FREEDOM OF RELIGION OR BELIEF – THE QUEST FOR RELIGIOUS AUTONOMY

Merilin Kiviorg

Wolfson College

A thesis submitted in partial fulfilment of the requirements of the Board of the Faculty of Law, University of Oxford, for the degree of Doctor of Philosophy

Number of words: 95 579

Trinity 2011

Abstract

In this thesis it is argued that while the concept of freedom of religion or belief itself is opaque and difficult to define, the right to religious freedom must contain certain basic factors – most importantly the right to individual (religious) autonomy. The individual autonomy approach is seen here as providing the necessary rationale for the protection of freedom of religion or belief. This rationale is not cemented in stone in the practice of the Convention and this has caused the Court to lose its focus on individual freedom. It is a dangerous tendency. It allows the focus to be placed on the role of the State and leaves freedom of religion or belief to be heavily affected by politics and fluctuating social attitudes. In this regard, this thesis looks for the meaning and scope of individual and collective religious autonomy and how it is and ought to be represented in the practice of the European Court of Human Rights. It is the aim of the author to contribute to a clearer and more principled understanding of Article 9 of the ECHR. The right to individual autonomy is thought to be able to provide the necessary focus for the European Court of Human Rights in creating a more robust framework for the protection of freedom of religion or belief different from current Court practice which shows inconsistency in its reasoning and theoretical chaos. This lack of clarity has also contributed to freedom of religion or belief being a relatively weak right. It is explored here as to how the principle of autonomy (as developed in this thesis) relates to other principles provided by the Court, namely the principle of State neutrality, pluralism and the effective protection of rights, but also the margin of appreciation and the autonomy of religious communities. The individual autonomy centred theoretical framework in the first part of the thesis will be engaged to analyse the conflict in the triangle of state-individual-community explored in the second part.

Acknowledgements

I would like to thank the funding organizations for giving me the opportunity to study at the University of Oxford. Without adequate funding this would not have been possible. Especially helpful were the Scatcherd European Scholarship provided by the University of Oxford, the Kristjan-Jaak Scholarship provided by the Archimedes Foundation and the Government of the Estonian Republic. I am also grateful for multiple small but very important grants received from Wolfson College, the Law Department of the University of Oxford, the Estonian Students Fund in the USA and the Estonian Educational Trust in London. Special thanks go to the Max Weber Post-doctoral Fellowship at the European University Institute for providing funding and editorial support (especially Dr. Laurie Anderson) in re-shaping and polishing the thesis at its final stage.

Many individuals have helped me to shape my ideas. However, any flaws in this thesis are obviously mine. For intensive discussions in the early stages of my research project I would like to thank Dr. Michael Gallagher (Estonian Law Centre), Dr. Ronald Craig (University of Oslo) and Prof. Raul Narits (University of Tartu). Special thanks go to my supervisor Prof. Sandra Fredman for her thorough comments and unbelievable patience even when the work was not forthcoming. I am equally grateful to Prof. Gerhard Robbers form the University of Trier for sharing his most valuable thoughts on my thesis, but also for his moral support and encouragement. I must also thank friends and colleagues in the European Consortium of Church and State Research for interesting discussions and insights on various topics in law and religion.

Special thanks go to my partner Ian Bellman for proof reading multiple drafts of my thesis, providing me with meals and comfort to keep me going when times were difficult. Many thanks to my parents for their unconditional love and support. Special thanks also go to my in-laws: Maie, Muriel, Keith, Tracy and Jamie. Last but not least, thanks go to my lifelong friends Helen and Kaire in Estonia and friends at Wolfson College for sharing the good and bad times during the writing process.

Table of Contents

Abbreviations

ECHR – European Convention on Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

HRC – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

JFS – Jewish Free School

NRM – New Religious Movement

OSCE – Organisation for Security and Co-operation in Europe

UNDHR – United Nations Universal Declaration of Human Rights

Table of Cases

European Court of Human Rights

European Commission of Human Rights

UN Human Rights Committee

Cases from Other Jurisdictions

Table of Authorities

International and EU Instruments

Domestic Legislation

Introduction

> Just as the concept of individual human liberty carried to
> its logical extreme would mean anarchy, so the principle of
> self-determination given unrestricted application could result in chaos.
> /Eleanor Roosevelt/[1]

Freedom of religion or belief is one of the rights universally and regionally protected by various international treaties. Although it has been repeatedly stated that freedom of religion is one of the most important freedoms, the actual content and scope of that freedom is still vehemently, debated. One of the reasons may be that the rationale of *why* freedom of religion or belief is protected has never been cemented. However, not everybody agrees with the statement that freedom of religion or belief is one of the most important rights. It is maintained in this thesis that religion has played a significant role throughout history and is still significant today, whether we talk about, for example, politics, conflict, culture, ethics or law. It has caused turmoil, but it has also been a unifying element in society. Denying the importance of religion or belief for individual believers is the same as closing one's eyes to reality. Moreover, denying the value of autonomy to individuals, vested with equal worth and dignity, to choose and live according to their beliefs, leaves freedom of religion or belief as an empty promise.

The autonomy approach taken in this thesis is greatly influenced by the author's experience of being a citizen of one of the republics of the former Soviet Union – Estonia - where both freedom of religion and belief were suppressed and believers often

---

[1] E Roosevelt, *The Universal Validity of Man's Right to Self-Determination* (US Dept of State Bulletin, 27, 8 December 1952) 919.

persecuted. However, witnessing the struggles of newly independent States to find their way in dealing with increasing religious diversity, intolerance and identity questions after the collapse of the Soviet Union, have all shaped the ideas presented in this thesis. In the Soviet Union no one was allowed to freely choose and live out their beliefs if these beliefs were found contradictory to the ideas of the regime. Indoctrination (especially of youths in their formative years) was a standard practice and manifestation of 'alternative' beliefs almost unthinkable. At the beginning of the 1990s after regaining independence, Estonia experienced what can be called a 'return of the religious', which was quite common in all Eastern European post-communist societies.[2] These processes were partly an expression of national identity and partly a reaction to the suppression of individual freedom by the Soviet regime. However, freedom also ment increasing religious diversity and conflicts in most post-communist countries. Some of the conflicts were related to general phobia against the emergence of so-called new religious movements[3]. This phobia was not limited to post-soviet countries, was also quite prominent in other parts of Europe in the 1990s and early 2000nds[4] and still generates conflicts today.[5] Several post-soviet countries were also faced with conflicts between Orthodox churches with different canonical subordination. These conflicts had a strong political, and identity dimension

---

[2] For a detailed account on law and religion in Estonia see M Kiviorg, *Religion and Law in Estonia* (Kluwer Law International, The Netherlands 2011).

[3] The expression 'new religious movements (NRM)' in this thesis does not mean necessarily absolute or world novelty, but rather novelty in Europe (in this sense it includes, for example, nineteenth-century communities such as Jehovah's Witnesses or the Bahá'í. It is not used as a pejorative term. The choice of the term seeks to emphasise neutrality and is preferred to terms such as 'sects' or 'cults' which seem to have clearly negative connotation in Europe.

[4] W Fautré, 'The Sect Issue in France and Belgium' <http://www.willifautre.org/publications/2002/heidelberg.pdf> accessed 5 Sept 2011; E Barker, 'Why the Cults? New Religious Movements' in T Lindholm, WC Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004).

[5] See eg *The Moscow Branch of the Salvation Army v Russia* (App no 72881/01) ECHR 5 Oct 2006; *Church of Scientology Moscow v Russia* (App no 18147/02) ECHR 24 Sept 2007; *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (App no 40825/98) ECHR 31 Jul 2008; *Avilkina and Others v Russia* (App no 1585/09) Communicated 23 May 2011.

reflecting desires of a part of the Orthodox community to have a canonical subordination other than the Moscow Patriarchate.[6] Further, historically dominant churches, in many countries, were sometimes hijacked for political purposes. This has caused resentment of other religions and of the secular community. The opening of the boarders and the fact of Estonia joining the European Union in 2004 have fueled debates about the possible influx of immigrants from a primarily Islamic background with different cultures and religions. In contrast to Western European (countries where the debate over these minority religions has been vibrant for many years), the debate in Estonia is just starting. However, many aspects of the debate are the same - national identity, level of tolerance and readiness to accept the otherness to comply with international human rights standards.

Although there are specifics which relate to the history and culture of different states in Europe, the struggle in finding adequate scope for freedom of religion or belief is acute in all European countries. This struggle is also reflected at the international level. The focus in this thesis is on the European Convention of Human Rights as an important international standard signed for by forty seven European states. Despite European countries having cultural and historical differences, protection of freedom of religion or belief under the Convention is highly significant today in formulating why and how individual States protect this freedom.

In this thesis it is argued that while the concept of freedom of religion or belief itself is opaque and difficult to define, the right to religious freedom must contain certain

---

[6] See also M Kiviorg, 'Eesti Apostlik Õigeusu Kirik ja objektiivne kirikuõigus' [*Estonian Apostolic Orthodox Church and Objective Ecclesiastical Law*] (1997) 10 Juridica 518–523.

basic factors – most importantly the right to individual (religious) autonomy[7]. The individual autonomy approach is seen here as providing the necessary rationale for the protection of freedom of religion or belief. This rationale is not cemented in stone in the practice of the Convention and this has caused the Court to loose its focus on individual freedom. It is a dangerous tendency. It allows the focus to be placed on the role of the State and leaves freedom of religion or belief to be heavily affected by politics and fluctuating social attitudes. In this regard, this thesis looks for the meaning and scope of individual and collective religious autonomy and how it is and ought to be represented in the practice of the European Court of Human Rights. It is the aim of the author to contribute to a clearer and more principled understanding of Article 9 of the ECHR. The right to individual autonomy is thought to be able to provide the necessary focus for the European Court of Human Rights in creating a more robust framework for the protection of freedom of religion or belief different from current Court practice which shows inconsistency in its reasoning and theoretical chaos. This lack of clarity has also contributed to freedom of religion or belief being a relatively weak right. It is explored here as to how the principle of autonomy (as developed in this thesis) relates to other principles provided by the Court, namely the principle of State neutrality, pluralism and the effective protection of rights, but also margin of appreciation and the autonomy of religious communities. The individual autonomy centred theoretical framework in the first part of the thesis will be engaged to analyse the conflict in the triangle of state-individual-community explored in the second part.

[7] As the discussion is about freedom of religion or belief, autonomy is referred in this thesis as 'religious autonomy'. This term is not a novelty. It has been used by various authors, although its actual meaning is variable.

Chapter I

Theoretical Framework and Methodology

1.1. Introduction

In the European context the most important instrument guaranteeing freedom of religion or belief is probably the European Convention on Human Rights. Under this Convention, the European Court of Human Rights (ECtHR) is called upon to defend the freedom of religion or belief enshrined in Article 9 of the Convention and to set a standard of protection for the European states. Setting a standard requires an idea of what that standard should be. For more than thirty years, until the 1993 *Kokkinakis* case[1] the ECtHR deemed most freedom of religion cases inadmissible as 'manifestly ill-founded'. One reason may be that religious freedom has continuously been an uncomfortable topic for the Court. Since *Kokkinakis*, however, there has been an explosion of the case law relating to freedom of religion, with rulings either under Article 9 (freedom of religion or belief) or under other articles of the Convention (for example, freedom of expression[2], right to association[3] and right to privacy[4]). This explosion of case law has probably been

---

[1] *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397. This case concerned a Jehovah's Witness who was convicted for unlawful proselytizing, which is a criminal offence under Greek law. The Court addressed the question of balancing the right of the applicant to practice his religion by seeking to share his religion with others against the right of the State to place restrictions to protect others from unwanted exposure to his point of view. On the facts of the case, the Court decided that the interference was unjustified.

[2] Eg *Otto-Preminger v Austria* (App no 13470/87) (1994) 19 EHRR 34. The case concerned conflict between artistic expression and religious freedom.

[3] Eg *The Moscow Branch of the Salvation Army v Russia* (App no 72881/01) (2007) 44 EHRR 46. The case concerned denial of registration of a branch of Salvation Army.

caused by many factors, but perhaps most importantly by the emergence of several independent post-communist countries with challenges involving democratic reforms and protection of human rights. Since *Kokkinakis*, there also seems to have been an attempt to provide a vision of religious freedom for the relations between State and religions in a democratic society, which is valid across Europe.

The Court has adopted certain principles which ought to guide the interpretation of the right to freedom of religion or belief. Firstly, religion or beliefs are considered salient aspects of identity.

> …freedom of thought, conscience and religion…is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.[5]

Secondly, the Court has emphasised the contribution of religious freedom to the promotion of democratic pluralism.[6] 'The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'[7] These two important principles co-exist in the Court's jurisprudence with two other major principles developed by the Court, namely the principle of State neutrality and that of autonomy of religious communities. Combined with other principles applicable to the interpretation of the Convention, such as margin of appreciation, effective protection of rights and non-discrimination, the Court thus has the necessary tools in hand to develop a vision suitable

---

[4] Eg *Hoffman v Austria* (App no 12875/87) (1994) 17 EHRR 293. The case concerned the right to family life and discrimination on the ground of religion. The applicant was denied custody of her children on the ground of her religious convictions as a Jehovah's Witness.

[5] *Kokkinakis v Greece* (n 1 above) para 31.

[6] I Rorive, 'Religious Symbols in the Public Space: in Search of a European Answer' (2009) 30(6) Cardozo L Rev 2669, 2672.

[7] *Kokkinakis v Greece* (n 1 above) para 31.

for Europe.

Nevertheless, there is a theoretical chaos in the jurisprudence of the Court, which is evident in the Court's inconsistent case law and its inconsistent theoretical reasoning in cases dealing with individual or collective freedom of religion or belief. Principles developed by the Court itself have been made to clash, instead of constructing a framework robust enough to guide the interpretation of freedom of religion or belief in Europe. The impression is that the Court is not sure itself what its role is as regards the protection of freedom of religion or belief. This lack of clarity has contributed to undermining both individual[8] and collective freedom of religion or belief.[9]

Taking into account the above picture, this thesis argues for the principle of autonomy (personal autonomy) as the harmonizing principle, for the Court to get its focus right if it is to protect pluralism and respect people's choices regarding their identity as enshrined in the *Kokkinakis* case.

The idea of autonomy is already to a certain extent embraced by the Court. In the case of *Pretty v UK* the ECtHR stated that:

> Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.[10]

---

[8] Eg *Efstratiou v Greece* (App no 24095/94) (1997) 24 EHRR 294; *Valsamis v Greece* (App no 21787/93) (1997) 24 EHRR 294; *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8.

[9] Eg *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 Jun 2000; *Lamaiz El Majjaoui and Stichting Touba Moskee v the Netherlands* (App no 25525/03) ECHR 20 Dec 2007.

[10] *Pretty v UK* (App no 2346/02) (2002) 35 EHRR 1 para 61.

However, personal autonomy does figure more prominently in the jurisprudence of Article 8 (right to private and family life) than in the jurisprudence of Article 9. Marshall has rightly pointed out that Article 9 has largely been unsuccessful in upholding individuals' manifestation of their religious beliefs and that the Court's decisions have little to say about connection of such beliefs with people's identity, particularly their identity formation. She further argues, and quite rightly, that this is even more so when minority religious beliefs are involved.[11] Thus, although it is argued here that autonomy could be the grounding principle for the interpretation of freedom of religion or belief, the very idea of autonomy is under-developed in the jurisprudence of the Court regarding this freedom. Even if it is one of the principles underlying the interpretation of the Convention, it seems that autonomy has not been valued in the practice of Article 9. The ECtHR has taken a narrow view of what 'choice' or 'living out one's choice' means as regards freedom of religion or belief. This emerges clearly in the way in which the Court defines manifestation of religion or belief. It is also obvious in respect to the wide and often unjustified or unexplained margin of appreciation the Court leaves to States in dealing with issues of religion or belief. But most of all it is strikingly present in the Court's recent strand of case law holding that public space ought to be free of some religious manifestations.[12]

This thesis does not attempt to comprehensively cover all the nuances of ideas of

---

[11] J Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, Leiden 2009) 141.

[12] See eg *Leyla Sahin v Turkey* (n 8 above); *Dorgu v France* (App no 27058/05) ECHR 4 Dec 2008; *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37EHRR 1.

individual and collective rights. This is also not an attempt to offer the absolute truth about religious freedom. Any theoretical model would probably be incapable of taking into account the complexity of today's diverse societies. The aim is to argue for the principle of autonomy as a reference point for the Court when adjudicating cases on freedom of religion or belief. It will be argued that while the concept of freedom of religion or belief is itself opaque and difficult to define, the right to religious freedom must contain certain basic factors – most importantly, the right to religious autonomy.

The somewhat problematic use of the separate terms 'religious autonomy' and 'freedom of religion' is recognised here. Durham Jr. has pointed out that:

> In a broad sense, the term "autonomy" has become a synonym for "liberty" or "freedom", and in that sense, religious autonomy might simply be taken as another term used to describe the general right of religious freedom that is codified in various international agreements and national constitutions.[13]

It is justified to ask, whether it adds any additional value to talk about religious autonomy. Why not just talk about freedom of religion or belief? Adding another variable to an already very complex category (freedom of religion) can make understanding this freedom even more complicated. However, the focus on religious autonomy makes it explicit as to why freedom of religion or belief is protected. Moreover, as the term 'religious autonomy' is often used in today's discussion on freedom of religion or belief, it is important to try to clarify its nature and content. It is also maintained in this thesis that religious autonomy adds an important extra dimension to that of religious freedom. Whereas religious freedom can be understood as the right to be left alone, autonomy as

[13] W Cole Durham Jr, 'The Right to Autonomy in Religious Affairs: A Comparative View' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 686. For his discussion Durham subsequently narrows the meaning of autonomy down to autonomy of religious communities and not individuals.

developed here entails the positive right to self-determination. It embraces the individual's decision-making sphere, as well as the right of the religious community to make decisions. It is also a valuable analytic tool in that it makes it possible to define the rights and obligations not just of the individual in relation to the State, but also of the individual in relation to the community, and the community in relation to the State and other groups. Focusing on religious autonomy rather than simply on the right to religious freedom also facilitates analysis of the relationships, and at times the clashes, between individual and collective autonomy.

The aim here is to elaborate a framework which will make it possible for the European Court of Human Rights to decide religious freedom cases in a more consistent and robust manner than it has done so far. The following subchapters will try to set the points of departure for discussion in this thesis. They will also clarify some of the terms used in this thesis and will provide a detailed account of methodology used and how this thesis relates to current literature.

1.2. Justification of the Right to Freedom of Religion or Belief

To begin with, it is asserted that there is a need for a separate right to freedom of religion. Some authors argue that other existing rights, like the right to freedom of expression and freedom of association and assembly would be enough to cover the needs of religious freedom in a liberal democratic society.[14] Nickel has suggested that separate enumeration

---

[14] See, for example, interesting and provocative discussion presented by Jurgens at the colloquium in Leuven. E Jurgens, 'Are Freedom of Religion and a Special Legal Position for Churches, Necessary or Even to be Desired in a Liberal Democracy under the Rule of Law?' in H Warnink (ed), *Legal Position of Churches and Church Autonomy* (Peeters, Leuven 2001) 239-243. In his article Jurgens calls for debate about the necessity of a separate right to freedom of religion as it seems to be more of an asset to churches and not for sects.

of freedom of religion in national and international bills of rights may be useful, but that it is not essential. He suggests that without a specific clause, it would be possible to gain broad and ecumenical scope for freedom of religion. This approach '…does not require that we precisely define the boundaries of religion because it equally protects near-relatives of religion such as philosophical and ethical outlooks.'[15] He argues that this helps to avoid a clause-bound focus in interpreting freedom of religion and helps to resist exaggerating the priority of freedom of religion.[16] Nickel argues that religious liberty is more secure if it is not enumerated as a separate clause. In his view this would enable freedom of religion to gain widespread acceptance in a religiously and ethnically diverse society that includes many nonreligious individuals. This seems also to be in conformity with the idea of personal autonomy as will be elaborated in this thesis, and does not necessarily place any *prima facie* importance (or primacy) in any particular ideas or beliefs.[17] However, the problem is that in modern, pluralistic and increasingly secular societies, the value and self-evidence of one's religion or belief is more difficult to argue for.[18] This is also evident in the ECtHR's case law which deals with the definition of manifestation of religion or belief.

Without a specific clause we may overlook the possibility that in the form of religion and also belief we are dealing with phenomena, which are sometimes unexplainable, incomprehensible, and frankly often marginalised for various reasons.

---

[15] JW Nickel, 'Who Needs Freedom of Religion' (2005) 76 U Colo L Rev 941, 951.

[16] Ibid.

[17] Whether there is a need or no need for defining the boundaries of religion and belief will be discussed in the third chapter of this thesis.

[18] A similar thought is expressed by C Evans in the context of Mills' argument in favour of not suppressing religious truth. C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2001) 28.

Although other freedoms are important and applicable in the case of religion or belief, dissolving all aspects of freedom of religion (or belief) between these freedoms may seriously damage protection of (minor and unknown) religions and beliefs under the Convention.[19] This approach entails the danger of ignoring the possibility that religion or belief may be a core element of individual identity and for some, potentially determinative of one's entire way of being. For those who do not believe, the right to freedom of religion or belief is a guarantee that they would not be forced to believe, but also a reminder that, however bizarre the religion or belief is, it is important for many fellow citizens. It is also suggested that without a separate article on freedom of religion the unique communal aspect of this freedom may not get adequate protection. It would also be difficult, both on an individual and collective level, to fit in the idea of the accommodation of religious needs where appropriate. Moreover, where religions are in a minority compared to the secular majority, they need special attention. Thus, without going into various justifications for the right to freedom of religion, it is taken in this thesis that freedom of religion or belief is a precious asset in a democratic society.[20]

1.3. Theoretical Framework

Human rights are seen as '…the rights, in the strict and strong sense of entitlements, that one has simply because one is a human being'.[21] The idea that human rights are equally

---

[19] It is not a task of this thesis to weigh the importance of freedom of religion against other freedoms in abstract. However, specific cases may require the balancing of different rights against each other.

[20] About historical, instrumental and religious arguments for religious freedom see, for example, C Evans (n 18 above) 19-28.

[21] J Donnelly, 'Human Rights, Individual Rights and Collective Rights' in J Berting et al (eds), *Human Rights in a Pluralistic World: Individuals and Collectivities* (Meckler, London 1990) 39-40.

held by all who possess them is intrinsic to the concept of human rights. The centrepiece of human rights talk and human rights law today are the ideas of equal worth, dignity and autonomy of every human being. International, political human rights talk abounds with this rhetoric. A legally protected right to individual self-determination or autonomy is not explicitly included in any catalogue of human rights documents.[22] However, it seems to be a value protected by the Universal Declaration of Human Rights (UNDHR).[23] Article 22 of the UNDHR states that everyone is entitled to the realisation of the rights indispensable for his dignity and the free development of his personality. However, this free development is conditioned and dependant on the fact that a person is a member of a society. The UNDHR declares that: 'everyone has duties to the community in which alone the free and full development of his personality is possible'.[24] It can also be discerned from the UNDHR that autonomy does not 'just happen'. It does not take place without national effort and international co-operation.[25]

The preamble of the European Convention on Human Rights refers to the UNDHR as an inspiration. Similar to the UNDHR, the right to individual autonomy is not explicitly mentioned in the text of the European Convention of Human Rights. However, as was seen above in the *Pretty* case, it has been *expressis verbis* acknowledged as an important principle (or a right[26]) underlying the interpretation of the Convention's

[22] For a full account on this issue see eg J Marshall (n 11 above) 30 -32.

[23] Universal Declaration of Human Rights (adopted 10 Dec 1948) UNGA Res 217 A III (UDHR). The UNDHR, although adopted as the UN General Assembly resolution and thus not a legally binding document, may have partly obtained the status of customary international law.

[24] Article 29 UNDHR.

[25] Article 22 UNDHR.

