

# The National Margin of Appreciation Doctrine: In Search of a Balance between Democracy and Rights in the International Sphere

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The interpretation and application of international human rights conventions is an especially delicate task. Although the international courts charged with interpreting them have, within their sphere of competence, the function of protecting human rights against possible state interferences, the exercise of their jurisdictional role is impossible without a constant reconciliation of elements and values that may be in tension. These courts must exercise great skill to accommodate citizens' expectations of rights protection, the will of the states, either collective or individual, and democratic considerations in social settings that are plural and changing.

The jurisprudence of the European Court of Human Rights ("ECtHR"), which will be the subject of this paper, is an example of these difficulties. Determining the requirements of the European Convention on Human Rights (the "ECHR" or "the Convention") when analyzing whether a member state of the Council of Europe has violated a right protected by the Convention involves a constant balancing between democracy and human rights in the region. This axiological duality inherent in the Convention has marked the jurisprudence of the ECtHR since its beginning. Although the Court has acquired a "constitutional narrative" in its reasoning, which is driving the ever-greater protection of Convention rights, the Court itself has weakened this narrative in order to maintain its *auctoritas* vis-à-vis states, via hermeneutic recourse to the doctrine of the margin of appreciation.<sup>2</sup> The way in which the ECtHR has used this doctrine, especially in areas such as religious liberty, is one of the most controversial aspects of its jurisprudence. In this article I will lay out the main characteristics of this doctrine; I will distinguish two versions of the margin of appreciation doctrine; and I will use the parameters of what I will call a "rationalized version" of the margin to evaluate the jurisprudence of the ECtHR with respect to religious symbols in public schools.

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<sup>2</sup> On the balancing that informs the architecture of European human rights Law, *see e.g.*, Krisch (2010, Ch.4).

## I. The Outlines of Convention Rights

Although the idea of human rights is fundamental to asserting the moral value of human life, insisting on institutional commitments, and incentivizing activism,<sup>3</sup> the clauses on rights that we find in an international instrument like the Convention are a long way from reflecting a strong moral understanding of rights. Convention rights do not link up well with a conception of rights as “trumps” against collective interests (that is, with the idea that rights are not balanceable with considerations external to the rights themselves); or to use other related characterizations, with visions of rights as “firewalls,” rights as “side constraints,” or rights as “reason-blocking.”<sup>4</sup> In general, the articulation of the Convention suggests flimsy rights that are readily balanceable against states’ public interest reasons and other value considerations. This weakness is captured in many of the Convention’s Articles, but especially in Articles 8 to 11, which contain the so-called “accommodation” or “limitation” clauses. As is well known, the dynamic of each of these articles is to recognize rights in the first paragraph and then to establish in a second paragraph a broad list of reasons that can justify state interference with these rights.

Let us look, for example, at the structure of Article 9:

1. 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.

2. 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 for the protection of the rights and freedoms of others<sup>5</sup>.

Rights like those recognized in Article 9 do not match the image of a right as a trump, even when interpreted in the best light. For a reasonable characterization of its legal status that might have some textual support, we must look to alternative conceptions that better reflect its relative strength. The issue of how to provide a conception of fundamental rights or of human rights that accounts for I) the practice of balancing them

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<sup>3</sup>See Raz (2010).

<sup>4</sup> On the various ways of understanding Convention rights, *see e.g.*, McHarg (1999), Greer (2003), Kumm (2007), Legg, (2012).

<sup>5</sup> In the application of the accommodation clauses, the ECtHR always follows the same structure of questions when it evaluates a challenged measure: 1) Is there state interference with a Convention right? 2) Is this interference prescribed by law? 3) Does it have a legitimate purpose? 4) Is the measure proportionate and necessary in a democratic society to achieve this purpose? A good general development of these steps can be found in Evans (2001, 136-164).

against public interests, but that at the same time II) permits us to maintain the priority of rights against collective goals has recently generated a large literature.

Some authors argue for an attenuated version of rights as trumps that attempts to square the priority importance of rights with an exercise of balance and proportionality in their confrontation with other social considerations.<sup>6</sup> The same objective can be sought from the perspective of other theories of rights that permit a greater flexibility in their confrontation with collective interests. Some version of the Razian theory of rights as protected interests, or of the vision of rights as social goals along the lines initiated by Amartya Sen, could serve this purpose. The first view permits us to acknowledge a right in its central core on account of the value of the interest that supports it, but also allows us to assess which duties it justifies or which derived rights it entails, keeping other considerations of duty in mind.<sup>7</sup> The second view, in conceiving of rights as social goals with intrinsic value that the state must pursue, considers a failure to satisfy them to be a great shortcoming. But on this conception it seems plausible to assume that rights may yield other considerations of value that may limit the scope of the right.<sup>8</sup>

Another way to characterize the rights like those recognized in Article 9 of the Convention would be eschew any substantive notion of rights and limit oneself to adopt, along the lines of Robert Alexy, a structural conception that conceives of them as principles. We could understand them as optimization requirements, whose satisfaction is a matter of degree. Their very nature asks for their balancing against other principles, whether these principles refer to other Convention rights or to collective interests. From

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<sup>6</sup> Different strategies for reaching this compatibility have been proposed with more or less success by Greer (2003), Klatt and Moritz (2012 Ch. 2).

<sup>7</sup>This conclusion could follow from Raz' conception of rights. This author assumes that both the existence of a right and the consideration of what duties it justifies are subject to a balancing of reasons that can include other considerations of duty that are external to rights. *See, e.g.,* Raz (1984, 209-214). In fact, his conception of rights has led him to a vision of human rights that is much weaker than the traditional ones and is closer to the practical functioning of the international instruments that regulate them. Although Raz considers that the idea of human rights is important because it makes it possible to underscore the moral value of human life and incentivizes activism, he offers two reasons that undercut their status. On one hand, a human right stops being one, even if it remains a right, if there is no possibility of a fair and trustworthy structure of implementation. On the other hand, which of the duties we can associate with each right will depend on which other social goals are worth pursuing, as well as on issues of feasibility and institutional legitimacy. *See* Raz (2010, 41-47). Consider also Raz' political conception of human rights (2007). For some critiques of the viability of using an interest theory to account for Convention rights, *see, e.g.,* McHarg (1999, 678-680).

<sup>8</sup> This conception, centered on the moral importance of capabilities for human functioning, could have many variants, and some of them may be very close to the idea of rights as "side constraints," as is the case of the theory of Martha Nussbaum (1997, 300), but its premises seem to me to be compatible with a more flexible vision of rights. That explains, for example, why Sen, when he refers to human rights as ethical demands, considers that as reasons for action, what they justify is the duty to give reasonable consideration to the actions that tend to satisfy the right. *See* Sen (2004, 323 and 338-345).

this perspective, the application of Convention rights would require an exercise of proportionality or balancing with other value considerations. The Convention's accommodation clauses would act here as guides that set out which kind of considerations must be balanced by the ECtHR in cases of state interference with protected rights.

But Alexy's structural theory does not grant any priority to rights as against other principles regarding collective interests. In this way, although the theory may satisfactorily account for the logic of the German constitutional system of rights protection, it may not do the job if the goal is to emphasize the priority of rights in an international instrument with the structure of the Convention<sup>9</sup>. For this reason, authors such as Mathias Kumm insist that a structural theory like that of Alexy must be complemented with considerations of political justice that justify the priority of principles-rights in the application of the proportionality test when they come into conflict with other principles<sup>10</sup>.

