on the cultural reality within the nation it leads.¹⁵ The government then uses the same concept that they rejected and secularism becomes the creed of the state, leaving no place for religion. Secularism, therefore, becomes a church without an actual church. For instance, when the French Republic increased regulations on religious symbols in public schools for fear of Muslim extremism, this resulted in stringent regulations for all faiths, which became collateral victims, leaving no place for religious expression.¹⁶

Secularism’s rejection of public religiosity causes all of these problems. Yet, as the next section will discuss, it can still achieve its goal of protecting minorities without pushing out religion.

III. PROPOSED SOLUTIONS

One way to remedy these problems is for secularism to transform its position from dogma to dialogue by inspiring a discussion of all

religious and philosophical convictions.” Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Protocol No. 1], *available at* <http://conventions.coe.int/treaty/en/treaties/html/009.htm>. *See also* Grégor Puppink, *The Case of Lautsi v. Italy: A synthesis*, 2012 BYU L. REV. 873, 875 (2012). Crosses are a “passive” symbol that represents tradition and, therefore, do not actively influence someone’s quality of life. *Lautsi*, App. No. 30814/06, 2011 Eur. Ct. H.R. at ¶ 16.

15. *See Lautsi*, App. No. 30814/06, 2011 Eur. Ct. H.R. at ¶¶ 1.1–1.6.

16. *See supra* notes 4–6 and accompanying text.

peoples with understanding and respect toward the spiritual identity of the culture, which will lead to greater public morals and order. Problems arise when a group seeking the rights provided by the system do not respect the system that provides them. In particular, there is grave importance for those seeking the rights of the system to acknowledge religion's importance to that system. Arguing that religion does not form public morals, even in today's world, is a fallacy. Lawyers must do their part: they must shape the law to fit the religion and culture within the nation. Law should be a tool for religious cohabitation; though there are arguments to be made regarding how to achieve this coexistence, whether from the top down or the bottom up.¹⁷ One must act wherever one is situated, which means to fight for religious coexistence regardless of whether one is on the top or bottom.

For Europe, its situation presents unique challenges in comparison to America. In his most recent book, legal philosopher Brian Leiter¹⁸ discusses religious tolerance, including the importance of spirituality.¹⁹ He describes philosophical dimensions of court rulings that could work in America but not in Europe, where established secularism holds a firm place within the division of powers.²⁰ Although Leiter critically examines elements of religion and why it should have a special place within the legal system, the issue that religion is a phenomenon that addresses questions of ultimate reality²¹ speaks of a spiritual element that is very important to human beings and should not be marginalized. Societies that did not realize the importance of spirituality (where it was important, of course) did not succeed in a new de-spiritualization of society in the

17. The top-down approach is that society should be changed from inside, slowly and evolutionally, and then there is a law which will just state and describe the "real" situation on the ground which will be already achieved. The bottom-up approach is when political elites decide to achieve something, they can and should use the law to shape the behavior and protect what is perceived as endangered. *See, e.g., infra* Section IV.C.1. (showing a bottom up approach where intellectual and political elites, who were conservative, started collecting signatures in order to change Croatia's Constitution).

18. Professor of Jurisprudence and Director, Center for Law, Philosophy, and Human Values, University of Chicago Law School.

19. *See generally* BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

20. *Id.* at 92–133.

21. *Id.* at 47–52. "Religious beliefs involve, explicitly or implicitly a *metaphysics of ultimate reality.*" *Id.*

form of radical secularism.²² Accepting the role of religion and not insisting on its passive place could lead to a new, contemporary form of religious tolerance that will lead to better problem solving, especially in complex religious and ethnic societies. Furthermore, the American perspective on religion may differ from the European one for the basic reason that the American state was founded on the grounds of establishing religious freedoms for those who were persecuted for it, and as such it has a “formative” role in the constitutional sense.²³

Another issue is that countries under communist/socialist rule somehow preserved a connection with Christianity in a different way than was done in the West.²⁴ Paradoxically, suppression and living in catacombs actually helped spiritual life flourish.²⁵ Westerners softened their attitudes toward their Christian roots and conformism-bleaching spiritual foundations of Europe much more than secularism did.²⁶ Therefore, it is no surprise that traditional countries like Italy and Spain moved away from their Christian foundations; France perhaps went the furthest of all.²⁷ Principles of secularism therefore were not accepted equally well in Central and Eastern Europe. The recent constitutional referendum in the newest

22. See Tariq Modood, *Is There a Crisis of Secularism in Western Europe?*, 73 SOC. OF RELIGION 130, 132 (2011) (In Great Britain, traditional religion is being replaced with no religion or new religious and spiritual trends, but these do not conflict with political secularism).

23. Washington, the first president of the United States, showed strong support of religion, noting that “religion and morality are indispensable supports,” the “firmest props of the duties of men and citizens,” and “a necessary spring of popular government.” George Washington, Washington’s Farewell Address (1796), available at http://avalon.law.yale.edu/18th_century/washing.asp.

24. See, e.g., Victor Yelensky, *Religion, Church, and State in the Post-Communist Era: The Case of Ukraine (with Special References to Orthodoxy and Human Rights Issues)*, 2002 BYU L. Rev. 453 (2002). Other countries include Poland, Hungary, Croatia, Slovakia, Bulgaria, and Romania from the former European Eastern Bloc.

25. See generally JASON WITTENBERG, *CRUCIBLES OF POLITICAL LOYALTY: CHURCH INSTITUTIONS AND ELECTORAL CONTINUITY IN HUNGARY* (2006); CYRIL E. BLACK ET AL., *REBIRTH: A POLITICAL HISTORY OF EUROPE SINCE WORLD WAR II* (2d ed. 1999).

26. See ELIZABETH SHAKMAN HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* 29–37 (2008).

27. See, e.g., C.C. tit. IV, ch. 1, art. 42 (Spain); Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 opening marriage to same sex couples], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], May 18, 2013, p. 8253.

European Union (EU) state, Croatia, show all the complexity and even the drama of the clashes of cultural identification.²⁸ This Article will demonstrate how Europe deals with these problems today and will try to show where God resides within the old and new statehoods of the Old Continent.

But as this Article will show, there is one solution that applies uniformly to all of these cases: the Neutrality, but Tradition Principle (“NBT Principle”) and the Tolerance but Tradition Principle (“TBT Principle”). The NBT Principle incorporates tradition, both current and accumulated, while also including all concerns for human rights as standards of humankind. The TBT Principle seeks to respect tradition while tolerating differences. It benefits all parties: the majority feels comfortable in surroundings that fit their cultural needs, and the minority feels protected by the majority in a defined and honest dialogue.

There are five steps to applying these two principles. First, the state must acknowledge that religion is an important part of the cultural life of citizens (Awareness). Second, it must also acknowledge that religion has shaped the culture (Foundations). Third, it must secure a minimum of the prevailing set of norms of the majority by law (Democratic Principle). Fourth, it must give the maximum possible rights to the minority by law (Human Rights Principle). Fifth, it must balance between minority and majority rights (Cohabitation). As each of these three examples are explained, these principles will present a solution to each of their major challenges.

IV. THREE EXAMPLES

A. The Importance of Lautsi in European Human Rights

This first case shows how important public religiosity is for a nation and how courts can recognize its importance within the individual context of each nation. *Lautsi and Others v. Italy* is one of the most important cases for religion in recent European legal history. It was decided on March 18, 2011, by the Grand Chamber

28. See *infra* Part IV.C.

of the European Court of Human Rights (ECtHR).²⁹ It is the longest-running case in ECtHR history. For the purposes of this Article, the most important dimension of the *Lautsi* case is how it shows the two different sides in the debate on the European continent over religion and cultural positions that has led to what are popularly called “cultural wars.”³⁰

This section explores the case, starting first with the claims and the holdings of the lower courts before proceeding to the holding of the ECtHR and then finishing with an analysis of the ideas found in that holding.

1. *Claims and lower court holdings suggestions?*

In *Lautsi*, the Grand Chamber of the Court decided 15 to 2 that a crucifix hanging on the wall in a public school classroom did not violate the Convention’s provisions on the freedom of religion, namely those set up in Article 2 of the First Protocol, which guarantee the right to education,³¹ and Article 9 of Protocol No. 14

29. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. 47; *see also* Puppinck, *supra* note 14. *Lautsi* is a landmark case and lawyers in law and religion should always return to it when considering the views of the supreme judicial body concerning human rights in Europe. The European Court of Human Rights (ECHR) is a pan-national and supra-national European court. The ECHR was established by the European Convention of Human Rights, which entered into force on September 3, 1953 and is effective in all European states excluding Belarus. Even countries of Caucasus (Armenia, Azerbaijan, Georgia, and Turkey) are signatories of the Convention. Russia is also a member and has a representative judge sitting on the Court. ECHR, therefore, has a wider range of influence than any other treaty originating from the bodies of the European Union. See COUNCIL OF EUROPE, EUROPEAN COURT OF HUMAN RIGHTS: QUESTIONS & ANSWERS, *available at* http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf.

Discussing the *Lautsi* case, however, has become more challenging since the Grand Chamber of the European Court of Human Rights decided *S.A.S. v. France*. *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R. This case and its consequences are discussed in greater detail in another section dedicated to the recent development of secularism in France. *See infra* text accompanying notes 49–97.

30. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); JAMES DAVISON HUNTER & ALAN WOLFE, IS THERE A CULTURE WAR?: A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE 1–9 (E.J. Dionne Jr. & Michael Cromartie eds., 2006).

31. Protocol No. 1, *supra* note 14, at art. 2. “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.” *Id.* The issue presented

(freedom of thought, conscience and religion).³² There were also claims that Article 14, which provides protection against discrimination, had been violated;³³ however, those were subsequently dismissed for being connected and consumed by the previous (or as the court said, non-existing) violations. Although in the first instance the Chamber court ruled that there have been violations of the aforementioned articles,³⁴ in the second instance the Grand Chamber took a completely different approach when deciding what today could be considered one of the most influential cases in modern European legal history. Informatively, the Grand Chamber described all the stages through which the case passed, both in Italy and Europe, which describe the case in a more cultural context.