[26] *Tysiac v Poland* (App no 5410/03) ECHR 20 Mar 2007.

guarantees. It needs to be acknowledged that autonomy does not have a settled meaning in international practice, nor in that of the European Convention of Human Rights. It also does not have a unitary meaning in political philosophy which could help to interpret the meaning of autonomy for the purposes of Article 9.[27] However, within liberal tradition there seems to be a common core to it: the concept of autonomy has its roots in the idea that 'provided others are not harmed, each individual should be entitled to follow their own life plan in the light of their beliefs and convictions'.[28] In the context of the ECHR it should be pointed out that there are differences in interpretation of Article 8 and 9, but also complexities which stem from the use of the concept of personal autonomy interchangeably or together with other indeterminate concepts like dignity[29], identity and moral integrity.[30]

While acknowledging the above problems, it is argued here that the principle of autonomy can pull together some of these philosophical concerns, but also would serve to clarify ambiguous notions used in the Convention practice itself in order to make sense of freedom of religion or belief. This is for the following reasons:

---

[27] J Marshall (n 11 above) 57-68. See also C Evans (n 18 above) 29-33; L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, Oxford 2008) 36-40.

[28] J Marshall (n 11 above) 57; W Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, Oxford 1989) 9-19.

[29] For example, Feldman points out it should not be assumed that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect: 'The quest for human dignity may subvert rather than enhance choice, and in some circumstances may limit rather than extend the scope of traditional "first generation" human rights and fundamental freedoms. Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two-edged sword.' D Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) PL 682, 685. The concept of dignity can both enhance and hinder individual autonomy, when lawmakers and judges take a stand on what it means to live a dignified life. See eg J Davis, 'Forbidding Dwarf Tossing: Defending Dignity or Discrimination Based on Size?' (2006) 9 YBNZ Juris 238. Thus dignity is something of a conundrum.

[30] For the comprehensive account of interpretation of personal autonomy, identity and integrity under Article 8 and other relevant articles see J Marshall (n 11 above).

Firstly, the principle of autonomy as understood in this thesis entails respect for the importance of religion or belief and its manifestation for an individual believer. This can be argued was the essence of the Court's statement in the *Kokkinakis* case, emphasising that both religion and belief are considered to be salient aspects of one's identity and protection of this identity is important for democracy.[31] It can be argued that the very idea of religious freedom entails the idea of autonomy in making and living out one's own choices. Individual autonomy or self-determination is reflected in the very right to freedom of thought, conscience and religion (right to have a religion or belief). It includes the freedom to change one's religion or belief and the freedom for individual or collective expression, which is often most important for an individual believer.[32]

Secondly, the principle of autonomy protects the value to the individual of her religion and beliefs from State interference. Only in this way can any meaningful balancing of individual rights and state interests be achieved. This appears crucial, given that some of the recent case law[33] suggests that there is a dangerous tendency in the Court's practice to shift its focus away from the right of the individual towards the role of the state in matters of religion: as M. D. Evans observes '… this is not what human rights protections are meant to be about'.[34]

---

[31] *Kokkinakis v Greece* (n 1 above) para 31.

[32] Freedom of religion or belief is protected by a multitude of international instruments, most importantly by Article 18 of the Universal Declaration of Human Rights, Article 9 of the European Convention on Human Rights and Fundamental Freedoms, and Article 18 of the International Covenant on Civil and Political Rights. Universal Declaration of Human Rights (adopted 10 Dec 1948) UNGA Res 217 A III (UDHR); European Convention on Human Rights and Fundamental Freedoms (adopted 4 Nov 1950, entered into force 3 Sept 1953) 213 UNTS 221 (ECHR); International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171 (ICCPR).

[33] See eg *Leyla Sahin v Turkey* (n 8 above); *Refah Partisi (The Welfare Party) and Others v Turkey* (n 12 above).

[34] MD 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* (CUP, Cambridge 2008) 291, 315.

Thirdly, the principle of autonomy requires respect for the equal worth, dignity and identity of a believer to choose and live out his or her belief. Nussbaum contends that:

> Because religion is so important to people, such a major source of identity, there is also a strong argument from *respect for persons* that supplements these considerations of intrinsic value. When we tell people that they cannot define the ultimate meaning of life in their own way – even if we are sure we are right and that their way is not a very good way – we do not show full respect for them as persons.[35]

Her main argument evolves from the fact that modern liberal democracies defend the value of a wide range of human interests, liberties and opportunities, including freedom of religion or belief. Sometimes other liberties or interests conflict with religious freedom and this creates a dilemma for the liberal state. She sees it profoundly problematic that some theorists (feminists) do not see it as a dilemma either by diminishing the value of religion in some people's lives or not recognizing the diversity of views within the religion itself. At this point it is enough to agree with Nussbaum when she contends that liberty of religious belief, membership, and activity are among the central human capabilities. For a person to be able to search for an understanding of the ultimate meaning of life in his or her own way is among the most important aspects of a life that is truly human. '[E]ven, if a certain group of religious beliefs (or all beliefs) were nothing more than retrograde superstition, we would not be respecting the autonomy of our fellow citizens if we did not allow them these avenues of inquiry and self-determination.'[36]

---

[35] MC Nussbaum, 'Religion and Women's Equality: the Case of India' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 343.

[36] Ibid.

Further to this point on self-determination, it should be also mentioned that a hotly disputed issue in the philosophy of autonomy is the role or place of the influence of others on an individual.

> When we are born, our condition is one of near complete dependence upon others for survival and nurture, and even as we mature and become increasingly independent, it is evident that the possibilities available to us are in large measure defined by the social conditions within which we find ourselves. We do not create ourselves *ex nihilio*, as self-defining adults, but emerge, through education and inculcation, as members of particular families and communities.[37]

Thus, it is arguable as to whether anyone can in fact be autonomous in the sense of complete independence. We are influenced by others – family, religious community, societal cultures etc. Kymlicka has observed that:

> People make choices about the societal practices around them, based on their beliefs about the value of these practices (beliefs which, I have noted, may be wrong). And to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture.[38]

He also argues that understanding one's own cultural narratives is a precondition of making intelligent judgements about how to lead one's lives: 'In this sense, our culture not only provides options, it also "provides the spectacles through which we identify experiences as valuable".'[39] Kymlica suggests that liberals should care about the viability of societal cultures, because they contribute to people's autonomy, and because people

---

[37] BG Scharffs, 'The Autonomy of Church and State' (2004) Brigham Young U L Rev 1217, 1254.

[38] W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford 1995) 83.

[39] Ibid, citing R Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge MA 1985) 228.

are deeply connected to their own culture.[40] Thus, interdependence and autonomy should not be seen as profound opposites. Autonomy can also be seen as a capacity which needs to be developed – 'it can flourish through human relationships or lie underdeveloped'.[41] It is not concerned with isolation but depends upon the existence of relationships that provide support or guidance: 'relatedness in not the antithesis of autonomy but its precondition'.[42]

Taking these considerations into account it can be argued that the principle of autonomy requiring respect for the equal worth, dignity and identity means respecting pluralism as far as moral ideas of a good life are concerned. This argument rests on the theory that a government treats its citizens as equals by allowing each of them to define what is of value to them, not by applying a single conception of the good life to everyone. Government, however, can provide tools like education and the protection of individual rights to contribute or protect individual autonomy. As Kymlicka convincingly argues:

> These aspects of liberal society only make sense on the assumption that revising one's ends is possible, and sometimes desirable, because one's current ends are not always worthy of allegiance. A liberal society does not compel such questioning and revision, but it does make it a genuine possibility.[43]

In this regard, it is argued here, the principle of autonomy has a dual facilitating aspect: in certain circumstances State action may be required in order to protect or

[40] W Kymlicka (n 38 above) 94. He defines societal culture as 'a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational and economic life, encompassing both public and private spheres'. Ibid 76.

[41] J Marshall (n 11 above) 65 (footnote omitted).

[42] Ibid (footnote omitted).

[43] W Kymlicka (n 38 above) 82. Kymlicka argues that a liberal society not only allows people to pursue their current way of life, but also gives them access to information about other ways of life (through freedom of expression) and indeed requires children to learn about other ways of life through mandatory education. A liberal society also makes it possible for people to engage in radical revision of their ends without legal penalty.

provide for the actual enjoyment of individual self-determination (individually or in community[44]). As Raz has argued '…positive freedom derives its value from its contribution to personal autonomy. Positive freedom is intrinsically valuable because it is an essential ingredient and a necessary condition of the autonomous life.'[45] This view is also consistent with concerns about equality and especially providing substantive equality rather than only formal equality. As Fredman has put it:

> …human rights hold out more than just the promise of freedom from State interference with their exercise. Human rights are based on a much richer view of freedom, which pays attention to the extent to which individuals are in a position actually to exercise those rights. This positive view of freedom carries with it a substantive view of equality. Given that human rights promote freedom by removing constraints, the promise of equality must require all to be in a position actually to enjoy that freedom.[46]

However, the principle of autonomy is clearly not without complications. Trigg, for example, has noted that the problem with an emphasis on autonomy is that it can easily degenerate into subjectivism which allows every person's judgement to be final (at least for them). He contends that this way autonomy comes to mean not just freedom from coercion, but the ability to decide what the truth shall be for each individual. This in turn makes it easy to '…slip quickly from the innocuous principle that we must all make up our own minds to the view that there are no external standards of truth to which we are all accountable'[47]. However, it can be argued that autonomy not only involves respect for

---

[44] This dual aspect involving protection of autonomy in its individual and collective dimension will be explained later on in this thesis.

[45] J Raz, *The Morality of Freedom* (OUP, Oxford 1988) 409.

[46] S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford 2008) 9. Professor Fredman discusses the nature of positive rights and positive duties generally and not specifically in the context of freedom of religion. She argues that the values of freedom, equality, solidarity, and democracy, which underpin human rights, logically entail that corresponding duties are both positive and negative.

[47] R Trigg, *Religion in Public Life: Must Faith Be Privatized?* (OUP, Oxford 2007) 136.

one's own identity and dignity, but also for that of others. Autonomy for all individuals must mean that no one individual can use his or her freedom to deprive others of their autonomy. Evans, for example, argues that perhaps the most important of all the principles to have emerged from the Convention case-law has been the principle of respect, noting that already in the *Kokkinakis* case the Court had argued that it may be necessary to place restrictions on freedom of religion or belief in order to reconcile the interests of various groups 'and to ensure that everyone's beliefs are respected'.[48] This in principle means that there are external standards (however challenging they might be to determine) based on mutual respect, which filter out (religious) behaviour not acceptable in a democratic society. Further to this, as noted above, under the UNDHR, free development is conditioned and dependant on the fact that a person is a member of a society. In this regard everyone has duties to the community. Thus, there is a requirement for a certain degree of solidarity, which would enable free development of everybody.

1.4. The Individual and the Value of Collective Autonomy

What makes the question of religious autonomy particularly complex is the fact that not only individuals but also groups and religious organisations are protected under today's human rights law. As Nickel has pointed out, one of the differences between contemporary human rights and natural law is that contemporary human rights are more willing to recognise the importance of family and community in the lives of individuals.[49] One could argue that individual autonomy - as understood in philosophy and

[48] MD Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Martinus Nijhoff, Leiden 2009) 26; *Kokkinakis v Greece* (n 1 above) para 33.

[49] JW Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press, Berkeley 1987) 8-10.

acknowledged as a basis of individual (religious) freedom - transfers directly into the sphere of group rights and autonomy of religious communities, in that collective autonomy is no more than the sum of each individual's autonomy. However, this transfer is not as simple as it may appear. In particular, religious communities themselves have a right to freedom of religion under human rights law. Moreover, the very notion of what is meant by a collective or group right has been a matter of serious debate.[50] To put it simply, the principal question in discussion of collective rights is: who comes first - the individual or the group? In this thesis it is argued that the community (and the autonomy of the community) is essential to individual autonomy. In other words the principal justification of collective rights is that individual self-determination often requires a collective dimension. In this sense an individual right and a collective right cannot be dissociated. As Margalit and Raz argue, individuals flourish through culture and culture is maintained by groups: the prosperity of cultural groups is therefore necessary to the well-being of their members and self-determination is necessary for the protection of groups.[51]

This means that it is incorrect to assume that collective self-determination is always opposed to individual autonomy. A similar idea has been expressed by the European Court of Human Rights in the case of *Hasan and Chaush*:

> Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community

[50] It should be pointed out that there are terminological but also substantial variations when different theorists talk about collective rights and beneficiaries of these rights. See, for example, comparison made by Y Tamir, 'Against Collective Rights' in LH Meyer, SL Paulson, TW Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford 2003) 192-198.

[51] A Margalit and J Raz, 'National Self-determination' (1990) 87(9) Journal of Philosophy 439-461. Although Margalit and Raz are more concerned with national minorities the argument as such could be extended to religious or ethnic-religious groups.

> not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[52]

It would appear that the ECtHR recognises collective religious autonomy, but also understands collective autonomy as a liberal value or a right which enhances individual freedom. Collective religious autonomy as an instrumental right may be needed for more effective or full protection of individual rights. It also may appear that through the collective dimension (membership) individuals have more chance for accommodation of their particular religious needs, for example, in cases of conscientious objection where some evidence is needed of one’s religious affiliation. The right to collective religious autonomy may also give a more balanced starting point for communicating or negotiating the accommodation of religious needs vital for individuals. There may be more avenues for participation through the community in the decision making which affects the life of religions and beliefs in States; and ultimately individual autonomy.[53] However, collective religious autonomy has intrinsic value as well. This value stems from the importance of the collective (community) dimension to an individual believer. To put it simply, the community dimension may be part of the religion or belief one has. As Raz argues:

> Something is instrumentally good if its value derives from the fact that it makes certain consequences more likely, or that it can contribute to producing certain consequences. Something is intrinsically good or valuable if it is valuable independently of the value of its actual or probable consequences, and not on account of any consequences it can be used to produce or to the production of which it can contribute casually.[54]

---

[52] *Hasan and Chaush v Bulgaria* (App no 30985/96) 34 EHRR 35 para 62.

[53] Although it is not in focus here, R Alexy, for example lists participation as being amongst the bundle of positions of complete constitutional right. R Alexy, *A Theory of Constitutional Rights* (OUP, Oxford 2004) 295.

[54] J Raz (n 45 above) 200.

He further distinguishes between three different categories among intrinsically valuable things: (1) things that are valuable in themselves, irrespective of what else exists, (2) things that are constituent goods if they are elements of what is good in itself which contribute to its value, without which the situation which is good in itself would be less valuable; and (3) ultimate goods, the value of which does not need to be explained or justified by reference to other values.[55] The (putative) intrinsic character of collective religious autonomy as understood in this thesis probably falls most comfortably within the category of constituent goods.

Thus, collective religious autonomy (of a religious group or institution) is required since it may be instrumentally or intrinsically important for an individual believer. However, there are limits. It is true that the different interests involved may cause tensions in the triangle of state – individual – community.[56]

It should be kept in mind that in contemporary discussions on freedom of religion autonomy in relation to religious communities may have multiple meanings. The term 'autonomy' derives from two Greek words: '*auto*' meaning 'self' and '*nomos*' meaning 'law' or 'legal rule'.[57] In encyclopaedias 'autonomy' is usually defined as self-government, whether of a state or a political subdivision, or a private body.[58] In its most

---

[55] Ibid.

[56] The conflict in this triangle will be discussed in detail in the fifth chapter of this thesis.

[57] *Võõrsõnastik* (Tea, Tallinn 1999) 65, 391; A Eide, 'Cultural Autonomy: Concept, Content, History and Role in the World Order' in M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 251.

[58] Encyclopaedia Americana Intl Edn (Vol 2, New York 1966); Encyclopaedia Americana Intl Edn (Vol 23, New York 1966); Eesti Entsüklopeedia, (Kd 1, Tartu 1932); Eesti Nõukogude Entsüklopeedia (Kd 1, Tallinn 1985).

widespread meaning in law and politics, it is regarded as an instrumental right, entailing the delegation of authority from a pre-established sovereign body. Most often in legal-political language and in international law, autonomy is regarded 'as the granting of internal self-government to a region or group of persons, thus recognising a partial independence from the influence of the national or central government.'[59] At the international level autonomy seems to be linked to the right to (partial) self-determination. Autonomy in this sense is treated as an instrument (or instrumental right) to solve a conflict situation where recognition of the right to full self-determination (meaning sovereignty) is not acceptable. In this context, 'autonomy' is (a right) delegated by the State to a social agent, e.g. minority group, a territorial unit or a religious community because it has a right to self-determination. In this context constitutional and administrative lawyers also talk about delegating public tasks or sharing the public domain.[60]

However, even in the legal-political context and especially in the light of the protection of individual and collective rights and rights of minorities, autonomy has been interpreted in different ways. At the domestic level, in German constitutional law, for example, the notion of religious autonomy of religious communities is expressly linked to the right to self-determination. It is articulated in Article 137(III) of the Weimar Constitution, as incorporated into the Basic Law by Article 140: 'Religious societies shall regulate and administer their affairs independently within the limits of the law that applies

---

[59] HJ Heintze, 'On the Legal Understanding of Autonomy' in M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 7.

[60] Ibid.

to all'. The notion of autonomy covered by this self-determination right is very broad.[61] Thus, in German constitutional law autonomy of religious societies is expressly and primarily protected by this constitutional provision. However, autonomy can also be considered an important part of religious freedom as set forth in Article 4 (I-II) of the German Basic Law. Robbers notes that until rather recently the foundation of religious autonomy was not seen in freedom of religion or belief, but in the institutional guarantees for religions in the German Constitution as enshrined in Article 137 of the Weimar Constitution through Article 140 of the Basic Law.[62] He further observes that now, '[i]t is generally accepted that religious freedom is the basis of church autonomy…'.[63]

In Estonia the right to religious autonomy is considered to be an essential part of the collective freedom of religion protected by Article 40 ('freedom of religion') and also by Articles 48 ('freedom of assembly'), 19 (1) ('right to self – determination') and Article 9 (2) ('fundamental rights of legal persons') of the Constitution. Autonomy of religious associations entails the right to self-administration in accordance with its internal laws and prescriptions. This was explicitly stated in the presidential decision[64] to veto the 2002 Churches and Congregations Act. The Churches and Congregations Act regulates activities of religious bodies in Estonia.[65] The presidential decision concerned a provision

---

[61] W Cole Durham Jr (n 13 above) 687.

[62] G Robbers, 'Church Autonomy in Germany' in H Warnink (ed), *Legal Position of Churches and Church Autonomy* (Peetes, Leuven 2001) 122.

[63] Ibid.

[64] Presidential Decision No 1112 (RTL 2001, 82, 1120). According to Article 107 of the Estonian Constitution the President of the Republic may refuse to proclaim a law passed by the Parliament and, within fourteen days after its receipt, return the law, together with his reasoned resolution, to the Parliament for a new debate and decision. If the Parliament passes the law which is returned to it by the President of the Republic, un-amended, the President of the Republic proclaims the law or proposes to the Supreme Court to declare the law unconstitutional. If the Supreme Court declares the law constitutional, the President of the Republic shall proclaim the law, if not, the law goes back to the Parliament for amendments.

[65] Churches and Congregations Act, RT I 2002, 24, 135.

(Article 14 (3)) in the law prohibiting registration of religious communities whose administrative or economic governance takes place or whose decisions are approved by a body outside Estonia. The veto act stated that this provision is not in conformity with Article 40 (freedom of religion or belief) of the Estonian Constitution. It pointed out that there are many religious communities in Estonia, with established hierarchical structures, which would be adversely affected by this provision. As many religious communities have a strongly hierarchical structure, imposition of the above restrictions profoundly changes the nature of these communities and thus the nature of collective freedom of religion or belief. It further explained that collective religious autonomy is clearly considered an important part of freedom of religion or belief. The law was subsequently amended by Parliament.[66]

A further manifestation of the concept of collective autonomy is found in Article 50 of the Estonian Constitution, which sets forth the right of ethnic minorities to establish institutions of self-government.[67] Minorities which are registered in the national register of national minorities in Estonia may submit an application for national cultural autonomy.[68] The autonomy granted includes in particular, the right to organise education in the mother tongue and form minority cultural institutions, but also the preservation of their distinctive religion. In this context autonomy is a right granted (delegated) to the particular group, which besides other characteristics may profess a distinctive religion.

[66] However, before it came into force on 1 July 2002 it was vetoed once more on different grounds (RTL 2002, 7, 65).

[67] The focus in this thesis is on religious groups rather than on ethnic groups with a particular religion. However, it is acknowledged here that distinctions like this are not always easy to make.

[68] National Minorities Cultural Autonomy Act, RT I 1993, 71, 1001.

The view of autonomy being a delegated right differs from the view that autonomy is a (natural) right enjoyed by groups and organisations and 'is not by the grace of government'[69] Robbers has pointed out that delegated autonomy would not be acceptable to churches.

> They have their self-sufficiency as independent from the state. Their freedom is acknowledged and guaranteed, not transferred from the state. It is original freedom, not a special position inside government and state organisation.[70]

As applied to the State and Church relationship, the word 'autonomy' is recent, but the underlying concept is not.[71] Historically, variations and different degrees of autonomy can be found within this relationship throughout Europe. These varying degrees of autonomy reflect the self-understanding of churches of their independence from State interference, and the State's understanding of how much control it needs to exercise over religious matters. In European (largely Christian) history, Protestants and Catholics have continuously debated what constitutes the domain of exclusive competence to be preserved since the seventeenth century. Catholics see their Church as *sui iuris*, which has received from its Founder all the means necessary for its independence and autonomy from the State; Protestants, on the other hand, have chosen to submit the external legal administration of the church to the state.[72] Today autonomy applies to a wide range of religions and the debate over its content is still vibrant.

---

[69] G Robbers, 'Foreword' in G Robbers (ed), *Church Autonomy: A. Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 5.

[70] G Robbers (n 62 above) 122. It is not necessary to resolve this question for the purposes of this thesis.

[71] R Minnerath, 'Church Autonomy in Europe' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 381.

[72] Ibid 382.

As to terminology in current legal debate, it should be noted that instead of the term 'collective religious autonomy' most scholars tend to use the term 'church autonomy' even if they are referring broadly to collective religious autonomy.[73] There are probably many historical and psychological explanations for the choice of this term. Today, the term 'church' has a broader meaning than in the past, especially in the United States (and to a lesser extent in Europe) where it can be said to embody both the traditional and so called new churches. But this does not solve the problem. Firstly, the term seems to implicitly exclude a large range of religions. Secondly, even in its broadest sense it does not incorporate non-Christian religions.[74] Moreover, this term seems to apply only to institutional (corporate) autonomy without reference to the individual dimension of it. Consequently, this thesis uses instead the term 'collective religious autonomy', rather than the more widespread term 'church autonomy'. This is to emphasise that this thesis is concerned about the autonomy of all religions, and especially of minority religions, both on an individual and collective level. It could be argued that the term 'collective religious autonomy' does not fully encompass the institutional meaning of the concept as it can mean aggregation of individual autonomies, whereas the term 'church autonomy' makes it clear that it is institutional autonomy which is at issue. There is no intention here to weaken the concept of institutional autonomy (church autonomy) by using the term 'collective religious autonomy'. However, in this thesis it is

[73] G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001); H Warnink (ed), *Legal Position of Churches and Church Autonomy* (Peetes, Leuven 2001). Both books are compilations of articles by scholars on the field of freedom of religion or belief.

[74] For example, although in a different context, Estonian law employs Christian terminology even though such terminology does not directly apply (and may be alien) to non-Christian religious organisations. This was brought to the attention of the Legal Chancellor by non-Christian religious organisations. They claimed that imposition of the term 'church' on non-Christian religions by the legislator is unconstitutional and restricts their freedom of religion. Not to mention that this can be viewed as an intrusion into their autonomy in choosing their own name. Letter of Legal Chancellor to Ministry of Internal Affairs, Letter No 1-14/158 (25 June, 2002). See also M Kiviorg, *Expert Opinion on Compatibility of Provisions of the Churches and Congregation Act with the Estonian Constitution* (Office of Legal Chancellor, 2003).

argued that the primary beneficiary of religious autonomy is the individual. Nevertheless, the institutional expression of religion is often the most important for individuals. It is for this reason that institutional/church autonomy is important. This in fact should make a strong argument for institutional autonomy in human rights discussion. Thus, the rationale for the protection of institutional autonomy stems from the importance it has for individuals. Claiming institutional autonomy for the sake of institutional autonomy makes no sense in the context of human rights protection. In this regard and taking account of previously mentioned reasons, the term 'collective religious autonomy' or 'autonomy of religious community' is thought to be justified here. Moreover, whatever the collective dimension of autonomy is termed, is not as important as how it is understood.