Despite the importance of this discussion I will not dwell on these problems. Independent of what is the best way of conceiving of rights in the Convention, in this paper what interests me is to emphasize another aspect of the ECtHR's approach to Convention rights. In addition to the fact that these rights do not match up well with the conception of rights as trumps, the jurisprudence of the ECtHR has created an additional mechanism, the margin of appreciation doctrine, which may result in an even greater weakening of Convention rights as against the public interest and the decisions of the states of the Council of Europe. The margin of appreciation doctrine appears mainly linked to the presence of the accommodation clauses of the ECHR, norms that by their nature provide some maneuvering space to states in deciding when and in what measure

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<sup>9</sup>Viewing fundamental rights as principles that can be balanced in a test of proportionality with any other principle is a good way of explaining the functioning of a constitutional structure like Germany's, where rights have an expansive character and are conceived of broadly. If any institutional interference with individual liberty acquires constitutional relevance, the application of a proportionality test in the interpretation of constitutional rights may be a good mechanism for avoiding a tyranny of rights. On this conception, *see* Alexy (1993, 111-138). On this point *see also*, Kumm (2004, 582-584; 2006, 574-596). But the Convention is a different regulatory context. Here it does not clearly turn out that the character of Convention rights is expansive, nor does the jurisprudence of the ECtHR tend to conceive many of them broadly.

<sup>10</sup>Kumm (2004; 2007) is thinking of anti-perfectionist, anti-collectivist and anti-consequentialist arguments that justify granting priority to Convention rights relative to collective interests. The fundamental idea is that to be able to prioritize Convention rights over other value considerations, we must have recourse to arguments of political morality that provide us answers to the issue of what the intrinsic and instrumental value is of these rights in the organization of an association of states that is also fair to their citizens.

to limit a Convention right<sup>11</sup>. But the ECtHR has made expansive use of this doctrine and has applied it in spheres where the text of the Convention does not include an accommodation clause. That has led to a broad debate about whether the ECtHR is jeopardizing its own function as a body for human rights protection in Europe.

## **II. The national margin of appreciation doctrine**

From the beginning of its history, and with greater articulation since *Handyside v. United Kingdom*, the ECtHR has adopted the margin of appreciation doctrine with the purpose of granting deference to states' judgments in protecting the rights set out in the Convention.<sup>12</sup> The Court has offered various reasons justifying this deference. On one hand, it has observed that the European system of human rights protection is the product of the division of labor between the states and the Court. The states are mainly responsible for this protection and the Strasbourg court only intervenes in a subsidiary way; that is, through contentious proceedings and once all domestic remedies have been exhausted. On the other hand, in areas as sensitive as morality or religion there is no consensus among states, and domestic authorities, being in direct contact with the vital forces of their countries, are better situated to appreciate the social circumstances and to decide how to manage conflictive situations. Nevertheless, according to the ECtHR itself, this margin is limited, is subject to supervision, and will vary as a function of the sensitivity of the issue, the type of right in play, the degree to which the legitimate interests pursued by the state can be considered objectively, and the evolution of the European consensus on the matter.<sup>13</sup>

As a product of this jurisprudential doctrine, the judicial function that the ECtHR takes on is not that of carrying out an abstract examination of the compatibility between a state measure and the provisions of the Convention. Rather, its task consists of reviewing whether a state has overstepped its margin of appreciation in the protection of Convention rights. That marks an important difference with respect to the type of reasoning that a domestic constitutional court can undertake. At the same time, it entails a

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<sup>11</sup> The ECtHR has also used this doctrine when ruling on national measures restricting the contents of Articles 15 and 14 ECHR and Article 1 of its First Protocol.

<sup>12</sup> For a general description of the margin of appreciation doctrine, see Arai-Takahashi (2002, Ch. 1); Brauch (2005, 114-121); Legg (2012, Part I).

<sup>13</sup> *Handyside v. United Kingdom* (December 7, 1976), paragraphs 48 and 49.

particularized or contextual review of the challenged national measure, considering the internal situation of each country and its legal, political, and social circumstances. This contextual examination of compatibility with the Convention makes it possible for the ECtHR to provide different answers in cases that are similar but arise in differentiated domestic circumstances.

The margin of appreciation doctrine has been criticized as an hermeneutic device for making it more difficult to generalize the legal answers of the Court, for provoking structural incoherence, and in general for endangering legal certainty and preventing the Convention from consolidating a reliable system of rights protection in the region.<sup>14</sup> The doctrine has also been praised for being a mechanism that assures the rhetorical flexibility necessary to legitimize the authority of the Court over the decisions of states in rights protection, and for reflecting as well the democratic pluralism existing in Europe.<sup>15</sup>

One of the areas in which the margin of appreciation doctrine has had the greatest influence in recent year is in the understanding of the right to religious freedom recognized in Article 9 of the Convention and in the interpretation of Article 2 of its Protocol 1, which establishes the right of parents to educate their children according to their religious and philosophical convictions. Here the jurisprudence of the ECtHR has granted states very broad autonomy to interfere with religious freedom via secular laws; has opened the way for states' overprotection of majority religious sensibilities as against freedom of expression; has endorsed rules that impose the presence of a crucifix in public schools; and has not raised objections to states' restrictions of headscarves and other religious clothing in the educational context.<sup>16</sup>

In this text I will focus especially on two of the ECtHR's lines of jurisprudence. The first is the one sketched out since the *Lautsi* case, and the other is the one that the Court has adopted with regard to domestic rules that restrict the use of the Islamic headscarf in public schools. In both areas, which I will summarize shortly, the use of the margin of appreciation doctrine has played a transcendental role in the direction of the Court's judgments.

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<sup>14</sup>See e.g., Brauch (2005, 113-150); Hutchinson (1999, 638-650); Kratochvil (2011, 324-357).

<sup>15</sup>See especially, McGoldrick (2011, 451-502); Gerards (2011, 80-120); Mahoney (1998).

<sup>16</sup> On this jurisprudence, see e.g., the general updated overview outlined by Solar (2009) and Martínez-Torrón (2012).

### **III. The margin of appreciation doctrine and the jurisprudence of the ECtHR on religious symbols in schools**

#### *3.1. The case of Lautsi v. Italy*

On March 18, 2011, the Grand Chamber of the ECtHR surprised many observers in reversing a November 3, 2009 Chamber ruling, which had established unanimously that the Italian regulation, that since the 1920s had mandated the presence of a crucifix in public schools, had violated the right of Mrs. Lautsi to educate her children according to her secular convictions, as well as the religious freedom of her children, aged 11 and 13 at the time.

The arguments that the Chamber used to justify its finding of a violation of the Convention are a typical example of an abstract evaluation of compatibility between the Italian regulation and Convention rights. The Chamber's ruling (hereinafter "*Lautsi 2009*") held that a crucifix in a classroom of a public school, being a religious symbol, could trouble non-believing students emotionally, and give them the perception that their educational context was marked by religion. This interference threatens rights of religious freedom because it contradicts the state's duty to be neutral on this matter, a duty that prohibits the state from imposing religious beliefs, even indirectly, when it is dealing with people who are especially vulnerable or depend on the state.

The Grand Chamber reversed this initial ruling of the Chamber, clarifying its position and incorporating the margin of appreciation doctrine in evaluating the Italian regulation. In the first place, the Court clarified the Convention requirements of state religious neutrality in the educational realm. Drawing on its jurisprudence in the cases *Folguero* and *Zengin*,<sup>17</sup> it indicated that this requirement consists of a prohibition on proselytizing or indoctrination in the educational framework, which is compatible with establishing mandatory religious education and giving priority to the knowledge of the majority religion.

