Religious freedom and the European Court of Human Rights' two margins of appreciation

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Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation

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Abstract

The European Court of Human Rights' (ECtHR) use of the margin of appreciation (MoA) in cases concerning religious clothing is well-documented. This article paints a more complete picture of the use of the doctrine in cases falling within Article 9 and Article 2, Protocol 1 of the European Convention on Human Rights (ECHR). The ECtHR's use of the *normative* MoA often appears to be superfluous as is does not appear to extend past the Article 9(2) ECHR, limitations clause. In contrast, the *systemic* MoA allows almost complete deference to the State, which has the potential to undermine the religious freedom of minorities.

Keywords

margin of appreciation – European Court of Human Rights – freedom of religion or belief – European Convention on Human Rights

1 Introduction

In the *Kokkinakis* decision, the European Court of Human Rights (ECtHR) accepted that in the context of Article 9 European Convention on Human Rights (ECHR),[1] 'a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. 005, entered into force 3 September 1953.

the necessity of an interference'.[2] The ECtHR has, subsequently, accepted that States have a wide margin of appreciation (MoA) in relation to the freedom of religion or belief on the basis of a lack of consensus.[3] The MoA gives effect to the principle of subsidiary within the ECtHR's case law.[4]

The use of the MoA under Article 9 ECHR is well documented, particularly in the context of restrictions placed on religious clothing.[5] On the one hand, its use has been lauded for acknowledging the ECtHR's limitations as an international mechanism of adjudication and, specifically, that national authorities may be better placed to determine the appropriate course of action in a given set of circumstances.[6] On the other hand, academics have often viewed the ECtHR's deference to the MoA as an abrogation of the ECtHR's duties,[7] on the basis that it fails to recognise the deficiencies inherent in democracy.[8]

Alongside these competing views of the desirability of the MoA, academics have also struggled to conceptualise the MoA in manner that fully captures the range of contexts in which it has been deployed. Nonetheless, it is widely accepted that in practice there are two formulations of the MoA: the *normative* MoA and the *systemic* MoA.[9] The *normative* MoA refers to deference on the basis of merits-related reasons, specifically, when States have

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[2] *Kokkinakis* v. *Greece,* 25 May 1993, European Court of Human Rights, No. 14307/88, para 47.
[3] *Cha'are Shalom Ve Tsedek* v. *France,* 27 June 2000, European Court of Human Rights, No. 27417/95, para. 84; *Leyla Şahın* v. *Turkey,* 10 November 2005, European Court of Human Rights, No. 44774/98, para. 109.
[4] Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 213 opened for signature, 24 June 2013, not yet in force.
[5] See, for example, Malcolm D. Evans, 'Freedom of Religion and the European Convention on Human Rights; Approaches, Trends and Tensions', in P. Cane, C. Evans, and Z. Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008), pp. 291-314; Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights', 7:1 *Melbourne Journal of International Law* (2006), pp. 52–73; Tom Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation', 56:2 *International and Comparative Law Quarterly* (2007), pp. 395-414.
[6] Robert. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *Human Rights Law Review* (2014), p. 499; Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee', 65 *International and Comparative Law Quarterly* (2016), p. 33.
[7] Dimitrios Tsarapatsanis, 'The Margin of Appreciation Doctrine: A Low-Level Institutional View', 35 *Legal Studies* (2015), p. 676.
[8] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 31 *New York University Journal of International Law and Policy* (1998-1999), p. 853.
[9] Oddný M Arnadóttir, 'Rethinking the Two Margins of Appreciation', 12 *European Constitutional Law Review* (2016), pp. 27-53.

sought to strike a balance between Article 9 ECHR and a competing right or collective goal.[10] It may also refer to the interpretation or application of rights at a domestic level.[11] In contrast, the *systemic* MoA recognises the limitations of the ECtHR's powers of review and results in deference to States on the basis of 'a functional or pragmatic rationale related to the different competences of different actors in the European system for the protection of human rights'.[12] Thus, Letsas understands the structural MoA as being rooted in State sovereignty and the principle that the ECtHR must not act as a Court of Fourth Instance.[13] The boundaries between these two formulations of the MoA are not clear[14] and, indeed, Arnadóttir submits that '[t]he systemic and the normative elements of the margin of appreciation can intersect in various ways within the same case'.[15]