1.5. Challenging Socio-Legal Context

The present discussion and criticism of the lack of clarity in the Court's approach to freedom of religion or belief needs to be placed in a wider context. First of all it needs to be acknowledged that this lack of clarity is not surprising as the protection of religion or belief raises complicated questions both for a State and international court. This is because this freedom does not just involve holding a religion or belief but also manifesting it. Religion is not just a private issue, but it has its presence in the public arena too and not all the manifestations (expressions) of religion or belief are happily received by States or by fellow citizens. Moreover, there may be a conflict between an individual's religion or belief and the values of a democratic society and the requirement to obey its generally applicable laws. One can argue that religious individuals live in the sphere of two sets of norms – secular and divine. As McConnell observes:

> The essential problem is that religious believers have an allegiance to an authority outside the commonwealth. To be sure, the demands of faith do not necessarily (or even frequently) conflict with the laws of the civil society; often they are mutually reinforcing. Much depends on the nature of the religion and of the state. Religions that place few non-spiritual demands on their adherence, or whose cultural and moral commitments are more or less congruent with the wider community, will create relatively few conflicts. Governments that confine themselves to the few essential functions necessary to peace and good order will generate fewer conflicts than governments active in the educational, cultural, and moral lives of their citizens. But in principle, so long as church and state are separate, there is always the possibility of conflict between spiritual and temporal authorities.[75]

This statement although correct, should not be limited to the model of separation of church and state. The conflict between secular and divine authorities for an individual may occur in any model of state and church relationship, for example, in European states with established churches.

Events like 9/11 and terrorist attacks in countries like Spain and the United Kingdom, child abuse cases in the USA and elsewhere, the rise of fundamentalism within different religious groups, to name but a few, have all served to push individuals and societies to test the level of tolerance towards 'otherness' – expressions of world views and values which differ from mainstream society. The cases named are extreme, however, provoking questions about other (milder) expressions of religion or belief as well. Today we deal with a multitude of different religious groups – so called old religions and new religious movements. Due to several factors, including economic globalization and migration, there are a growing number of Muslim communities and other groups who make historically and culturally Christian, but largely secularised Europe feel uneasy. In addition, the increase of so-called new religious movements has caused resentment throughout Europe and especially in the post-Soviet region. All this presents a serious test for democratic orders facing the facts of cultural and religious diversity. There is a great

---

[75] MW McConnell, 'Believers as Equal Citizens' in NL Rosenblum (ed), *Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 91.

danger that ignorance, cultural prejudice and suspicion will be allowed to guide decisions over the scope of freedom of religion or belief, leading to overreaction by States in cases where a more sensitive approach is needed.

Many people place great value in historically dominant religions, even if they are not devoted church-goers or even if they do not believe at all. This stance is a complex combination of national identity, valued traditions, and perhaps the belief of a majority. In a pluralistic society, both for majorities as well as for minorities, religion plays a peculiar role in identity related dynamics.[76] Although most European legal systems provide protection for religious freedom and to religious minorities, the scope of this protection is affected by many factors. History, traditions (including constitutional traditions) and social factors play crucial roles in shaping relations between religious individuals, communities and the State. One should also note that political agendas have some role in these relations. The interplay between these complex factors emerged quite prominently in the recent case of *Lautsi v Italy* (*Crucifix case*) which involved displaying the crucifix in a public school.[77]

Furthermore, the status of the European Convention on Human Rights as an international treaty sets certain limits to its application and implementation. Since the mid-1990s, notwithstanding the principle of subsidiarity and doubts about its country-specific expertise, the Court has become increasingly willing to identify the specific structural shortcomings in domestic law which need to be changed in order to ensure

---

[76] A similar point is made by Mancini specifically regarding religious symbols. S Mancini, 'Power of Symbols & Symbols as Power' (2009) 36 (6) Cardozo L Rev 2629, 2630.

[77] *Lautsi v Italy* (App no 30814/06) ECHR 18 Mar 2011. The case will be discussed in detail in the next chapter.

compliance with the Convention and to avoid repetitive applications.[78] However, in cases concerning Article 9 the Court has predominantly left a wide margin of appreciation to States. In some cases, mainly relating to collective religious autonomy, the Court has narrowed the margin. However, the Court has no systematic or well articulated approach to explain this fluctuating degree of European supervision. The principal problem seems to be to what extent the Court needs to take into account specific circumstances and cultural backgrounds of particular member states, and to what extent it can suggest structural changes to domestic law or deliver constitutional justice in regard to religion or belief. The effectiveness of the Convention also depends on the willingness of States to comply. How can the Court provide a vision for Europe keeping these complexities in mind?

1.6. Materials and Methodology

In recent years there has been a burst of writings on freedom of religion, and also on religious or church autonomy. Some valuable studies have taken on the challenge of exploring this multi-dimensional and interdisciplinary subject from a legal point of view.[79] Most of these studies have been compilations of articles on religious (church)

---

[78] S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, Cambridge 2006) 161.

[79] Eg M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998); Specifically on religious autonomy see eg G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001); H Warnink, (ed), *Legal Position of Churches and Church Autonomy* (Peetes, Leuven 2001); N Doyle, M Hill 'Justifications to Church Autonomy' in R O'Dair, A Lewis (eds), *Law and Religion* (OUP, Oxford 2001); R Minnerath, 'The Right to Autonomy in Religious Affairs' in T Lindholm, W Cole Durham, Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004). A considerable amount of related research has been published by political philosophers. To mention only a few see eg B Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press, Cambridge 2001); W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford 1995); S Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press, Oxford 1998); NL Rosenblum (ed), *Religious Accommodation in Pluralist Democracies: Obligations of Citizenship and Demands of Faith* (Princeton University Press, Princeton, 2000).

autonomy in different countries. However, there are a few which offer a more comprehensive elaboration on freedom of religion.[80] This thesis takes on the ambitious task of systematically considering freedom of religion or belief. By contrast with previous works, the focus and emphasis are on the principle of autonomy as elaborated above in this chapter. This thesis makes an attempt to elevate autonomy from being a mere theoretical underpinning of the Convention to the nature of a right. In fact, one can argue that this right is already part of freedom of religion or belief. However, it is neither very well expressed nor protected. 'To be something in an imperfect way does not mean, however, not to be that thing.'[81] Further, the conflict in the triangle of state-individual-community is analysed keeping in mind the autonomy centred framework developed in this thesis. The analysis is provided from a legal, human rights perspective, drawing, when necessary, on political philosophy. The works of Raz, Dworkin, Rawls and Kymlicka have been an inspiration here.

This thesis looks for the meaning and scope of religious autonomy and how it is and ought to be represented in the practice of the European Court of Human Rights. It is the aim of the author to contribute to a clearer and more principled understanding of Article 9 of the ECHR. When necessary, the thesis draws on the practice of other international bodies (e.g. UN Human Rights Committee) and the domestic case law of individual states. Although the position of many States can be seen through the case law

---

[80] MD Evans, *Religious Liberty and International Law* (CUP, Cambridge 1997); C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2001); R Ahdar, I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005); P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP, Cambridge 2008); T Lindholm, W Cole Durham, Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004); N Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP, Oxford 2011).

[81] R Alexy, 'Nature of Arguments about Nature of Law' in LH Meyer, SL Paulson, TW Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford 2003) 9.

of the European Human Rights Court or Commission, many domestic cases which have contributed to an understanding of religious autonomy or offer interesting solutions, have not been reflected in international practice. Examples from the legal framework and court practice of the United Kingdom, the United States and Canada are of particular interest in this regard.

This thesis is divided into two main parts. The first part (chapters I and II) sets the theoretical framework for religious autonomy and analyses its relationship to other principles developed by the Court as regards freedom of religion or belief (especially the principles of neutrality, pluralism and the effective protection of rights). The second part (chapters III-V) deals with the question of what the ECtHR can reasonably do to better protect individual and collective religious autonomy, how it should balance interests in the triangle of state-individual-community and how it should provide for religious needs.

The second chapter outlines the protection of freedom of religion or belief under the European Convention of Human Rights and addresses the question of what religious autonomy entails and should entail under the ECHR, at both the individual and at the collective level. Firstly, it is explained that religious autonomy encompasses both internal and external decision making spheres. The distinction between the internal and external sphere is highly problematic when we talk about individuals. The chapter also explores the question of whether there is an untouchable *forum internum* (absolute sphere of freedom) when we talk about religious communities and not individuals. It will be argued that predetermined (fixed) sets of issues which fall under the absolute competences of religious bodies have the potential to conflict with individual rights, and thus are not desirable. However, taking into account the importance of community to individual believers the Court needs to carry out the careful balancing of different interests in specific factual circumstances giving due respect to *both* individual and collective religious autonomy. Secondly, the chapter outlines the main principles guiding interpretation of freedom of religion or belief in the ECHR, and explores how these principles link to religious autonomy. The main focus is on the relationship between principle of autonomy and the principle of neutrality, but also effective protection of rights.

The third chapter argues that the problem of autonomy, first of all, manifests itself when the ECtHR has to address the question of who is entitled to protection under the freedom of religion or belief clause. It is argued in this chapter that there is a conceptual deficiency in respecting religious autonomy especially when it comes to determining the existence or importance of manifestations of religion or belief. There is also a danger of discriminating against unknown and minor religions and beliefs. The ECtHR has developed rather obscure criteria to identify what constitutes religion or belief, or the manifestation of it. These criteria are sometimes employed and sometimes not, with no consistency in practice. This also means that virtually no one can be sure that their religion or belief is protected by the Convention. Secondly, the chapter questions whether a definition or objective criteria are needed to determine who is protected by Article 9. It is argued that defining religion or belief is very difficult and an all-satisfying definition probably unachievable. Even if it were possible, it is not absolutely necessary. Moreover, an objective definition is in conflict with religious autonomy. It is argued that it is inappropriate for the Court to pronounce what one's belief is or is not, or to assess the importance of a manifestation of these beliefs to an individual or community. There should be an obligation to take religious autonomy into account. This should be the minimum standard or duty that the ECtHR has to meet to respect anybody as an autonomous person. This chapter puts forward a more subjective, autonomy based definition of religion or belief which also applies to manifestation of religion or belief.

The fourth chapter aims to explore whether the ECtHR has taken into account the religious autonomy of individuals or communities when deciding the scope and limits of freedom of religion or belief under Article 9. There are no easy answers to the extent to which the State has to respect or accommodate religious autonomy, since '[w]e do not have a human right to everything that is good, or to everything that we need.'[82] It can be argued that the limitations-clause is the point at which the relationship between the state and 'autonomy' or 'freedom' actually gets defined (where the scope of the freedom gets defined). Thus, it is not the definition of religion or belief under Article 9, but the reasons for limiting freedom of religion or belief that should be the focus. It is also argued in this chapter that the practice of the European Court of Human Rights has been inconsistent in the application of limits to freedom of religion or belief. The level of scrutiny applied in cases involving religion or belief has been variable without proper explanation and this has undermined both individual and collective autonomy. It is proposed in this chapter that the ECtHR has to adopt a more systematic approach to assessing the limits applied by States to freedom of religion or belief. It is also suggested that variable degree of scrutiny in cases related to freedom of religion or belief is not justified. It is argued in this chapter that the right to freedom of religion or belief is weighty enough to attract a narrow margin of appreciation. In this regard this thesis follows Greer's thought that the margin of appreciation is a 'secondary constitutional principle' and that in exercising this doctrine

---

[82] M Freeman, *Human Rights: An Interdisciplinary Approach* (Polity, Cambridge 2002) 63.

the State is constrained by an overarching primary principle of ensuring that there is 'a priority of rights'.[83]

The aim in the fifth chapter is to analyse how the previously set framework works in the case of the conflict in the triangle of state-individual-community. For example, how should the State understand collective religious autonomy in the case of religious communities, which do not subscribe to values like democracy, tolerance, individual freedoms and rights (including gender equality and rights of children)? What should the response be if the religious community violates the individual rights of either its own members or of others in society? Should there be exceptions to general rules to accommodate religious beliefs? Is there a duty upon the State to interfere even if an individual has not claimed that his or her rights have been violated? What is the role of the ECHR in this regard?

[83] S Greer (n 78 above) 195-230. Greer lists 'rights', 'democracy' and 'priority to rights' as primary and 'subsidiarity', 'positive obligations' and 'non-discrimination' as secondary constitutional principles in the context of the ECHR.

Chapter II

What does Religious Autonomy Entail?

2.1. Introduction

It was argued in the last chapter that first of all the principle of autonomy requires respect for the importance that religion or belief and its manifestation holds for an individual believer. It was stated that the idea of religious freedom entails the idea of autonomy in making and living out one's own choices. Individual autonomy or self-determination is reflected in the right to freedom of thought, conscience and religion (right to have a religion or belief). It includes the freedom to change one's religion or belief and the freedom for individual or collective expression, which is often most important for an individual believer.

This chapter will firstly examine the structure of Article 9 of the European Convention of Human Rights. It will explore how religious autonomy is protected under the ECHR by considering the structure of the Article and probing the problematic distinction between the private and public spheres as understood in the Convention practice. It will then discuss principles developed by the Court, most importantly neutrality, pluralism and effective protection of rights, and their connection to the principle of autonomy. It will be argued that the ECtHR should explicitly recognise the right to religious autonomy, because this provides a reference point to the Court in getting its focus right if it is to protect pluralism and respect people's choices regarding their identity.

2.2. The Sphere(s) of Individual Autonomy – the Structure of Freedom of Religion in the ECHR

Article 9 of the ECHR describes freedom of religion or belief in the following terms:

> 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 (Article 9 (1)).
>
> Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others (Article 9 (2)).[1]

Freedom of religion or belief in international human rights law and under the ECHR is generally perceived to include two interrelated elements: 1) freedom to adopt or have a religion or belief of one's own choice (*forum internum*), and 2) freedom to manifest that religion or belief (*forum externum*). Thus, the structure of Article 9 of the ECHR suggests that there is a divide between what a person believes and actions based on these beliefs. The structure used – 'to have' and 'to manifest' – also suggests that there is a private/public divide in understanding of religion or belief. This public/private divide is rooted in the liberal understanding of freedom of religion or belief. Neither of these divides is necessarily recognised by believers themselves. What is most valuable for a believer is usually the possibility of expressing one's convictions alone or in community. In the believer's mind there may not be any meaningful distinction between beliefs and action. From the religious point of view 'what good is it…if a man claims to have a faith,

[1] Article 9 ECHR.

but has no deeds?'[2] The acts of beliefs and religions may extend to the social and political spheres of public life. From a believer's point of view it may be difficult to draw a clear line between the internal and external sphere in regard to religion or conscience, as C. Evans notes: 'While there is no acknowledgement of this in the jurisprudence of the Court and Commission, the idea that beliefs and actions are separate and distinguishable notions is controversial.'[3]

While these beliefs/actions and public/private divides are echoed in the state neutrality debate regarding the role or place of religion in public sphere and politics[4], they also have implications in terms of how beliefs and religions are defined in legal practice. The current approach taken by the ECtHR indicates that while the Court tends to accept the autonomy of the individual in determining his beliefs in *forum internum*, it has taken upon itself to determine what a manifestation of religion or belief is, leaving little autonomy to individuals in this regard. It is argued in this thesis that there ought to be a right to religious autonomy consisting in the ability to determine, both at the individual and collective level, what one's belief is, and how to manifest it and the relative importance of doing so. For that purpose, a more subjective definition of beliefs and actions based on those beliefs is advanced in this thesis. Any restriction should not be dealt with by a limited (objective) definition, but through the application of Article 9 (2), justifiable interferences. The definition of a religion or belief and practical problems

---

[2] James 2: 14; See also discussion in R Ahdar, I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005) 125.

[3] C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2003) 74 (footnotes omitted). The entry into force of Protocol No 11 on 1 November 1998 altered the supervisory mechanism of the Convention. The Commission and the Court were replaced by the new permanent Court.

[4] This is comprehensively discussed, for example, in R Ahdar, I Leigh (n 2 above) 42-52 and by D Meyerson, 'Why Religion Belongs in the Private Sphere, not the Public Square' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP, Cambridge 2008) 44 - 71.

related to it will be discussed in detail in the next chapter.

The structure of Article 9 indicates that *forum internum* (the inner sphere – 'to have' and 'to change religion or belief') is absolute. It is not subjected to State interference. However, the freedom to manifest one's religion or belief is not absolute: it can be limited under Article 9 (2). Autonomy cannot be absolute in this sphere as external restrictions ultimately affect the scope of one's autonomy.[5] However, the scope of the *forum internum* seems to be defined very narrowly in the ECtHR's practice. The current approach taken by the Court, as pointed out by M. D. Evans, indicates that '…the forum internum is very much a sphere of inner personal conviction and offers little by way of substantive protection to those seeking to protect the lifestyle generated by their beliefs from the intrusion of the state.'[6] It almost has been understood in a very literal sense to as permitting 'little more (if anything) than the freedom to believe what one wishes'.[7] This approach has allowed States considerable scope to require individuals to act in ways that violate their religion or belief. C. Evans observes that:

> …the Court and Commission have tended to assume that the issue of interference in the *forum internum* is not in question, without proper consideration of the way in which being forced to act in a manner that is prohibited by a religion or belief may have implications for the fundamental internal freedom of religion or belief as well as for its manifestations.[8]

[5] Raz, for example, describes what is not being autonomous by using extreme examples of a man in the pit and the hounded woman. The man is unable to climb out; however, he has enough food to keep himself alive. The woman is sharing an island with a fierce carnivorous animal which perpetually hunts her. Both the man and the woman have limited choices, or one could argue no choices at all. Raz argues that neither of them enjoys an autonomous life. J Raz, *The Morality of Freedom* (OUP, Oxford 1988) 372-373. Taking it from here, it can be argued that the restrictions which fall short of this extreme also limit the autonomy of an individual or community.

[6] MD 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* (CUP, Cambridge 2008) 293.

[7] Ibid 292.

[8] C Evans (n 3 above) 102.

This in itself should not mean that the area of absolute freedom needs to be extended. However, the fact that restrictions on manifestation of religion or belief can affect the absolute sphere of inner beliefs illustrates the problematic distinction between beliefs and actions and the importance of the recognition of the right to religious autonomy. This right implies taking believers' views into account before embarking on an assessment of the justifiability of restrictions imposed by the State on manifestation of religion or belief. To put it more robustly, protecting *forum externum* is necessary to guarantee *forum internum*.

2.3. The Spheres of Collective Religious Autonomy

It was argued in the last chapter that collective religious autonomy is necessary since it may be intrinsically and instrumentally important for the individual believer. Another substantial question relating to spheres of religious autonomy is thus whether there is, in the case of collective autonomy, a *forum internum* corresponding to that of the individual, and similarly untouchable: such an untouchable *forum internum* would be a sphere which is completely (theoretically) shielded off from State interference.[9] It would be the sphere of collective autonomy which could not be limited under Article 9 (2) of the ECHR. The following will elaborate on the issue by firstly looking into the possibilities/justifications for determining the absolute sphere of collective religious autonomy and secondly discussing the practice of the ECHR. It needs to be aforementioned here that the idea of an absolute *forum internum* for collectivities is not supported in this thesis. However,

[9] It is acknowledged here that the term '*forum internum*' is not completely appropriate to use in the context of religious communities, as it refers to an individual's ability to have thought, conscience and religion. However, because the importance of collective autonomy is defined in this thesis through the importance it has for individuals forming the community, the use of this term is felt to be justified.

there should be a sphere of strongly protected collective autonomy subject to justifiable limits, because it is important for individual autonomy. Unfortunately, the case law of the ECHR shows that the practice of the ECHR is fluctuating when it comes to protecting collective religious autonomy even in the areas identified by the Court itself as deserving strong protection.

Boundaries between *forum internum* and *forum externum,* already difficult to define on an individual level, are even more muddled when we are talking about religious communities. One could argue that at the collective level everything constitutes a manifestation of religion or belief - whether by individuals collectively, or by an institution finding its legitimacy (in human rights terms) in the collective will/choice of individuals. If everything at the collective level constitutes a manifestation of religion or belief, then it should be subject to limitations under Article 9 (2). Nevertheless, there is a tendency to think that certain matters (such as teachings, offices, structure and membership) fall completely (or mostly) within the control of the religious community.[10] These are issues which touch upon core doctrinal matters of religious communities, so that interference in these matters would seem to affect not only collective religious autonomy, but also the autonomy of individual believers in *forum internum* and *forum externum*.

[10] This approach may have several explanations, one of which is the historical or traditional understanding of Church autonomy with its philosophical roots in natural law. From a slightly different angle, Professor van der Vyver, for example, has explored religious (church, institutional) autonomy from the perspective of sphere sovereignty. Sphere sovereignty stipulates that different social entities (incl. Church and State), 'do not derive their respective competencies from one another, but are in each instance endowed with an internal enclave of domestic powers that emanate from the typical structure of the social entity concerned and as conditioned by the particular function that constitutes the special destiny of that social entity'. JD van der Vyver, 'Sphere Sovereignty of Religious Institutions' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 655.

In this regard one should at least entertain the idea that there may be absolute freedom of communities in certain cases and in some areas. Determining what these areas are, is not, however, an easy matter. At first glance the easiest solution here would be to delineate a set of issues deemed to be internal matters of the community, and which may consequently be fully shielded from State interference: 'Render unto Caesar the things which are Caesar's, and unto God the things that are God's'.[11] This Biblical quotation has a multitude of interpretations and in modern-day terms links up to the idea of separation of State and Church. Locke, for example, esteemed it 'above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and other'.[12] However, McConnell has rightly pointed out that:

> The flaw in Locke's prescription is not with its desirability but with its congruence to reality...Even conceding, with Locke, that "the care of souls is not committed to the civil magistrate," there remain numerous and inevitable potential conflicts between the demands of civil society and demands of faith. Indeed, the very boundary between sacred and secular is a point of contention on which persons of various religious and secular persuasions will inevitably disagree.[13]

Somewhat similarly to Locke's approach Von Campenhausen, for example, argues from the German context that in practice today it is not difficult to determine (define) religious communities' (churches) own matters and matters of the State. This suggestion seems to rely on the premise that the boundaries are based on different functions of these institutions. These functions have fallen into place during the course of history and constitutional development.

---

[11] Matthew 22:21.

[12] J Locke, 'Essay on Toleration' in Vol 6 of The Works of John Locke (1823; photo reprint, 1963) 1, 9.

[13] MW McConnell, 'Believers as Equal Citizens' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 94.

> Today it is mostly agreed upon what the so called "own matters" are and where the line has to be drawn between state matters, church matters and such matters, in which both claim competence, the so called *common matters*.…Today the conviction prevails that "the drawing of the line" is not a question of arbitrariness, but has to be done in accordance with different functions of the state and the religious communities.[14]

While this may be true in regard to traditional religious communities, it does not necessarily apply to minority religions (or beliefs) or to relatively new religious movements.

Another approach is to identify possible fully-protected core areas by comparing practices in several democratic countries. The idea is that consolidated practice, if shared across a range of democratic countries, would be a criterion to establish what falls within *forum internum* (absolute sphere of competence) of religious communities. Durham, Jr., for example, has tried, to map out common core areas where collective autonomy is absolute or near absolute by comparing different European countries, the United States and OSCE.[15]

> Balancing of some kind, either express or tacit, may be inevitable at boundaries, but are there clear cases?...If there is a fairly well established domain of protected religious autonomy that is discernible in several credible democratic countries, it becomes very difficult to argue that state interference that imposes limitations on autonomy in such a domain is "necessary in a democratic society". It would accordingly appear to follow, under Article 9 (2) of the

---

[14] A Freiherr von Campenhausen, 'Church Autonomy in Germany' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 79.