Second, the Grand Chamber asserted that the crucifix is a passive religious symbol whose influence cannot be compared with that of education and participation in religious activities. For this reason, it reversed the ruling of the Chamber and held that there was

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<sup>17</sup>*Folguero v. Norway* (June 29, 2007), and *Zengin v. Turkey* (October 9, 2007).

not sufficient evidence either to affirm or to reject that the presence of this religious symbol “could” affect students or influence them. In this sense, although it seemed understandable that parents would have a subjective perception that the presence of the crucifix indicated a lack of respect for their rights, this subjective perception was not enough to determine that there had been a violation of the Convention.<sup>18</sup>

Third, the Grand Chamber resorted to the margin of appreciation doctrine. According to the Court, as long as there is no intention to indoctrinate, the state enjoys a margin of appreciation in deciding on the presence of the crucifix in classrooms. The Italian state considered it an aspect of its tradition and a sign of its identity, and the decision whether to perpetuate a tradition falls in principle within its margin of appreciation. It was likewise the state’s prerogative to decide how to reconcile the place it assigns to religion in the educational sphere with the rights of parents and students. The ECtHR found that an additional factor supporting this margin was the lack of consensus among states on the presence of religious symbols in public schools and on the maintenance of these traditions.

Finally, although the Grand Chamber acknowledged that the crucifix gives greater visibility to the Catholic religion in schools, it also indicated – again applying the margin of appreciation doctrine – that this extreme must be put into perspective, considering also the Italian state’s attitude on religious pluralism in schools. In the case of Italy the crucifix was not linked to any compulsory Catholic instruction; the school environment was open to other religions, there was nothing to prevent students from using other religious symbols such as the headscarf; celebrations of other religions were permitted; and there was nothing prohibiting alternative religious education for other creeds.

All of these elements seemed adequate to the Grand Chamber of the ECtHR to conclude that the Italian state was respecting religious pluralism in schools; that Mrs. Lautsi could still exercise the right to educate her children according to her beliefs; and that the negative religious freedom of her children had not been harmed.

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<sup>18</sup> The Chamber had used the *Dahlab* case (where in 2001 the ECtHR had confirmed that it was compatible with the Convention for the Swiss authorities to prevent a public school teacher from wearing the headscarf in class) to support the idea that religious symbols can affect children. But the Grand Chamber emphasized that *Dahlab* was a different case, where national law assumed denominational neutrality in religious matters, and given the young age of the children (4 to 8 years), the prohibition fell within the state’s margin of appreciation.

Both the Chamber's and the Grand Chamber's rulings have been widely criticized. The first was criticized as a display of Christianity-phobia; for imposing a model of strict secularism that respected neither pluralism nor existing traditions in Europe, nor Europe's diversity of religion-state relations; and finally for exceeding the powers of the Court's competency in the protection of Convention rights.<sup>19</sup> The ruling of the Grand Chamber, meanwhile, has been criticized as a setback for secularism in Europe; for being a political decision; for giving in to pressure from some states and European institutions; and in general, for indicating an abandonment of the functions of the ECtHR.<sup>20</sup>

Independent of these criticisms, what is certain is that the main difference between the two results is due to the role that the margin of appreciation doctrine plays in the final decision of the Grand Chamber, an interpretive doctrine that is absent in the Chamber's analysis. Is the broad use that the Grand Chamber makes of this doctrine justified? Before getting into and answering this question, I will briefly pause to discuss the second line of decisions that I mentioned earlier.

### *3.2. The jurisprudence of the ECtHR on the Islamic headscarf in educational settings*

The restriction on the use of the headscarf and other religious articles in public schools has generated a substantial controversy in Europe, a controversy that the case-law of the ECtHR has resolved by always accepting the judgments of states.<sup>21</sup> The French and Turkish regulations, which represent an active secularism that restricts religious expression in public space, are those that have generated the greatest number of cases brought to the Strasbourg court, many of which have been rejected for being "manifestly" ill-founded.

From this jurisprudence one can conclude that states have the autonomy to limit the use of the headscarf in some classrooms or in all, both in public schools and in universities; this restriction can cover teachers and can extend to Islamic schools financed

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<sup>19</sup> On these criticisms, *see especially* McGoldrick (2011, pp. 470-475). The ruling was also welcomed as a great step for the ECtHR in defense of secularism, state neutrality, and the protection of religious minorities in Europe. *See* Andreescu and Andreescu (2010b, 47-74).

<sup>20</sup> On these objections, *see* the recent contributions of Panara (2011, pp. 259-264); Zuca (2013).

<sup>21</sup> *Dahlab v. Switzerland* (February 15, 2001), *Şahin v. Turkey* (November 10, 2005, GC), *Köse and 93 Others v. Turkey* (November 4, 2006), *Kervanci v. France* and *Dogru v. France* (December 4 2008) and *Aktas v. France*, *Bayrak v. France*, *Gamaleddyn v. France* and *Ghazal v. France* (June 30, 2009).

by the state. The arguments that have been considered legitimate and have been provided to justify limitations on the use of headscarves in schools are very varied. The most generic reason is the state's embrace of an active secularism (the *Kervanci*, *Dogru*, *Şahin*, *Köse* and *Dahlab* cases). Also in general appeals have been made to public order, to protection of the rights of others, and to the defense of democracy (especially in the *Şahin* case). Finally, other arguments that have been used as a reason to prohibit the use of the headscarf are those based on promoting gender equality (*Dahlab* and *Şahin*) and considerations of health and safety in sports (*Kervanci* and *Dogru*).

In the case of *Şahin v. Turkey*, which is the case I will dwell on briefly, the controversy arose out of a circular from the academic authority of the University of Istanbul prohibiting the use of the Islamic headscarf on the premises. From that time on, the appellant, who was in her final years of her medical studies and had worn the headscarf to the university all along, was barred from taking exams and matriculating in some courses on account of her continued use of the headscarf.

Just as in the other cases on the Islamic headscarf, the arguments of the ECtHR in approving of this restriction of religious freedom in the university were characterized by constant recourse to the margin of appreciation doctrine. The Court attributed the need to use the doctrine to the lack of consensus in Europe on this subject, and to the idea that state and university authorities are better situated than an international body to resolve the controversy. Although the Court recalled the state duty of religious neutrality and indicated that its function in this case consisted of determining whether the institutional measure was justified in principle and was proportional, it did not carry out a detailed analysis of this justification or of proportionality. Relying on the margin of appreciation doctrine, the Court assumed in the first place that the political choice of state secularism could in itself justify restrictions on religious freedom and could require sacrifices from individuals for the sake of safeguarding tolerance and religious harmony. In the second place, it did not undertake to evaluate in detail the applicability of the general arguments of the Turkish state to the concrete case: the danger of radical Islamism to public order and democracy; respect for gender equality; and the protection of the rights of other students. The ECtHR concluded that state secularism combined with these general

arguments were sufficient to determine that the prohibition, although it restricted the religious freedom of Leyla Şahin, did not violate the Convention.<sup>22</sup>

### 3.3. *A broad margin of appreciation for states?*

In line with what occurred in the *Lautsi* case, the Court's jurisprudence on the Islamic headscarf is an example of the importance of the margin of appreciation doctrine to the Court's reasoning and to its way of evaluating state restrictions on Convention rights. With respect to the headscarf, not only theorists but also human rights organizations have repeatedly denounced this reasoning as entailing a clear lack of protection for religious freedom in Europe. The judgment of the ECtHR in the *Lautsi* case has received these same criticisms. However, as I have already mentioned, many others retort that this deferential reasoning is the right vehicle by which the ECtHR, as an international institution, can maintain a constitutional narrative without losing its legitimacy vis-à-vis states.

Whether we agree with one side or the other, what is certain is that the ECtHR, in exercising its function of interpreting the Convention, is seeking to achieve both legitimacy and substantive quality in its decisions. This conciliatory attempt seems to be inherent in the ECHR itself from the moment in which its preamble affirms that maintaining Convention rights rests, on one hand, on an effective political democracy, and on the other hand, on a common understanding and observance of human rights. This axiological duality could be seen as one of the specific features of the Convention, and as such must be present in any theory concerned with understanding the requirements that flow from this instrument.<sup>23</sup>

The issue remains, however, whether the Court has succeeded in this conciliatory task in its jurisprudence on religious symbols. In the *Lautsi* case the strategy of the Grand Chamber, which shaped its ruling, was that of replacing the issue of whether there has been a justifiable interference with the *forum internum* of religious freedom – a right that the text of the Convention does not subject to public interest restrictions – with the

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<sup>22</sup> It is worth noting that in this case the Court (in paragraph 78) also did not show with certainty that wearing the Islamic veil was an act of religious practice and not merely an act inspired or motivated by religion, which would not be protected by Article 9.