It is from this starting point that this article traces the justifications for and circumstances in which the ECtHR has accepted that States have a MoA in cases concerning the right to manifest religion. Given the close link between Article 9 ECHR and Article 2 Protocol 1 ECHR[16] both rights will be considered together. A full exploration of the ECtHR's jurisprudence in this field reveals that the lack of consensus relating to Church-State relations is but one justification for the adoption of the MoA. It is argued that while the *normative* MoA does not seem to extend significantly past the limitations contained in Article 9(2) ECHR, the *systemic* MoA permits almost complete deference. This is problematic as restrictions on freedom of religion or belief predominantly impact religious minorities and

[10] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), p. 85.
[11] Jan Kratochivíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights* (2011), p. 328.
[12] Arnadóttir *supra* note 9, p. 52. See also, George Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006), p. 706.
[13] Letsas, *supra* note 10, p. 85.
[14] Kratochivíl, *supra* note 11, p. 332.
[15] Arnadóttir *supra* note 9, p. 53.
[16] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 009, entered into force 18 May 1954.

the *systemic* MOA, in particular, has the potential to defer to majoritarian preferences, in disregard of the deficiencies inherent in democratic decision-making.

2 Lack of Consensus

In *Cha'are Shalom Ve Tsedek* the ECtHR accepted that States have a MoA 'with regard to establishment of the delicate relations between the Churches and the State'.[17] In *Şahın,* it further elaborated that on the basis of the lack of consensus in this area 'the role of the national decision-making body must be given special importance'.[18] The secular or Christian traditions of the State have been accepted by the ECtHR to justify a wide MoA under Article 9 ECHR as there is a lack of consensus in relation to Church-State relations. Interferences with Article 9 ECHR on the basis of secularism all concern religious clothing,[19] whereas the MoA on the basis of Christian traditions has primarily been recognised in the educational context.[20] Deference on this basis is not absolute. Although States have a wide MoA, this must be consistent with the role of the State as the 'neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.[21] Notably, the width of the MoA available to States appears to differ according to which tradition is invoked.

In the context of cases concerning religious clothing, the ECtHR has been criticised for approaching secularism as unproblematic. For example, Carolyn Evans has argued that

[17] *Cha'are Shalom Ve Tsedek* para. 84 [sic].
[18] *Şahın*, para.109.
[19] *Ibid.*; *Dahlab* v. *Switzerland,* 15 February 2001, European Court of Human Rights, No. 42393/98; *Dogru* v. *France,* 4 December 2008, European Court of Human Rights, No. 27058/05; *Ebrahimian* v. *France,* 26 November 2015, European Court of Human Rights, No. 64846/11.
[20] *Folgerø and others* v. *Norway,* 29 June 2007, European Court of Human Rights, No. 15472/02; *Lautsi and others* v. *Italy,* 18 March 2011, European Court of Human Rights, No. 30814/06.
[21] *Şahın* para.107.

'[i]n the headscarf cases, the Court ... does not question the elevated position of secularism'.[22] In practice, the ECtHR has uncritically accepted that restrictions on an individual's freedom of religion in the name of secularism fall within the State's MoA,[23] as secularism is presumed to be compatible with the role of the State as 'neutral and impartial organiser.[24] This lack of scrutiny suggests that deference on the basis of secularism is not based on merits-related reasons (the *normative* MoA). Instead, it is suggested that the MoA in cases concerning secularism appears to be justified by democratic and constitutional reasons. For example, in *Dogru,* the ECtHR justified the MoA on the basis that 'in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools'.[25] Similarly, in *Şahın,* the ECtHR deferred to the State's MoA and accepted that secularism 'may be considered necessary to protect the democratic system in Turkey'.[26] This leads to the conclusion that the MoA in these cases is *systemic* rather than *normative* in nature.