[15] W Cole Durham Jr, 'The Right to Autonomy in Religious Affairs: A Comparative View' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 686-714. Durham's article is summarising contributions provided for the conference on church autonomy bringing together experts on state-church relations from Europe and the United States. As he points out himself, the map of core matters is incomplete and *ad hoc* following the information discerned from these contributions.

> European Convention, that it is not permissible to limit manifestation of religion, including institutional manifestations, in the area in question.[16]

Durham identifies, in fact three main areas of possibly exclusive matters of a religious community (the core areas or what in Germany is known as 'own affairs'):

(1) The inner domain of faith, doctrine and polity: for example, dogma, teaching, ecclesiastical polity (constitution and organisation), authority and legislation;

(2) The core ministry: for example, matters of worship, ritual, liturgy, inviolability of places of worship, confidential counselling, confession, education (teaching the faith), education and teaching of clergy, dissemination of beliefs to others, temporal care for members/others;

(3) The core administration: the right to appoint and dismiss religious/ministerial employees, employees/volunteers contributing to religious mission, secular employees/volunteers; church discipline; financial issues, etc.[17]

Durham points out that his map of core areas corresponds in many respects to the OSCE commitments recorded in the 1989 Vienna Concluding Document.[18] For example, principle 16 (4) of the document in question specifies that participating States have committed themselves to respect the rights of religious communities to establish and maintain places of worship, to organise themselves according to their own hierarchical and institutional structure, to select, appoint, and replace their personnel according to their own rules and needs, and to receive financial contributions. Principle 16 (6) also commits

---

[16] Ibid 693.

[17] Ibid 697.

[18] Ibid 694. See Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (adopted 17 Jan 1989). Similar commitments are recorded in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA Res 36/35.

States to protect the right to receive and dispense religious education individually or in association with others. It also urges States to allow religious ministers to be trained in appropriate schools and to respect the right of believers and communities to possess books or objects needed for religious practice (16 (8) and 16 (9)). Principle 16 (10) stresses the right of religious faiths, institutions and organisations to produce and import and disseminate religious publications and materials.[19] As Minnerath has observed ‘this document in effect constitutes a manifesto of corporate rights of religious organizations. The general right to self-government is implied and specified in considerable detail’[20]. It should be noted, however, that although the Vienna Concluding Document is an important political standard setting it is not a legally binding document.

From Durham’s discussion and synthesis of country reports it seems there is some common ground on collective religious autonomy in Europe. He points out that:

> There is no doubt that religious organizations enjoy strong protection in their core “inner domains”: with respect to matters of doctrine, ecclesiastical polity, and core ministry. Moreover, a variety of constitutional and international commitments point toward assurance of broad autonomy protections in a range of practical areas critical to administration of religious organizations.[21]

Durham, however, does not *expressis verbis* conclude anything definitive on absolute autonomy in some areas of communal religious activity which could emerge as a principle or norm at the European level. He uses ‘strong protection’ and ‘broad autonomy protections’, but not ‘absolute protection’ to describe the situation in compared countries.

---

[19] Concluding Document of the Vienna Follow-up Meeting (n 18 above) Principle 16.

[20] R Minnerath, ‘The Right to Autonomy in Religious Affairs’ in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 311.

[21] W Cole Durham Jr (n 15 above) 714.

Durham further elaborates that the difficulty with any chart of core areas is that it necessarily oversimplifies. In reality many core religious activities radiate outward into adjacent non-core domains. For example, educational and charitable activities shade into arguably secular matters of education, social services and culture. Similarly, different countries disagree on the scope of exemptions that should be allowed to religious organisations.[22] It should be added that the question of autonomy not only arises in the context of the main religious body, but also in the context of all kinds of affiliated entities (like hospitals, schools, rehabilitation centres, publishing houses), which may enjoy different degrees of autonomy in different countries. Tradition, history, societal attitudes seem to affect the scope of autonomy attributed to communities. Moreover, there are various examples of restrictions on autonomy, even in these areas where there are strong international commitments.[23] Durham Jr., for example, points out restrictive laws and practices in Russia, Italy, Spain and even Belgium.[24] Consequently, it can be discerned from the above discussion that there is some common European consensus as to the areas of collective religious autonomy which should have broad/strong protection. However, the actual practice varies. There is no explicit consensus as to the absolute sphere of collective religious autonomy and even if this consensus may exist regarding Europe's traditional churches, it does not necessarily extend to minority religious communities.

The third approach to determine the absolute sphere of collective religious autonomy is based on the fact that collective religious autonomy is important for inner

---

[22] Ibid 694.

[23] Like the ones listed in the OSCE documents or in the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. However it has to be noted, like 1989 Vienna Concluding Document, the 1981 Declaration is a politically binding and not a legally binding document.

[24] W Cole Durham Jr (n 15 above) 696.

beliefs of individuals forming this community. Durham Jr., in one of his more recent accounts on religious association laws, points out that:

> …one can at least argue that matters of doctrine, beliefs about internal ecclesiastical structure, membership and discipline, a variety of other organizational matters, and possibly even beliefs about how donations should be made and administered, are all themselves matters of religious belief linked to the internal forum. The fact that these beliefs are shared by members of a religious community does not itself transmute them into limitable "manifestations" of belief. They are internal beliefs that are held in common by the community. Arguably, shared internal beliefs become limitable manifestations when they begin to have adverse effects for other parties. The collective feature of internal beliefs may help explain why states should respect religious autonomy by remaining neutral and avoiding intervention in matters of doctrine and religious polity; any other course inevitably involves inappropriate intrusion not only into internal religious affairs, but also into shared internal religious beliefs.[25]

From the perspective taken in this thesis, this approach seems to be most convincing. As Minnerath contends:

> …individual freedom of conscience for most is intimately tied to a community of belief, and if that community is not free to shape itself, the conscience of its individual believers is inevitably compromised. Religious authenticity, for both the individual and the community, cannot be fully achieved if communal autonomy is impaired.[26]

However, it is seen as questionable in this thesis that collectively shared inner belief is enough to argue for a pre-determined absolute sphere of competence of religious communities which is completely shielded off from State interference. From the human rights perspective deciding which (completely fixed) sets of issues fall under the exclusive competences of religious communities' risks coming into conflict with

---

[25] W Cole Durham Jr, 'Religious Association Laws' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 360. Durham rightly points out that the precise outer boundaries of the non-derogable *forum internum* have never been precisely demarcated.

[26] R Minnarath (n 20 above) 293.

individual rights (for example, those listed in the Convention), and would thus not be desirable. Religious liberty is just one right among several strongly advocated in liberal democratic states, especially freedom of speech, privacy and equality. Nevertheless, the fact of collectively shared inner beliefs highlights that it is not appropriate for the Court to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed communally ('due respect to religious communities' self-understanding'). In cases of conflict between individual rights and collective autonomy, the Court needs to carry out the careful balancing of different interests in specific factual circumstances giving due respect to *both* individual and collective religious autonomy. The resolution of the conflict between an individual and community will be discussed in the last chapter of this thesis. The debate in this regard is not between absence of collective autonomy and absolute collective autonomy but about appropriate limits to religious autonomy.

As to the practice of the ECtHR, it should be recognised that there are certain areas where collective religious autonomy seems to have gained strong (but not absolute) protection. Minnerath, highlights two of these: access to legal entity status and rejection of attempts by States to intervene in internal religious disputes. As regards the first area, Minnerath observes that: 'the Court has recognised the importance of a crucial threshold condition for autonomy by recognising the right of religious organisations to acquire legal entity status'.[27] In a series of cases under Article 11 (freedom of association) and under Article 9, the Court has stressed the importance of this right. The close synergy between these Articles is now well established.[28] The ECtHR has clearly recognised that the

---

[27] Ibid 311; *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 13*; The Holy Synod of the Bulgarian Orthodox Church and Others v Bulgaria* (App nos 421/03; 35677/04) ECHR 22 May 2007.

[28] MD Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Martinus Nijhoff Publishers, Leiden 2009) 31.

individual is enriched by association. The European Court of Human Rights 1998 decisions in *United Communist Party of Turkey v Turkey*[29] and *Sidiropoulos and Others v Greece*[30], are landmarks in freedom of association case law that have significant implications for the law of religious associations. In the case of *Sidiropoulos and Others*, the Court stated that the right to form an association is an inherent part of the right to freedom of association and that citizens should be able to form a legal entity in order to act collectively in fields of mutual interest.[31] The right to form an association is an inherent part of the right set forth in Article 11 of the Convention. In the case of the *Metropolitan Church of Bessarabia* the Court concluded that where the organization of the religious community is at issue, a refusal to recognize it also constitutes interference with the applicants' right to freedom of religion under Article 9 of the Convention.[32] The Court emphasised that the individual right to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. 'Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.'[33]

Obtaining legal personality/registration of a religious community can be seen as instrumentally important for individual believers to enjoy their freedom collectively.

---

[29] *United Communist Party of Turkey and Others v Turkey* (App no 19392/92) (1998) 26 EHRR 121.

[30] *Sidiropoulos and Others v Greece* (App no 26695/95) (1999) 27 EHRR 633.

[31] Ibid para 40.

[32] *Metropolitan Church of Bessarabia and Others v Moldova* (n 27 above) para 130.

[33] Ibid para 118; *Hasan and Chaush v Bulgaria* (App no 30985/96) (2000) 34 EHRR 55 para 62.

Without the possibility of organizing in a manner suitable for the religious community, religious autonomy be affected in both its individual and collective dimension.

The registration and obtaining of legal personality should not be considered to be a precondition to manifest one's religion or belief. For example, in the case of *Masaev v Moldova*[34] the Court stated that it did not accept the Government's argument that it was compatible with Article 9 and 11 of the Convention to sanction the individual members of an unregistered religious denomination for praying or otherwise manifesting their religious beliefs. 'To admit to the contrary would amount to the exclusion of minority religious beliefs which are not formally registered with the State and, consequently, would amount to admitting that a State can dictate what a person must believe.'[35] There are religious communities, which do not want to obtain legal personality.[36] However, these cases are rare and most of the problems with legal personality/registration are related to situations where States have been obstructing registration of religious communities.[37] Many religious communities prefer to obtain some sort of legal personality. This option is vital for everyday functioning of a religious community and for a meaningful and effective communal enjoyment of freedom of religion or belief. Ferrari points out that:

---

[34] *Masaev v Moldova* (App no 6303/05) ECHR 12 May 2009.

[35] Ibid para 26.

[36] Religious communities with or without legal personality are protected by the ECHR. In the admissibility case of the *Christian Association of Jehovah's Witnesses v Bulgaria* the commission stated that 'according to the commission's case-law non-governmental organisations include also religious associations without legal personality.' *Christian Association of Jehovah's Witnesses v Bulgaria* (App no 28626/95) (1998) 24 EHRR 52. This case ended with friendly settlement on 9 March 1998.

[37] See eg *Church of Scientology Moscow v Russia* (App no 18147/02) 46 EHRR 16; *The Moscow Branch of the Salvation Army v Russia* (App no 18147/02) 44 EHRR 46; *Canea Catholic Church v Greece* (App no 25528/94) (1999) 27 EHRR 521.

> As a rule, religious activities such as gathering for prayer etc. can be performed without the need for any legal organization: but…the inability to obtain legal personality can indirectly affect religious liberty when it prevents the religious community from owning or renting a place of worship, opening a bank account etc.[38]

Minnerath further argues that the second and 'deeper' level of protection of religious autonomy is evident in cases which have overturned States' efforts to intervene or otherwise take sides in religious disputes.[39] In the case of *Serif v Greece,* for instance, the Court held that conviction of a Moslem cleric for 'usurping the functions of a known religion' violated Article 9.[40] The case emanated from the fact that the Greek government appointed a Mufti to Rodopi prefecture (an administrative unite in Greece). However, the relevant Muslim community elected a different person for that post. The elected Mufti, together with other Muslims, challenged the lawfulness of the appointment of Mufti by the State. Consequently, the Rodopi public prosecutor initiated criminal proceedings against the elected Mufti on grounds that he usurped the functions of a minister of a 'known religion' (the term used in Greek criminal law) and for having publicly worn the dress of such a minister without having the right to do so. The Court did not find it necessary to go into the details of the peculiarities of the domestic law, because the restriction was in substance incompatible with Article 9 of the Convention. The facts

[38] S Ferrari, 'Religious Communities as Legal Persons: An Introduction to the National Reports' in L Friender (ed), *Churches and Other Religious Organisations as Legal Persons* (Leuven, Peeters 2007) 5.

[39] *Serif v Greece* (n 27 above); *Metropolitan Church of Bessarabia and Others v Moldova* (n 27 above); *Hasan and Chaush v Bulgaria* (n 33 above).

[40] In Greece Muftis have certain public functions. They have competence to give legal effect to religious weddings and competence to adjudicate on certain family and inheritance matters between Muslims. The Government argued that as Muftis exercised an important judicial function they cannot be elected by people. However, in this case it was not established that the applicant actually carried out these public functions. He was convicted simply on the basis of delivering some religious messages and appearing in the clothes of a religious leader. *Serif v Greece* (n 27 above) para 51. The simple fact that a Mufti in Greece carries out some public functions is not seen here as a relevant argument to deny a Muslim community the right to select their own leaders. It is seen here as contrary to the spirit of Article 9. Whether there should be any additional requirements for persons carrying out some public functions is a completely different matter. The Court should have expressed its opinion about the domestic law, however, it seems to have shied away from doing so.

showed that the individual in question was duly selected by a group of Moslems independent from the Mufti officially appointed by the State. The Court stated that 'punishing a person for the mere fact that he acted as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society'. Minnerath concludes that the Court deemed it 'inappropriate for the government to intervene in the self-structuring or autonomy of religious groups'.[41] The Court held that unless there is a pressing social need the State is not permitted to interfere in a purely religious question that has been decided by a religious community, even when that community has become divided by opposite views on the issue and social tension might subsequently rise.[42] Thus, the Court has recognised that religious communities enjoy strong protection in some areas of communal manifestation of freedom of religion or belief. However, this autonomy is not absolute, but can be restricted when there is a pressing social need.

In addition to Minnerath's observations, strong protection of internal matters can be also seen in cases in which an individual has claimed that his or her rights have been infringed by the religious association itself. According to the case law of the ECtHR, internal dissent is usually protected by the right to leave the community.[43] The problematic aspects of the conflict between individual and collective rights will be

---

[41] R Minnerath (n 20 above) 312.

[42] *Serif v Greece* (n 27 above).

[43] *X v Denmark* (App no 7374/76) (1976) 5 DR 157. See also *E/GR v Austria* concerning the levying contributions from church members, *E/GR v Austria* (App no 9781/82) (1984) 37 DR 42; *Williamson v UK* concerning Church of England priest opposing the decision of the Church to ordain women, *Williamson v UK* (App no 00027008/95) 17 May 1995; and *Karlsson v Sweden* in which the applicant priest's views on the priesthood of women were incompatible with the view generally held by the Church. In consequence, the Church was not obliged to accept the applicants candidacy for a post of vicar, *Karlsson v Sweden* (App no 12356/86) (1988) 57 DR 172; *Rommelfanger v the Federal Republic of Germany* (App no 12242/86) (1989) 62 DR 151.

discussed in the last chapter.

There are several cases, on the other hand, in which the Court has not recognised collective religious autonomy. For example, State interference into doctrinal matters (which could be considered as needing strong protection), has been considered to be justified in the case where the State refused to grant approval necessary for access to slaughterhouses with a view to performing ritual slaughter in accordance with the ultra-orthodox religious prescriptions.[44] In this case the Court ignored the collective religious autonomy of the Jewish community involved. This case will be analysed in detail in chapter four of this thesis. The core administration issues[45] have received fluctuating degrees of protection as well. The appointment of ministers had seemed to be within (almost exclusive) autonomy of religious communities until the case of *El Majjaoui and Stichting Touba Moskee v the Netherlands* in which a work permit was refused to an imam of the Stichting Touba Moskee on the grounds that the job vacancy was not advertised and reported as prescribed by law to consider priority labour.[46] The Court found that the fact that the religious organisation had to comply with certain requirements before it was able to employ the applicant did not as such raise an issue under Article 9. It appears that in the Court's view the restrictions on appointment of an imam do not necessarily involve autonomy of a religious community. The Court seems to have confused Article 9 (1) and 9 (2) in this case. Effectively, it ignored the autonomy of a religious community in regard to the importance of appointing a particular religious

---

[44] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 Jun 2000.

[45] Like the ones described by Durham. W Cole Durham Jr (n 15 above) 697.

[46] *Lamaiz El Majjaoui and Stichting Touba Moskee v the Netherlands* (App no 25525/03) ECHR 20 Dec 2007.

leader. Whether restrictions on appointment of religious leaders under Article 9 (2) could be justified in certain circumstances is a completely different matter. The case was referred to the Grand Chamber. In 2006 the applicant foundation lodged another application for a work permit in the Netherlands, which was successful. On these grounds the Government submitted that the applicant could no longer be considered a 'victim' for the purposes of the Convention. The case was struck off the list of cases by the Grand Chamber. Three dissenting judges expressed serious doubts that issuing the work permit to Mr. El Majjaoui was enough to conclude that this was adequate and sufficient to remedy or resolve the initial complaint of the applicant foundation. In their opinion the case should not have been considered solely as one involving the admission of a foreign national to the domestic labour market.[47] They went further to explain that:

> In certain circumstances a measure which results in a religious community being prevented from appointing the minister of religion of its choice may constitute an interference with that community's rights under Article 9, even if the minister concerned is a foreign national.[48]

Thus, there are areas of collective religious autonomy which have obtained strong protection by the European Court of Human Rights. However, there are inconsistencies in the case law, which do not make it possible to assert with full confidence what the position of the ECtHR is. The inconsistency in the Court's case law demonstrates that there is a fluctuating degree of protection in areas where religious communities could enjoy broad autonomy according to the lists developed, for example, by the OSCE. There is no explicit reference to absolute sphere of freedom of religious communities.

---

[47] The majority of the Court was drawing on cases like *Öz v Germany* (App no 32168/96) ECommHR 3 Dec 1996 *and Sisojeva and Others v Latvia* (App no 60654/00) ECHR 15 Jan 2007.

[48] Joint Dissenting Opinion of Judges Zupančič, Zagrebelsky and Myjer, *Lamaiz El Majjaoui and Stichting Touba Moskee v Netherlands* (n 46 above).

To conclude on spheres of autonomy: although the distinction between *forum internum* and *forum externum* is problematic, it is valuable as a reminder that there are areas of individual autonomy, which need to be absolute or deserve higher protection from State interference in order for freedom to be meaningful. Moreover, there are areas of communal religious manifestation which deserve broad autonomy (subject to justifiable limits), especially taking into account that this is important for the protection of individual religious autonomy both in *forum internum* and *forum externum*. The ECtHR should give serious regard to communities' and individual's self-understanding (self – determination) of their beliefs and actions motivated by them. This practice has been largely missing in the ECtHR, especially concerning individual freedom. Thus in order for the right of religious autonomy to be meaningful, the ECtHR ought to take into account what individuals or communities have to say about their beliefs (especially when dealing with unknown or minor religions or beliefs). The main problem seems to be that the ECHR has not *expressis verbis* recognised the *right* to individual religious autonomy. Explicitly recognising this right is important in order to clarify values what Article 9 protects.

2.4. Neutrality, Pluralism and Autonomy

As well as identifying the internal and external spheres of individual and collective autonomy, it is necessary to consider the links between the principles of pluralism and neutrality and that of autonomy. These principles have been often referred to by the ECtHR in cases dealing with freedom of religion or belief, hence the importance of discussing them in the context of autonomy. It is argued below that these principles ought to be seen as advancing the idea of the right to religious autonomy. However, the way the Court has utilised the principle of neutrality in recent case law appears to indicate a dangerous shift - losing focus on the individual - in the understanding of freedom of religion or belief. It is evident in the case law which deals with manifestations of Islamic religion. However, it is also evident in the Court's practice which seems to respond to nostalgia for ethno-cultural unity and to the fear that Europe is losing its values, soul, and coherence due to individualism or immigrant minorities bringing in traditions somewhat alien in Europe. This is a shift which is understood here not to be in compliance with the idea of human rights and personal autonomy. This shift makes it specifically important to pursue the right to religious autonomy. The following will develop this argument and exemplifies it with the recent and vehemently debated case of *Lautsi v Italy* (the *Crucifix case*)[49]. Firstly, however, it is necessary to explore the meaning of the principles of pluralism and neutrality in theory and in the practice of the ECtHR and reflect on the complexities which arise from the fact of diversity of State and Church relationships in Europe.

The ECtHR has repeatedly stated that religious pluralism is one of the cornerstones of a democratic society. The idea of religious pluralism was expressed in the often-cited *Kokkinakis* case. The Court stated that pluralism of religious or moral ideas of individual's is indissociable from a democratic society.[50] In the case of *The Moscow Branch of the Salvation Army* the Court stated that besides political parties and other associations, associations formed for the purposes of proclaiming or teaching religion are important for the proper functioning of democracy. It went further to explain that:

[49] *Lautsi v Italy* (App no 30814/06) ECHR 18 Mar 2011.

[50] *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397 para 31.

> Pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.[51]

A number of points can be made on the basis of the above statements from the ECtHR practice on pluralism. Firstly, the principle of pluralism requires that not only religious beliefs but also other beliefs be recognised and protected. The *Kokkinakis* case seems to imply that the distinction between religious and non-religious beliefs is not important in terms of Article 9 of the ECHR (this is a point of contention, however, and will be discussed in the next chapter). Secondly, pluralism is viewed as arising from the genuine recognition of diversity of associations with various beliefs. Thus not just diversity of individual beliefs, but also diversity of associations and communities with various beliefs are important from the point of view of the principle of pluralism. Thirdly, the ECtHR clearly links the principle of pluralism to democracy. Pluralism seems to be an obligatory element of democracy, which is the only political model considered compatible with the Convention.[52] In other words, there can be no democracy without pluralism.[53]

---

[51] *The Moscow Branch of the Salvation Army v Russia* (n 37 above) para 61. See also *Supreme Holy Council of the Muslim Community v Bulgaria* (App no 39023/97) (2005) 41 EHRR 3 para 93; *Gorzelik and Others v Poland* (App no 44158/98) ECHR 17 Feb 2004 para 92.

[52] *Barankevich v Russia* (App no 10519/03) ECHR 26 Jul 2007; *The Moscow Branch of the Salvation Army v Russia* (n 37 above) para 60; *Christian Democratic Peoples Party v Moldova* (App no 28793/02) ECHR 14 Feb 2006 paras 62-63.

[53] *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37 EHRR 1 para 44.

From the above it could be concluded that diversity and pluralism are good and enriching for a democratic society. It is argued here that the fundamental right to freedom of religion or belief would not have much content to it if diversity of beliefs were not accepted. Raz, for example, has argued that 'to be autonomous a person must not only be given a choice but he must be given an adequate range of choices'[54]. He also argues that 'valuing autonomy leads to the endorsement of moral pluralism'[55]. It should be pointed out that the precondition for autonomy is respect of diversity of religions and beliefs. State neutrality is also a precondition for pluralism.

One way of looking at neutrality in political theory is to view it as a State maintaining a neutral stance towards various ideals of the good life. In the context of freedom of religion or belief this means that a State does not favour one religion or belief over another, and does not put forward policies which advance the ideals of some citizens and hinder others. In Raz's words, '[s]uch a doctrine is a doctrine of restraint.'[56] This also seems to imply that the State should keep an equal distance from all religions and beliefs.

However, the social and political reality of Europe provides a different picture. The Council of Europe has forty seven member states.[57] There is a multitude of different State and Church relationships in Europe. For example, there are States with established churches, and States with some religious communities enjoying the status of recognised

---

[54] J Raz (n 5 above) 373.

[55] Ibid 399.