<sup>23</sup> See especially, Arai-Takahasi (2002, Ch. 13). As that author observes (p. 243), the search for a fair or adequate balance between an individual right and general societal interests as a whole is inherent in the Convention itself.

question of whether the state, in the exercise of its margin of appreciation, was sufficiently neutral in its respect for the religious pluralism of its citizenry. This replacement enabled the Court to evaluate concretely the importance that the crucifix may have as a cultural tradition and as a sign of collective identity in Italy. It also permitted the Court to put the Italian regulation in context, analyzing the extent to which the Italian educational environment was open to religious pluralism. The Grand Chamber ended up using what it has been called a “theory of neutralization,” which emphasizes those ways in which the Italian educational system is fair in its openness to religious pluralism in schools, to counteract its lack of neutrality with the symbols of the majority religion.<sup>24</sup>

The Court displays a similar strategy in *Şahin* when it accepts in a rather uncritical fashion the state’s general arguments to justify the banning while it avoids entering into the detailed examination of proportionality required by Article 9.2. Even when these strategies do not find support in the text of the Convention, perhaps they could be admitted once we approach the doctrine of the margin as a general hermeneutic instrument to be used by the Court, endorsing an extension of this device beyond the accommodation clauses. Granting a wide margin to the state on religious issues could be justified by two elements of this doctrine: the lack of consensus and the idea that the state is better placed to decide on the suitable way of settling conflicts over religious symbols in educative institutions.

From the information sought by the ECtHR itself, it is clear that there is no consensus in Europe about the exhibition of the crucifix in public schools. Its exhibition is prohibited in states such as Macedonia, Georgia, and France (excepting in Alsace and Moselle); it is compulsory in Italy, Austria, Poland, and in some German states and Swiss cantons, and some crucifixes are present without express state regulation in Spain, Greece, Ireland, San Marino, and Romania. It is also clear that there is no unanimous consensus on permission to wear the headscarf in educational institutions. Although the regulations deal with many different types of clothing, the people who wear it, and the schools the regulations apply to, one can find prohibitive measures or examples of restrictions in France, Turkey, Germany, Belgium, Great Britain, and Switzerland.

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<sup>24</sup> See Andreescu y Andreescu (2010a, 210).

It seems, then, that for the ECtHR the lack of consensus justifies granting greater breadth to the state margin. But the jurisprudence of the ECtHR has been ambivalent with respect to the role of European consensus in the interpretation of the Convention. Although the Strasbourg court has frequently resorted to the absence of consensus or has concerned itself with the evolution of a European consensus as an important element of its jurisprudence, it has been a little erratic in its use as an interpretive reason. In this sense it remains unclear, in the first place, what degree of lack of consensus can be determinative in broadening the state margin. Is it enough that there is not homogeneity among states, or rather that it is not possible to identify a clear and advancing tendency towards a given answer? The ECtHR has been very variable on this point.<sup>25</sup> In the second place, it remains unclear at what level a lack of consensus on an issue may be determinant to justify greater deference. On many of the occasions in which the ECtHR has used this argument in religious conflicts, despite the fact that at the general regulatory level there was no homogeneity among states, one could rather find a consensus against the particular challenged measure. (Examples of this are the cases of *Şahin v. Turkey*, *Dahlab v. Switzerland*, *Valsamis v. Greece*, *Köse v. Turkey*, and *Kervanci v. France*).<sup>26</sup> Finally, the state of consensus on socially sensitive issues seems to have had an unstable relevance for the ECtHR. Not every time that it has granted a broad margin of appreciation has the Court concerned itself with the level of regulatory homogeneity in Europe, nor has it reduced this margin when the contrary consensus has been clear.<sup>27</sup>

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<sup>25</sup>See Gerards (2011, 109); Spielmann (2012, 18-22); Brauch (2005, 45-147). The lack-of-consensus argument has served, for example, to approve of institutional measures aimed at protecting majority religious sentiments against freedom of expression in the United Kingdom, Austria, Ireland, and Turkey, despite the fact that the ECtHR has acknowledged that there is a clear European tendency to eliminate prohibitions on mere religious offenses. See especially the cases *Otto-Preminger-Institut v. Austria* (September 20, 1994), *Wingrove v. United Kingdom* (November 25, 1996), *Murphy v. Ireland* (June 10, 2003), and *I.A. v. Turkey* (September 13, 2005).

<sup>26</sup> Also, in the *Lautsi* case, as was argued in the dissenting vote, if what we are inquiring about is the lack of consensus on the imposition of the crucifix in public schools in Europe, the states that impose it are a minority. Along the same lines, see the dissenting vote of Judge Tulkens in the *Şahin* case. Even in *Handyside*, the seminal case regarding the margin of appreciation doctrine, the controverted schoolbook had been commercialized in most European countries without any legal or social controversy. See Brauch (2005, 129-130).

<sup>27</sup> This has been the case in the issue of abortion, for example, where despite acknowledging the existence of a contrary consensus, the ECtHR has approved of the strict prohibition in Ireland, upholding it based on the profound moral values of Irish people concerning the nature of life. See *A.B.C. v. Ireland* (December 16, 2010). On the other hand, the evolution of the European consensus on conscientious objection to military service for religious reasons contributed to the Grand Chamber's ruling (July 7, 2011) against Armenia in the *Bayatyan* case, revising the ruling of the Chamber that put the consensus aside and instead favored the margin of appreciation of Armenia, which did not foresee this possibility of objection. Changes in the European consensus have also been relevant in the Court's jurisprudence on the rights of homosexual and transsexual people.

We might say that the ECtHR has a general tendency to analyze the lack of European consensus or the evolution of consensus with a view to favoring the margin of appreciation, and associating it with an often-automatic assumption that national authorities are better situated than a body far from the concrete reality of a country to settle sensitive religious conflicts.<sup>28</sup> As I will insist further on, this latter link may be very problematic. At the same time that the ECtHR resists imposing the European consensus on dissident states seems sensible given its effort to please states. Imposing the external consensus remains a counter-majoritarian instrument with respect to the internal democratic decisions of the dissident state.<sup>29</sup>

The balances struck by the ECtHR to apply the margin of appreciation doctrine in areas such as that of state management of religious pluralism have led to a jurisprudence with a high degree of axiological incoherence that undermines the Convention principle of effective protection of individual rights.<sup>30</sup> It is true that this axiological incoherence is more faithful to value disagreements that exist among states than the alternative of an abstract determination of compatibility, but the ambivalence of the Strasbourg court about the role of consensus blurs even this legitimizing effect. Should the ECtHR abandon the margin of appreciation doctrine?

### **I. Two versions of the margin of appreciation doctrine**

To adequately evaluate this doctrine and answer the above question, it is important to distinguish between two versions of the margin of appreciation doctrine. The first is a version we might call “voluntarist.” It centers on the fact that the ECtHR is an international body, and involves a vision of the principle of subsidiarity that is normative

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<sup>28</sup> Some judges of the ECtHR have criticized the automatic way in which it is argued that the state is better situated. Judge Rozakis, for example, has insisted that the margin of appreciation doctrine should only apply when states are in fact better placed to decide a conflictive matter that affects Convention rights, and that this judgment should only be made after a careful evaluation of the case by the ECtHR, rather than automatically. *See* his concurring opinion in *Egeland and Hanseid v. Norway* (April 16, 2009).