The ECtHR has also accepted that States with a Christian tradition have a MoA on the basis of the same lack of consensus. In *Folgerø and Others*, the ECtHR was willing to accept that the prioritisation of Christianity within the religious education syllabus fell within the State's MoA **'**[i]n view of the place occupied by Christianity in the national history and tradition of the respondent State'.[27] Similarly, in *Lautsi,* the Grand Chamber held that 'the decision whether or not to perpetuate a tradition falls in principle within the margin of

[22] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' 26 *Journal of Law and Religion* (2010-2011), p. 336.
[23] Stephanie E. Berry, 'A "Good Faith" Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and UN Human Rights Committee', forthcoming in *Legal Studies* (2017).
[24] *Ibid.*
[25] *Dogru*, para. 72.
[26] *Şahın*, para. 114.
[27] *Folgerø*, para. 89.

appreciation of the respondent State'.[28] However, in *Lautsi,* the Grand Chamber also observed that 'that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.'[29] Indeed, the MoA in relation to Christian traditions appears to be narrower than in cases concerning secularism. Rather than accepting that restrictions are *prima facie* legitimate, the ECtHR considers whether the State has struck an appropriate balance. In *Folgerø,* despite the State's MoA, the ECtHR carried out a detailed analysis of the religious education syllabus and concluded that it was incompatible with the State's role as a 'neutral and impartial organiser'.[30] Thus, as the merits of the case are considered, a *normative* MoA is employed in cases concerning Christian traditions.

It is notable that in the analogous case of *Zengın,* which concerned the content of the religious education syllabus in Turkey, the ECtHR did not recognise that the State had a MoA concerning Islamic traditions.[31] Given that the ECtHR carried out a similar level of analysis in *Zengın* as in *Følgero,* this suggests that the reference to the MoA in *Følgero* was unnecessary.[32] However, it also suggests that the scope of the MoA permitted on the basis of national traditions is contingent upon the extent to which those traditions are perceived by the ECtHR to be consistent with the role of the State as 'the neutral and impartial organiser'. The ECtHR has found Islam to be incompatible with both the values underpinning the Convention and the requirements of 'neutrality and impartiality'.[33] Thus, while the ECtHR is happy to afford secular and Christian States a MoA on the basis of a 'lack of consensus', it seems unlikely that this will be extended to States with a majority Muslim population.

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[28] *Lautsi*, para. 68.
[29] *Ibid.*
[30] *Folgerø*, paras. 95-100.
[31] *Hasan and Eylem Zengın* v. *Turkey,* 9 October 2007, European Court of Human Rights, No. 1448/04.
[32] Kristin Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion', 4 *Oxford Journal of Law and Religion* (2015), p. 409.
[33] *Refah Partısı (The Welfare Party) and others* v. *Turkey,* 13 February 2003, European Court of Human Rights, Nos. 41340/98; 41342/98; 41343/98' 41344/98, paras. 123 and 128.

3 Reconciling the Interests of Various Religious Groups

In *Kokkinakis,* the ECtHR accepted that 'in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[34] Thus, the ECtHR has accepted that States have a MoA to restrict individual religious freedom in order to protect religious pluralism and harmony.[35] Secular policies are consistently accepted to be consistent with this aim.[36] Nonetheless, such measures must again align with the role of the State as the 'neutral and impartial organiser'. Consequently, in the context of registration requirements for religious communities, the ECtHR has found that States have overstepped their MoA if they deny official status on arbitrary or discriminatory grounds.[37] Furthermore, while registration requirements are consistent with Article 9 ECHR, the failure of a religious community to register does not permit the State to interfere with the individual exercise of this right. Consequently, in *Masaev*, the State had overstepped its MoA by prosecuting individuals for practicing an unregistered religion.[38]

This MoA does not permit the State to interfere with religious matters in order to resolve intra-religious disputes. The principle that the State is 'impartial and neutral' is paramount in this respect. Thus, in *Supreme Holy Council of Muslim Community,* the ECtHR