[56] Ibid 110.

[57] Council of Europe <http://www.coe.int/T/e/com/about_coe/member_states/default.asp> accessed 01 Aug 2009.

churches.[58] Some States include secularism as one of their fundamental constitutional values.[59] Many European countries have multi-tiered and/or co-operational systems for religious communities with different rights and different degrees of autonomy.[60] Traditional religious communities still play a significant role in public life in many countries. There are no completely egalitarian relationships between State and all religious or belief communities. Van der Vyver puts it even more strongly, stating that: '…institutionalized denominational favouritism is commonplace in Europe.'[61]

It needs to be emphasised that the ECHR does not require separation of State and Church, as, in the case of disestablishment in the United States, or *laïcité* (secularity) in France. As Martínes Torrón points out, the ECHR aims at providing adequate guarantees to freedom of religion or belief and not at establishing uniform criteria for church-state relations in the Council of Europe member states.[62] One of the arguments in support of this position is that most of the State and Church relationships in the constitutional

---

[58] The Roman Catholic Church is an established church, or is afforded special constitutional recognition in Liechtenstein (Liechtenstein Constitution 1921, Art 37), Malta (Republic of Malta Constitution 1964, Art 2) and Monaco (Principality of Monaco Constitution 1962, Art 9). The Evangelical Lutheran Church is an established church in Denmark (Kingdom of Denmark Constitution 1953, Sec 4), Iceland (Iceland Constitution 1944, Art 62) and Norway (Kingdom of Norway Constitution 1814, Art 2). The Eastern Orthodox Church of Christ enjoys the status of the prevailing religion in Greece (Greece Constitution 1975, Art 3) and status of traditional religion of Bulgaria (Republic of Bulgaria Constitution 1991, Art 13(3)). The Church of England is the established church in England and the Presbyterian Church enjoys the same status in Scotland. JD van der Vyver, 'Freedom of Religion or Belief and Other Human Rights' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, the Netherlands 2004) 105-106.

[59] For example, the constitution of Turkey includes in Article 2 a description of Turkey as a democratic, secular and social state and Article 4 makes these basic principles irrevocable. Turkish Constitution (Law No 2709).

[60] For example, Austria, Germany and Lithuania. See G Robbers (ed), *State and Church in the European Union* (2th edn Nomos, Baden-Baden 2005).

[61] JD van der Vyver (n 58 above) 105.

[62] J Martínes Torrón, 'Religious Liberty in European Jurisprudence' in M Hill (ed), *Religious Liberty & Human Rights* (University of Wales Press, Cardiff 2002) 106.

framework of member states predate the Convention. Evans and Thomas, for example, argue that: 'The fact that establishment existed in many member states at the time of the drafting of the ECHR is good evidence that Article 9 should not be interpreted as an absolute prohibition on establishment.'[63] They point out that if the ECHR had prohibited establishment, then it is quite possible that significant states (including Norway, Sweden and the United Kingdom) would not have ratified it or would have included reservations in their acceptance.[64] The ECtHR itself has stated that:

> A State Church system cannot in itself be considered to violate Article 9 (Art. 9) of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy Article 9 (Art. 9), include specific safeguards for the individual's freedom of religion.[65]

Evans and Thomas argue that one reason why Article 9 does not prohibit establishment is that the Court is not convinced that all forms of establishment are incompatible with the ECHR. 'A country such as the United Kingdom, it might be argued, has a great deal of religious freedom and religious tolerance – more than many secular countries – despite its established church.'[66] Thus, neutrality in the practice of the ECtHR does not require institutional separation of State and Church as some would assume. In fact effective protection of rights is not necessarily dependent on a particular model of the relationship between State and religious communities' holding (constitutional wording) in a particular European country.

---

[63] C Evans, CA Thomas, 'Church and State in the European Court of Human Rights' (2006) 3 Brigham Young U L Rev 699, 706. They also point out that the text of the ECHR does not take an explicit position on establishment.

[64] Ibid.

[65] *Darby v Sweden* (App no 11581/85) (1991) 13 EHRR 774 para 45.

[66] C Evans, CA Thomas (n 63 above) 707.

The State and Church (religious communities) relationships are typically (roughly) categorised into three main models: (1) systems of established churches, (2) systems of co-operation, and (3) systems of separation of Church and State. As Durham Jr. points out, there is considerable disagreement about the exact configuration of relationships between Church and State that maximizes religious liberty.[67] He illustrates the complexities of the clear-cut categorizations of the relationships, which depend to a great deal on how these relationships are carried out in practice. For example, there is no straightforward correlation between non-identification (separation) regimes and religious liberty. In its rigid forms it may even drift to hostility towards religion. The constitutional framework in Soviet countries can serve as an example. However, '[s]ecularist insistence in other countries that religion be confined to the ever-diminishing "private sphere", though typically less extreme, can have similar results in marginalizing religious life'.[68] Durham Jr. concludes quite rightly, that historical experience suggests that maximal religious liberty tends to be achieved when church-state identification is in the accommodation or non-hostile separation mode.[69] He points out that substantial religious liberty can also exist in cooperationist or endorsed church regimes, 'at least where genuine religious equality is present'.[70]

---

[67] W Cole Durham Jr, 'Perspectives on Religious Liberty: A Comparative Framework' in *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Publishers, the Hague 1996) 15-25.

[68] Ibid 19. Torrón terms it 'secular intolerance'. He points out that primary justifications put forward for States to be positively secular are: (1) historical factors (eg France), (2) preservation of reciprocal autonomy of the State and the churches (eg US) and claims that secularism is important to keep the State free from religious intolerance (eg Trukey). 'In any event, the experience shows that these states frequently adopt aggressive secularism and endeavour to remove any actual reference to religious beliefs and practice from public life. Secularism then becomes a sort of official religion.' JM Torrón, 'European Court of Human Rights and Religion' in R O'Dair, A Lewis (eds), *Law and Religion* (OUP, Oxford 2001) 203. See also FM Gedricks, 'Public Life and Hostility to Religion' (1992) 78 Virginia L Rev 671-696.

[69] W Cole Durham Jr (n 67 above) 24.

[70] Ibid.

Torfs in his account on State and Church relationships points out that Europe is characterized by a two-level model with regard to religious freedom guarantees. Level A guarantees religious freedom as such. Level B grants certain (additional) advantages and privileges to a limited number of religious groups.[71] He emphasises that level B presupposes the realisation of level A.[72] It needs to be added that advantages and disadvantages, respectively at level B and A can present a challenge regarding equality requirements. In similar lines Van Bijsterveld, for example, argues that although the ECHR presupposes existing national arrangements concerning religion and the law and contains no preference to any particular model of Church and State relationship, it nonetheless has a critical function with respect to existing national laws.[73] In other words, although traditional relationships between State and Church are not *per se* in conflict with the Convention, freedom of religion or belief need to be guaranteed for everybody.[74] Van Bijsterveld rightly contends: 'If national legal arrangements do not comply with the guarantee they cannot be upheld. The article provides a minimal safeguard. Indirectly, therefore, Article 9 can modify Church and state arrangements.'[75] It is argued here that

---

[71] R Torfs, 'Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities' (2007) 1 Religious Studies Rev 67-73.

[72] Ibid 67.

[73] SC van Bijsterveld, 'Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments' in Ahdar RJ (ed), *Law and Religion* (Ashgate, Aldershot 2000) 167.

[74] Van Bijsterveld does not mention principle of non-discrimination in her discussion of the framework provided by ECHR.

[75] SC van Bijsterveld (n 73 above) 167. Van Bijsterveld points out that existing Church-state relationships have been more overtly discussed in the context of the ICCPR rather than in the context of the ECHR. For example, the General Comment of the Committee of Human Rights states that: 'The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27 [guaranteeing freedom of religion and minority protection respectively], not in any discrimination against adherence of other religions or non-believers'. General Comment No 22 (Art 18) UN GAOR Hum Rts Comm (1993).

this critical function at level A ought to apply both to countries which endorse certain religions and to countries which include secularism and strict separation of State and Church as a value in their constitutional framework (secularism[76] is not an ideologically neutral commitment).

Torfs commenting on existing constitutional frameworks in Europe (the European model) concludes - especially regarding level B – that two clear trends can be identified: the criteria leading to material advantages for just some religious groups tend to become more objective (regarding justifications for privileges); and the general trend in State policy goes in the direction of extending advantages to an increasing number of churches and religious communities (levelling up). He also suggests that there is a third option where old religions lose part of their privileged position as, for example, witnessed in the disestablishment of the Church of Wales and of the Church of Sweden.[77] He concludes that leveling up turns out to be both the more sympathetic and the politically more feasible approach.[78] The trend towards levelling up can to some degree be witnessed in the practice of the ECtHR as well, for example, in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria,*[79] which concerned discrimination against

---

[76] The clear distinction between secularism as a constitutional concept and secularisation as social phenomenon is kept here. Secularism as a constitutional concept in itself (alone) is not an absolute guarantee for religious liberty and autonomy. Secularisation as a social phenomenon may even inhibit religious freedom: as noted in the previous chapter, in pluralistic and increasingly secular societies, the value and self-evidence of one's religion is more difficult to argue. However, it should be acknowledged that it is not certain that secularisation is happening. There is new interest in alternative or individualized spiritual manifestations. There is also new interest in the spiritual roots of one's identity caused by the polarisation which happened after 9/11.

[77] R Torfs (n 71 above) 72-73.

[78] Ibid 73.

[79] *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (App no 40825/98) ECHR 31 July 2008.

Jehovah's Witnesses because they could not obtain the status of a religious society in public law. The case will be discussed in the fourth chapter.[80] Tulekens contends:

> [P]ublic authorities are under no obligation to provide an identical legal status to each community. Nevertheless, the Court will control with severity the conformity with the Convention of advantages granted exclusively to one religious community. Any advantage conferred to a religious community to the exclusion of the others must rest on a legitimate justification and remain proportionate.[81]

Article 9 and principles underpinning its interpretation (including neutrality and non-discrimination) can thus be seen as constituting at least a challenge to existing relationships between State and religions. With this observation in mind, let us move on to examine some of the principal statements the European Court of Human Rights has made about the principle of neutrality.

The European Court of Human Rights has repeatedly emphasised the State's role as the neutral and impartial organiser of the exercising of various religions, faiths and beliefs and has pointed out that this role is conducive to public order, harmony and tolerance in a democratic society. In other words, rather than simply using neutrality to describe a specific relationship between State and religion it has emphasised that the State has a duty to remain neutral and impartial in relation to various religions and beliefs, because such a stance is important in order to preserve pluralism and the proper functioning of democracy.[82] As the ECtHR does not require institutional separation of

---

[80] See Ch IV at 177.

[81] F Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism' (2009) 30 Cardozo L Rev 2585 (footnotes omitted). See also *Canea Catholic Church v Greece* (n 37 above) and *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 44 above).

[82] *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8 para 107; *Manoussakis and Others v Greece* (App no 18748/91) (1996) 23 EHRR 387 para 47; *Hasan and Chaush v Bulgaria* (n 33 above) para 78; *Refah Partisi (The Welfare Party) and Others v Turkey* (n 53 above).

church and State this probably means that as long as freedom of religion is protected at level A, there is no infringement of the neutrality principle. However, neutrality in combination with the requirement of substantive equality may have implications for both level A and level B.

This thesis is not distinguishing between neutrality and impartiality, but instead is developing a concept of substantive neutrality. It is a myth that States (or even international Courts) are, or can be, ideologically neutral. As Fredman has put it '…the illusion of neutrality disguises particular value commitments. Autonomy and individualism are themselves value commitments…'.[83] Along similar lines, it can be suggested that the principle of neutrality ought not to be morally sterile. Neutrality ought to be a principle which protects individual autonomy both in its individual and collective dimension. In other words, by placing focus on autonomy, neutrality in the context of the ECHR ought to be cultivated as substantive neutrality as opposed to formal neutrality.[84] As Trigg has highlighted:

> Any state has to make judgements about what is conducive to the public good. The need for the law to be impartial is itself a basic moral demand. Any government, interested in anything beyond the blind exercise of power, has to have a moral vision, and this has to come from somewhere. The demand for individual freedom is itself a basic moral requirement, and so democracy itself can only flourish in a moral context. So far from democracy requiring pluralism of belief, and official neutrality to different beliefs, it has to be carefully nourished. A morally sterile environment is likely to destroy it.[85]

The Court has also elaborated on what neutrality means in practice. It has stated

[83] S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford 2008) 20.

[84] This idea will be explored further in the next sub-chapter.

[85] R Trigg, *Religion in Public Life: Must Faith Be Privatized?* (OUP, Oxford 2007) 147.

that a State's duty of neutrality and impartiality is incompatible with any power on its part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[86] Here the Court seems to be coming out quite strongly in favour of the autonomy of religious individuals or communities. It appears to be recognising an individual's or community's right to determine their beliefs both in *forum internum* and *forum externum* ('the ways in which those beliefs are expressed'). Although the meaning of the principle of neutrality is imperfectly implemented by the ECtHR[87], the principle of neutrality should be seen as one of the basic guarantors for the autonomy as understood in this thesis. It can be argued that neutrality has been interpreted by the Court as an obligation to respect religious choices of citizens, whether or not they adapt to the widespread religious beliefs in the country, and whether such beliefs are popular or unpopular.[88] Although the Court's practice refers to the duty of States to refrain from assessing the legitimacy of religious beliefs or the ways in which those beliefs are expressed, the same neutrality and impartiality principle ought to apply to the European Court of Human Rights itself. Thus, the Court ideally ought to respect the choices of individuals and communities.

However, some recent cases indicate that the Court has taken a strong secularist stance (which some have termed 'fundamental secularism') towards religion by significantly restricting religion in the public sphere. This strong secularist stance has been most evident in cases where the Court has dealt with Islamic symbols (e.g.

---

[86] *Church of Scientology Moscow v Russia* (n 37 above) para 72; *Metropolitan Church of Bessarabia v Moldova* (n 32 above) para 123.

[87] The deficiencies are most explicit in the way the Court determines who has freedom of religion or belief under the ECHR. This will be discussed in the next chapter.

[88] J Martínes Torrón (n 62 above) 106-107.

headscarves), or other manifestations of that belief (e.g. via political parties).[89] In regard to these cases, Evans has rightly pointed out that there has been a shift in the practice of the European Court of Human Rights which has involved switching its focus away from the right of the individual and towards the role of the state in matters of religion. He has observed that:

> …human rights law regarding the freedom of religion in Europe today is developing in a fashion which is as likely to hinder as it is to assist the realisation of the goals of tolerance and religious pluralism which are said to be what it is seeking to achieve…While the traditional focus of human rights thinking has been to ensure that the interest of the individual are not engulfed by those of the state, there appears to be a danger that it is the interest of the state which are now assuming a clear priority as against the religious rights of individuals and communities – and this is not what human rights protections are meant to be about.[90]

Evans explains that by shifting its focus away from the right of the individual and towards the role of the state in matters of religion, the Court has endorsed a form of neutrality which is potentially at odds not only with aspects of religious liberty itself, but also with long-established models of church-state relations.[91] He admits that at one level this approach is benign since it is still built on ideas of ensuring respect, pluralism and tolerance which according to *Kokkinakis* and subsequent cases remains the overriding imperative. Evans concludes, however, that:

> …the European Human Rights Court is not itself acting in an even-handed fashion since it appears to be embracing a form of 'secular fundamentalism' which is

[89] *Leyla Sahin v Turkey* (n 82 above); *Refah Partisi (The Welfare Party) and Others v Turkey* (n 53 above).

[90] MD Evans (n 6 above) 291, 315. From a slightly different angle, Ferrari adds to this point, that the security issues raised by September 11 increased this tendency. S Ferrari, 'The Italian Pattern of Law and Religion Relations: Catholicism as the Italian Civil Religion' in *Convictions Philosophiques et Religieuses et Droits Positifs*, *Textes Preséntés Au Colloque International de Moncton 24-27 Août 2008* (Bruxelles 2010) 406.

[91] MD Evans (n 6 above) 291.

> incompatible with its self-professed role as the overseer of the state as the 'neutral and impartial organiser' of the system of beliefs within the state. This is deeply problematic for all religious believers since it is tantamount to elevating secularism in the name of pluralism, and achieving this by 'sanitising' public life of traces of the religious.[92]

From a different perspective Thorson Plesner similarly suggests that the practice of the ECtHR is often built on 'secular fundamentalism' or 'fundamentalist secularism'. She distinguishes between liberal secularism and fundamental secularism, both of which have been followed by the ECtHR. She explains that both liberal and fundamentalist notions of secularism imply that religion is a private issue, but in two different ways. Liberal secularism does not prohibit individual manifestation of religion or belief in the public sphere or in public institutions. Although it presupposes a certain separation of the competence of the public authorities and the competence of religious institutions, the separation does not exclude religious manifestations in the public realm.[93] Article 9 itself sets forth the freedom, either individually or in community with others, and *in public* or private, to manifest one's religion or belief. Fundamental secularism, on the other hand, assumes that religion is a private issue and religious manifestation should be kept within the realm of private areas.

> The "fundamentalist" aspect of this approach lies in the fact that it imposes a secularist way of life on all individuals when they enter the public domain, also on those whose religious identity calls for certain manifestations like wearing a particular jewel, clothing or other symbols. Making this notion of secularism a superior principle with which the state policies and definition of rights should be in compliance, may undermine human rights and hence conflict with the dual purpose that secularism is – or should be – aiming to secure in the fist place; the equal freedom and rights of all inhabitants to live according to their conceptions of

---

[92] Ibid 312.

[93] I Thorson Plesner, 'The European Court on Human Rights: Between Fundamentalist and Liberal Secularism' (Paper for the seminar on *The Islamic Headscarf Controversy and the Future of Freedom of Religion or Belief*) <http://www.strasbourgconference.org> accessed 30 Sept 2008.

"the good", and peaceful coexistence in a plural society.[94]

However, there is an equally worrying tendency in the practice of the European Court of Human Rights which is inspired by the largely Christian background of Europe. This tendency is represented in earlier cases like *Johnston and Others v Ireland* (concerning non-availability of a divorce)[95], *Otto-Preminger Institute v Austria* (concerning conflict between artistic expression and religious freedom)[96], *Pretty v UK* (concerning euthanasia)[97] and in the more recent case of *Lautsi v Italy* (concerning display of crucifix in public schools)[98]. To some degree this tendency contradicts the fundamental secularism in the Courts' practice. However, this tendency can also be seen as another side of the same coin. The Court seems to give certain preference to Christianity, which it sometimes equates with secularism or with universal or national cultural values.

The powers of traditional churches are still strong and especially in some Eastern European countries they have re-established their influence in State's affairs, with a consequent impact on the implementation of laws (including the ones regulating freedom of religion or belief). Alongside other scholars Sajó has argued that 'strong religion is back in the public square'[99]. Constitutional arrangements are facing new forms of

---

[94] Ibid 3.

[95] *Johnston and Others v Ireland* (App no 9697/82) (1986) 9 EHRR 203.

[96] *Otto-Preminger v Austria* (App no 13470/87) (1994) 19 EHRR 34.

[97] *Pretty v UK* (App no 2346/02) (2002) 35 EHRR 1.

[98] *Lautsi v Italy* (App no 30814/06) ECHR 18 Mar 2011.

[99] A Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 ICON 605. See also response to his article in L Zucca, 'The Crisis of the Secular State – A Reply to Professor Sajó' (2009) ICON 1-21 and Sajó's response to Zucca in 'The Crisis that was not there: Note on A reply' (2009) 7 ICON 515-528.

religiousness due to mass emigration, and because religion of both migrants and locals is changing to stronger versions that aspire to control or reclaim the public space.[100] He claims that strong religions are capable of undermining the legal arrangements that claim to be neutral and generally applicable to all. He contends that the requirement of public reason is under attack: strong religion denies the necessity to translate religiously inspired politics into public reasons which can be understood and are accessible to all citizens.[101] As to the ECtHR, it ought to be prepared at least to question its own judgements as being influenced by certain beliefs and world views (whether religious or fundamental secularist), but most importantly keep its focus and respect on individual autonomy.

After the terrorist attacks in the US (9/11) and other countries, there has been a tendency in public opinion, in politics, and in religious leadership to categorise religions into 'bad' (predominantly Islamic) and 'good' (predominantly Christian) religions.[102] 'Bad' religions need to be opposed and discriminated against because they impede integration and deny fundamental western values; 'good' religions have to be acknowledged and actively supported since they safeguard traditions, preserve national identities and support social cohesion.[103] Before 9/11 and even now, some so called 'new' religious movements[104] (Christian and non-Christian) were easily put into the category of 'bad' religions. This approach is most evident in the negative practices of some former

[100] A Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 ICON 605.

[101] Ibid 607.

[102] See eg M Ventura, 'Religious Pluralism and Human Rights in Europe: Equality in the Regulation of Religion' in MLP Loenen & JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerpen 2007) 125.

[103] Ibid.

[104] As noted in the introduction the expression 'new religious movements (NRM)' in this thesis does not mean necessarily absolute or world novelty, but rather novelty in Europe and it is not used as a pejorative term.

post-communist Eastern/Central-European countries. This 'good' and 'evil' ('white' and 'black') categorisation is now reflected in socio-political debate about the identity of different European countries or even of Europe at large[105], and in concerns about integration and social cohesion.[106] Van Bijsterveld highlights that '…we should be careful not to fall into the trap of only looking at religion and religious freedom in a negative or problematic perspective.'[107] She adds rightly that the real issue is whether it is religion and religious freedom which needs to be restricted or simply certain behaviour. She warns that using religion as a policy point for solving or regulating integration and preventing extremism is problematic. She contends that using religion as a policy mechanism is too broad in its focus and not strong enough to solve real problems. It is also problematic because it affects structural relations between religion and law and can thus have a wider negative effect on all religions, especially when equal treatment is at issue.[108] In consequence, it is argued here, that in the described socio-political atmosphere it is especially important not to lose focus on individual autonomy. As emphasised in the last chapter the centrepiece of human rights talk and human rights law today are the ideas of equal worth, dignity and autonomy of every human being. In this regard, a critical approach to the 'good-bad' polarisation after 9/11 is strongly needed.

---

[105] For example, Ferrari points out that in Europe the fear of terrorism joins up with the fear of immigration and this has spread the conviction that Europe is about to lose its identity and its soul. Churches are called upon to join the battle to preserve the European cultural heritage and provide civil religion, a set of values shared by a large segment of the European population and aggregating believers and non-believers. This was reflected in the attempt to insert a reference to Christianity in the preamble of the European Union Constitution. S Ferrari (n 90 above) 407-408.

[106] Economic concerns have added an additional dimension to this already complex situation.

[107] S Van Bijsterveld, 'Equal Treatment of Religions? An International and Comparative Perspective' in MLP Loenen & JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerpen 2007) 117.

[108] Ibid 116.

It is argued here that sanitizing public life from the religious, does not necessarily give - in practice - the desired results of social cohesion and integration. Sanitizing the public life of the religious carries the message of not respecting religion or belief and personal autonomy of the believing part of society. Van Bijsterveld argues that tailor made solutions are needed for state and religious communities' relationships. Solutions of this kind take into account not only specific religious needs and local socio-political realities, but also historic, traditional relationships of State and religious communities in different countries. While it seems to be a reasonable suggestion and offers a realistic/practical framework for solving problematic questions regarding religion, it can easily be abused by States in the framework of human rights protection under the ECHR (but also under other international instruments). Without the focus on religious autonomy there is a danger that simply invoking local realities will be enough to override individual freedoms. It also needs to be highlighted here that preserving traditions and cultural heritage (although a valid pursuit) and keeping to values of a democratic society (including autonomy and protection of minorities) are not necessarily one and the same thing. These two pursuits may sometimes clash with each other.

Some of the above controversies need to be illustrated with one of the recent and vehemently debated cases in the practice of the ECtHR. In March 2011 the Grand Chamber of the Court delivered its opinion in the case of *Lautsi v Italy* (hereinafter the *Crucifix Case*)[109] reversing its Chamber decision of November 2009.[110] This case happened to touch many sensitive issues regarding individual freedom and state neutrality. In this case Ms. Lautsi argued on behalf of herself and her two children, that

---

[109] *Lautsi v Italy* (n 49 above).