<sup>29</sup> We might even have the case in which the dissident state grants a higher standard of protection of the right to religious freedom than that in the other member states. Here, the imposition of a European consensus, in addition to violating Article 53 of the Convention, would undercut substantive quality in human rights protection. On this point, *see* Arai-Takahashi (2002, 15). On the idea that the European consensus does not necessarily entail an advancement of Convention rights protection, *see* also Brauch (2005, 146).

<sup>30</sup> For example, *see* the analyses of the treatment of the religious factor by the ECtHR in Martínez-Torrón (2012); Solar (2009). On the Convention principle of effective protection as a central standard that gives meaning to the Convention, *see* Greer (2003).

and not merely temporal or procedural.<sup>31</sup> From this perspective, the Court recognizes that its political legitimacy is strictly derived compared to that of states, and grants a robust baseline presumption in favor of the state, avoiding carrying out an independent evaluation of compatibility between the challenged measures and the Convention. This presumption is only rebutted when there are especially strong reasons to conclude that the state has overstepped its bounds in the exercise of its autonomy. On this conception, factors such as the lack of European consensus and the idea that the state is better situated become important for general reasons of institutional legitimacy.

The voluntarist version of the margin (hereinafter “VVM”) is that which can be found behind the public opposition that *Lautsi 2009* received from many states in the Council of Europe and other European institutions. Dominic McGoldrick’s opinion expresses the logic of the VVM when he asserts that the ECtHR must have a political antenna because “judicial authority ultimately depends on the confidence of the citizens and there is no real link between the European judges and the European population. If the Court’s interpretations deeply differ from the convictions of the people, the people (and their governments) will start resisting judicial decisions.”<sup>32</sup> Janneke Gerards also expresses this in asserting that the margin of appreciation is an attractive tool “to negotiate between the court’s task to protect human rights as effectively as possible, and its need to respect national sovereignty and make its judgments acceptable for national authorities.”<sup>33</sup>

The second is a “rationalized” version of the national margin of appreciation. Here the margin doctrine is perceived as the result of reaching a balance between the values in play in the protection of Convention rights, rather than as a strong baseline presumption in favor of the state. This rationalized version of the margin (hereinafter “RVM”) is, for example, that which inspires the accommodation clauses seen in Articles 8 to 11 of the Convention, and in general is that which would be adjusted to the axiological duality expressed in the preamble of this international treaty. On this conception, the reasoning of the ECtHR focuses on examining if the challenged state measure manages to achieve a fair balance between individual rights and democratic values. Here the reasoning of the

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<sup>31</sup> A similar distinction between a structural concept and a substantive concept of the margin of appreciation can be found in *Letsas* (2006, 709-715 and 720-724).

<sup>32</sup> McGoldrick (2011, 449-501).

<sup>33</sup> Gerards (2011, 114).

Court need not be obstructed by general concerns about its institutional legitimacy, nor does the will of the states acquire independent value. Its value will be a function of the states' success in achieving this axiological equilibrium inherent in a democratic society. The purpose of the RVM is not simply the justification of "deference" to the state, but rather is the balanced recognition of the democratic values at the heart of the Convention.

The adoption of the VVM by the Strasbourg court, somewhat typical in matters of religious freedom, is clearly questionable because it has led it to renounce its jurisdictional role rather than to consolidate its institutional legitimacy vis-à-vis states.<sup>34</sup> A jurisprudence so stuck to states' circumstances and particularities is worrying because it prevents the ECtHR from articulating a stable framework of constitutional minimums that defines the threshold within which states may operate in managing their internal religious pluralism. The *Lautsi* case and the headscarf jurisprudence reflect this abandonment of the Court's functions. The abrupt turnaround of the Grand Chamber with respect to *Lautsi 2009*, its ad hoc distancing from the reasoning used in *Dahlab*, and the replacement of the object of discussion demonstrate this absence of a constitutional model of minimums that enables the Court to assess what margin may be accorded to the Italian state without falling into mere political concession. Something similar is happening with the headscarf jurisprudence and with the Court's reluctance to engage in a concrete analysis of proportionality between the prohibitive measures and the reasons supplied by states. The VVM used in these cases, given its lack of axiological basis, runs the risk of ending with "almost anything goes" for states.

These defects of a VVM have led some commentators and some of the Court's judges to insist that the Court must begin to let go of its resort to the margin of appreciation doctrine, which in their opinion only made sense at the beginning of its course as a way of assuring institutional stability, and in a context of greater homogeneity of values among a smaller number of states.<sup>35</sup>

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<sup>34</sup> On these criticisms, see particularly Brauch (2005, 147-150); Solar (2009, 160-161).

<sup>35</sup> See, for example, Brauch (2005, 147-150), who insists that the ECtHR must adhere to the letter of the Convention; Martínez-Torrón (2003, 17). Judge De Mayer, in his partially dissenting opinion in the case of *Z. v. Finland* (February 25, 1997), also expresses this view. Here he asserts the following: "I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies. (...) But where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not. On that subject the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each State individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each State".

This reflection seems clearly correct when it refers to the VVM. But I would say that the RVM, in contrast, still has a place in the assessment of the restrictions that a Convention right like that of religious freedom exercises over state autonomy. I have already indicated that Article 9.2 reflects the axiological duality of the Convention, which supports the assertion that the application of the right to religious freedom is subject to considerations of proportionality in the pursuit of diverse social goals, such that “interfering” with this right does not automatically mean “violating” it. To what extent does this consideration bring into play a rationalized margin of appreciation doctrine?

For authors such as George Letsas, for example, a RVM would in reality be superfluous. It would only tell us that a ruling of the ECtHR must be based on a proportionality test, something that the accommodation clauses of the Convention – provisions that would be the natural area to apply this doctrine – already contemplate.<sup>36</sup> In contrast to Letsas’ view, I believe that a RVM is not redundant with respect to the accommodation clauses because it can be generalized as a way of orienting teleologically the jurisprudence of the ECtHR. Letsas reaches his conclusion by considering that the best way of understanding rights in the Convention is to conceive of them as trumps – an understanding that he himself recognizes has little basis in the provisions of the Convention.<sup>37</sup> For its part, the RVM can show that an abstract judgment of compatibility like that which the Chamber carried out in *Lautsi 2009* turns out to be inadequate even when a restriction on the *forum internum* of freedom of religion was at stake, or can justify the rejection of strict proportionality scrutiny in the interpretation of 9.2. As I will explain next, taking religious liberty as my base, this version of the doctrine pays attention to the balance reached by the state taking into account its internal political, social, and cultural circumstances; takes into account how the state manages in general its internal religious pluralism; and appreciates the importance of the external pluralism currently existing in Europe. Finally, and although I do not fully develop this point, the

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<sup>36</sup> See Letsas (2006, 709-715).

<sup>37</sup> The vision of Convention rights as trumps – or in the terminology that Letsas adopts from Waldron, the understanding of rights in a “reason-blocking” model – obliges Letsas to be very restrictive with respect to the possibilities of accommodating other social goals. From that position Letsas acknowledges that this vision of rights finds very little support in either the text of the Convention or the jurisprudence of the Court, and he offers very weak arguments to justify that this model could account for the accommodation clauses like those of Article 9.2, which include collective interests which, on this conception of rights would be a clear case of external preferences of a collective nature that cannot be balanced with individual rights (considerations of public morality, for example). Letsas (2006, 717, 719-720, and 731-732).