On 17 March 2005, the Administrative Court dismissed the application. After ruling that Article 118 of the royal decree of 30 April 1924 and Article 119 of the royal decree of 26 April 1928 were still in force and emphasizing that ‘the principle of the secular nature of the State [was] now part of the legal heritage of Europe and the western democracies’, it held that the presence of crucifixes in State-school classrooms, regard being had to the meaning it should be understood to convey, did not offend against that

here raises many important questions connected with the right of the parent to raise children in accordance with their own “religions and philosophical convictions.” In that sense, the judges of the Grand Chamber were right when they stated that the appellant’s opinions were philosophical values and therefore could be treated as religion. By accepting the appellant’s arguments, the majority, the Christian and Catholic parents, could feel that there was an “abuse of the minority position.” For more about this topic and further explanations by the Court, see *infra* text accompanying notes 41–64.

32. Convention for the Protection of Human Rights and Fundamental Freedoms Protocol No. 14 art. 9, June 1, 2010, C.E.T.S No. 194, 213 U.N.T.S. 222, [hereinafter Convention], *available at* <http://conventions.coe.int/treaty/en/treaties/html/005.htm>. (“Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. . . . Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.”).

33. “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.* at art. 14. This article is often used in conjunction with the provisions of other regulations of the Convention.

34. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. 47 ¶ 49.

principle. It took the view, in particular, that although the crucifix was undeniably a religious symbol, it was a symbol of Christianity in general rather than of Catholicism alone, so that it served as a point of reference for other creeds. It went on to say that the crucifix was a historical and cultural symbol, possessing on that account an ‘identity-linked value’ for the Italian people, in that it ‘represent[ed] in a way the historical and cultural development characteristic of [Italy] and in general of the whole of Europe, and [was] a good synthesis of that development’. The Administrative Court further held that the crucifix should also be considered a symbol of a value system underpinning the Italian Constitution.³⁵

The protocol for applying cases to the ECHR requests that the applicant exhaust all domestic institutions where he or she can seek help. The reasons for this include filtering cases so that only the most relevant cases remain and preventing inundating the Court with numerous cases that could be decided at the lower level(s). Therefore, the Italian Supreme Administrative Court³⁶ became involved, essentially confirming that the “presence of crucifixes in State-school classrooms has its legal basis.”³⁷ This decision also assured the public that secularism shapes both the law and cultural customs, which are reflected in legal order:

35. *Id.* ¶¶ 4–5. The administrative court wrote extensively about the cultural meaning and value of the Cross in European Culture. The court explained: “At this stage, the Court must observe, although it is aware that it is setting out along a rough and in places slippery path, that Christianity, and its older brother Judaism—at least since Moses and certainly in the Talmudic interpretation—have placed tolerance towards others and protection of human dignity at the center of their faith. Singularly, Christianity—for example through the well-known and often misunderstood ‘Render unto Caesar the things which are Caesar’s, and unto . . .’—through its strong emphasis placed on love for one’s neighbor, and even more through the explicit predominance given to charity over faith itself, contains in substance those ideas of tolerance, equality and liberty which form the basis of the modern secular State, and of the Italian State in particular.” *Id.* at 5. Additionally, the court commented that “[t]he link between Christianity and liberty implies a logical historical coherence which is not immediately obvious—like a river in a karst landscape which has only recently been explored, precisely because for most of its course it flows underground—partly because in the constantly changing relations between the States and Churches of Europe it is much easier to see the numerous attempts by the Churches to meddle in matters of State, and vice versa, just like the frequent occasions on which Christian ideals have been abandoned, though officially proclaimed, in the quest for power, or on which governments and religious authorities have clashed, sometimes violently.” *Id.* ¶¶ 5–6.

36. *Consiglio di Stato* is the court of last appeal in administrative matters in Italy.

37. *Lautsi*, App. No. 30814/06, 2011 Eur. Ct. H.R. at ¶ 16.

As with any symbol, one can impose on or attribute to the crucifix various contrasting meanings; one can even deny its symbolic value and make it a simple trinket having artistic value at the most. However, a crucifix displayed in a classroom cannot be considered a trinket, a decorative feature, nor as an adjunct to worship. Rather, it should be seen as a symbol capable of reflecting the remarkable sources of the civil values referred to above, values which define secularism in the State's present legal order.³⁸

The Supreme Administrative Court accepted most of the lower court's reasoning, holding that the sign of the Cross represented the framework, culture, and values of the Italian nation. This reasoning was particularly apparent when the court explained that the Cross symbolized acceptance of others, especially those from outside Europe.³⁹ The presence of religious symbols varies from country to country in Europe—no rule sets norms on an international level within either the European Union or Europe in general. For instance, France expressly forbids the appearance of religious symbols in public spaces. However, Austria and some states in Germany—Bayern for instance—merely request it,⁴⁰ and many states have no

38. *Id.* (quoting *Consiglio di Stato*, 2006 Judgment No. 556).

39. *Id.* ¶ 15 (quoting *Consiglio di Stato*, 2006 Judgment No. 556, at §§ 12.6, 13.4) (“It must be emphasised that the symbol of the crucifix, thus understood, now possesses, through its references to the values of tolerance, a particular scope in consideration of the fact that at present Italian State schools are attended by numerous pupils from outside the European Union, to whom it is relatively important to transmit the principles of openness to diversity and the refusal of any form of fundamentalism—whether religious or secular—which permeate our system. Our era is marked by the ferment resulting from the meeting of different cultures with our own, and to prevent that meeting from turning into a collision it is indispensable to reaffirm our identity, even symbolically, especially as it is characterized precisely by the values of respect for the dignity of each human being and of universal solidarity The cross, as the symbol of Christianity, can therefore not exclude anyone without denying itself; it even constitutes in a sense the universal sign of the acceptance of and respect for every human being as such, irrespective of any belief, religious or other, which he or she may hold.”).

40. The German Constitutional Court ruled that Crucifixes in the public classroom, even in Bavaria (Bayern), are not permissible. Bundesverfassungsgericht [Federal Constitutional Court], Aug. 10, 1995, 32, *Entscheidungen des bundesverfassungsgerichts* (Ger.). This ruling shocked many and caused unprecedented public reaction. Stephen Kinzer, *Crucifix Ruling Angers Bavarians*, N.Y. TIMES, Aug. 23, 1995, <http://www.nytimes.com/1995/08/23/world/crucifix-ruling-angers-bavarians.html>. The court, realizing the negative effect of the ruling, issued a subsequent opinion stating that Crucifixes may remain so long as parents do not object, or children of other creeds are put in separate classrooms. *See Deutsche*

specific legal rules on the issue. Interestingly, the Grand Chamber held that the ECtHR in its first instance was wrongly decided. It disagreed that the Cross on the wall would influence “vulnerable” children and that the “state ha[s] a duty to uphold confessional neutrality in public education” even if it meant violating rights of the religious majority.⁴¹

The moral and ethical values of a nation cannot be separated from religious norms or even feelings. In the *Lautsi* case, the Italian government made specific reference to this argument by pointing to the *Otto-Preminger-Institut v. Austria* judgment of September 20, 1994.⁴² In *Otto-Preminger*, a large margin of deference was afforded to Austria when a movie was forbidden to be played in Austrian cinemas because it offended the feelings of Austrian Catholics—the

Welle, *German High Court Crucifix Ruling*, DW: TODAY IN HISTORY, http://www.todayinhistory.de/index.php?what=thmanu&manu_id=1545&tag=10&monat=8&year=2002&dayisset=1&lang=en (last visited September 4, 2015). This was one of the most controversial decisions of the Court.

41. *Lautsi*, App. No. 30814/06, 2011 Eur. Ct. H.R. at ¶ 31. This is decision of the Court of the first instance. The Italian Government insisted that neutrality is not same thing as secularism. “The Government also criticised the Chamber’s judgment for deriving from the concept of confessional ‘neutrality’ a principle excluding any relations between the State and a particular religion, whereas neutrality required the public administrative authorities to take all religions into account. The judgment was accordingly based on confusion between ‘neutrality’ (an ‘inclusive concept’) and ‘secularism’ (an ‘exclusive concept’). Moreover, in the Government’s view, neutrality meant that States should refrain from promoting not only a particular religion but also atheism, ‘secularism’ on the State’s part being no less problematic than proselytising by the State. The Chamber’s judgment was thus based on a misunderstanding and amounted to favouring an irreligious or antireligious approach of which the applicant, as a member of the Union of atheists and rationalist agnostics, was asserted to be a militant supporter.” *Id.* at ¶ 35. It should be stressed that atheism is also to be considered a “religious” identification. Although it does not include believing in a supreme being, it does include believing that One does not exist: so atheism is not ‘religious’ by itself but holds religious attributes. There is a recent example of an Afghani immigrant seeking asylum in the UK on the grounds of being atheist. The UK Government granted him asylum on the grounds of religious persecution (persecution caused by religious identity of the applicant). This was heavily followed by the British press. See Owen Bowcott, *Afghan Atheist Granted UK Asylum*, GUARDIAN, Jan. 13, 2014, available at <http://www.theguardian.com/uk-news/2014/jan/14/afghan-atheist-uk-asylum>. It is also interesting that European laws (EU Laws) say nothing about family law issues, the majority of which are connected to religious norms. Thus Europe recognizes the special position of family law and silently declares its connection to moral and ethical values.

42. *Lautsi*, App. No. 30814/06, 2011 Eur. Ct. H.R. at ¶ 37 (citing *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 1994 Eur. Ct. H.R.).

vast majority of Austrian citizens.⁴³ The fact that the movie had been shown in movie theatres and was hurting the feelings of the majority of the Catholic population was sufficient reasoning for the decision of the Court when the blasphemous movie was forbidden.⁴⁴ The Italian Government used this case to show that other European States had similar circumstances and that the Court provided similar protection to the cultural values of the state. In *Lautsi*, the government's major objection is asserted in the following comment:

On the contrary, the Court should acknowledge and protect national traditions and the prevailing popular feeling, and leave each State to maintain a balance between opposing interests. Moreover, it was the Court's case-law that school curricula or provisions establishing the preponderance of the majority religion did not in themselves point to undue influence on the part of the State or attempted indoctrination, and that the Court should respect constitutional traditions and principles relating to relations between the State and religions—including in the present case the particular approach to secularism which prevailed in Italy—and take into account the context of each State.⁴⁵

2. *The court's holding*

At the European Court for Human Rights, the case was very simple. The applicants argued that a crucifix in the classroom represented the “despotism of majority.”⁴⁶ The Italian Government, however, claimed that removing the crosses would be an “abuse of a minority position.”⁴⁷ The final decision was 15 to 2 in favor of crucifixes in the classrooms.⁴⁸ The court determined that the crucifix, as a “passive symbol,” does not actively harm other's rights of religious freedom and equality.⁴⁹

43. See *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 1994 Eur. Ct. H.R.

44. *Id.*

45. *Lautsi*, App. No. 30814/06, 2011 Eur. Ct. H.R. at ¶ 37.