[110] *Lautsi v Italy* (App no 30814/06) ECHR 3 Nov 2009.

displaying the sign of the cross in a state-school the latter attended constituted interference incompatible with her right to ensure that her children receive education and teaching in conformity with her religious and philosophical convictions within the meaning of Article 2 of Protocol No. 1 ('right to education and right of parents to educate their children in conformity with their convictions'). She argued that in reality the crucifix, over and above all, had a religious connotation. In her view, the fact that the cross could be interpreted in other ways did not take away its main connotation, which was a religious one. Favouring one religion by the display of a symbol gave state-school pupils (including the applicant's children) the feeling that the State adhered to a particular religious belief. Ms. Lautsi argued that in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth. The applicant submitted that the situation which she complained about led to pressure being undeniably exerted on minors: the State gave an impression that it was estranged from those who did not share Christian beliefs. She further argued that the concept of secularism required the State to be neutral and keep an equal distance from all religions, as it should not be perceived as being closer to some citizens than to others. 'The State should guarantee all citizens freedom of conscience, beginning by providing a public education service equipped to foster personal autonomy and freedom of thought, in accordance with respect for the rights guaranteed by the Convention'.[111]

The Italian Government insisted that displaying the sign of the cross, did not undermine the secular foundations of the State (a principle which is enshrined in the Italian Constitutional framework) and the agreements with the Holy See. Nor was it the

[111] Ibid para 32.

sign of preference for one religion, since it was a reminder of a cultural tradition and humanist values shared by persons other than Christians. In short, the Government was of the opinion that displaying the sign of the cross did not breach the State's duty of impartiality and neutrality, because it was a cultural rather than a religious symbol. The government went further to state that democratic values today were rooted in a more distant past, the age of the evangelical message. The message of the cross in the Government's view was therefore a humanist message which could be read independently of its religious dimension and was composed of a set of principles and values (such as non-violence, equal dignity, justice and sharing, the primacy of the individual over the group, freedom of choice, separation of politics from religion and love of one's neighbour) forming the foundations of our democracies.[112]

In addition, the Government pointed out that the crucifix was a passive symbol and impact on individuals was not comparable to active conduct. The Government also emphasised the importance of the wide margin of appreciation which has been given to States by the Court in cases where there is no European consensus regarding religious symbols. It also pointed out that there is no European consensus as to the principle of the secular nature of the State. The Government urged the ECtHR not to give a predetermined substantive content to the principle of secularism, as that would run counter to the legitimate diversity of national approaches and lead to unforeseeable consequences. In the Grand Chamber the Government clarified this point by adding that the Court should not confuse neutrality (as an inclusive concept) with secularism (as an exclusive concept). 'States should refrain from promoting not only a particular religion but also atheism, "secularism" on the State's part being no less problematic than proselytising by the

[112] Ibid para 35.

State'.[113] In the Grand Chamber the Government also referred to the *Otto-Preminger Institute v Austria*[114] arguing that the Court should not treat the fact that the Catholic religion was that of a large majority of Italians as an aggravating factor. They urged the Court to acknowledge and protect traditions and prevailing popular feeling, and leave each State to maintain a balance between opposing interests. They also pointed out the rights of parents who wanted crucifixes to be kept in classrooms as representing the wish of the majority in Italy. 'Removing crucifixes from classrooms in such circumstances would amount to "abuse of a minority position".[115]

The third-party intervener – the Greek Helsinki Monitor ('GHM') contested the Government's argument that the crucifix was a cultural rather than a religious symbol during the Chamber deliberations. The GHM argued that the sign of the cross, and still more the crucifix, can only be considered religious symbols. The GHM also drew attention to the fact that seeing the cross as not a religious symbol conveying humanist values may be insulting to the Church. It added that other religions saw in the cross only a religious symbol. Further to the question about the breach of the neutrality and impartiality principle the GHM pointed out that:

> The Government's argument that the display of the crucifix required neither a salutation nor a sign of attention raised the question why in that case the crucifix was displayed. Display of such a symbol could be perceived as an indication that it was the object of institutional veneration.[116]

---

[113] *Lautsi v Italy* (n 49 above) para 35.

[114] *Otto-Preminger Institute v Austria* (n 96 above).

[115] *Lautsi v Italy* (n 49 above) para 40.

[116] *Lautsi v Italy* (n 110 above) para 46.

As to the specific situation (educational environment), the GHM quite rightly pointed out that according to the Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools developed by the council of experts on freedom of religion and belief of the Organization for Security and Cooperation in Europe (OSCE), the presence of such a symbol in a public school may constitute implicit teaching of a religion, for example by giving the impression that a particular religion is favoured vis-à-vis others.[117] It needs to be noted, however, that the OSCE/ODIHR advisory council of experts does not take a definite position on this matter. They acknowledge the complexity of the issue and note the fact that different countries have developed different policies with respect to religious symbols.[118] Nevertheless, they do make an overarching comment about the symbols. They emphasise that teachers and administrators should strive to act in ways that communicate respect and encourage inclusion of all in society at large.[119] Thus, while they are not taking a definite stance regarding religious symbols, they have formulated the principle for the educational environment.

The GHM further argued that if the Court could declare, in the case of *Folgerø and Others v Norway*[120], that participation in religious activities could influence children, then the display of religious symbols might do the same. In *Folgerø and Others v Norway* the applicant parents claimed that refusal to grant full exemption of their children from a compulsory subject in Christianity, Religion and Philosophy violated their rights under Article 2 Protocol No. 1. The Grand Chamber in *Folgerø* decided by nine votes to eight

---

[117] Ibid.

[118] *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (Warsaw, OSCE/ODIHR 2007) 74-75.

[119] Ibid 75.

[120] *Folgerø v Norway* (App no 15472/02) ECHR 29 Jun 2007.

that there was a violation. As to the general principles regarding education the Court emphasised the State's duty to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to peruse an aim of indoctrination that might be considered as not respecting parent's religious and philosophical convictions.[121] It should be emphasised that the Court pointed out that the fact that knowledge about Christianity represented a greater part of the curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot of its own be viewed as a departure from the above mentioned principles. However, in this case (*Folgerø and Others*), the Court found elements of indoctrination in the curriculum.[122] Further aspects of the case inclined the decision in favour of applicants. Although, Norway had provided an option for partial exemptions from parts of the curriculum, the Court considered that this particular system of opting out was subjecting parents to a heavy burden with the risk of undue exposure of their private life (Article 8) and beliefs (Article 9).[123]

In its judgement of November 2009 the Chamber unanimously held that there had been a violation of Article 2 of Protocol No 1 (right to education) taken together with Article 9 in the *Crucifix case*. The Court found that displaying a crucifix in public schools was contrary to the principle of neutrality and impartiality.[124] The Court considered that the compulsory display of a symbol of a particular faith in the exercising of public authority in relation to specific situations subject to governmental supervision,

---

[121] Ibid para 84 (h).

[122] Ibid para 93 and 94.

[123] Ibid para 98-100.

[124] *Lautsi v Italy* (n 110 above).

particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of school children to believe or not to believe. In the Chamber's view, displaying the crucifix infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercising of public authority, particularly in the field of education.[125] The Court reiterated its opinion already expressed in the case of *Folgerø v Norway* that in the context of teaching, neutrality should guarantee pluralism.[126]

This decision of the Chamber of the European Court of Human Rights triggered a strong political and public response. These responses can roughly be put into two camps: one requiring a wide margin of appreciation and respect to cultural diversities of European states, and the other protection of individual freedoms and strict neutrality in the context of education. In March 2010 the panel of five judges of the Grand Chamber accepted the referral request submitted by the Italian Government. Several third party interventions were allowed for the Grand Chamber hearing.[127] The hearing was held 30 June 2010. In March 2011 the Grand Chamber reversed the Chambers decision by fifteen votes to two, deciding that there has been no violation of Article 2 of Protocol No 1 and that no separate issue arises under Article 9 of the Convention. Similarly to the

---

125 Ibid para 57.

126 Ibid para 47 (e); *Folgerø v Norway* (n 120 above) para 84.

127 In accordance with article 36 (2) of the Convention, the President of the Court authorised the following third parties to present written observations: Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation and San-Marino; Jointly 33 members of the European Parliament; Greek Helsinki Monitor; Associazone nazionale de libero Pensiero; European Centre for Law and Justice; Eurojuris; jointly : International Commission of Jurists, Interights, Human Rights Watch; and jointly: Zentralkomitee des deutschen Katholiken, Semaines sociales de France, Associazioni critiane lavoratori italiani. Press Release Issued by the Registrar, Grand Chamber Hearing *Lautsi v Italy* 30 Jun 2010.

Chamber's judgement the Court decided unanimously that there is no cause to examine the complaint under Article 14.

It may seem that the Court has finally abandoned its fundamental secularist approach to religious symbols by taking a new open stance towards symbols in schools. However, the predominance of the principle of the wide margin of appreciation in this case leaves many questions unanswered, especially regarding minority symbols (for example, Islamic headscarves) and regarding rights of non-believers.

The Court stated that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The fact of great diversity between European states particularly in the sphere of cultural and historical development needed to be taken into account. The States enjoy a margin of appreciation regarding decisions made about the school environment and curriculum and the Court has a duty to respect decisions about the place they accord to religion provided those decisions do not lead to indoctrination.[128] In this regard the Court accepted the Government's argument that a crucifix on the wall is an essentially passive symbol, which does not have influence on pupils comparable to didactic speech or participation in religious activities. In respect to the influence on pupils it also made a distinction between the *Dahlab v Switzerland* case[129], which concerned the wearing of the Islamic headscarf by a teacher (considered by the Court to be a powerful external symbol) and the present case. However, the Grand Chamber did not provide convincing arguments as to the differences of these cases, especially considering that the *Dahlab* case lacked evidence

[128] *Lautsi v Italy* (n 49 above) para 69.

[129] *Dahlab v Switzerland* (App no 42393/98) 2001-V ECHR. The details of this case will be discussed in the Chapter IV.

and the court only assumed that the headscarf had a negative influence on pupils. In fact lack of evidence of the negative influence of the crucifix was only pointed out in the *Lautsi* case. However, what is clear from the Court's reasoning is that the doctrine of margin of appreciation played the decisive role in both cases. The Grand Chamber made it clear that it accords a wide margin of appreciation to States regarding regulation on religious symbols (upholding strict neutrality in Switzerland's public schools and tradition in Italy). In this regard it can also be argued that neutrality in the framework of the ECtHR has started to mean neutrality towards plurality of cultural and historic solutions in different member States, but not neutrality towards pluralism of ideas within a State. The shift from the focus on the individual to the role of the State is visible in this case.

As a side (or minor) argument in support of its findings the Court pointed out the specific situation in Italy where the school environment is open to other religions. Unfortunately it is not clear that the fact of openness emerges as a possible criterion for future cases on religious symbols at schools (or in other public places). As to scholarly discussion in this regard, for example, Ferrari points out that in an Italian context religious symbols are common and visible parts of everyday life. Further, no official or unofficial prohibition on entering a school with garments that clearly reveal a religious membership has been in force in Italy. He argues that to some degree the dominance of Catholic symbols has created a protective umbrella extended to all religious symbols.[130]

[130] S Ferrari, 'The Italian Pattern of Law and Religion Relations: Catholicism as the Italian Civil Religion' in *Convictions Philosophiques et Religieuses et Droits Positifs*, *Textes Preséntés Au Colloque International de Moncton 24-27 Août 2008* (Bruxelles 2010) 412. Some parallel to this can be seen in the Netherlands, where Muslim parents choose Christian (primarily Roman Catholic) schools when there is no Islamic school in the region. S Van Bijsterveld, 'Religion in Public Education' Paper given at the European Consortium for Church and State Research Conference on Religious Education, Trier 11-14 Nov 2010. It is possible that they feel more understood or protected in a religious environment rather than in a completely secular one.

Some authors have put it even more prominently: 'the cross in Italy's state schools is the main defender of the headscarves of Muslim pupils'.[131] As was highlighted above, in modern, pluralistic and increasingly secular societies, the value and self-evidence of one's religion is more difficult to argue. It is argued here that religion(s) being a natural and acceptably visible part of everyday life may contribute to the necessary protection.

The educational environment is for developing critical/analytical thought (fostering autonomy) and respect to various beliefs (religious or secular), including those of pupils and their parents. Perhaps this is the key to fostering the mutually respectful co-existence of various religions and beliefs. In that kind of environment some public endorsement of traditional religions important for the identity of the majority can be accepted. It is not necessary to prohibit or abandon traditional relationships between the State and religious communities (as noted above traditional relationships between State and Church are not *per se* in conflict with the Convention); however, room needs to be made to accommodate manifestations of different religions or beliefs. Ideally, the educational environment should make children feel comfortable when encountering different religious symbols and world views (religious or secular). Ignorance and non-exposure to different cultures and beliefs is believed here to pave the way to prejudice and hostility. Education is the key to the eradication of many problems related to religion. In this regard, the educational environment needs to have a strong emphasis on learning how to navigate in a pluralistic world, while remaining open minded and critical at the same time. Dialogue and respect are the keywords, which should characterise both the curriculum and the educational environment and act as a guarantee for individual autonomy. However, this should not be understood to mean that there ought to be an *absolute* right to display or wear religious

[131] A Ferrari, 'Religious Education in a Globalized Europe' in G Motzkin, Y Fisher (eds) *Religion and Democracy in Contemporary Europe* (London, Alliance Publ Trust, 2008) 119.

symbols (at school or any other public space). There may well be compelling factual circumstances and evidence, which justify restrictions in a particular case.

There is another layer to the *Lautsi* case however. It is true, that the Catholic Church in Italy has a relatively strong position: 'it is a "popular" Church that is something that still has an impact on civil society.'[132] It is important for many in Italy. However, as Ferrari highlights, while Catholicism provides a protective umbrella for other religions, non-Catholic religions have to accept its role as a 'gate-keeper' of the Italian identity. 'In other words, religious plurality can develop in Italy as long as it is confined within a cultural and ethical horizon defined by the Catholic tradition.'[133] He argues that governing religious plurality through Catholicism can only provide short-term solutions. In the long run, this project is not viable, as religious plurality/diversity inevitably implies cultural and ethical plurality as a social fact.[134]

Moreover, there is an attempt to develop Catholicism into Italian civil religion.[135] This idea was expressed by the Council of State (dealing with the appeal of the *Lautsi* case) stating, in principle, that the crucifix is the symbol of the Italian model of *laïcité.* Its meaning depends where it is situated: at schools it becomes a tool for educating students, independently of their religious beliefs, to the values of tolerance, mutual respect, dignity of the human being, human solidarity, non discrimination, etc. – values that are at the core

[132] S Ferrari (n 130 above) 418 (footnotes omitted).

[133] Ibid. Ferrari makes an interesting comparison with the French secular conception of civil religion to pronounce peculiarities of the Italian system. He points out one of the facets of civil religion, which is sacralization of secular concepts and symbols that become the axis around which civil society is organized. In France *laïcité* is a cluster of universal and abstract values (e.g. liberty, equality, tolerance) that every citizen must embrace independently from his or her origin, preferences or belongings. Ibid 414.

[134] Ibid 419.

[135] Ibid 413.

of the notion of *laïcité*.[136] Although, this take on the crucifix may seem perfectly acceptable, it is seen here as a reflection of the above discussed socio-political concerns (or fear) about the identity of different European countries or even of Europe at large, and in concerns about integration and social cohesion. Further, Ferrari points out that until recently support for the Catholic Church has been defended on democratic arguments, based on the fact that the majority of Italian citizens were members of the Church. However, 'in the "civil religion" perspective, the Catholic Church can claim public support because it constitutes a fundamental component of the Italian tradition.'[137] Its privileged position may become disconnected from popular will and in this environment the Church can claim State support as the custodian of Italian heritage.[138] Ferrari warns that this would be a step backwards in the direction of the old-fashioned confessional model of State and Church relationships.

On the basis of the aforementioned it can be argued that the message the European Court of Human Rights needs to deliver is not necessarily for a wide margin of appreciation but a requirement of respect for a variety of religions and beliefs. The symbol of the crucifix in classrooms can only be accepted as far as this requirement is fulfilled. In spite of the strong historic, social, but also political importance of traditional religions in different European countries, 'local identity' should be more accurately viewed as 'local identities'. As pointed out in the previous chapter, no European country can be called homogenous today. This is a social fact. Thus, if the crucifix is to stay in Italian public schools (and according to the Court it will), a strong message of respect to

---

[136] Ibid. See also Council of State, decision of February 13, 2006, no 556, <http://www.olir.it/reicerca/index.php?Form_Document=3517> accessed 25 Oct 2010.

[137] S Ferrari (n 130 above) 419.

[138] Ibid.

individual autonomy and dialogue needs to follow. This should also nicely enlighten the 'lost' soul or identity of Europe. The Court should not have based its decision on the wide margin of appreciation, but should have looked deeply into the wider context which affects the perception of different religious symbols in Europe today and specifically in Italy. It should have mainly based its decision on whether there is sufficient plurality and respect for other religious and non-religious children. In the absence of this respect and dialogue it should have held that Article 9 was violated.

2.5. The Principle of Effective Protection

As well as exploring the principles of pluralism and neutrality, it is necessary to consider the role of the principle of effective protection in regard to autonomy. The principle of effective protection is explicitly or implicitly present in many judgements of the ECtHR, including judgements on freedom of religion or belief. Van Dijk and van Hoof have observed that 'this means, first of all, that the Court is inclined to look beyond appearances and formalities, and to focus on the realities of the position of the individual.'[139] The ECtHR has emphasised numerous times that its mission is not to guarantee rights that are theoretical or illusory, but rights that are practical and effective.[140] However, it is not entirely clear what would qualify as an effective protection of freedom of religion or belief. Does it impose a duty on States just to refrain from interfering with the enjoyment of such freedom or does it require protection from third parties or even facilitation of religion or belief?

---

[139] P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998) 74.

[140] *Leila Şahin v Turkey* (n 82 above) para 136.

Freedom of religion can be considered as a classical negative right, which historically would have needed the negative duty of the State to respect and not interfere with the enjoyment of that right (hands off policy). Nevertheless, the interpretation of human rights instruments reveals that today freedom of religion is also a positive right, which requires States to commit to something more than just leaving religious individuals or groups alone. What States have to commit themselves to exactly is, however, debatable.

The divide between negative and positive rights is related to the categorisation of rights into civil and political rights and economic, social and cultural rights. Civil and political rights were meant to be negative rights, requiring States to refrain from interference into the enjoyment of individual liberties, and as such they are ideally implemented and immediately justiciable without any significant (financial) burden on the State. Economic, social and cultural rights on the other hand have been considered programmatic (aspirational, not justiciable) rights which set positive obligations on States to gradually achieve full realisation of these rights. This second generation of rights are often considered to be dependent on resources available. For example, Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) sets forth the requirement to take steps to the maximum of available resources to achieve progressively the full realisation of rights recognised in the Covenant.[141] Thus, there is an element of indeterminacy in these rights. However, this kind of distinction between negative and positive rights is not accurate and does not reflect the full complexity of human rights obligations today. Rights are not static and even if the dichotomy of rights had some use

[141] International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec 1966, entered into force 3 Jan 1976) 993 UNTS 3 (ICESCR) Art 2 (1).

before, it does not reflect tendencies in current case law. As mentioned before, classical negative rights, like freedom of religion or belief, are considered to impose positive obligations on States. Also economic, social and cultural rights have justiciable elements to them.[142] For example, the ECtHR has stated that whilst the Convention sets forth what essentially civil and political rights are, many of them have implications of a social or economic nature. The Court has noted that the mere fact that an interpretation of the Convention may extend into the sphere of social or economic rights should not be a decisive factor against such an interpretation: there is no water-tight division separating that sphere from the field covered by the Convention.[143] As Fredman has put it:

> …it is artificial to attempt to distinguish between rights according to the nature of their correlative duties. Instead, all rights can be seen to give rise to a range of duties, including both duties of restraint and positive duties. There is now some measure of recognition of this indivisibility of positive and negative duties.[144]

As an alternative to a dichotomy between negative and positive rights with correlative negative or positive duties, a tripartite approach – respect, protect and fulfil (promote or facilitate) – has been used to describe types of duties to which human rights give rise.[145] All these notions can be found in the various international human rights instruments.[146] The meaning of respect has been described above. The obligation to

---

[142] An interesting discussion on justiciability of economic, social and cultural rights is presented by Koch. See IE Koch 'The Justiciability of Individual Freedoms' (2003) 72 Nord J Intl L 3-39.

[143] *Airey v Ireland* (App no 6289/73) (1981) 3 EHRR 592 para 26.

[144] S Fredman (n 83 above) 65.

[145] P Alston, HJ Steiner, *International Human Rights in Context: Law, Politics, Morals* (2nd Edn OUP, Oxford 2000) 181-185.

[146] Eg ICESCR (n 141 above); European Social Charter (adopted 18 Oct 1961, entered into force 26 Feb 1965) 529 UNTS 89, ETS 35; European Social Charter (revised) (adopted 3 May 1996) ETS 163; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA Res 36/35; Convention on Elimination of All Forms of

protect requires measures by the State to prevent third parties from depriving individuals and groups of the enjoyment of their rights.[147] The obligation to fulfil, or facilitate, means the State must engage in activities (legislative, judicial, administrative, budgetary etc.) intended for full realisation of rights. Hence the right to freedom of religion or belief may attract three sets of obligations – respect, protect and fulfil. The duty to protect and fulfil are categories of positive duties.

As to the European Convention of Human Rights, the existence of positive obligations is a combination of different interrelated principles underlying the Convention. Firstly, there is the requirement in Article 1 that States should secure convention rights to all persons within their jurisdiction. Secondly, the Court has emphasised in its case law that 'it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.[148] Thirdly, Article 13 of the Convention fortifies the effective protection of rights even further by establishing that effective domestic remedies should be provided for arguable breaches of convention rights.[149] The principle of effective protection of rights could be said to be a common feature of all human rights treaties,

---

Discrimination against Women (adopted 19 Dec 1979, entered into force 3 Sept 1981) 1249 UNTS 13 (CEDAW).

[147] There is extensive case law, for example under articles 2, 3, 6, 8 and 11, where the Court has mentioned States' positive obligations to protect enjoyment of rights and freedoms. Eg *Gezici v Turkey* (App no 34594/94) ECHR 17 Sept 2005; *Pretty v UK* (n 97 above); *Airey v Ireland* (n 143 above); *Sarı and Çolak v Turkey* (App nos 42596/98, 42603/98) ECHR 04 Apr 2006; *Ignaccolo-Zenide v Romania* (App no 31679/96) ECHR 25 Jan 2000. The Court has stated that 'a genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11, nor with that of the Convention in general'. *Ouranio Toxo and Others v Greece* (App no 74989/01) ECHR 20 Oct 2005 para 37.

[148] *Leila Şahin v Turkey* (n 82 above) para 136.

[149] See also AR Mowbray, *Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford 2004) 5.

including UN treaties, for example, ICCPR.[150] The effectiveness principle has been relied upon many times in order to allow the European Commission of Human Rights or Court to make interpretations in which convention rights are not merely negative rights, but also positive rights which put positive obligations on States.[151] However, the Court has not provided an authoritative definition of positive obligations. Judge Martens in his dissenting opinion defined them as 'requiring members to…take action.'[152] Even if positive duties are not explicitly in the text of the Convention, they may accompany the purely negative duty of States to refrain from interfering in the enjoyment of Convention rights.[153]

The practice of the ECHR does not leave any doubt that the Court has to some extent recognised the positive obligations of States as regarding freedom of religion or belief. For example, in the case of *Otto-Preminger v Austria* the Court clarified the duty to protect stating that:

> …the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the

---

[150] In the General Comment No 18 to the ICCPR, the Human Rights Committee has emphasised that the principle of equality sometimes needs affirmative action in order to diminish or eliminate conditions which cause discrimination. This implies a positive duty of the State. General Comment No 18 (Art 26) UN GAOR Hum Rts Comm (1989).