RVM would be especially applicable to conflicts between rights and collective interests, as the issue of whether it is applicable to conflicts between Convention rights would remain open.<sup>38</sup>

## **II. The dynamic of a rationalized version of the margin of appreciation**

The RVM could work as a general hermeneutic resource for the ECtHR on matters of religious freedom under certain prior premises that frame the function of the Court. For one thing, we must assume that the purpose of the ECHR, as tool for strengthening democracy in the region, is to consolidate a “minimum” standard of formal and substantive quality in protecting the Convention rights. However, as Michael Hutchinson observes, that does not mean that the role of the ECtHR is to settle, according to its own criteria and by means of its particular decisions, what this minimum threshold of universal protection is. In that case it would not be necessary to reach any type of balance with other considerations, and the deliberation carried out by the state would not really take on any transcendence; the ECtHR would take on the responsibility of deciding what this minimum is, and the rest would remain in the hands of national authorities. The problem remains that this minimum is not determined in the abstract. As a consequence, it would have a certain degree of mobility and its outlines would continue to depend on a balance between democracy and rights.<sup>39</sup>

On the other hand, I asserted at the beginning of this work that we must keep in mind that the dual logic of the Convention makes it difficult to support a legal characterization of the right to religious freedom as a trump or as a “side constraint.” Again, this vision turns out to be too restrictive for thinking about judicially protected legal rights that can come into direct competition with public interest considerations. It has been observed that it is somewhat paradoxical that an international structure specifically designed to protect basic rights, which one would hope would establish the limits on the collective interests of states, should provide such means for their restriction via these same considerations of collective interest.<sup>40</sup> Obviously, it is not easy to escape

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<sup>38</sup> On the reasons why a margin of appreciation does not clearly apply to conflicts between Convention rights in the application of the “rights and freedoms of others” part of the accommodation clauses, *see* for example Greer (2003, 431 and 432).

<sup>39</sup> *See* Hutchinson (1999, 642-644). *See* also Brems (2009, 358-359).

<sup>40</sup> McHarg (1999, 672).

this general paradox of constitutionalism at the international level. But to account for the operating logic of the Convention we must assume some weaker conception of Convention rights that can have critical value without ending up blurring the outlines of this international instrument.

From these two premises, the RVM assigns to the ECtHR the function of supervising the internal axiological balance of states faced with demands by their citizens for rights protection. But its function is also systemic. The ECtHR has the task of consolidating a legal structure of rights protection in Europe that can serve as a general guide to action for states. Which elements or variables must be present in the implementation of this version of the margin of appreciation in the Court's reasoning to carry out these functions?

One basic element in the evaluation of a state's rights-restrictive measure is to use the proportionality principle. I have already noted that in religious matters it is very common for the ECtHR to minimize its examination of proportionality and to resort to the VVM. This permits it to defer to the discretion of states in determining when a restriction on religious liberty is necessary within a democratic society.<sup>41</sup> Many object that the ECtHR should apply a stricter proportionality test that serves as a limit on the discretion of the state. But the issue is how this proportionality scrutiny should be made, from the perspective of a RVM that takes seriously the axiological duality of the Convention.

Once we confirm that a rights-restrictive measure is in pursuit of a legitimate end, the proportionality analysis can be conceived of as an examination of three issues: 1) Whether the measure is "suitable" for achieving that end; 2) Whether it is "necessary" for achieving that end (whether there are other, less restrictive ways of achieving that end with similar efficacy); and 3) Whether it is proportional in the strict sense, that is, whether it is balanced with respect to the degree of impact on the right and the degree to which the collective interest being pursued is satisfied. This test, usually called the German proportionality test, is used by many constitutional courts, and also with more or less depth by the European Court of Justice.<sup>42</sup> But the ECtHR has not engaged in such a

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<sup>41</sup> On the minimization of the examination of proportionality in the Court's jurisprudence on the Islamic headscarf, see Martínez-Torrón (2012, 18-19).

<sup>42</sup> On the dynamic of the examination of proportionality, see generally Alexy (1993, 111-115); González Beilfuss (2003); Klatt and Miester (2012, cap. 1); Barak (2012, 243-420).

structured examination for understanding what the Convention requires with respect to the proportionality principle. When it has mentioned this principle at the time of determining whether the rights-restrictive state measure was “necessary in a democratic society,” its reasoning has turned on issues such as whether there is a pressing social need; whether the restriction on the right was the minimum possible given the alternatives available to the state; and whether a fair balance has been reached between the legitimate purpose and the right.<sup>43</sup> Yet the Strasbourg Court has not addressed all these questions simultaneously or in a sequential way.

Without questioning the Court’s somewhat vague vision of the proportionality principle, the first aim of a RVM, in contrast to what a VVM would indicate, is that the ECtHR should embark effectively on an assessment of the proportionality of the challenged measure. This constitutes an important step in the effective protection of Convention rights against state decisions. Given that it is still a margin of appreciation doctrine, however, the version that I present assumes that in the proportionality assessment it is necessary to balance both first-order reasons and second-order reasons for action.<sup>44</sup> Thus, when the time comes to resolve an eventual conflict between Convention rights and collective interests it is possible to use, together with first-order reasons, some second-order reasons that may grant a certain prominence to states and democratic considerations. These second-order reasons, which might be inconsequential if we completely rejected any margin of appreciation doctrine in the ECHR framework, would be relevant for analyzing the permissible level of restriction as well as the alternatives available to the state.

A first question to be considered in the proportionality test is the general level of protection to the right in issue provided by the state. This consideration takes on transcendence when we assume the Court’s subsidiary role in a division of labor between member states and European supervision. If in global terms the state facilitates secure and

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<sup>43</sup> In the case of *Handyside v. United Kingdom*, Paragraph 48, the ECtHR interprets the idea of “necessary in a democratic society” not in the sense of indispensable or absolutely necessary, but instead using the terminology of a “pressing social need.” It also assumes that, in the application of the margin of appreciation doctrine, the initial assessment of this pressing social need is the state’s prerogative. As Greer observes, the requirement that there be a pressing social need makes it possible to give priority to rights as against collective interests because it imposes on the state the burden of proving this social need. Greer (2003, 409 and 428). On the functioning of the proportionality assessment in the ECtHR’s reasoning, see also Arai-Takahashi (2002, 15 and 99-100); Spielman (2012), 22; Legg (2012, Ch. 7).

<sup>44</sup> On the importance of second-order reasons in the analysis of the margin of appreciation, see especially Legg’s (2012) recent contribution.

fair access to this right, in some cases where the restriction of the right is not severe, a “theory of neutralization” like that used by the Grand Chamber in *Lautsi* might come into play. On the other hand, when this general level of protection is low, the ECtHR has reasons to be more rigorous with the state in its concrete judgment of proportionality. This later situation will require it to exercise its role as effective guarantor of Convention rights, and will mean that within its sphere of jurisdictional competence it will make up for a lack of action by a state in fulfilling its international commitments. In short, the more that national authorities demonstrate a higher level of general protection of the right in question, the more their judgment can be relied upon.

In the second place, the ECtHR may resort to what is called the “comparative method,” paying attention to how other European states behave to assess whether the minimum coercion possible has been used and if other less burdensome alternatives were possible.<sup>45</sup> Given that the Convention arose to improve the level of human rights protection in Europe as a whole, one reason to call into question whether a state lacked other less restrictive alternatives is to see whether other states, in similar situations, have achieved the same social goal with different measures that have not involved this restriction of the right.

In the third place, the state of the European consensus on a given matter can also be relevant in relaxing the stringency of the proportionality test, although for different reasons from those that the VVM offers. This relevance will depend on the presence of a link between consensus building and the rationale of gradual progress in the general system of human rights protection in Europe. Thus it would go together with the logic of an evolutive interpretation of the Convention, another essential interpretive resource in the jurisprudence of the ECtHR.<sup>46</sup> Addressing the lack of consensus to increase the freedom of the state would be instead questionable if it ends up resulting in a gradual reduction in the standard of protection in the region. The extent of European consensus becomes important as far it is useful to identify a gradual improvement in the quality of the European democratic systems while diminishing the “surprise” effect that an evolutive interpretation disassociated from the current “state of the issue” in Europe could imply. In this way, the relevance of the existing consensus depends on a balance

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<sup>45</sup>See Arai-Takahashi (2002, 15).