[34] *Kokkinakis*, para 33.
[35] *Metropolitan Church of Bessarabia and Others* v. *Moldova,* 13 December 2001, European Court of Human Rights, No. 45701/99, para. 116.
[36] *Şahın*, para. 114.
[37] *Religionsgemeinschaft der Zeugen Jehovas and others* v. *Austria,* 31 July 2008, European Court of Human Rights, No. 40825/98, para. 98; *Umhuriyetçi Eğitim Ve Kültür Merkezi Vakfi* v. *Turkey,* 2 December 2014, European Court of Human Rights, No. 32093/11, para. 50.
[38] *Masaev* v. *Moldova,* 12 May 2009, European Court of Human Rights, No. 6303/05, para. 26.

found that Bulgaria had overstepped its MoA on the basis that '[t]he role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.[39] Reference to the State's MoA in this case does, however, appear to be unnecessary as the ECtHR reached a similar decision in the analogous case of *Hasan and Chaush v Bulgaria* by scrutinising the necessity of the interference under Article 9(2) ECHR without making reference to the MoA.[40]

4 Reconciling a Clash between Individual Religious Freedom and 'the Rights and Freedoms of Others' or Other Societal Goals

In addition to recognising that States have a MoA to reconcile the claims of various religious groups, the ECtHR has accepted that 'regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State'.[41] Thus, 'various concessions on the part of individuals or groups' may be necessary 'to maintain and promote the ideals and values of a democratic society'.[42] Interference with the right to manifest religion in order to protect 'the rights and freedoms of others' falls within the scope of Article 9(2) ECHR. The *normative* MoA in this context permits States to determine the appropriate weight to be afforded to competing interests.

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[39] *Supreme Holy Council of the Muslim Community* v. *Bulgaria,* 16 December 2004, European Court of Human Rights, No. 39023/97, para. 96.
[40] *Hasan and Chaush* v. *Bulgaria,* 26 October 2000, European Court of Human Rights, No. 30985/96.
[41] *Eweida and others* v. *The United Kingdom,* 15 January 2013, European Court of Human Rights, Nos. 48420/10; 36516/10; 51671/10; 59842/10, para. 84.
[42] *Şahın*, para.108.

The nature of 'the rights and freedom of others' that are threatened by the individual manifestation of religion influences the scope of the MoA. Thus, in *Eweida*, the ECtHR prioritised the applicant's right to manifest religion by wearing a crucifix above the competing right, 'the employer's wish to project a certain corporate image'.[43] It is significant that the right competing with Article 9 ECHR in this case was not a recognised 'human right'. A far wider MoA has been awarded to States to reconcile a perceived clash between freedom of religion or belief on the one hand, and LGBT rights[44] or gender equality on the other.[45] In the context of gender equality, the ECtHR has recognised that States have a particularly wide MoA on the basis that it is 'one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe'.[46]

The ECtHR has also permitted States a wide MoA to pursue societal goals under 'the rights and freedoms of others', including integration policies in order to avoid 'the emergence of parallel societies'.[47] Furthermore, in *SAS,* the ECtHR accepted that the State had a wide margin of appreciation to pursue the aim of 'living together'.[48] In this context, the State appears to have a much wider MoA to resolve conflicts between the majority and religious minorities than it does to resolve intra-religious conflicts. For example, in *SAS,* the partially dissenting judges noted that*,* '[b]y banning the full-face veil, the French legislature ... has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension'.[49] Thus, it can be inferred that while States must be impartial in relation to religious affairs, this requirement is not as onerous in relation to social policies that impact religious communities.

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[43] *Eweida*, para. 94.
[44] *Ibid.,* paras. 106, 109.
[45] *Dahlab*; *Şahın*, para.115.
[46] *Şahın, ibid.*
[47] *Konrad* v. *Germany,* 11 September 2006, European Court of Human Rights, No. 35504/03; *Osmanoğlu and Kocabaş* v. *Switzerland,* 10 January 2017, European Court of Human Rights, No. 29086/12 para. 105.
[48] *SAS* v. *France,* 1 July 2014, European Court of Human Rights, No. 43835/11, paras. 153-55.
[49] *Ibid.,* Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom para 14; cf. *Supreme Holy Council of the Muslim Community*, para. 96.