46. *Id.* ¶ 45.

47. *Id.* ¶ 40.

48. *Id.* ¶ 31.

49. *Id.* ¶ 72.

The central questions in these types of cases are: Do we believe the secular identity of the State to be protected by the Constitution? Do we accept the historical and cultural dimension of religion? Does religion have a social role within Society? Many of these questions can be answered with this insight: religious symbols could be seen as both religious and cultural. That line, of course, is thin and delicate. But if we draw it, we maintain the option that the State and Society could be both secularly and culturally shaped. It is important to see what technique the Court uses to determine which values deserve special protection and how the Court attempts to draw that thin and delicate line.

The Court sought to draw this line by using the “margin of appreciation” doctrine (or “range of discretion” doctrine). This doctrine is defined by the ECtHR and widely used for cases where specific protective elements are found in the laws. Under interpretative opinions of the Council of Europe and ECtHR, “the term ‘margin of appreciation’ refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights.”⁵⁰ This establishes that even in the most democratic countries where the freedom of expression standard is enviable, law leaves a special place for the peculiarities of specific countries. Article 10.2 of the Convention mentions using “public morals” for setting standards.⁵¹ Thus, state law, viewed as an intrinsically normative phenomena, is based on judgments of social reality and incorporates

50. See *The Margin of Appreciation*, COUNCIL OF EUR., <http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17> (2000).pdf (last visited Sept. 4, 2015). See also *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R. (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>. The European Court justified the limitation of freedom of expression over the protection of public morals. See generally HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996).

51. Convention, *supra* note 32, at art. 10.2. “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” *Id.*

the statistical factors which require that the majority principle be protected; factors which make up the cultural environment of a particular state. It is important to realize that public morals also make law. In that sense, the decision in the *Lautsi* case—by using the margin of appreciation doctrine when the Court decided that the presence of the cross cannot be disturbing to non-believers—re-affirmed the cultural element of public morals, which are also responsible for the formation of law.⁵²

3. *Analysis of Lautsi*

There are some interesting comparisons to the U.S. Establishment Clause cases which are valuable in understanding the *Lautsi* case. Richard W. Garnett from Notre Dame University shared interesting insights into how this case would turn out in the U.S. when he discussed the *Lautsi* case before the decision of the Grand Chamber.⁵³ He argues that, for the United States Supreme Court, this would be an easy decision in which the justices would unanimously invalidate it for First Amendment reasons.⁵⁴ But, he also argues that the nature of the symbol would be important—he mentions that a Christmas tree in a public space is a non-influential symbol to non-Christians.⁵⁵ He is correct when he asserts that if something would be in violation of a secular element of the state—and protection of the First Amendment—it would be crucial to know what kind of significance the symbol in question has to society. He provides a few factors to consider: the length of time the symbol has been in place, the artistic significance of the symbol, its political significance, etc.⁵⁶ Even though he believes U.S. judges would decide differently, this decision would be reached because of the different

52. *Id.* § 66.

53. Richard W. Garnett, *Section III, in* LECTURE PAPER 14: THE EUROPEAN COURT VERSUS THE CRUCIFIX: A PANEL DISCUSSION 10 (The Nanovic Inst. Lecture Papers, A. James McAdams ed., 2010), https://nanovic.nd.edu/assets/54613/crucifix_paper.pdf [hereinafter LECTURE PAPER 14].

54. *Id.* at 10.

55. *Id.* at 10–11.

56. *Id.* at 11.

cultural structure of the United States.⁵⁷ Additionally, some issues could be more difficult, like Nativity scenes displayed alongside menorahs by the government.⁵⁸ He also mentions that it would not be required for Los Angeles to change its name, but some towns would have to remove crosses from their seals.⁵⁹

He argues “that most jurists are sensible enough to realize that ours has been and remains a society that is comfortable with mild, non-sectarian forms of ‘public religions,’ and that they should not overreach.”⁶⁰ He notes that “if we err in one direction, we give heckler’s veto to people who simply don’t like any religious imagery. If we err in the other direction, we fall into unattractive and unthinking deference of majorities.”⁶¹ So, culture is important, as well as public morals, on both sides of the Atlantic. Cultural substance is the only thing that differs. America is, or at least has been, a Protestant, and not a Catholic, country whose culture surely determined public morals, which in turn were transformed into law.⁶²

Thus, the *Lautsi* case shows that law as a product of historical context produces the framework which we call public morals and public order (Awareness and Foundations Principles). This framework exists despite the requests of governments, groups, or individuals to have secular society detached from religion and religious (moral) values. To be more precise, law and legal order cannot—and should not—function without regard to what the public response would be—public response being dependent on the social puzzle of the values of a particular society (Democratic Principle). The margin of appreciation doctrine assures that when fighting over God, He stays in the public arena as long as His presence is visible in social elements that form that society and its normative structure. In other words, even if states or political parties want changes, those changes cannot be of such dimension and range

57. *Id.* at 10.

58. *Id.* at 12.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

that their application would mean the complete corrosion of the system where they are applied.

In this light, secular norms (and attitudes) should not be so aggressive that they undermine aspects of religious foundations that establish law and society. In democratic societies, there should be a place for everyone, which means that the majority should not be excluded. Laws of culture, as long as those are laws of the land and life, should be respected, even if secularism is a constitutional value (Cohabitation Principle). Finding balance is the key. Having those rules in mind, Swedes or Norwegians could keep their flags with the symbol of the cross, and Americans could keep “in God we trust” on their banknotes. There should be norms which are applicable to all whether you’re talking about Provo or Manhattan⁶³ and whichever different group is asked, regardless of territorial, religious, or other cultural differences. It is impossible to cherish the products of the European state’s historical development by merely accepting the evolution of developing individual human rights without at the same time respecting the twenty centuries of tradition in which that evolution took place.⁶⁴

B. The Final Fall of the French Veil: S.A.S. v. France

One of the most controversial religious freedom issues is the problem of religious clothing in France. On July 1, 2014, the Grand Chamber of the ECtHR decided *S.A.S. v. France*, which challenged the French ban on wearing face coverings in public spaces.⁶⁵ As the aim of this text is to show the importance of recognizing religious elements in society on a different level from that which is (or would like to be) accepted today, this Article will not go deeply into the facts of this case, but will merely use the case and its sociological development as additional proof that the ECtHR has a consistent approach towards religion and law on European soil. This section starts with a brief review of the case’s issues and arguments. It then

63. *Id.* at 14.

64. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. 47 (Bonello, G., concurring).

65. *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R.

deals with the context of the case by looking at French secularism. It proceeds to the court's holdings before finishing with a comparison to the Dutch to show a better solution.

1. *The case*

The major question at issue was whether the decision of the French republic to ban head coverings in public spaces was based on the grounds of public order, gender equality, and protection of secularism, or rather the protection of tradition, culture, and public safety.⁶⁶ The non-governmental organization Open Society Justice Initiative made interesting arguments that correctly pointed out that these measures were made against Muslim customs and behavior:

This third-party intervener pointed out that the ban on the full-face veil had been criticised within the Council of Europe and that only France and Belgium had adopted such a blanket measure. It emphasised [sic] that, even though the French and Belgian Laws were neutral in their wording, their legislative history showed that the intent was to target specifically the niqab and the burqa.⁶⁷

By not accepting the religious freedom of its citizens, the French Republic falls into a contradictory and illogical situation in which, by defending secularism, it acts as a protector of moral and even religious practices that are shadowed by traditional values but that are formal practices of the state, even if it does not recognize them as religious. For example, some states protect the principle of “living together” or things that are part of their foundational and valued nature, but do not protect individual religious practices such as wearing a religious veil. When kippas or crosses, which are also religious symbols or necessities, were worn there were no complaints. The French Republic protects public order on the same grounds—and in the same way—that any religiously grounded country in the world would. France has difficulty admitting that its public order, although secular, is based on

66. This was the notion of the non-governmental organization Open Society Justice Initiative. See Written Comments of the Open Society Justice Initiative *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed July 10, 2012) § 22, available at <http://www.opensocietyfoundations.org/sites/default/files/sas-france-written-comments-20130423.pdf>.

67. *S.A.S.*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 102.

particular values which derive their substance from the country's Judeo-Christian roots. Evidence of this is that questions about protecting secularism (*laïcité*) by banning religious symbols were not present in French legal history with populations of Christians or Jewish believers, which brought skull heads and crosses into the public sphere. But, when the Muslim population grew and started to culturally shape the country, the Republic reacted—using secularism as its religion in defense. Now that the former adversary, the Catholic Church, is neutralized and does not present a “serious problem” after the French Revolution in 1798, attention has shifted to the Muslim community in France. Even if secular in their deepest beliefs, French cultural circles must pretend that they completely left Christian concepts and cultural values. This by itself would not be a problem, except that when claiming absolute and pure secularism, they are at the same time neglecting individual religious freedom and human rights that are guaranteed by the freedom of religion clauses. In this case, we face unfair discriminatory behavior aimed at one particular group—Muslims.

In conclusion, the intervener argued that there was a European consensus against bans on the wearing of the full-face veil in public. It further stressed the fact that blanket bans were disproportionate where less intrusive measures might be possible, that public order justifications must be supported by concrete evidence, that measures introduced to promote equality must be objectively and reasonably justified and limited in time, and that measures seeking to promote secularism must be strictly necessary.⁶⁸

The problem, of course, is multifarious in its essence. Protection of the state's secular identity jeopardizes society's individual freedoms and customs. The issue here is that if we agree that wearing religious symbols violates public morals and public order, which could be legitimate in particular cultural settings, are we admitting in that case that some human rights are neutralized? If so, which rights?