<sup>46</sup> On the relationship between evolutive interpretation and European consensus, see Dzehtsiarou (2011).

between reasons of legal certainty and substantive concerns, seeking a mutual adjustment that favors the consolidation of human rights. If this mutual adjustment fails – something to be determined by the ECtHR – the lack of consensus would lack interpretive relevance because it would reflect only the use of the VVM. At the same time, concerns about institutional legitimacy as well as democratic considerations are also not enough to justify imposing a European consensus on a dissident state, because as I indicated earlier, imposing an external consensus on a dissident state has a counter-majoritarian effect with respect to the democratic will expressed by that state.<sup>47</sup>

In the fourth place, the issue of whether the state is really better placed to decide can also be key to guiding the determination of proportionality. If, after thorough consideration, the ECtHR perceives that a conflictive situation cannot be adequately resolved without deep knowledge of the circumstances of a particular society, then the Court has a strong reason for carrying out less strict scrutiny of the axiological balance reached by a state.<sup>48</sup> Even here, however – and focusing on religious freedom – this reason carries force only when the state’s impartiality towards religion has not been compromised. In those cases in which the state tends to privilege the majority religion or gives in to the most established denomination, it does not seem reasonable to assert that the state is still better situated than an external body to resolve the internal tensions that this lack of impartiality can entail.<sup>49</sup> The same can be said when the measure restricting religious freedom comes from a denominational or semi-denominational state. When the state itself pushes for an imbalance among the different religions practiced by its citizens and this imbalance has been approved of by its internal courts, it does not seem plausible to assert that the national authorities are better placed than an international body to monitor the management of its internal religious pluralism. The same reasoning can be applied to the state that has opted ideologically for a militant or active secularism. A state

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<sup>47</sup> I have already pointed out that such a state might even have a higher standard of protection than other states. For a more critical vision of the use of consensus as relevant element in the comprehension of the Convention, see Letsas (2004, 204-305). For the contrasting position that the ECtHR should generally adhere to consensus, see Hutchinson (1999, 649-649).

<sup>48</sup> Some ECtHR judges, for example Rozakis and Spielmann, think that the fact that a state is “really” better placed than an international body to decide an issue is the main justification for a margin of appreciation doctrine, especially when the national courts have supervised the balancing exercise carried out by the state.

<sup>49</sup> As Mancini (2010, 25) observes, in these cases if the ECtHR grants a wide margin of appreciation, it is in fact taking on a counter-majoritarian role, given that this body was created out of a consensus among states aimed at correcting the deficiencies of majoritarian democracy.

pushing strict secularism in all public spaces also cannot be perceived as an impartial guarantor of the right to religious freedom.

Members of the Council of Europe have certainly full autonomy to decide on their state-religion system. The resulting pluralism of this national option should be able to be incorporated in the framework of the Convention, something that the Court has clearly accepted. States' choice, however, must be compatible with their international commitments regarding the right of religious freedom of their citizens. That is why in all these cases, the ECtHR must be stricter in its proportionality test because it takes on the function of watching over the Convention requirements of state neutrality with respect to religion. This conclusion is supported by the vision of the ECtHR itself on the role of the state in managing its internal religious pluralism. On one hand, the ECtHR has emphasized the link between religious freedom and democracy, stressing the role of this right in assuring the pluralism inherent in a democratic society.<sup>50</sup> On the other hand, the ECtHR has insisted that the responsibility of the state is to assure, neutrally and impartially, the exercise of different religions and beliefs, as well as contributing to maintaining public order, religious harmony, and tolerance, especially when there are opposing groups.<sup>51</sup> In this sense, the idea that the state is best situated only has force if its institutional position and prior practices enable it to exercise this responsibility reliably.

Finally, for the RVM to constitute a good hermeneutic resource for balancing democracy and rights, the ECtHR must be coherent in its use of the doctrine and must provide generalizable standards that can serve as guides to states and their citizens. Certainly the proportionality test takes into consideration the social, legal, and political context of the challenged measure. For that reason, the Court cannot limit itself to carrying out an abstract analysis of compatibility between an individual right and a national regulation. But it is also part of the Court's function to build – via its particular rulings – a general framework for understanding each of the Convention rights. Following Greer's terminology, we might distinguish between two forms of axiological balancing: a) An "ad hoc" balancing, where deliberation is fully focused on the particular case, and b) A "structured" balancing, where a particular deliberation on rights and public

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<sup>50</sup>For example, the cases of *Kokkinakis v. Greece* (May 25, 1993, Paragraph 31); *Manoussakis and Others v. Greece* (August 29, 1996, Paragraph 44); *Serif v. Greece* (December 14, 1999, Paragraph 49).

<sup>51</sup>*Lautsi v. Italy* (March 18, 2011, GS, Paragraph 60); *Şahin v. Turkey* (November 10, 2005, GS, Paragraph 10).

interests is influenced by the aim of establishing a general doctrine of rights protection in Europe.<sup>52</sup>

This structured balancing is what many voices demand from the ECtHR, not only for simple reasons of discursive rationality, but for the very purpose of the ECHR – achieving a closer union between the members of the Council of Europe through a common conception of and respect for human rights. Those who are skeptical that an international body should have the last word on issues of rights, including when its rulings do not have the same legal value as those of domestic courts, can see as a virtue the fact that the ECtHR limits itself to seeking particular, reasonable solutions case by case, rather than establishing general doctrine. But that approach ends up eroding the Court's jurisdictional function as interpreter of the Convention, because it makes the Court more like a simple arbitration body. The ECtHR can only maintain its legitimacy as a consolidated judicial institution if the production of doctrine is as important as the production of particular results.<sup>53</sup> In this way, its role is to keep one eye on the material issue of balancing individual rights and democratic values in each particular case, and the other eye on the structural issue of providing generalizable, stable answers Europe-wide. That is why the jurisprudence of the ECtHR on religious matters has been so criticized for its axiological incoherence, its variability from one matter to another, and its lack of predictability.<sup>54</sup>

Unlike the VVM, which encompasses an unrestricted particularism, the RVM that I have presented has the capacity to provide these more generalizable and stable standards of protection, which also address the axiological dualism of the ECHR. Its adoption by the Strasbourg court would encourage it to assess challenged state measures using comparable parameters and with an eye to building a constitutional framework of minimums in the protection of rights in Europe. This framework, in addition to helping build a theory about the value and specific purpose of each right, should be comprehensive enough to make space for a plurality of legitimate social purposes without failing to preserve a minimum substantive quality in the standards of protection. The remaining work of providing institutional coverage of Conventional rights, as well as the

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<sup>52</sup>Greer (2003, 413).

<sup>53</sup> On this point *see* McHarg (1999, 696).

<sup>54</sup> On these criticisms, *see especially* Brauch (2005, 125-147); Kratochvil (2011, 343 and 351-352).

determination of the optimal standard of protection beyond this threshold, is a question for each state.

### **III. The *Lautsi* and *Şahin* cases from the perspective of the rationalized version of the margin of appreciation.**

Now that the dynamic of the RVM has been explored my suggestion is to apply the doctrine, even though briefly for reasons of space, to demonstrate why the deferential logic that the ECtHR used in the *Lautsi* and *Şahin* cases did not turn out to be legally reasonable.