[151] Eg *Belgian Linguistics Case* (App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1968) 1 EHRR 252.

[152] Dissenting opinion of Judge Martens, *Gül v Switzerland* (App no 23218/94) ECHR 19 Feb 1996; See also AR Mowbray (n 175 above) 1-6.

[153] The recognition of positive obligations may have helped the effectiveness of the Court itself. For example, the Court's desire to minimise the use of time consuming and expensive fact-finding missions had been achieved, in part, by imposing positive obligations on States to conduct effective investigations. Likewise, the courts effort to reduce the overwhelming number of cases has called upon putting positive obligations on states to provide an effective domestic remedy to deal with complaints of unreasonable delays. AR Mowbray (n 149 above) 222.

holders of those beliefs and doctrines.[154]

The Court denied freedom of speech to the applicant to show a film which ridiculed leading Christian figures. The Court decided that there was no breach of his rights under Article 10. The seizure and forfeiture of the film was considered necessary under Article 10 (2) to protect the religious feelings of the predominantly Catholic Province of Tyrol. The Court stated that in extreme cases the methods opposing religious beliefs can be such 'as to inhibit those who hold such beliefs from exercising their freedom to hold and express them'.[155]

Although the outcome of the case was controversial, it indicates a positive duty of the State, under Article 9, to protect persons from attacks by third parties. Similar reasoning was put forward in the case of *Wingrove v UK.*[156] In the case of *Leila Şahin v Turkey* the Court reiterated the *Kokkinakis* case, where the Court emphasised that it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of various groups and ensure that everyone's beliefs are respected. The Court added that this follows from paragraph 2 of Article 9, and the State's positive obligation under Article 1 of the Convention to secure for everyone within its jurisdiction the rights and freedoms defined in the Convention.[157]

There is also a category of cases in which the wording does not say anything about

---

[154] *Otto-Preminger v Austria* (n 96 above).

[155] Ibid para 47.

[156] *Wingrove v UK* (App no 17419/90) (1996) 24 EHRR 1. See also *Dubowska v Poland* (App no 33490/96) and *Skup v Poland* (App no 34055/96) (joined), 89-A ECnHR DR 159 (1997). The Commission acknowledged in these cases that the State could be under some positive obligation to protect freedom of religion or belief.

[157] *Leila Şahin v Turkey* (n 82 above) para 106.

positive obligations to protect, but it can be argued that this is implied. For example, in the case of *Larissis v Greece*[158] the Court found that the Greek authorities were justified in taking measures to protect the lower ranking airmen from improper pressure applied to them by the applicants in their attempt to promulgate their religious beliefs. In principle, this means putting an obligation on a State to protect individuals from improper proselytism. The interesting nuance here is that this obligation applies to the protection of individuals from religion or more precisely from improper manifestations of religion. It should not be forgotten that Article 9 also provides protection to non-religious beliefs and the unconcerned.

However, the positive duty to provide (facilitate) is perhaps the most controversial duty. Alexy points out that the idea of positive protection is hardly problematic when one is concerned with things like the protection from third parties. 'Problems arise in the case of entitlements such as state subsidies.'[159] First of all it should be noted that neither at the individual or collective level is there a clear or systematic approach to facilitation of religion or belief. Cases which could be said to deal with the positive duty to provide are very much tied to the specific circumstances of the case and do not necessarily allow broad generalisations on the Court's approach to these duties. However, there is a sign that in relation to individual freedom there a concept of positive duties to provide has begun to emerge when the issue involves discrimination on religious grounds or conscientious objection to military service.[160]

---

[158] *Larissis v Greece* (App no 140/1996/759/958-960) (1999) 27 EHRR 329.

[159] R Alexy, *A Theory of Constitutional Rights* (OUP, Oxford 2002) 149.

[160] *Thlimmenos v Greece* (App no 34369/97) (2001) 31 EHRR 411.

The case which needs to be discussed here in some detail is that of *Thlimmenos v Greece*[161]. It could be called a landmark case, developing an understanding of discrimination and exemptions from generally applicable laws in the context of Article 9 and 14 of the ECHR. However, its influence remains obscure.[162] This is true even when taking into account the development of the concept of indirect discrimination in the practice of the ECtHR.[163]

As to the facts of this case, Thlimmenos was an accountant who was refused a job on the basis of his previous criminal conviction. His conviction occurred due to his conscientious objection to military service. He claimed that he was discriminated against as the law excluding persons convicted of a serious crime from appointment to a charted accountant's post did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds. He invoked Article 14 in conjunction with Article 9.[164]

Under Greek law no person convicted of a serious crime can be appointed to civil service.[165] By the wording of it, this requirement was applied equally to all without exemptions. At first glance, this is a perfectly reasonable condition, if one disregards the

---

[161] Ibid.

[162] See eg recent cases of *El Morsli v France* (App no 15585/06) ECHR 4 Mar 2008, *Mann Singh v France* (App no 24479/07) 13 Nov 2008. As Roriver notes, it is striking that the issue of discrimination (specifically concerning religious symbols), when brought to the Court is usually undermined as the Court considers that 'no separate question' arose in this respect. I Rorive, 'Religious Symbols in the Public Space: in Search of a European Answer' (2009) 30: 6 Cardozo L Rev 2669, 2688.

[163] See *D H and Others v the Czech Republic* (App no 57325/00) (2008) 47 EHRR 3.

[164] *Thlimmenos v Greece* (n 160 above) para 33.

[165] Greek Civil Servants' Code Art 22 § 1.

fact that the ‘serious crime’ in this case was refusal to do military service on religious grounds.

> …what needed justification was not differential treatment of otherwise like situations, but the failure to differentiate between people who were relevantly different: that is, between those convicted for offences related to the exercise of their religion and those who were convicted of other offences. Thus, the comparison needed to discover whether the claimant differed from his comparators on the ground of religion.[166]

The European Court of Human Rights considered that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise his profession. The applicant had served a prison sentence for his refusal to wear military uniform. In these circumstances, the Court considered that imposing a further sanction on Thlimmenos was disproportionate. The Court found that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.[167] The Court stated that the right under Article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the right not to be discriminated against in the enjoyment of rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[168]

---

[166] A Baker, ‘Comparison Tainted by Justification: Against a "Compendious Question" in Art. 14 Discrimination’ (2006) PL 495.

[167] *Thlimmenos v Greece* (n 160 above) para 47.

[168] Ibid para 44.

The Court found that the State was responsible for having enacted legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. 'That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.'[169] Thus the State had a positive obligation under Article 14 (non-discrimination) in conjunction with Article 9 (freedom of religion or belief) to introduce exemptions from generally applicable laws. However, it is not clear yet whether this reasoning is related to the circumstances of one particular case (conscientious objection to military service), or if one could adopt a more general approach to the exemptions from it.

Thus, there may be a developing duty to provide exemptions from generally applicable laws, when to do otherwise would mean discriminating on the grounds of religion or belief.[170] As to religious communities, positive duties to facilitate can be detected in cases concerning legal personality, registration and leadership of religious communities.

At this point the following general theoretical remarks should be made. To start, the connection needs to be made between religious autonomy and principles of neutrality, pluralism and effective protection (in the form of positive duties to facilitate religion or belief). It was suggested in the last chapter that the principle of autonomy has a dual facilitating aspect: in certain circumstances State action may be required in order to protect or provide in order to guarantee the actual enjoyment of self-determination

[169] Ibid para 48.

[170] The exemptions from generally applicable laws will be discussed in the last chapter of this thesis.

(individually or in community). Moreover, positive freedom is an essential ingredient and a necessary condition of the autonomous life.[171] Raz, for example, has argued that:

> If the duties of non-interference are autonomy-based then the principle of autonomy provides reasons for holding that there are other autonomy-based duties as well. Every reason of autonomy which leads to the duties of non-interference would lead to other duties as well, unless, of course, it is counteracted by conflicting reasons. Such countervailing reasons are likely to be sometimes present, but they are most unlikely to confine the duties of autonomy to non-interference only.[172]

It is argued here that freedom of religion or belief cannot be effectively protected if reasonable accommodation of religious needs is not provided. This is important as some religious individuals or communities may otherwise lack the opportunity to fully (effectively) enjoy their freedom.

Moreover, as noted above the concept of neutrality is closely connected to the concept of equality. Neutrality can be divided into formal and substantive neutrality. For example, formal neutrality developed by liberal theorists like Rawls means: if the state is to treat citizens equally, it should not give preference to one religious individual over another, nor to the religious over the non-religious.[173] Formal neutrality as formal equality does not take into account differences in religious needs. Nor does it recognise the possibility that difference-blind neutrality and neutrality without accommodating differences may lead to injustice and discrimination. As Raz has put it:

---

[171] J Raz (n 5 above) 409.

[172] Ibid 408.

[173] J Rawls, *Political Liberalism* (Columbia University Press, New York 1993); See also discussion in S Song, *Religious Liberty and State Neutrality: Accommodation the 'Free Exercise' of Religion* (MPhil Thesis in Politics, University of Oxford 1998) 1 and 64.

> Doctrines of governmental restraint are those which deny the government's right to pursue certain valuable goals, or require it to maintain undisturbed a certain state of affairs, even though it could, if it were to try, improve it.[174]

It is suggested here that the ECtHR ought to use parameters like neutrality, pluralism, effective protection and the right to religious autonomy as being linked to the equal worth and dignity of all human beings, in order to start an assessment of State's positive duties to facilitate religion or belief. The emphasis on neutrality, pluralism, effectiveness and autonomy are specifically important as facilitation of religion or belief raises questions not so much about available resources to spend, but more about States' and society's attitudes towards religion or belief, and the position of religion in society and in the public sphere. Using these criteria as a starting point would fortify freedom of religion not only as a negative right, but also as a positive right which then can be balanced against justifications put forward by the State. This does not mean that the Court cannot make decisions taking into account the specific facts of the case. There can well be reasons (justifications) for not facilitating religion or belief. The Court ought to test those using parameters like effective protection, neutrality and the right to autonomy in making its assessment.

2.6. Conclusion

This chapter has highlighted the fact that religious autonomy relates to both internal and external spheres of freedom of religion or belief. It was argued that there ought to be a right to religious autonomy to determine, both at the individual and collective level, what

[174] J Raz (n 5 above) 110.

one's belief is, and the ways and relative importance of manifesting it. Moreover, there are areas of communal religious manifestation which deserve broad autonomy, especially taking into account that this is important for the protection of individual religious autonomy both in *forum internum* and *forum externum*. Focusing on the right to individual religious autonomy is important in order to clarify values that Article 9 protects.

The principles of neutrality, pluralism and effective protection have also been shown to support the idea of the right to religious autonomy. The right to religious autonomy is also needed to make a stronger claim for accommodation/facilitation of religion or belief. This is important as some religious individuals or communities may otherwise lack the opportunity to enjoy their freedom. The following chapters will explore in more detail the practical implications of these suggestions for the practice of the ECtHR.

Chapter III

Defining Religion or Belief: Who has a Right to Religious Autonomy?

3.1. Introduction

The last chapter explored what religious autonomy should mean in the context of the ECHR and how principles such as neutrality, pluralism and effective protection, developed by the Court itself, relate to it. This chapter examines the theoretical and practical implications of the right to individual autonomy at the stage when the Court decides whether certain beliefs or behaviour are protected under Article 9. In this regard, problematic aspects of defining religion or belief are discussed: should the individual have the right to define his or her own beliefs (religious or otherwise), or should the State or Court have the power to do so? Does this right extend to the manifestation of that religion or belief, and if so to what extent? If the Court has the power to define religion or belief protected under the ECHR, has it or can it provide a convincing and workable definition? What is the real purpose of defining religion or belief?

It is argued here that for the right to religious autonomy to be a meaningful one, the ECtHR ought to take into account, and sometimes accept at face value, just exactly what individuals and communities have to say about their beliefs (especially when dealing with unknown or minor religions or beliefs). In consequence, this thesis puts forward a subjective definition, which also largely extends to the manifestation of religion or belief, although with some qualifications. A subjective definition means accepting a person's or a communities' autonomy to determine what their beliefs and forms of manifestation are. In contrast, an objective interpretation requires a legislature or a court to adopt a definition to determine what religion or belief as protected by the Convention is. It should be highlighted here that an essentially subjective definition does not exclude restrictions on forms of manifestation which conflict with interests listed in Article 9 (2) of the Convention. The advantage of the subjective definition is that limitations can be properly weighed. The objective definition is problematic because claims may be defeated at the definitional stage, rather than at the stage of justification with the accompanying risk that important questions about the reasons for limiting freedom of religion or belief may never be faced. As a consequence, an objective definition may become (and already has become) a matter of convenience.

Thus, a preferable approach is to focus on justifications as to why one limits religious autonomy under 9 (2) rather than providing an objective definition of religion or belief under Article 9 (1). Gunn has rightly pointed out that the most serious conceptual obstacles for adjudicators may derive from 'well – intentioned but mistaken assumptions about what religion means from their personal perspective or that of scholars rather than from the perspective of how religious discrimination and religious persecution are actually practised'.[1]

This chapter analyses the current ECHR case law in the light of the meaning attributed to religious autonomy in this thesis and in the light of principles underlying the protection of the Convention. It is suggested that the Court ought to develop a clear and systematic understanding of what is protected under Article 9. This means it

[1] TJ Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law' (2003) 16 Harv Hum Rts J 191, 193.

should develop a clear respect for religious autonomy both at the individual and collective level. This in turn means accepting a broad and pluralistic view of religion or belief applicable both in *forum internum* and *forum externum*. In this way it should seek better conformity with the principles of neutrality and effective protection of rights. The risk of non-inclusion of legitimate minority religions or personal beliefs justifies a pluralistic approach. A pluralistic definition of religion or belief is the price that has to be paid if autonomy linked to equal dignity and worth of all human beings is given any value at all.

An analysis of the cases shows, however, that the Court has not taken a definitive view on this question. The main problem is inconsistency and vagueness in reasoning, which indicates the absence of a theoretical concept on this matter. The Court has developed its own objective definition of religion or belief and manifestation of it. However, in its current state this definition is incoherent. Two main problem areas further complicate the matter. Firstly, there is a (probably never ending) scholarly debate about which beliefs and especially, which non-religious beliefs, are covered by Article 9. This debate stems from the understanding that religions and some beliefs are singled out for special protection under Article 9 (distinguishing them, for example, from beliefs protected under Article 10). However, this standpoint is debatable and will be discussed in the following sections of this chapter. This assumption of special protection in the context of the Convention seems to be based on the wording of Article 9[2] and on Court's rather controversial attempts

[2] For example, Evans contends that the wording of Article 9 referring to the freedom of 'thought, conscience and religion' but only the right to manifest 'religion or belief' indicates that Article 9 distinguishes one type of personal philosophy (beliefs) for a greater degree of protection than others. She further suggests that the types of manifestation listed in the second part of Article 9 (worship, teaching, practice and observance) suggests that belief is not intended to have a very general and broad scope. C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2003) 65 – 66.

to define religion or belief.

The complexity of the matter is further emphasised by the fact that in most European countries religions and some beliefs enjoy benefits that other beliefs do not. Lucy Vickers, for example, points out that:

> The divide is located between 'religious and philosophical beliefs' which are subject to special protection, and other beliefs which are not. In order to determine on which side belief systems such as 'transcendental meditation' or 'veganism' should fall, one must still determine what is meant by the core terms 'religion' and 'philosophical belief'.[3]

C. Evans, similarly contends that a more conceptual approach to religion or belief could help to ensure that the term 'belief' does not become 'unduly restrictive or exclusionary of new religious groups, but does not become so open-ended that it is rendered essentially meaningless'.[4] Both Evans and Vickers seem to suggest that 'belief' should be given a restricted meaning linked to its playing essentially the same role as religion. This suggests that some kind of objective definition of both 'religion' and 'belief' is necessary, but also 'thought' and 'conscience', as used in the ECHR. Vickers contends further that:

> Tempting as it may be to avoid definition, to do so altogether leaves courts acting in a vacuum, and without any principles to guide them. It becomes difficult to predict how a court will make its assessment, and impossible to challenge any individual decision. Moreover minority religions are particularly likely to be left unprotected. A working definition of religion is therefore required, in order to provide a principled basis for deciding cases, and to help

---

[3] L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, Oxford 2008) 15. She lists, for example, political views as clearly not under this special protection.

[4] C Evans (n 2 above) 65.

determine when a philosophical belief will qualify for protection.[5]

The second problem area is related to the debate as to which acts constitute manifestation of religion or belief. As Scheinin points out 'States have not considered it difficult to allow their citizens the freedom to think. The difficulties start when we come to the right to *express* one's conviction, the right to *organize* as a community in order to promote a religion or belief and the right to *act* in accordance with one's conscience…'[6] The theoretical and debatable division between *forum internum* and *forum externum* adds more complexity. The following sections will discuss these two issues with the aim of pursuing an essentially subjective definition.

3.2. Religions, Beliefs and Non-religious Beliefs

There is no generally accepted definition of religion. Providing one for this social phenomenon (not to mention a legal definition) has proven to be a difficult task. However, as Gunn points out:

> …the absence of a definition of a critical term does not differentiate religion from most other rights identified in human rights instruments and constitutions. However, because religion is much more complex than other guaranteed rights, the difficulty of understanding what is and is not protected is significantly greater…. While academics have the luxury of debating whether the term "religion" is hopelessly ambiguous, judges and lawyers often do not.[7]

Gunn rightly notes that whether or not State institutions are competent to

---

[5] L Vickers (n 3 above) 15.

[6] M Scheinin, 'Article 18' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights* (Kluwer Law International, The Hague 1999) 379.

[7] TJ Gunn (n 1 above) 190-191.

determine what is and is not religion, in the actual world of law, judicial and political institutions are sometimes forced to make such determinations.[8] Most often these decisions concern whether an entity is a 'religious association' for purposes of granting legal personality and/or tax benefits, or limiting the personal liability of organizers; whether someone has 'religious beliefs' for the purpose of obtaining conscientious objector status; and whether someone should be exempted from a law of general applicability on the grounds of religious belief.[9]

There have been attempts by scholars,[10] and in Court practice,[11] to define religion for the purposes of the clauses protecting freedom. There is no intention here to give full or comprehensive coverage of the different approaches taken towards definition of religion. The aim instead is to emphasize the complexity and inconclusiveness of the debate on this matter.

From the dozens, if not hundreds of proposals one can identify three main approaches to the definition of religion.[12]. First is a content-based definition. This content-based definition would focus on the question of which features of religion

---

[8] Ibid 191.

[9] Ibid 191-192.

[10] Eg B Clements, 'Defining "Religion" in the First Amendment: A Functional Approach' in W Sadurski (ed), *Law and Religion* (Ashgate, Dartmouth 1992); W Sadurski, 'On Legal Definition of "Religion"' (1989) 63 The Australian L J 834; E Peńalver, 'The Concept of Religion' (1997) 107 The Yale L J 791; JH Choper, 'Defining "Religion" in the First Amendment' in W Sadurski (ed) *Law and Religion* (Ashgate, Dartmouth 1992).

[11] Eg *Davis v Beason* 133 US 333. 342 (1890); *US v Macintoch* 283 US 605. 633-34 (1931); *Torcaso v Watkins* 367 US 488 (1961); *US v Seeger* 380 US 163 (1965); *Malnak v Yogi* 592 F.2d 197, 207-10 (3d Cir 1979); *Africa v Pennsylvania* 662 F.2d 1025 (3d Cir 1981); *US v Moon* 718 F.2d 1210 (2d Cir. 1983).

[12] For the concise overview of these three approaches see, for example, L Vickers (n 2 above) 16-22.

should be considered 'essential'. Is it a belief in God, some other Supreme Being or beings? It has to be said immediately that a theistic interpretation runs the risk of being unacceptably exclusive for (international protection) of freedom of religion. One of the more inclusive content-based definitions has been based on the works of Tillich who suggests that religion relates to a person's 'ultimate concern'.[13] Clements, clarifying the deficiencies of this approach notes that this definition (wrongly) assumes that the concerns of any individual can be ranked and that each individual has a single highest concern that 'gives meaning and orientation to a person's whole life'.[14] Greenawalt points out that '…many people care a great deal about a number of things – their own happiness, the welfare of their family, their country, perhaps their religion – without any clear ordering among these and without any single ordering principle for clashes between them'.[15] He points out that another drawback of the restrictive ultimate concern test is the inquiry into the sincerity it would require. 'In order to decide whether claims were religious, courts would have to assess whether people accurately described their intensity of commitment and willingness to compromise.'[16] It should be noted that any definition which has a subjective element to it may run into this problem. Vickers points out that a content-based definition can be both under-inclusive and over-inclusive. It is under-inclusive when too detailed and unable to develop and respond to developments in religious and philosophical thinking. 'It can be based on very orthodox understandings of religion.'[17] It can also

---

[13] P Tillich, *Dynamics of Faith* (Harper and Row, New York 1958).

[14] B Clements (n 10 above) 541.

[15] K Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton University Press, Princeton 2006) 133.

[16] Ibid 134.

[17] L Vickers (n 2 above) 17.

be too broad, becoming too opaque and meaningless: 'as with refusing to define at all we are given no real principled basis for determining the content of religious belief.'[18]

An alternative approach is to define religion by analogy with those religions which are universally recognised as religions.[19] The analogy approaches are often derived from Wittgenstein's discussion of 'family resemblances':

> Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games and so on. What is common to them all? – Don't say: "There *must* be something common, or they would not be called 'games'" – but *look* and *see* whether there is anything common at all. – For if you look at them you will not see something that is common to *all,* but similarities, relationships, and a whole series of them at that…the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.[20]

This definition does not require that all religions have specific elements in common. Vickers points out that a range of criteria have been identified that indicate that belief systems are religious; however no single feature is determinative. She states that the danger of this approach is that it encourages the view that some religions are superior to others. Peňalver, for example, contends that everything we think of as religion results from a bias within the word itself. 'The meaning of the word "religion" developed within a uniformly Christian (and, since the sixteen century, Protestant) context. Thus it is a term that has largely been adapted to the taxonomic

---

[18] Ibid.

[19] Ibid.

[20] L Wittgenstein, *Philosophical Investigations*, GEM Anscombe (tr) (MacMillan Co 1953) § 66, 31-32.

needs of western, Protestant society.'[21] Gunn takes it even further and argues that:

> Legal definitions do not simply describe the phenomenon of religion, they establish rules for regulating social and legal relations among people who themselves may have sharply different attitudes about what religion is and which manifestations of it are entitled to protection. Legal definitions, as a result, may contain serious deficiencies when they (perhaps unintentionally) incorporate particular social and cultural attitudes towards (preferred) religions, or when they fail to account for social and cultural attitudes against (disfavoured) religions.[22]

For example, in Europe the traditional notion of religion has been derived from Christianity, Judaism and Islam -- in other words from religions with which European nations have had the most contact. This traditional notion of what a religion is does not always sit comfortably with other religious faiths. The ideological use of the legal notion of religion or religious organisation has sometimes been challenged by minority religious groups and new religious movements, whose status as 'religions' is contested by some public institutions.[23] Gunn, for example, rightly points out that:

> …"religion" may be seen not simply as a neutral description of such things as theological beliefs or ritual practices, but as judgment on whether the particular beliefs or actions are acceptable to the society or the legal system. Thus, a definition of "religion" may not simply be neutral, but may contain an inappropriate societal value judgment regarding particular beliefs or actions with "good" beliefs being characterized as "religions" and "bad" beliefs being characterized as "cults" or "heresies".[24]

Another criticism is that reasoning by analogy is inherently opaque and vague.

---

[21] E Peńalver, 'The Concept of Religion' (1997) 107 The Yale L J 791, 812. Peňalver discusses definition of religion mainly in the context of the US case law.

[22] TJ Gunn (n 1 above) 195.