Additionally, there is the question of gender equality. There are multiple ways to frame this issue. Some would argue that wearing a scarf would mean putting the woman into a position where her

68. *Id.* ¶ 105.

rights are endangered. But others would argue that the human rights of women are violated by not allowing them to wear what they want. In either case, the European Grand Chamber departed from the previous opinions in *Dahlab*⁶⁹ and *Sahin*⁷⁰—cases where it stated that wearing the scarf is contrary to the principles of tolerance and gender equality. The court clearly separated the issue into two questions: one was a question of the protection of public order and the other was a question of having the right to a private life⁷¹ and cultural identity.⁷² The problem was also shaped by the idea that secularism should impose a particular form of state neutrality—understood to mean that a state should remain neutral, but not require the same from its citizens.⁷³ This is indicated when states tend to make peace

69. *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643>. This was a Swiss case deciding that a Muslim teacher could not wear a traditional Islamic headscarf while teaching. *Id.*

70. *Leyla Şahin v. Turkey*, App. No. 4474/98, 2004 Eur. Ct. H.R. ¶ 299. This is a Turkish case forbidding a student in a public medical school from wearing a headscarf. The case was decided in favor of Turkish law. *Id.*

71. This expectation is protected by Article 8 of the Convention. There were also applicants' petitions regarding the alleged violation of the right to private and family life. Article 8 states that (1) "Everyone has the right to respect for his private and family life, his home and his correspondence," and (2) "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Convention, *supra* note 32, at art. 8.

72. See Lasia Bloss, *European Law of Religion: Organizational and Institutional Analysis of National Systems and their Implications for the Future European Integration Process* (N.Y. Univ. Law Sch. Jean Monnet Program, Working Paper 13/03, 2003). "The protection of human dignity is similarly rejected as a legitimate aim by the Court. The Court states that it 'is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy.' The Court thus respects the applicant's autonomy and refrains from attributing a meaning to the way she is dressed and the religion she professes. At the same time, the Court also clearly gives a message that the society cannot impose its view on a particular religious dress on the women concerned." Saïla Ouald Chaib & Lourdes Peroni, S.A.S. v. France: *Missed Opportunity to Do Full Justice to Women Wearing a Face Veil*, STRASBOURG OBSERVERS, Jul. 3, 2014, <http://strasbourgoobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/>.

73. See generally Rafael Palomino, *Religion and Neutrality: Myth, Principle, and Meaning*, 2011 BYU L. REV. 657; Jay Wexler, *Government Disapproval of Religion*, 2013 BYU L. REV. 119.

between human rights and freedoms of the individual on one side and state order in general on the other side.

2. *The context*

The history of the French approach is delicate and lengthy.⁷⁴ Most recently, France established the principle of secularism (*laïcité*)⁷⁵ within its own Constitution of 1958: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”⁷⁶

There are two major problems with the implementation of this secularist notion of equality. First, religion is not a significant issue in French legal thinking; this is more pertinent for citizens with religious beliefs, but also applies to those without them. Under basic French law, religion is not something with which the French Republic is really concerned. Religion is included merely because of historical problems with the Catholic Church, which was “dethroned” by the French revolution and its outcomes. Recent developments in France show that religious and non-religious people in France are not treated equally. In fact, atheists enjoy more privilege since they are not required to wear scarfs or yamacas as part of their religious practice. Another issue is connected with the normative ideal that all religions are to be respected. From one point of view, none are respected and followed in their literal forms.

The following situation illustrates the difficulty in treating religions differently from other movements that could become a public problem. Imagine if there was an artistic movement that wanted only brown to be worn in public on Wednesdays. But, one might say, artistic appearances are not covered by the ban. However, what if the artistic movement became so powerful and pervasive as to

74. For purposes of this Article, I will focus on the recent history, although not without some hesitation. The post-18th century revolution period had a significant influence on the logic that shapes French governance even today in its more contemporary form.

75. See ELIZABETH SHAKMAN HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* 46–64 (2007).

76. 1958 CONST. pmb. art. 1 (France); see Bloss, *supra* note 72, at 21.

penetrate every public place in the Nation. Who will decide and what will determine and clarify when and if that artistic movement becomes a cult (which might be more dangerous to society than religion)? What would impact and influence the decision of which artistic movements are to be treated as a religion and which remain just art?⁷⁷

Although no one can legitimately declare that France is not a country dedicated to human rights principles, the problem nevertheless exists that France does not treat religions equally. This is indicated by its tax regulations.⁷⁸ Bloss points out that even France is not territorially homogenous in respect to equally approaching religion: departments of the Alsace and Moselle regions as well as the French Guyana have historically had special relationships with the Catholic Church, which form constituent parts of the French state.⁷⁹ The so-called Eastern Departments in Alsace and Moselle (Haut-Rhin, Bas-Rhin and Moselle) maintain special relationships with the Holy See for historical reasons.⁸⁰

Regarding treatment of Muslim clothing, the Republic has not had a consistent approach. When in 1989, a local school in Grenoble denied entry to a Muslim girl wearing a *foulard* to class, no one

77. Brian Leiter, professor of legal philosophy from the University of Chicago, proposes two hypotheticals, one of which is real and the other fictional. In 2006, in front of the Canadian Supreme Court *Multani v. Comm'n scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 6 (Can.) was argued, which resulted in a decision to allow a Sikh boy wearing a ritual knife *kirpan* to go to public school since it represents his religious identity which would be suppressed without such an item. On the other hand, Leiter argues that if a similar situation arose and another boy requested the same right of wearing a gun into the classroom for reasons which are not religious, but could be cultural and connected with his identity (like passing the gun from grandfather to father to son), he correctly admits that courts' decisions would be entirely different. He asks all of us: Why do we tolerate religion? LEITER, *supra* note 19, at 1–4.

78. Bloss, *supra* note 72, at 23 (“The Government currently does not, for instance, recognize Jehovah’s Witnesses or the Church of Scientology as fulfilling the requirements for a religious association, and therefore subjects them to a 60% tax on all funds they receive.”). Someone might say in jest that religion only matters in financial issues.

79. *Id.*

80. DOE, *supra* note 7, at 8 n.53 (According to the Law of Separation in 1905, “diplomatic relations with the Holy See were cut in 1904; the law does not apply to Haut-Rhin, Bas-Rhin, or Moselle, which were formerly under German Rule but returned to France in 1918”).

would have thought that it would cause decades of cultural fighting on all levels in European judicial systems—in 1995, “[t]he *Council d’Etat* . . . affirmed that simply wearing a headscarf does not provide grounds for exclusion from school and subsequently struck down some decisions to expel girls for wearing their *foulards*.”⁸¹ Interestingly, only Belgium has adopted a similar law to the one in France.⁸²

3. *The court’s holdings*

France’s actions are, to some extent, inconsistent. Even though France is a secular state, it is still historically bound to its Judeo-Christian traditions. The French society did not have problems with the display of crosses and kippas (yamacas), which are a reflection of its Judeo-Christian roots, but did have problems with the expressions of the Muslim worshippers. As a result, France decided that showing religious symbols in French public schools is contrary to the secular foundations of the French state. Manifestations of religion matter and are a major reason why France decided to ban *burqas* and *hijabs*, a decision upheld by the European Court under its margin of appreciation principle. “[T]he Council of Europe prefers States to have a secular posture, with neutrality and separation between State and religion, but at the same time promoting dialogue with religion. However, the European Union formally respects the national

81. Bloss, *supra* note 72, at 27 (citation omitted).

82. Belgian Law was cited in *S.A.S. v. France*: “To date, only Belgium has passed a law that is comparable to the French Law of 11 October 2010, and the Belgian Constitutional Court has found it compatible with the right to freedom of thought, conscience and religion However, the question of a ban on concealing one’s face in public has been or is being discussed in a number of other European States. A blanket ban remains a possibility in some of them. In particular, a Bill has been tabled to that end in Italy: although it has not yet passed into law, it appears that the discussion is still open. In Switzerland the Federal Assembly rejected, in September 2012, an initiative of the Canton of Aargau seeking to ban the wearing in public of clothing covering all or a large part of the face, but in Ticino there was a vote on 23 September 2013 for a ban of that kind (the text still has to be validated, however, by the Federal Assembly). Such an option is also being discussed in the Netherlands, notwithstanding unfavourable opinions by the Council of State It should also be noted that the Spanish Supreme Court has ruled on the legality of a ban of that kind.” App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 40 (internal citations omitted).

church-state postures of its Member States.”⁸³ This attitude leaves a wide space for implementing a *quaestio facti* approach and workable margin of appreciation maneuvers.

The court in Strasbourg had concerns about how Islam could fit within the framework of pluralism and democracy.⁸⁴ The Council of Europe recognized that “Islam is not only a religion but also a social, legal and political code of conduct,” and that “Islamism can be violent or mainstream and peaceful, but in both cases it does not accept the separation between religion and state, which is a fundamental principle of democratic and pluralistic societies.”⁸⁵ It is important to stress, as the Council did, that Islam is and should be recognized as a religion that impacts and contributes to the development of European culture and values.⁸⁶ Therefore, every effort needs to be made to neutralize negative assumptions toward people who profess that faith.⁸⁷ As in other religions, there are also variations among different denominations, which should be understood in their essential and social context. In his lecture at Notre Dame University, Azouz Begag, former Minister for Equal Opportunity of French Government, described problems which Maghrebian youth face in France, living in “two worlds,” one of ethnic and religious expectations and the other of the state formation where they live.⁸⁸

This understanding clarifies why issues of secularism and non-religious society were even more important in the French republic in the *S.A.S.* case. Apart from being a “member” of a predominantly Christian circle and having bonds with traditional Judeo-Christian

83. DOE, *supra* note 7, at 29, 29–30 nn.168–172 (citations omitted).

84. *Id.* at 28. See *Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1 at 39 (Grand Chamber 2003).

85. Eur. Consult. Ass., *Islam, Islamism and Islamophobia in Europe*, Res. 1743 ¶ 2 (2010), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17880&lang=en>.

86. *Id.*

87. See Palomino, *supra* note 73, at 658–59.

88. Azouz Begag, former Minister for Equal Opportunity of French Government, *Identity and Self-Construction Among the Children of Maghrebian Immigrants in France, Keynote Address at the University of Notre Dame: The Place of Islam in Contemporary European Literature*, in NANOVIC INSTITUTE LECTURE SERIES, UNIVERSITY OF NOTRE DAME, LECTURE PAPER 15 (Nov. 16–18, 2009), available at https://nanovic.nd.edu/assets/60893/paper_15_final_web.pdf.

values with a secular prefix, France is actually protecting what is an essential part of its existence: a secular environment. The secular environment is a state's public morals, which determines what the public order is or which shape it should take. Public morals and public order are again key determining factors of the creed of society as a whole.

One must ask if it is possible to achieve a softer approach in using the margin of appreciation doctrine and reaching the standards that could amalgamate both desires: to have a country that values and recognizes human rights and to have a country of predominant values. Contemporary Europe has not been able to depart from its evolutionary path in which human rights were delivered, but which also lean on tradition and culture through the same evolution.⁸⁹ Acknowledging and valuing both create a formula for peaceful coexistence. Fear cannot be the reason to give up human rights and standards of freedoms.