In the *Lautsi* case, interference with the *forum internum* of religious freedom occurred for the sake of preserving a cultural tradition of religious origin. Although the possibility of this kind of interference lacks textual support in the Convention, it was not an especially intense restriction given that the indoctrinating effect of a crucifix is not obvious when compared with the imposition of a religious practice or activity. It seems sensible to assume that the active or passive character of a religious symbol depends to a great extent on the particular context of its use. But the question is whether in this matter there are sufficient reasons to support deference to the state's choice to require the crucifix in public school classrooms. Using the above parameters, the argument about the lack of consensus would not provide much support for this deference. Although there is no regulatory consensus in Europe regarding religious symbols, the requirement of the crucifix is rather exceptional given that it only appears in a minority of European countries. This fact undercuts the strength of considerations of legal certainty that might favor the position of the Italian state. In addition, the lack of regulatory homogeneity with respect to the crucifix is more due to a plurality of state-church systems and traditions than to a genuine pluralism in understanding religious freedom and its limits. For this reason, the absence of homogeneity should play a minor role within the logic of a gradual consolidation of the right to religious freedom in the region.

There is also reason to doubt that a state whose cultural traditions privilege the symbols of a particular religious denomination to the detriment of non-believers or other religious minorities is really better situated to resolve impartially the conflicts that the institutional use of this symbol has generated. For this reason, neither the argument from

lack of consensus nor the idea that the state is better placed would in this case justify granting broad deference, keeping in mind as well that the Italian regulation has a weak democratic pedigree, coming as it does out of decrees from the 1920s, mainly from the fascist period, without further parliamentary confirmation, and that it has also not been assessed by the Italian constitutional court.<sup>55</sup>

From here one might wonder whether the Italian state used the least restrictive measure possible when interfering with individual religious freedom to preserve its cultural traditions. As the ECtHR has aptly recognized, maintaining cultural traditions falls within the legitimate purposes of a democratic state.<sup>56</sup> But the issue is whether the Italian state had other less burdensome alternatives that did not require it to abandon this objective, and whether it used the minimum level of coercion possible. Using the comparative method, it seems false to say there were no alternatives for maintaining the cultural tradition of the crucifix in Italy. In fact, I have already noted that in Spain, Greece, Ireland, San Marino, and Romania, which do not have an express regulation, this type of symbol remains present in some public schools. The imposition via regulation turns out then to be unnecessary (or at least the Italian state has not proved that necessity in its social circumstances). Nor is the imposition via regulation certainly the best way of maintaining the cultural traditions of a democratic society. The persistence of traditions is connected to many interlinked factors, and to a great degree depends on how engrained they are among the public and on the existence of a social setting of mutual tolerance and respect. Given that there are other less burdensome and coercive options, the disproportionality of a measure that affects a protected sphere cannot be compensated for with an openness to religious pluralism in other educational spheres, as a theory of neutralization has little strength in this case. What is really in play, then, is the will of the Italian state expressed in its complaint to *Lautsi 2009*, which, as I have noted, does not have value in itself under a rationalized version of the margin of appreciation.

This by no means implies that the only option compatible with the Convention is to prohibit exhibiting the crucifix in public schools. Although I cannot develop it further here, the RVM would also make it possible to show that the abstract analysis of

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<sup>55</sup> In this regard, see the dissident vote in the Grand Chamber's *Lautsi* ruling, at Paragraph 1. Curiously, given that this matter was not analyzed following the steps of the accommodation clause of Article 9.2, the ECtHR saved itself from having to assess whether the measure was contemplated by a law of minimum quality.

<sup>56</sup>*Lautsi v. Italy*, Paragraph 68.

compatibility carried out by the Chamber in *Lautsi 2009* is deficient, due to its opacity to contextual factors, and because there are reasons to argue that other regulatory options or contextual solutions to the controversy of crucifixes in schools are compatible with the Convention.

With respect to the issues raised by the Şahin case, I would say that we are looking at a more severe restriction, this time on the *forum externum* of religious freedom, a right that according to Article 9.2 can be balanced against other social considerations. The issue here is again whether we have reasons to defer to the judgment of the state. In contrast to what happened in Italy regarding the exhibition of the crucifix, the prohibitions on the use of the Islamic headscarf in Turkey are supported by the constitutional principle of state secularism, and this regulatory option has the approval of the country's constitutional court. But the reasons for deferring to the state in the case of the restriction on the headscarf in the university are even weaker than in the *Lautsi* case. As to the European consensus, practically no European state limits the use of the headscarf in universities, and it is reasonable to assert that looking to this contrary consensus favors the protection of religious freedom in the region. In addition, I dare say that the tendency to prohibit the wearing of religious clothes that is gaining ground in some European countries has been encouraged, at least in part, by the great deference that the ECtHR has shown with these restrictions on religious freedom that began in Turkey and France.

The argument that the state is better placed to decide on the appropriateness of limiting the use of the headscarf in universities is not either well positioned to justify deference to the Turkish state. As I noted above, state secularism is a legitimate but not unbiased political choice with respect to religious pluralism in a democratic society. Looking at this political choice, just as looking at the institutional choice of the denominational state, the ECtHR takes on a qualified safeguarding role in making sure that this model of religion-state relations does not prevent the fulfillment of the state's international commitments with respect to Convention rights. At the same time, the choice of active secularism typically comes with a low general standard of protection of this freedom in public spaces, and as a result there are few reasons simply to trust the

judgment of the state. The way to carry out this supervision is to use a strict proportionality test, or at least to engage in a detailed assessment of proportionality.

In this proportionality test, the ECtHR should have verified in a detailed way whether the general reasons supplied by the Turkish state for prohibiting the headscarf in universities are convincing. For one thing, the existence of a constitutional principle of secularism is not determinative or sufficient, given that we can see via the comparative method that even in France, which also embraces this model, secularism is maintained without this restriction on religious freedom in universities. In this sense, this constitutional principle does not release the state from its obligation to demonstrate the presence of a “pressing social need” to use coercive measures. Without this evidence, the state has not justified that it lacks other less coercive alternatives for achieving its legitimate purposes with the same efficacy.

Something similar occurs when we look at the other general arguments that Turkey supplied, arguments based in hypothetical connections amongst the use of the headscarf and the risks to democracy in Turkey, the promotion of Islamic radicalism, and the encouragement of gender discrimination. The Strasbourg Court should have analyzed in detail the strength of such connections and whether they support the use of institutional coercion in the university context. In the same way, the Court should have supervised if these arguments were convincing enough in the particular case of Leyla Şahin. As Judge Tulkens aptly observed in her dissenting vote, the state did not demonstrate at any time that the use of the headscarf by an adult such as Şahin was forced on her or subordinated her as a woman. Nor was there any indication that Şahin wore this article of clothing for any extremist political purpose, or that the use of the headscarf by this student would have led to problems of public order or would have affected other students or limited any of their rights. In summary, and leaving aside other interesting questions, the ECtHR’s resistance to engaging with these arguments in this concrete case indicates an abandonment of jurisdictional functions in protecting the appellant’s human right to religious freedom, and can only be explained by the VVM.

My objective in this paper has been to show that the ECtHR would have exercised more satisfactorily its jurisdictional role within the dual logic of the Convention by adopting a RVM in its jurisprudence on religious symbols in the educational setting. That

also would have enabled it to build a more stable and coherent framework of constitutional minimums around the requirements of this Convention right. Returning to my first words, it is true that the interpretation of international human rights conventions is an especially delicate activity, and that the ECtHR is an institution that has the difficult responsibility of protecting rights, moving between the turbulent waters of values and political pressures of the highest level.<sup>57</sup> This is an arduous judicial task that for a domestic judge could involve a significant erosion of his or her jurisdictional independence. But constant political concession to states in highly sensitive religious conflicts will not make it possible, in the long run, for the Strasbourg court to maintain its institutional *auctoritas* in Europe, because when someone almost always agrees with you, even when he or she should not, you end up thinking that your reasons are the only ones that matter.

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<sup>57</sup> The unprecedented political and institutional uproar within the European system of human rights protection that the Chamber’s ruling in the *Lautsi* case provoked is a good demonstration of this. On the political and legal responses that the case generated, see especially McGoldrick (2011, 470-475).

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