The ECtHR has also accepted that States have a wide MoA to restrict proselytism in order to protect 'the rights and freedoms of others'. In respect of proselytising acts by individuals in a personal or official capacity, States have been permitted a *normative* MoA to strike an appropriate balance between the freedom of religion of the applicant and 'the rights and freedoms of others' under Article 9(2) ECHR. The *Kokkinakis* case established that the State's MoA in cases concerning Christian witness as opposed to 'improper evangelism' is not unlimited and subject to scrutiny.[50] In *Larissis,* the ECtHR found that the State had struck the correct balance in limiting the right to proselytise, as the applicants had abused their position of power,[51] whereas limitations on the same applicants' right to proselytise in their personal capacity were found to violate Article 9.[52] Notably, in *Larissis,* the ECtHR did not make reference to the State's MoA, which suggests that resort to the MoA in these cases is, yet again, unnecessary.

This jurisprudence is somewhat complicated by the ECtHR's acceptance that 'the wearing of a headscarf might have some kind of proselytising effect',[53] regardless of whether the applicant is in a position of power[54] or had an intention to proselytise.[55] The uncritical acceptance by the ECtHR of the proselytising impact of the *hijab* can be attributed to the *systemic* MoA permitted to secular States, explored above.

Finally, under Article 2(1), Protocol 1, the ECtHR has established that '[t]he State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions'.[56] However, as noted above, States also

[50] *Kokkinakis*, para. 48.
[51] *Larissis and others* v. *Greece,* 20 February 1998, European Court of Human Rights, No. 23372, paras. 54-55.
[52] *Ibid.,* para. 59.
[53] *Dahlab*.
[54] *Şahın*, para. 115; Dogru, para. 64.
[55] *Şahın, ibid.,*, Dissenting Opinion of Judge Tulkens, para. 8; Ebrahimian *supra* note 19, para. 71. Cf. *Ahmet Arslan and others* v. *Turkey,* 23 February 2010, European Court of Human Rights, No, 41135/98, para. 51.
[56] *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark,* 7 December 1976, European Court of Human Rights, Nos. 5095/71; 5920/72; 5926/72, para. 53.

have a MoA in the context of historical and religious traditions.[57] The presence of religion in the educational context is insufficient to establish that the State has overstepped the MoA available in this area.[58] However, qualitative differences between the teaching of Christianity and other traditions,[59] combined with an insufficient system of partial exemptions[60] has led the ECtHR to conclude that that State had overstepped its MoA.[61]

5 National Authorities are Better-Placed

The ECtHR has accepted under Article 9 and Article 2 Protocol 1, that the State authorities are better placed to make decisions in the context of planning permission;[62] social policy,[63] financial policy;[64] education;[65] hospitals;[66] prisons;[67] policing[68] and identity checks.[69] The impact of the *systemic* MoA in this context, often results in the ECtHR accepting the legitimacy of the interference with Article 9 ECHR, without scrutinizing whether the restriction was proportionate. Thus, in *Chaplin,* concerning the failure of a hospital to accommodate the wearing of crucifix, the ECtHR held, '[t]he hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court