Other issues put before the Court in the *S.A.S.* case could also have an impact on religious freedom. One issue raised was a question regarding gender equality, which was argued in connection with the violation of religious freedom. Gender issues were used to unwrap religious discrimination and to purport that this was a case in which women should stand together to protect women's rights.⁹⁰ The Court dismissed those arguments⁹¹ and explained that there was not enough evidence to prove that religious scarfs put women in a subordinate position and that it should remain a question of culture, which in this case was a private matter.⁹²

The Court paid more attention to the issue of cultural identity, which in a democratic society should be observed through the lens of democratic principles: if we accept that people may have different

89. See *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. ¶¶ 1.1–1.2, 1.4 (Bonello, J., concurring).

90. *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 17.

91. *Id.* ¶¶ 118–19.

92. *Id.* ¶ 119 (“The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”). See also *Schuler-Zgraggen v. Switzerland*, App. No. 14518/89, 1993 Eur. Ct. H.R. ¶ 67; *Konstantin Markin v. Russia [GC]*, App. No. 30078/06, 2012 Eur. Ct. H.R. ¶ 127 (2012).

reasons to belong to particular religious groups, and we (at least) tolerate that, we should tolerate beliefs which belong to the different cultural models which form those religions.⁹³ It is not possible to respect pure belonging without recognizing that the belonging is established on different sets of values and world views, which if they weren't different would be our own. While human dignity was worthy of discussion, the Court made no findings that a woman wearing religious clothing by her own choice was enough to find discrimination—it would be hard in any modern legal system to describe the willful behavior of a mature person as discrimination.⁹⁴

The Grand Chamber argued deeply about the coexistence of religions in democratic societies. Sometimes, they said, such coexistence will necessitate setting some rules, (in accordance with the majority's culture) which will enable all to feel comfortable, or at least less uncomfortable.⁹⁵ Also, the Court discussed the states' duties of neutrality and impartiality: "Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society."⁹⁶

93. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. ¶ 60 ("States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups . . .").

94. *S.A.S.*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶¶ 119–20 ("[H]owever essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity that contributes to the pluralism that is inherent in democracy. It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body. Moreover, it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.")

95. *Id.* ¶ 126. ("In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.")

96. *Id.* ¶ 127–28 ("[The Court] also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed . . ."). *See also* *Manoussakis v. Greece*, 23 Eur. Ct. H.R. (ser. A) at 1363, ¶ 47 (1996); *Hasan and Chaush v. Bulgaria* [GC], App. No. 30985/96, 2000 Eur. Ct. H.R., ¶ 78; *Refah Partisi (the Welfare Party) v. Turkey* [GC], App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 2003 Eur. Ct. H.R., ¶

Regarding Article 9 of the Convention that protects free practice of religious beliefs (including the ability to believe, to show, and to proselytize),⁹⁷ the Court in *S.A.S.*, and through manifestation decided to use “a wide margin of appreciation”⁹⁸ doctrine, as it opined that French society is so immersed in the principle of secularism.⁹⁹ In other words, secularism is the core value of French society and it is connected with all common values of “living together” within the limits of the same society.¹⁰⁰ Furthermore, the Court described the limitation on the freedom of religion in this case as “necessary,” and did not say that under some other circumstances and in some other cultural landscape, it would not decide differently.¹⁰¹

A valuable part of the Court’s decision is when it decided to expressly state that national traditions are to be respected and regarded as important while at the same time defending the margin of appreciation approach, which many consider too broadly accepted, used, explained, and tolerated.¹⁰² The major problem in following the French approach is, as stated before, the non-transparent behavior of the French Republic in which it is difficult to

91. “[T]his duty requires the State to ensure mutual tolerance between opposing groups.” *S.A.S.*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 127.

97. See *DOE*, *supra* note 7, at 40, 44–49.

98. *S.A.S.*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 155.

99. *Id.* ¶¶ 153–58.

100. *Id.*

101. *Id.* ¶ 129 (“As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is ‘necessary’. That being said, in delimiting the extent of the margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is ‘necessary.’”); see, e.g., *Manousakis*, 23 Eur. Ct. H.R. (ser. A) ¶ 44; *Leyla Şahin v. Turkey*, App. No. 4474/98, 2004 Eur. Ct. H.R. ¶ 110. “[The Court] may also, if appropriate, have regard to any consensus and common values emerging from the practices of the States parties to the Convention (see, for example, *Bayatyan v. Armenia* [GC], no. 23459/03, § 122, ECHR 2011).” *Id.*

102. *Id.* ¶ 130. (“[I]t was thus not possible to discern throughout Europe a uniform conception of the significance of religion in society and that the meaning or impact of the public expression of a religious belief would differ according to time and context. It observed that the rules in this sphere would consequently vary from one country to another according to *national traditions* and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. It concluded from this that the choice of the extent and form of such rules must inevitably be left up to a point to the State concerned, as it would depend on the specific domestic context.”) (emphasis added) (citation omitted).

know what the rules are. By recognizing traditional, cultural, and even religious foundations of the French republic, a state could be fair and say that traditions (even those hidden in secularism) are to be respected (Awareness and Foundations Principles) and care would be then given to maximize protections of minorities who deserve a fair approach (Human Right Principle). Saying that the French Republic is secular and respecting of religious beliefs, while at the same time restricting those rights dramatically, results in unnecessary confusion.

Another objection is that French secularism has characteristics of religion, but prefers and tolerates the more traditional cultural elements rooted in French history and folklore. As previously stated, acting like this *la République*, to some extent, is unfair to the Muslim community.¹⁰³ The principle of proportionality is evidenced as “[c]ourts throughout Europe often engage in a determination of whether a restriction of the right to manifest religion is justified on grounds of necessity.”¹⁰⁴ This principle is mentioned as an integral part of the process of acquiring the label of margin of appreciation. The margin of appreciation can’t be fully understood without the principle of proportionality.¹⁰⁵

In conjunction with that principle, the Court ruled that the *S.A.S.* case was different from previous cases of a similar sort since this ban was considered as pertaining to Muslim women wearing the kind of clothing that covers most of the face and hides most of the body.¹⁰⁶ This was deemed justifiable as a necessity in order to promote and maintain public safety.¹⁰⁷ Public safety is viewed as an integral part of European society. The Court considered whether the ban was “necessary in a democratic society for public safety”—also

103. See *supra* text accompanying note 66.

104. DOE, *supra* note 7, at 62.

105. *Id.*

106. See *S.A.S.*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 136 (“Among all these cases concerning Article 9, *Abmet Arslan and Others* is that which the present case most closely resembles. However, while both cases concern a ban on wearing clothing with a religious connotation in public places, the present case differs significantly from *Abmet 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.”).

107. *Id.* ¶ 138.

confirming that the court was dedicated to “protection of the rights and freedoms of others.”¹⁰⁸

The Court observes that this is an aim to which the authorities have given much weight. This can be seen, in particular, from the explanatory memorandum accompanying the Bill, which indicates that “[t]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of ‘*living together*’ in French society” and that “[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity, . . . falls short of the minimum requirement of civility that is necessary for social interaction” It indeed falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity. Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places.¹⁰⁹

The Court equates the fundamental requirement of “living together” with the principle of secularity and the public morals of the French Republic. The Grand Chamber “reiterates that remarks which constitute a general, vehement attack on religious or ethnic groups are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects.”¹¹⁰ The Court in *S.A.S.* decided that the kinds of decisions like the banning of full-face veils, is not against the “choice of society,”¹¹¹ and is against the cultural necessity of the appearance of the veil in public. Cultural norms ground the choice of society in ways that are similar to choices that are religious in their nature and consistent with that society’s chosen values.

Thus, the question of whether women should be permitted to wear the full-face veil in public places constitutes a choice of society. This case is actually about giving the margin of appreciation to

108. *Id.*

109. *Id.* ¶ 141 (emphasis added).

110. *Id.* ¶ 149 (citations omitted).

111. *Id.* ¶ 153. Choice of society means the shape of public morals and the shape of public order, which is formalized through democratic representation of the majority of citizens.

France on the grounds of the cultural shape of the French republic. Limitations, which were impugned, are to be considered a necessity in a democratic state like France.¹¹² To be sure, a democratic state, which also belongs to a particular cultural and religious circle, is covered by the veil of secularism.

4. *A Dutch comparison*

A comparison with the Netherlands shows a better solution to France's problem. The Netherlands, in many respects, is comparable to France. Both countries are members of the European Union and the Council of Europe, and are firmly situated with the secular character of the state. They also share (to some extent) a similar European history and, in many cases, similar values. Contrary to the French cases, Dutch regulations banning religious clothing were struck down by the Council of State of the Kingdom of the Netherlands, where the ruling authority of the State was not ready to move away from the principles of individual freedoms.¹¹³ France and the Netherlands belong to the same spectrum of countries where the state is "neutral" toward both religion and religious communities and where the financial support of the State is excluded.¹¹⁴ But, we

112. *Id.* ¶ 158.

113. *Id.* ¶¶ 51–52. In this case, the Court found that "the Government had not stated how the wearing of clothing covering the face was fundamentally incompatible with the 'social order' (*maatschappelijke orde*), nor had they demonstrated the existence of a pressing social need (*dringende maatschappelijke behoefte*) justifying a blanket ban, or indicated why the existing regulations enabling specific prohibitions hitherto deemed appropriate were no longer sufficient, or explained why the wearing of such clothing, which might be based on religious grounds, had to be dealt with under criminal law. . . . Lastly, the Council of State found that the subjective feeling of insecurity could not justify a blanket ban on the basis of social order or public order (*de maatschappelijke of de openbare orde*). . . . The Council of State further indicated that, in view of the foregoing, the Bill was not compatible with the right to freedom of religion. In its view, a general ban on wearing clothing that covered the face did not meet a pressing social need and was not therefore necessary in a democratic society." *Id.* These arguments are of course expected to arrive from the Dutch state, a country strongly dedicated to the principles of free religion and individual rights. It could be said that the Netherlands developed a completely different model of secularity in which individual religiosity is to be protected at almost all costs. So religion can enter public space as long as it enters through the individual and not through the State. However, recent developments in security issues could possibly change the mindset of the Dutch people.

114. *DOE, supra* note 7, at 29.

also witness different approaches to particular religious issues in each one of these states. As Norman Doe states, in France, “the doctrine of *laïcité positive*” allows for religious liberty, while at the same time, “perhaps paradoxically, . . . generates cooperation between State and religion.”¹¹⁵ As a result, “religious groups may function as private law associations; assistance is given to the maintenance of historic places of worship; and funding is available for spiritual assistance in schools, hospitals, prisons, and the armed forces; moreover, the president is consulted about the appointment of Catholic bishops.”¹¹⁶ This also shows that traditional elements of belonging are not formalistically present in the modern French state. Another anomaly is found in the spiritual leadership and support in the French army. There are Catholic, Protestant, and Jewish personnel, but not Islamic or Hindu, for instance.¹¹⁷

The differences between the French and Dutch treatments of religions are also seen in their different treatment of the people’s right to manifest their religion. It is commonly accepted that religious rights of individuals include: a) the right to believe and b) the right to manifest. Since the right to believe is uncontrollable,¹¹⁸ only the right to manifest belief falls under the scope of law. The right to manifest is visible to the public and, therefore, enters the public sphere where a person might interact with others and the

115. *Id.* at 34.

116. *Id.* (citations omitted). This seems contrary to the idea that France is not funding religion. However, the services funded are considered social activities and religious groups are considered charities. See Bloss, *supra* note 72, at 24–25 (noting that there are also actions which are more pragmatic and political than coherent). It is obvious that France has a special interest in cooperating with religious communities of some significance for two reasons: one societal and financial (using church infrastructure, personnel etc.) and the other purely political (France does not forget that the majority of its citizens is still Catholic). So there is no financial support for religion, but there is financial support for religious services. See DOE, *supra* note 7, at 34 nn.217–18 (pointing at the Napoleonic Concordat with the Holy See (July 15, 1801), which remained unchanged in this section).

117. Bloss, *supra* note 72, at 27 n.61.

118. *Cogitationis poenam nemo patitur* (lat.) [No one suffers punishment for mere intent.]. The phrase comes from the principles of Roman law and from general principles of criminal law. Even if thoughts would have been punished one must report himself in order to be prosecuted. See Gordana Buzarovska-Lazetic, Olga Kosevaliska & Lazar Nanev, *The “Extension” of the Roman Criminal Law in Today’s Macedonian Criminal Laws*, 6 MEDITERRANEAN J. OF SOC. SCIS. 318, 319 n.2 (2015).

practices of others and society as a whole. Doe correctly notes the importance of religion as seen in ECtHR writings where it is defined and emphasized.¹¹⁹

Freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.¹²⁰

Both French and Dutch models belong among those that favor separation of church and state, but the two countries extend the definition of ‘the right to manifest’ principle differently, which is then applied to the public space. The ‘right to manifest’ is much more appreciated in the Netherlands and almost made equal to the ‘right to believe.’ It is important to distinguish between religious freedom and religious tolerance.¹²¹ Religious freedom in France is determined with a lower level of religious tolerance than in the Netherlands. The reasons for that are, of course, historical and therefore cultural. It is interesting though, that France, as a secular country, still adheres to its Judeo-Christian roots as is obvious in the case *S.A.S. v. France*.¹²² Non-religious France still maintains its ties through manifestations of cultural Christianity and, in some less-

119. DOE, *supra* note 7, at 29.

120. *Id.* at 43 (quoting *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 409 (1993)).

121. See DOE, *supra* note 7, at 44 (“[R]eligious freedom is not to be confused with religious tolerance.”); see also CONSTITUTION OF ROMANIA, art. 29 (“(1) Freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions. (2) Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect.”).

122. *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶¶ 80, 133–35 (noting that the treatment of other religious symbols was not a problem to the French Republic on that scale).

important but symbolically significant aspects, through formal connections with Catholicism.¹²³

In examining both French and Dutch perspectives, there is a balancing between majorities' and minorities' requests and desires (Cohabitation Principle). It is understandable that for cultural and functional reasons, a state has specific décor and appearance requests for its citizens. In relation to the veil, France and the Netherlands have said that the veil should be allowed to be worn, but there are specific justified situations where all members of the community should respect the functional needs of the country and also respect the culture(s) of the majority (Democratic Principle). Having human rights without respect for democratic principles annuls the first principle of individual rights, which requests that the source that provides the rights is respected. If the source which "gives human rights" is not respected, it would be insincere to request rights within the system which one feels is flawed.¹²⁴ In more concrete terms, it would mean that while a state would generally allow wearing veils in public, the state may request that the veil be removed at police controls, at borders, while taking photos for official documents, while taking exams, at court witnessing, and other such occasions. It would mean requesting removal for practical (functional) reasons, which are of course connected with the practicalities of the state. Balancing the rights of both the majority and the minority is key, as demonstrated in the final example of Croatia, where constitutional changes still left enough space for the protection of the rights of non-believers who wanted a proposed amendment that marriage should only be reserved for heterosexual couples.

123. See *supra* note 7; *infra* notes 79–80 and accompanying text. The portions comment on Alsace and Lorraine (Moselle) and the specific positions of clergy in charity or state work (military).

124. *Quod ab initio vitiosum est non potest tractu temporis convalescere* (lat.) (What is wrong or flawed from the beginning cannot transform with passage of time).

*C. Marriage is Between a Man and a Woman: The Story of the
Recent Constitutional Change in Croatia*¹²⁵

The story of Croatia's constitutional marriage amendment shows how public morals of the majority can be preserved without trampling on the rights of the minority. This section begins by laying out this story. It then addresses the arguments on both sides, as well as the problems that arise from a situation like this. It finishes with possible solutions, including the one that Croatia chose.

1. History of the amendment

The Croatian Constitution can be changed in two ways. One is by establishing a regular procedure conducted in Parliament in which two thirds of all representatives will have to vote in favor of the change.¹²⁶ Another mode, which until now has never been used, is a constitutional change made by the people themselves in an indirect way—by referendum.¹²⁷ Croatian regulations require that 10% of the voting body sign formal request for referendum in which 50% of people who vote must be in favor of the decision proposed.¹²⁸ This relatively low percentage of votes for changing the quite firm Constitution is a result of a recent constitutional change which happened just before Croatia joined the EU: the ruling party and opposition agreed that it would be too risky to jeopardize entering the EU after all those painful years of negotiations.¹²⁹ This constitutional change opened the door more widely to citizens' initiatives allowing people to be more involved through activism and influence.

125. The text of this section, which has been changed and amended, was initially prepared for discussion at the Conference 'Religion, Democracy and Law' held at London Metropolitan University (UK) in January 2014.

126. CONSTITUTION OF THE REPUBLIC OF CROATIA, Dec. 22, 1990 (consolidated text) Jul. 6, 2001, art. 147 (Croat.). Constitution of the Republic of Croatia CROATIA CONST., and Referendum Law: Official Gazette of the Republic of Croatia No. 33/1996, 92/2001, 44/2006, 58/2006, 69/2007, 38/2009.

127. *Id.*

128. *Id.*

129. Tea Romić & Tomislav Krasnec, *Analiza kako je glasovala Hrvatska – protiv EU bilo 18 općina*, VEČERNJI LIST, Jan. 23, 2012 [analysis on how Croatia decided on referendum for joining EU], <http://www.vecernji.hr/eu/analiza-kako-je-glasovala-hrvatska-protiv-eu-bilo-18-opcina-368801>.

Until recently, there had not been any successful collection of enough votes in order to make a change. However, just before the summer of 2013 the Croatian public was faced with a large public initiative started by a relatively small and until then unknown Non-Governmental Organization (NGO), *“In the Name of the Family.”*²¹³⁰ Nearly 750,000 signatures were collected in just two weeks,¹³¹ more than was required by Croatian referendum laws. This sparked the largest public debate in the nation since the days of independence.

Although Croatian Family Law defines marriage as a union between a man and a woman, the citizens’ initiative insisted that this should be a part of the Constitution.¹³² The reasoning was that marriage is one of the highest moral values of Croatian society and therefore should be written into the Constitution as a safeguard ensuring that this could not be changed by a political decision of any ruling party in the future.¹³³ As leaders of the initiative said, what happened in France with legalization of gay marriages and allowing same-sex couples to adopt hastened the decision to organize action in support of the traditional family.¹³⁴ Croatia is predominantly a Catholic country,¹³⁵ and as a result the majority of its citizens feel that marriage should be protected as the union of a man and a woman, and as a place where the State should intervene to protect

130. See *O nama [About Us]*, U IME OBITELJI [IN THE NAME OF THE FAMILY] (last updated Jan. 2, 2014), http://referendumbraku.uimeobitelji.net/o_nama/.

131. See *The first referendum initiated by citizens at 1st December 2013*, U IME OBITELJI [IN THE NAME OF THE FAMILY] (Nov. 19, 2013), <http://referendumbraku.uimeobitelji.net/2013/11/19/first-referendum-initiated-citizens-1st-december-2013/>.

132. Article 12 of the Family Law, *Brak je zakonom uređena zajednica žene i muškarca* [Marriage is the union of men and woman regulated by law.], National Gazette of the Republic of Croatia No. 103/2015. For a similar example of this situation in Australia, see Neville Rochow, *Speak Now or Forever Hold Your Peace - The Influence of Constitutional Argument on Same-Sex Marriage Legislation Debates in Australia*, 2013 BYU L. REV. 521.

133. See Ivan Miklenić, *Hrvatska i dalje većinski katolička zemlja* [Croatia still predominantly a Catholic country], GLASA KONCILA [VOICE OF THE COUNCIL], Jun. 1, 2013, http://www.glas-koncila.hr/index.php?option=com_php&Itemid=41&news_ID=21748.

134. See *id.*

135. Out of 4,284,889 citizens, 3,697,143 declared themselves as Catholic. See *Census of Population, Households and Dwellings 2011, Population by Citizenship, Ethnicity, Religion and Mother Tongue*, REPUBLIC OF CROATIA BUREAU OF STATISTICS, available at http://www.dzs.hr/Hrv_Eng/publication/2012/SI-1469.pdf; see also Ivan Miklenić, *Hrvatska i dalje većinski katolička zemlja* [Croatia still predominantly a Catholic country], GLASA KONCILA [VOICE OF THE COUNCIL], Jun. 1, 2013, http://www.glas-koncila.hr/index.php?option=com_php&Itemid=41&news_ID=21748.

procreation, which is in the interest of every modern state (at least economically, if not existentially).