[57] *Folgerø*, para. 89.
[58] *Lautsi*, para. 66.
[59] *Folgerø*, para. 95.
[60] *Ibid.,* paras. 97-100
[61] Further on cases judged under Protocol 1, Article 2, see the article by Temperman in this same issue.
[62] *Johannische Kirche & Peters* v. *Germany*, 10 July 2001, European Court of Human Rights, No. 41754/98.
[63] *Konrad*; *Osmanoğlu and Kocabaş*, para.105; *SAS*, paras. 153-55.
[64] *Alujer Fernandez and Caballero Garcia* v. *Spain*, 14 July 2001, European Court of Human Rights, No. 53072/99; *Church Of Jesus Christ Of Latter-Day Saints* v. *the United Kingdom,* 4 March 2014, European Court of Human Rights, No. 7552/09, para. 33.
[65] *Folgerø*, para. 89; *Lautsi*, para. 69.
[66] *Eweida*, para. 99; Ebrahimian, *supra* note 19, para. 65.
[67] *Jakóbski* v. *Poland,* 7 December 2010, European Court of Human Rights, No. 18429/06, para. 47; *Vartic* v. *Romania (no 2)*, 17 December 2013, European Court of Human Rights, No. 14150/08*,* para. 45.
[68] *Karaahmed* v. *Bulgaria,* 24 February 2015, European Court of Human Rights, No, 30587/13, para. 105.
[69] *Mann Singh* v. *France,* 11 January 2009, European Court of Human Rights, No 24479/07; *El Morsli* v. *France,* 4 March 2008, European Court of Human Rights, No. 15585/06.

which has heard no direct evidence'.[70] Similarly, on the basis of the State's wide MoA in planning matters,[71] the ECtHR did not consider whether the denial of planning permission for a place of worship was discriminatory.[72] The danger inherent in this *systemic* MoA is particularly apparent in *SAS v France.*[73] Although the ECtHR expressed unease with the so-called *burqa* ban,[74] the MoA prevented if from questioning the legitimacy of the democratic decision-making process.[75]

The ECtHR has, nonetheless, adopted a narrower MoA in cases concerning the protection of freedom of religion or belief when the State has failed to comply with its positive obligation to secure the rights contained in the Convention.[76] Thus, although in *Karaahmed v Bulgaria* the ECtHR accepted that the State had a wide MoA in relation to 'operational matters' pertaining to policing, the failure of the police to prevent demonstrators from interfering with religious worship meant than the State had not struck an appropriate balance between the rights of protesters and Article 9 ECHR.[77]

Thus, it appears that in cases concerning politically sensitive issues, the ECtHR uses the *systemic* MoA (on the basis of democracy or democratic principles such as secularism) to avoid scutinising the legitimacy of the interference with the individual applicant's religious freedom. In contrast, the level of expertise of the national authorities does not always give rise to the same level of discretion, if the State has failed to comply with its positive obligations. While in the context of hospitals and planning permission the ECtHR has uncritically accepted restrictions on religious freedom, in cases concerning policing and

[70] *Eweida*, para. 99.
[71] *Johannische Kirche*.
[72] Stephanie E. Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime', 30 *Netherlands Quarterly of Human Rights* (2012), p. 24.
[73] *SAS*, para. 122.
[74] *Ibid.,* para. 149.
[75] *Ibid.,* paras. 88, 154.
[76] *Jakóbski*, para. 46; *Karaahmed*, para. 111.
[77] *Karaahmed, ibid,* paras. 105, 111.

prisons, the State has a positive obligation to secure the rights in the Convention and, thus, the MoA appears to be narrower.

6 Conclusion

The ECtHR has consistently recognised that States have a MoA in cases concerning the right to manifest religion. Under the *normative* MoA, the ECtHR usually scrutinises the necessity of the interference with the applicant's rights. Thus, although it allows States some discretion to decide whether an appropriate balance has been struck between individual freedoms and 'the rights and freedoms of others' or other societal goals, this discretion is not absolute. The use of the MoA in these cases does not always appear to be strictly necessary, as the ECtHR already allows States discretion when analysing the proportionality of the restriction under Article 9(2) ECHR.

In contrast, the *systemic* MoA appears to be much wider. In cases concerning secularism, democracy and the expertise of national authorities, the ECtHR has frequently approached the justification for the restriction on the applicant's rights as unproblematic. This precludes it from considering whether 'hostile-external preferences'[78] are at play. This level of deference has the potential to be particularly problematic in instances where the religious freedom of unpopular minorities is limited.

[78] Letsas, *supra* note 11, p. 729.