The initiative had a great deal of support. Specifically, it had the support of most of the major religious groups in the country including the Catholic Church, the Islamic Community, and the Orthodox Church.¹³⁶ The Jewish Community was divided in two by suggesting to its believers that they should follow their conscience. Pro-gay activists argued that this initiative would harm the human rights of people of different sexual orientation and felt that Croatia would be going backward if this change were to take effect.¹³⁷ The proponents for the initiative argued that they were not against gay rights, and that those rights, including unions, should be regulated by law.¹³⁸ But they argued that those unions could not be called marriage and that child adoption should only be reserved for heterosexual couples.¹³⁹ The legal issue here is that the initiative felt that by allowing gay couples to enter into marriages and adopt children, the State would break from public morals, which is the legal standard from which all norms of the society derive (from civil to criminal to medical laws, etc.). In the eastern parts of the EU, these public morals shape moral and furthermore legal standards, for instance, in countries such as Poland or Hungary.¹⁴⁰

But the initiative also faced significant opposition. It was confronted by same-sex activist groups and various NGOs from the liberal spectrum. These groups argued that issues regarding same-sex marriage and adoption should not be regulated by the Constitution,

136. See *Podupiremo referendum za brak jer time želimo zaštititi najslabije u našem društvu* [We support referendum for marriage because we want to protect the weakest in our society], HRVATSKA BISKUPSKA KONFERENCIJA [CROATIAN BISHOPRIC CONFERENCE], Nov. 12, 2013, <http://www.hbk.hr/?type=vijest&ID=465>.

137. *Croatians Back Same-Sex Marriage Ban in Referendum*, BBC NEWS, Dec. 2, 2013, <http://www.bbc.com/news/world-europe-25172778>.

138. See Miklenić, *supra* note 133.

139. See *id.*

140. “The marriage as the union of men and woman equally as family, motherhood and fatherhood will be under protection.” THE CONSTITUTION OF THE REPUBLIC OF POLAND Apr. 2, 1997, ch. 1, art. 18, *available at* <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. The “State of Hungary will protect institution of marriage as union of man and woman which is stipulated by free decision and institution of family which is stone base of nation existence.” CONSTITUTION OF THE REPUBLIC OF HUNGARY, art. L, *available at* https://www.constituteproject.org/constitution/Hungary_2011.pdf.

since those are in the sphere of human rights.¹⁴¹ However, the ECtHR decided that right to marriage is not a human right and that family law is one of those branches of laws that the European Union's legislation doesn't cover because of cultural differences between the states.¹⁴² Although same-sex couples do have rights in terms of free movement of people and labor laws.¹⁴³ The Croatian Government, which is currently left oriented (social democrats), had its hands tied, although there were still attempts made to stop the referendum.

In November 2013, the Croatian Parliament approved a referendum that would determine whether the definition of marriage as the union of a woman and a man should become part of the country's constitution.¹⁴⁴ Although the majority of MPs¹⁴⁵ were against the idea (left wing parties), they could do little to prevent the parliament from allowing it to happen. This was amalgamated with the current wish to change the rules of the referendum in order to prevent similar referendums in the future.¹⁴⁶ The rules which were good enough when required for entering the EU were not popular with the ruling party now that they opposed the idea in question (reserving marriage strictly for heterosexual couples).

An unprecedented and difficult public debate, which caused unimaginable division in Croatian society was followed by activism

141. See *Schalk and Kopf v. Austria*, App. No. 30141/04, 2010 Eur. Ct. H.R.; *Gas and Dubois v. France*, App. No. 25951/07, Eur. Ct. H.R.

142. *Id.*; see also *The Margin of Appreciation*, COUNCIL OF EUR., [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17 \(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%20(2000).pdf) (last visited Sept. 4, 2015); Treaty of Lisbon, 2007 O.J. (C 306) 1.

143. See also *The Margin of Appreciation*, COUNCIL OF EUR., [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17 \(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%20(2000).pdf) (last visited Sept. 4, 2015). See also Treaty of Lisbon, 2007 O.J. (C 306) 1.

144. *Sabor odlučio: Na referendum o definiciji braka idemo 1. prosinca!* [Parliament decided: The referendum on the definition of marriage go on December 1!], NOVA TV (Nov. 8, 2013, 12:36), <http://dnevnik.hr/vijesti/hrvatska/u-saboru-danas-glasovanje-o-referendumu-o-braku---310315.html>.

145. MP refers to a member of the Croatian parliament.

146. *Gradanske inicijative i pravni stručnjaci: Vlada želi novim zakonom spriječiti građanske referendume!* [Civic Initiatives and legal experts: the government wants the new law to prevent civil referendums!], NAROD.HR [PEOPLE], Feb. 17, 2015, <http://narod.hr/hrvatska/podolnjak-ovaj-prijedlog-zakona-je-uvaden-s-jednom-namjerom-da-sprijeci-buduce-gradanske-inicijative>.

on both sides (*pro et contra*).¹⁴⁷ This kind of intensive and ever-present activism involving hundreds of volunteers and such great media coverage as had not been seen before. No issue had ever been so inflammatory in Croatian public space. On December 1, 2013, when 37% of all those with voting rights came out to vote, the majority of citizens (65%) voted for the formulation “Marriage is the union between a man and a woman,” while 33% voted against.¹⁴⁸ This norm became Article 62 paragraph 2 of the Croatian Constitution.¹⁴⁹ With the strong support of many churches,¹⁵⁰ Croatia¹⁵¹ decided to join Bulgaria¹⁵², Hungary¹⁵³, Latvia¹⁵⁴, Lithuania¹⁵⁵ and Poland¹⁵⁶ as one of the European Union countries which maintain a traditional definition of marriage protected by its Constitution. But, this Amendment had major arguments on both sides and was not without its challenges.

2. *Arguments and challenges*

One reason for rejecting marriages and child adoption for same-sex couples is the defense of public morals. This is rooted in Natural

147. See *Croatians Back Same-Sex Marriage Ban in Referendum*, *supra* note 137.

148. *Id.*

149. CONSTITUTION OF THE REPUBLIC OF CROATIA, Dec. 22, 1990 and later amendments CROATIA CONST., ch. 3, pt. 3, art. 62 (“(1) The family shall enjoy the special protection of the state. (2) Marriage is the union between a man and a woman. (3) Marriage and legal relationships in the marriage, common-law marriage, and family shall be regulated by law.”).

150. Examples include the Catholic Church, the Serbian Orthodox Church, the Islamic Community, and the Jewish Community Beth-Israel.

151. At this time, Croatia was the newest member of the European Union and had just been involved in a terrible war twenty years previous.

152. CONSTITUTION OF BULGARIA, Jul. 12, 1991, ch. 2, art. 46, *available at* <http://www.parliament.bg/en/const>.

153. CONSTITUTION OF THE REPUBLIC OF HUNGARY, art. L, *available at* <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>.

154. THE CONSTITUTION OF THE REPUBLIC OF LATVIA, Oct. 15, 1998, ch. 8, art. 110, *available at* <http://www.sacima.lv/en/legislation/constitution>.

155. CONSTITUTION OF THE REPUBLIC OF LITHUANIA, Oct. 25, 1992, ch. 3, art. 8, *available at* <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>.

156. THE CONSTITUTION OF THE REPUBLIC OF POLAND, Apr. 2, 1997, ch. 1, art. 18, *available at* <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

Law which, in theory, is determined by nature.¹⁵⁷ Therefore, the argument is that even if marriage itself may be a social phenomenon, delivering babies is not, which is biological or natural in its essence. For lawyers, legal theorists, and constitutional lawyers, there is always the perpetual question of what the law should represent. Law could be a reflection of the majority's prevailing moral feelings on particular questions and issues and, therefore, citizens should have the right to live in a county which is shaped by their moral and/or religious beliefs. Religion and religious issues are different than any other social phenomena, partly for reasons that include questions of ultimate reality and a desire to fulfill rules and duties that sometimes require fighting for the frameworks (including the legal system) in which followers want to live.

The difficulty comes from the tension between public morals and the rights of minorities. A pluralistic society focused on human rights requires that we accept the rights of minority groups who think differently. By doing so, we are also accepting that all humans are equal in their choices and decisions and that freedom is the greatest of all goods (whether given by God or nature). But there are particular questions relating to these choices which become more public and communal and for which a need to demand social interference and create regulation exists. Balancing between the rights of the majority and the minority is the key task that will make global pluralistic societies work. Allowing minority rights to be fully lived should be in some sort of accord with the function of society as a whole. By allowing the minority to live its beliefs and choice of lifestyle at any time and all ways causes, as some harshly call it, a "dictatorship of the minority."¹⁵⁸ But this also must not be an excuse to allow any repressive measures against minorities just because they are different.

157. See, e.g., John Finnis, *Natural Law Theories*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), available at <http://plato.stanford.edu/entries/natural-law-theories/>.

158. This is *terminus technicus* (lat.) for all situations when you are forced to follow the minority rule instead of the majority one, because you have no other option. This is seen when a government decides according to the desires of minority party because the government had to include the minority party in order to be able to form the government. The consequence of this is that although the minority party does not have real power in quantity, in reality it could rule on particular issues because if it decide to go out of the coalition, the government collapses.

There are various combinations of issues that arise in this area, and many times the answers are not black and white. If, for instance, the credo of the society is religious freedom, then that freedom will of necessity in some cases be restricted by the principles of public security or public morals;¹⁵⁹ and other times religious rights will prevail as the strongest argument in the outcome of a particular case.¹⁶⁰ Here, new concerns are raised when there are established religions in states with regard to the rights of those who are not members of the established religions. On the other hand, if secularism (*laïcité*) is the basic credo of the society that exists parallel to the religious freedom principle, like in France (although one should doubt if something like exclusive secularism truly exists at all), the rights of the minority groups should be protected, even if there are restrictions of some sort.¹⁶¹ This raises the questions of which public values will be recognized and protected and which will not and potentially even be suppressed?

Democracy has to retain its virtue by not smashing the small and weak. In its essence it consists of the chance to decide and win and also the possibility to be free, and to be different, and to act differently. If we put this into a theological perspective, freedom is essentially God's gift. If God wants an individual to be free to choose on his own, who has a right to prevent that ability to choose and when?¹⁶² Of course we should always consider the limits in terms in which John Stuart Mill operated.¹⁶³ Balancing between acquiring rights for the minority within the society that lives a different lifestyle and maintaining respect for that different society of which one is also a part is a test for the modern state and society in which we are living

159. See generally LEITER, *supra* note 19.

160. See generally *Multani v. Comm'n scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 6 (Can.).

161. See Loi 2001-504 du June 12, 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales [Law 2001-504 of June 12, 2001 11, 2010 to strengthen the prevention and repression of sectarian movements affecting the human rights and fundamental freedoms] available at <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000589924&dateTexte=&categorieLien=id>. This law is commonly known as the About-Picard law.

162. See JORGE M. BERGOGLIO & Rabbi ABRAHAM, SKORKA, *SOBRE EL CIELO Y LA TIERRA* 56 (2012).

163. JOHN STUART MILL, *ON LIBERTY* 101 (4th ed. 1869) ("The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.").

today. With all of these challenges, it would seem difficult to find a solution, but there are some.

3. *Solutions.*

As mentioned earlier, proportionality principles should be followed in an effort to balance (Cohabitation Principle) the rights of the majority to live in an organized society that represents the values of its culture (Awareness and Foundations Principles) and the rights of the minority (Human Rights Principle), which have to be extended to the ultimate line of possibility. For example, it would not be right to ask from a state based on Sharia to allow selling whiskey on the streets, but it would be reasonable in that state to ask if Christians and Jews may use wine in the religious services they perform. Furthermore, maybe it would not be right to ask to allow same-sex adoption in a traditional Catholic society, but it would be more than fair to allow equal property rights for same-sex couples. To balance these tough legal dilemmas, a sensitive and tolerant approach is needed on all sides.

Croatia chose to follow this proportionality principle (or Cohabitation Principle). First, it is important to note that same-sex couples already have or will have the same rights as married couples with two distinctive characteristics: homosexual couples will call their union a “registered partnership” and they will not have the right to adopt children. Second, it is also important to stress again that EU laws do not regulate in the area of family law as can be seen in the case law of the ECtHR with the Margin of Appreciation Doctrine.¹⁶⁴ This doctrine shows respect for cultural differences of particular European countries and allows them to regulate family law accordingly.

V. CONCLUSION

Aggressive secularism doesn't have meaning in a territory that is deeply rooted in history and tradition and is shaped by those traditions, which constitute the system itself. The recent judgments of the ECtHR and the socio-legal infrastructure of Europe and its

164. *Hämäläinen v. Finland*, App. No. 37359/09, 2014 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145768>.

nations are based on balancing two standards: democracy (majority principle) and human rights protection (minority principle).¹⁶⁵ This balance should occur with the following tenets in mind:

1. Europe is not secular in its essence. When it seems that this is the case, it is because of political decisions not arising from the democratic needs of its citizens (majority principle).

2. Europe, as does every other political and legal space, has its own legal culture and legal history that shapes it, and its legal culture forms the public morals.

3. Before any position is determined by the majority or the minority, and before searching or investigating the prevailing moral and legal rules, states should recognize religion as a phenomena of exclusive character, because for many it determines what life really should be and touches upon questions of ultimate reality which are necessary for a vast number of humans.

4. Contemporary Europe is founded on the idea of human rights (minority principle) and dedicated to the promotion of and respect for differences. At the same time, it is necessary to determine real legal frameworks so that the majority does not feel that it lives in its “own foreign country.”

5. Balancing between the rights of the minority and the rights of the majority is necessary; even though it is difficult, it is the key task for lawyers and politicians alike.

6. Making secularism the religion of the state leads to the subordination of all members of society to the rules of that “religion.” They then feel that they are in a passive position, as a result of the State conquering all who cherish different cultures. That approach could lead to requests which are against the legal order, the public order, or public morals.¹⁶⁶

7. Real solutions come from understanding the traditions and foundations upon which a particular community is founded (Judeo-Christian, Islamic, Hindu, etc.), together with requests for the protection of the public order with maximal possible protection of

165. Although human rights are to be attached, or are attached to every human person from birth to death, in this statement I mean the protection of citizens who do not belong to the mainstream group and feel weak and fragile in a democratic society which is governed by the majority that sets the rules that guarantee freedoms, the same freedoms that the majority already enjoys and that are shaped through the institutions of the legal system.

166. Referring to autonomy and heteronomy in the law.

human rights. These solutions are where the minimum requirements of mutual understanding are met and where tolerance becomes acceptance.

These principles seek to protect both human rights and religious freedoms, although the latter possesses the pure essence of human rights. Denying formative elements that constitute the system of human rights in full can lead to serious and even tectonic disruptions of the legal system, which is built upon those elements. Amalgamation of human rights with public order and public morals could lead to a solution that protects higher values together with necessary values. Necessary values are those that are connected with the life of the legal system itself and without which the legal system would lose its distinctive element of existence. If religion has its distinctive place in the society, or at least if religious beliefs influenced the legal system in which it is rooted, all subjects should respect it and find a way to maneuver within it, even when they sometimes feel distant and that it is not their own.

Religion is not just a system of creeds; it is often part of the nation's values. By not recognizing this, states risk jumping into the fight with the principles on which the state itself is built, unprepared and with behavior that is contrary to the democratic principles of the legal system itself. Protection of the broader community's rights is connected with protecting the public order, which is often discussed in ECtHR arguments and decisions.¹⁶⁷ The right of the majority, which can enforce its will in referendums through elections, and through requests for law-making, should never be stymied by only allowing individual human rights to prevail. But, since protection of individual rights is essential to having a just and fair Europe, democratic principles should *always* be adjusted to protect human rights inasmuch as possible. Balance is the key.

Recognizing that religious and cultural values are actually derived from the creeds of religious groups in these countries, sends

167. See *The Margin of Appreciation*, COUNCIL OF EUR., [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17 \(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%20(2000).pdf) (last visited Sept. 4, 2015); see also *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R. (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>. The European Court justified the limitation of freedom of expression over the protection of public morals. See generally HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996).

a clear and non-hypocritical message of accepting cultural and thus religious norms for the sake of non-aggressive secularism. Secularity in Europe without religion does not have a place in the political landscape: a secular Europe which recognizes religion as an eminent factor can flourish. Successfully balancing these ideals in Europe will require everyone to respect the basic principles of cultural pluralism, leaving a place for everyone in the culture which protects its own fundamental cultural qualities.

Human rights are not and must not be an excuse for behavior that damages others while producing selfish benefits. Therefore, it is important to keep the moral considerations of the public in mind because the law has to presume not only rights, but also obligations and commitments—commitment to the system that is giving the right in the first place. Requests of minorities should go hand-in-hand with respect for the majority. Likewise, respect for the majority should go together with respect for the minority. The majority has to be able to exercise its spectrum of rights and duties, which naturally made it the majority. Complete secularism leads to the loss of the moral structure of society, because it will now be prone to being tectonically moved, shaken, and even attacked.

In *S.A.S.*, there are moral and logical inconsistencies. If the state does not mind religion and says that it is dedicated to the protection of human rights, then it is unfair to ask and punish *post-festum* acts which were, in a specific formal sense, legal. This produces a specific kind of retroactivity. It also produces a secular state and by doing so eliminates all forms of religious life, even for those whose religions that have been present in the society for ages. This behavior is really an excuse to attack just one behavior that was unwanted and considered to be in the widest gap with the dominant culture. In France, that culture was unjustly abandoned by the developments of secularism, although it remains very present and alive through the religious life and activities of the nation itself. Even if people are not believers, social norms derived from religion and religious norms influence what behavior is acceptable and what is not. Similarly, Christian, Islamic, and Jewish norms, cultures, and identities influence life in the states where those are religions are practiced.

A special problem arises when some groups do not respect the public order of the country where they live and unchecked human rights principles are allowed to be practiced fully; this can make things even more flammable. A combination and balance of public

order (public morals) and human rights is the only solution. Minorities should be treated and protected to the maximum possible level. Freedom should be cherished, as God himself wants us to be free and to be able to choose. But, the state needs to listen to its citizens and what they want for their society. This is integral and the most visible part of the democratic process in the way that laws are created to public response, which should be non rejectionist.

To be completely clear, human rights should be assured in full, but should also be tempered by public order so that no one feels threatened. It does not matter upon what cultural package one particular county is set. It could be religion or cultural influence x, y, or z, but every effort should be made to set a minimal standard for both majority and minority. To use the language from the ECtHR in *Lautsi*, there should not be an “abuse of minority position” or a “despotism of majority,”¹⁶⁸ but rather, a minimal standard for the rights of both.

In each of these cases from Italy, France, and Croatia, religious culture is, and for a long time will be, an integral part of the culture that stands behind those legal systems. By not recognizing the importance of religion in the cultural context of the nations, states are not ready to build a clear and fair framework in which all can fit. The practice of the ECtHR has shown that it is ready to give a wide margin of appreciation to the particular cultural issues of European countries. EU law does not regulate family law for the same reasons. By forcing secularity too strongly, states risk having a bad public response, which is never good for the stability of government. If the state does not have a clear position on the norms of public life and order, it easily can jump into an illogical concept of defending something without referencing its religious roots. For example, France defended the ‘living together principle’ which is based on cultural and religious norms, specifically those of Judeo-Christianity, but the state never mentioned its roots.¹⁶⁹ It is like having an old-fashioned grandparent who exists, but you do not mention to others that you have the grandparent because you are ashamed of his old-fashioned ways. A system in which care for the cultural position is

168. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. 47 ¶¶ 4, 7.

169. *See S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R. ¶ 153–58.

clear and at least mildly recognized could be fairer to both majorities and minorities alike.

Once again, the five steps that have to be acknowledged in order to apply the NBT Principle or the TBT Principle are:

1. Acknowledging that religion is an important part of the cultural life of citizens (*Awareness*);
2. Acknowledging that religion has shaped the culture (*Foundations*);
3. Securing a minimum of the prevailing set of norms of the majority by law (*Democratic Principle*);
4. Giving the maximum possible rights to the minority by law (*Human Rights Principle*); and
5. Balancing between minority and majority rights (*Cohabitation*).

If these five principles are followed, states will find that they are better able to deal with the challenges they face not only between religious majorities and secular minorities in a growingly diverse world, but also in all other combinations between secular and religious groups, and even between religious and secular groups themselves. Particular religious and secular beliefs are different among each respective group. Allowing for the maximum possible level of tolerance and respect for religious expression is not something that can just be invented or dictated and applied to all uniformly. Instead, a determination of how to balance interests and the will to do it will always remain an essential and crucial element, even within the work of law.