[23] S Ferrari, 'The New Wine and Old Cask: Tolerance, Religion and the Law in Contemporary Europe' in A Sajó, S Avineri (eds), *The Law of Religious Identity: Models for Post Communism* (Kluwer Law International, The Hague 1999) 7.

[24] TJ Gunn (n 1 above) 197 (footnotes omitted).

'Analogies can be strong or weak, and it is not clear how strong the analogy has to be between a well-established religion and a less well known set of beliefs, before the set of beliefs can be classified as "religious".'[25] Thus a third approach to the definition of religion has been put forward. This definition starts with the question as to what the purpose of protecting religion is.

> If we can identify why we need to protect certain belief systems, then it may help to create more certainty, in particular because it will provide a rationale for including the criteria by which we define religion.[26]

Vickers lists two possible reasons to protect religion. The first is that historically religion has been protected as a political or pragmatic response to religious conflict. The second is the protection of personal autonomy and identity, or alternatively, protection of group identity.[27] She points out that:

> In either case, religious freedom can be viewed as part of a general cultural diversity which as a plural, liberal society we choose to celebrate and affirm. However, if this is the only purpose for protecting religion, there is no principled reason to distinguish between 'religious belief' and other beliefs such as a passionate belief in the importance of football or a dedication to English country dancing.[28]

Vickers argues that as the purpose oriented approach views the importance of religion as being anchored in its role in fulfilling individual dignity and autonomy, it may (as a sole criteria) be in danger of being over inclusive. She advances her own

[25] L Vickers (n 3 above) 19.

[26] Ibid 20.

[27] Ibid.

[28] Ibid.

definition relying on two sources: the *Church of the New Faith*[29] case decided by the Australian High Court and Macklem's argument that the reason to protect religious views is that they are faith and not reason based. Macklem argues that, as based on faith, religious views are not susceptible to reason. However, they are of value because of the role they play in individual lives. In other words, despite their irrational nature they have a secular value. They help their holders to come to terms with matters unknowable, beyond reason, matters such as the nature and purpose of life.[30] Vickers adds to this a mix of the content and analogy approach followed by the Australian High Court in the *Church of New Faith* case and suggests that:

> Religion, then, can be taken to include a belief that reality extends beyond that which is capable of perception by the senses. To be 'religious' the belief system must also have some relation to man's nature and place in the universe and his relation to things supernatural: it must have something to say about their place and function in the world. Religious beliefs should require or encourage adherents to observe particular behavioural standards or codes of conduct, and may include specific practices having supranational significance, such as rites of worship. Finally, adherents constitute an identifiable group and see the ideas as religious. Although no individual criterion is determinative of the issue, using Macklem's explanation of why religion is important it would seem that the first two criteria are the most important….Whether an adherent claims 'religious' identity may be less important.[31]

Although Vickers does not offer this definition as an absolute source of truth, it is not accepted in this thesis as offering a better practical solution for the ECtHR than any other ambiguous scholarly definition of religion. Even football fans (or a club) can theoretically fall within this definition as an utterly irrational belief or way of life. More importantly, this definition puts an emphasis on the essence (content) of a religion rather than on autonomy of a person and is detached from the purpose (or

---

[29] *Church of the New Faith v Commission of Pay-roll Tax* (Victoria) [1982-3] 154 CLR 120.

[30] T Macklem, 'Faith as a Secular Value' (2000) 45 McGill LJ 1.

[31] L Vickers (n 3 above) 22.

the goal) of defining. It also emphasises the group dimension of religion, rather than the individual dimension in that religion is defined through (or being dependent on) the existence of 'an identifiable group'.[32] Such a definition focuses on the protection of religion itself and not on an individual. These factors are considered especially problematic here considering the idea of autonomy and human rights as outlined in this thesis.

As to the meaning of 'belief', Vickers suggests that inclusion of the term 'religion' in the protection provided by the ECHR places some boundaries around the meaning of 'belief'. She suggests that 'although beliefs do not have to be religious, the outer boundaries of what is protected may be determined in some way by analogy with the term "religion".'[33] This thesis cannot agree with this as the term 'religion' itself is undefined (and problematic to define), making a search for analogy problematic. More importantly, it does not explain how *non-religious* beliefs (as protected by the ECHR) should fit or benefit from the content based definition of 'religion' as presented above. Further, the above definition gives a great power to courts to decide what is and what is not religion or belief. Thus there is still a great deal of uncertainty about what is and what is not protected. One may end up circling around definitions which do not go anywhere, and offer no solid ground for the Court upon which to make decisions.

[32] This also does not take into account the fact that religion today for many (at least in Europe and North-America) has become a more individualized matter with no necessary institutional affiliation. See also DJ Jong, 'Freedom of Religion and Belief in the Light of Recent Challenges: Needs, Clashes and Solutions' in N Ghanea and A Stephens (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden 2007) 182. From a different perspetive, Torfs, in his book on the dialogue within the Catholic Church regarding human rights points out that research in a number of countries indicates that within Christianity the issue is not a critique of Jesus and his message. 'Rather, a very great scepticism or indifference, even aversion to the institutional Church can be observed'. R Torfs, *A Healthy Rivalry: Human Rights in the Church* (Peeters, Louvain 1995) 1.

[33] L Vickers (n 3 above) 23.

3.3. Religion or Belief in International Law

It has to be said that none of the above theoretical discussions has or is really happening in the context of international instruments protecting freedom of religion or belief.[34] 'Religion' remains undefined in international law. A major disagreement which has emerged during the preparation of international instruments protecting freedom of religion, however, has been whether non-religious beliefs fall within the scope of the articles.[35] The debate evolves around four terms: *thought*, *conscience*, *religion* and *belief* and around forms of manifestation of religion or belief. Article 18 of the International Covenant on Civil and Political Rights (ICCPR), for example, uses 'thought', 'conscience', 'religion' and 'belief' to describe the freedom under the Covenant. It states that 'everyone shall have the right to freedom of thought, conscience and religion…and freedom…to manifest his religion or belief in worship, observance, practice and teaching'[36].

It can be argued that the fourfold terminology (thought, conscience, religion

[34] A major effort was made to clarify rights protected under the concept of religion or belief with the creation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA Res 36/35. Also the General Comment of the UN Human Rights Committee on the scope of freedom of religion or belief within the ICCPR is of significant importance. General Comment No 22 (Art 18) UN GAOR Hum Rts Comm, 48th Sess, Supp No 40 at 208, 209, UN Doc A/48/40 (1993).

[35] Another major disagreement has been the possibility of changing one's religion, which has led to objection from Muslim countries. Likewise the possibility to persuade others into one's belief (proselytism) was an issue of controversy. For detailed description of the debates over the scope of freedom or religion in international documents see MD Evans, *Religious Liberty and International Law in Europe* (CUP, Cambridge 1997) 172-280.

[36] Article 18 (1) ICCPR.

and belief) adopted in the ICCPR and in most international and regional instruments, is evidence that there has been some sort of compromise made over the scope of the beliefs included for the protection. However, none of the doubts relating to the meaning and relationship between these various concepts have been conclusively resolved. The first part of Article 18 (1) of the ICCPR describes the right to have a conscience, thought and religion (*forum internum*), and the second part right to manifest one's religion or belief (*forum externum*). This can mean that thought and conscience can only be possessed in *forum internum* or as often suggested, manifested under other articles of the Covenant (e.g. freedom of expression, Article 19).[37] In principle, this would mean separating the definitions of 'thought' and 'conscience' from the definitions of 'religion' and 'belief'. Following this approach it should be possible to say what characteristics are necessary in order to differentiate between these concepts. This, however, may prove to be a burdensome and virtually impossible task. In the process of creating the ICCPR, Saudi Arabia, for example, distinguished 'religion' from 'thought' or 'conscience' by its 'dogmatic and relatively stable nature'.[38] Cyprus saw religion as a belief in 'divine ruling power'.[39] Nigeria objected to the definition of religion based on a formal way of worship and reliance on a holy book, referring to the fact that every individual should have the right to worship, even if he chose to worship a rock or a river.[40] Some countries took the view that it was best not to attempt to define the term at all.[41]

[37] MD Evans (n 35 above) 203.

[38] Ibid.

[39] Cyprus (A/C.3/SR.1025, § 30); MD Evans (n 35 above) 203.

[40] Nigeria (A/C.3/SR.1023, § 23).

[41] MD Evans (n 35 above) 203.

Belief is not mentioned in the first part of the ICCPR article. During the drafting process of the Covenant some considered belief to be a manifestation of thought, which meant inclusion of the right to manifest non-religious beliefs, while others viewed it as synonymous with religion.[42] The second part of Article 18 of the ICCPR states that religion or belief can be manifested through worship, teaching, practice and observance, all of which seem to add more weight to the understanding of 'belief' as religious belief. This would suggest that only religious beliefs can be manifested under the religious freedom clauses. However, worship, teaching and observance are not such clear cut terms either. The most well known report on international protection of freedom of religion (released in 1960), the Krishnaswami study, stated that 'in view of the difficulty of defining "religion", the term "religion or belief" is used in this study to include, in addition to various theistic creeds, such other beliefs as agnosticism, free thought, atheism and rationalism'.[43] As observed by Evans, the Krishnaswami study drew attention to the fact that some non-theistic philosophies could be equated with religious beliefs and treated in a similar fashion. It did not suggest that all forms of secular thoughts were beliefs, manifestations of which were protected. Nor did it say they were not.[44]

This ambiguity is reflected in the debate over the problematic scope of freedom of religion articles, which are inherent in all human rights instruments protecting freedom of religion or belief. In principle, there is a pluralistic view (or at

---

[42] Ibid.

[43] A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc E/CN.4/Sub.2/200/Rev 1 (United Nations, New York 1960) 1.

[44] MD Evans (n 35 above) 204.

least rhetoric) of what falls under freedom of religion articles. For example, the UN Human Rights Committee has stated that:

> Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[45]

Scheinin points out that the notion of religion or belief in the Covenant may also be broadening in the light of a variety of indigenous minority cases.[46] For example, the case of *Ilmari Länsman et al v Finland*[47] was decided under Article 27 of the ICCPR. Article 27 protects the right of persons belonging to ethnic, religious or linguistic minorities, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. However, it was illustrative of the fact that freedom of religion or belief may potentially be at the heart of an indigenous or minority claim. Sheinin points out that:

> For many indigenous minorities, land or specific sites are not only important as physical space for manifesting a religion, but they have sacred significance. Giving attention to indigenous conceptions of religion or belief broadens our understanding of how wide an area is actually covered by the notion of freedom of religion or belief.[48]

The case concerned reindeer breeders of Sami ethnic origin who challenged

---

[45] General Comment No 22 (n 34 above) para 2.

[46] M Scheinin, 'The Human Rights Committee and Freedom of Religion or Belief' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 200.

[47] *Ilmari Länsman et al v Finland* (Comm no 511/1992) (UN Human Rights Committee, 8 Nov 1994).

[48] M Scheinin (n 46 above) 200.

the decision of the authorities to pass a contract with a private company to allow the quarrying of stone in the area traditionally used by Samis for reindeer herding. They claimed that quarrying of stone in this area and its transportation through the territory would violate their rights under Article 27, 'in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry'.[49] They added that the quarry site is a sacred place of the old Sami religion, where in old times reindeer were slaughtered.[50] The UN Human Rights Committee decided that there was no breach of Article 27. However, the Committee noted that any future economic activity must, in order to comply with Article 27, be carried out in the way that the Samis continue to benefit from reindeer husbandry. It further noted that if the mining activities were to be approved on a large scale and significantly expanded, then this may constitute a violation of Sami rights to enjoy their own culture.[51]

3.4. Religion or Belief in the ECHR

Compared to those drafting the above-mentioned international instruments, the drafters of the European Convention seemed not to give much thought to the definitions.[52] Similarly to Article 18 of the ICCPR, the first paragraph of Article 9 of the ECHR uses four different categories: 'thought', 'conscience', 'religion' and

---

[49] *Ilmari Länsman et al v Finland* (n 47 above) para 3.1.

[50] Ibid para 2.6.

[51] Ibid para 9.8.

[52] Evans suggests that as the express purpose of the drafting of the Convention was to build on the project of the international protection of human rights set out in the Universal Declaration, it is relevant to keep in mind the debates and decisions made in drafting the latter. C Evans (n 2 above) 50. For detailed discussion over the drafting process see MD Evans (n 35 above) 263-280.

'belief' to describe the freedom in question:

> 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.[53]

The paragraph above raises some important definitional issues. Firstly, as in Article 18, only 'religion' and 'belief' can be manifested: 'thought' and 'conscience' are not mentioned. This again could either mean that thought and conscience belong only to *forum internum,* or they can be manifested under other articles of the Convention (like freedom of expression, Article 10). Secondly, the right to freedom of thought, conscience and religion includes freedom to change one's religion or belief. This should mean that 'belief', although not mentioned in the first sentence of the article, is also covered by the right in *forum internum*.[54]

The conclusion can be drawn that there are at least three different types of 'beliefs'. First, there are beliefs which are more like thought and conscience and can be expressed, for example, as ideas and opinions protected under Article 10 of the Convention (for example, political opinions).[55] This can mean that one should be able to clearly single out these beliefs for Article 10 protection. Also there is a different category of beliefs which can be both possessed and manifested under Article 9 (1). This latter category can be manifested either as religious belief (based on religion in

[53] Article 9 (1) ECHR.

[54] Freedom to change one's religion or belief is an absolute right.

[55] Evans points out that the Court should not define religion or belief so widely that they would incorporate all that would be more appropriately described as thought or conscience. She refers to the fact that most authors have concluded that there is no general right to conscience. C Evans (n 2 above) 52; See also P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998) 542-544.

forum internum) or non-religious belief (based on thought or conscience in *forum internum*). Finally there is, at least potentially, a third category of beliefs, which can only be held under Article 9 but not manifested under the Convention. As highlighted by M.D. Evans '…there are some forms of belief which might be considered incompatible with Convention values altogether and so cannot benefit from its protection at all.'[56] This means that these beliefs may be held but not manifested at all. Evans rightly points to Article 17 ('Abuse of Rights') which expressly seeks to prevent Convention provisions being used to undermine essential convention values.[57] Although the Court has not used Article 17 to deny protection of Article 9 to (religious or non-religious) believers, this remains possible in appropriate cases.[58] However, in this case the matter can be more appropriately decided not at the definitional stage, but at the second stage when limits to restrictions are assessed under the second paragraph of Article 9. There is a danger otherwise that any religious community, whose beliefs can be broadly construed not to comply with democratic values like non-discrimination (for example, on grounds of gender), tolerance etc., will be automatically excluded from the protection of Article 9. The definition should not become a matter of convenience in Convention practice to avoid (disregard) difficult questions relating to balancing freedom of religion and other interests.

---

[56] MD Evans, *Manual on the Wearing of Religious symbols in Public Areas* (Martinus Nijhoff Publishers, 2009) 9-10.

[57] Ibid 10. Article 17 'Abuse of Rights' states that: No one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where states seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights (for example where an individual issues a death threat).

[58] For example, in the case of *Norwood v the United Kingdom* the Court found that the display of a poster by a member of an extreme right wing party that identified Islam as a religion with terrorism amounted to a 'vehement attack on a religious group' was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination and as such, could not benefit from the protection of Article 10 (freedom of expression). *Norwood v UK* (App no 23131/03) ECHR 16 Nov 2004.

The term ‘religion’ is mentioned separately in all phrases of Article 9. This can mean that ‘religion’ is distinct from all other categories mentioned. This would mean that one should be able to separate religion from non-religious belief when it comes to manifestation. However, the terms thought, conscience, religion and belief, are all of an uncertain scope.

The practice of the ECHR does not offer much help in defining the above terms. However, the Court has established a few vague objective requirements that have to be met in order for protection to be guaranteed under Article 9. For example, in the case of *X v Germany* the Commission stated that religion or belief has to contain some ‘coherent view on fundamental problems’. This case concerned a man who did not want to be buried in a cemetery full of graves with Christian symbols and writings. He wanted his ashes to be scattered over his land. The Commission concluded that the desired action had ‘strong personal motivation,’ but decided that it was not protected by Article 9 (1).[59] As C. Evans points out, ‘this suggests that some level of intellectual or moral coherence is required before something can be considered a religion or belief’.[60] In the case of *Campbell and Cosans v UK*[61] the Court was a little bit more specific indicating that ‘belief’ ‘denotes views that attain a certain level of cogency, seriousness, cohesion and importance’.[62] The Court dealt with the notion of philosophical convictions under the second sentence of Article 2 of the First Protocol,

---

[59] *X v Germany* (App no 8741/79) (1981) 24 DR 137.

[60] C Evans (n 2 above) 54. However, one could argue that some sort of intellectual or moral coherence is needed to be understood as protected by Article 10 too.

[61] *Campbell and Cosans v UK* (App nos 7511/76, 7743/76) (1982) 4 EHRR 293.

[62] Ibid para 36.

which sets forth the parental right to educate their children in conformity with their own religious and philosophical convictions.[63] Mrs. Campbell and Mrs. Cosans advanced a complaint about the use of corporal punishment as a disciplinary measure in school attended by their children. They argued that the use of corporal punishment as a disciplinary measure in the school failed to respect their rights to ensure that their children's education and teaching was in conformity with their philosophical convictions.[64] The Court noted that in its ordinary meaning the word 'convictions', taken on its own, is not synonymous with the words 'opinions' and 'ideas', as utilised in Article 10 of the Convention, which guarantees freedom of expression: it is more akin to the term 'beliefs' appearing in Article 9.[65] This indicates that it is necessary to consider what elevates an 'opinion' which may be held under Article 9 and expressed under Article 10, into a 'belief', which may be both held and manifested under Article 9.[66] A certain level of cogency, seriousness, cohesion and importance was deemed to provide the necessary ground to distinguish between these categories. The Court noted that the adjective 'philosophical', does not lend itself to an exhaustive definition and little assistance as to its precise significance can be gleaned from the *travaux préparatoires*. The Commission, in its opinion, had pointed out that the word 'philosophy' can have numerous meanings: it is used to allude to a fully-fledged system of thought or, rather loosely, to views on more or less trivial matters. The Court agreed with this statement and found that neither of these two extremes can be

---

[63] Protocol No 1 Article 2 ECHR.

[64] They both claimed violation of Article 3 also. Mrs Cosans additionally alleged violation of the first sentence of Article 2 of Protocol No 1 (right to education) resulting from the suspension of her son from the school. The Court found no violation of Article 3. It decided by six votes to one that there was a violation regarding Mrs. Cosans' complaint about the violation of her son's right to education.

[65] *Campbell and Cosans v UK* (n 61 above) para 36.

[66] MD Evans (n 35 above) 290.

adopted for the purposes of interpreting Article 2: the former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or substance.[67]

The Court decided by six votes to one that Mrs. Campbell's and Mrs. Cosans' right to educate their children in conformity with their own religious and philosophical convictions was violated on account of the existence of corporal punishment as a disciplinary measure in the schools attended by their children. However, this case and subsequent Court practice does not shed any light on how to test cogency, seriousness, cohesion and importance. Even if one agrees with the decision in this case, it is not easy to follow the Court's reasoning as the requirements to be fulfilled are not explained. Apart from noting that the applicant's views related to a weighty and substantial aspect of human life and behaviour (namely the integrity of the person), no other clarification was added. However, as this kind of broad and vague definition of belief (and religion) potentially allows inclusion of a wide range of religions and beliefs, it is potentially in conformity with the idea of autonomy as advanced in this thesis.

Martínez-Torrón argues that the reference in Article 9 (1) of the ECHR to thought, conscience and religion does not intend to separate three different rights but merely indicate diverse profiles of the same fundamental right.[68] He is emphasizing that the terms 'religious freedom', 'religious liberty' or 'freedom of religion or belief' carry for him essentially the same meaning as 'freedom of thought, conscience and

---

[67] *Campbell and Cosans v UK* (n 61 above) para 36.

[68] J Martínez-Torrón. 'Religious Liberty in European Jurisprudence' in M. Hill (ed), *Religious Liberty and Human Rights* (University of Wales Press, Cardiff 2002) 103.

religion'. In similar terms Edge claims that the distinction between thought or conscience and belief is irrelevant.[69] Van der Vyver in his reference to the analogous Article 18 of the Universal Declaration of Human Rights[70] emphasises that 'the Declaration equates freedom of thought and conscience to freedom of belief, and subjects that freedom to the same norms which apply to freedom of religion'.[71] The perspective assumed by these scholars is convincing. It is clear that Article 9 (1) is aiming at diversity. As in above-mentioned international instruments, the fourfold terminology in Article 9 (1) of the ECHR should be interpreted as indicating the inclusion of differences rather than as an intent to define these terms separately for the purposes of protection. This interpretation is in line with the principle of protection of one's identity as regards religion or belief and the principle of pluralism enshrined in the *Kokkinakis* case[72], and with the principle of neutrality, which postulates that it is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[73] It is also in line with religious autonomy in this thesis. In this regard this thesis favours the purpose oriented approach which values autonomy and dignity; and which, although potentially over inclusive, is an appropriate approach for an international court dealing with diversities of different religions and beliefs. Before returning to these questions, however we need to address the issue of how the ECtHR approaches the manifestation of religion or belief.

---

[69] PW Edge, 'Current Problems in Article 9 of the European Convention on Human Rights' (1996) Jurid Rew 42, 43.

[70] Universal Declaration of Human Rights (adopted 10 Dec 1948) UNGA Res 217 A III (UDHR).

[71] JD van der Vyver, 'Limitations of Freedom of Religion or Belief: International Law Perspectives' (2005) 19 Emory Int Law Rev 499, 500.

[72] *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397.

[73] See eg *Church of Scientology Moscow v Russia* (App no 18147/02) (2008) 46 EHRR 16 para 72.

3.5. Manifestation of Religion or Belief according to the ECtHR

At first glance the European Human Rights Commission and Court have taken a generous approach to defining religion or belief. However, this generosity seems to extend only to the sphere of *forum internum* (and even that is arguable). Besides traditional religions and beliefs like several Christian denominations[74], Islam[75], Hinduism[76], Buddhism[77], Judaism[78], atheism[79], a variety of other religions and beliefs[80] have been recognized as falling under the protection of Article 9 (1) of the ECHR.[81] For example, Jehovah's Witnesses, the Church of Scientology, and the Moon Sect have been acknowledged. In the *Arrowsmith* case pacifism was accepted as a belief under Article 9.[82] The *Kokkinakis* case emphasised that agnostics and the unconcerned are also protected under Article 9 (1).[83] Even neo-Nazism and

---

[74] *Knudsen v Norway* (App no 11045) (1985) 42 DR 247; *Iglesia Bautista 'El Salvador' v Spain* (App no 17522/90) (1982) 72 DR 256.

[75] Eg *X v UK* (App no 8160/78) (1981) 22 DR 27; *Yanasik v Turkey* (App No 14524/89) (1993) 74 DR 14; *Karaduman v Turkey* (App no 16278/90) (1993) 74 DR 93.

[76] *Chauhan v UK* (App no 11518/85) (1990) 65 DR 41; *ISKCON and Others v U*K (App no 20490/92) (1994) 76-A DR 90.

[77] *X v UK* (App no 5442/72) (1974) 1 DR 41.

[78] *D v France* (App no 10180/82) (1983) 35 DR 199.

[79] *Angeleni v Sweden* (App no 10491/83) (1986) 40 DR 41.

[80] See *Kokkinakis v Greece* (n 72 above); *X and Church of Scientology v Sweden* (App no 7805/77) (1979) 16 DR 68; *X v Austria* (App no 8652/79) (1981) 26 DR 89.

[81] J Martínez-Torrón (n 68 above) 103.

[82] *Arrowsmith v UK* (App no 7050/75) (1978) 3 EHRR 218.

[83] *Kokkinakis v Greece* (n 72 above) para 33.

Communism have been potentially included as belief systems.[84] As Evans has put it 'the tendency of the Court and Commission at the definition stage of Article 9 cases has been to adopt a philosophy of inclusiveness'.[85] However, Evans argues that:

> While the term 'religion or belief' has been interpreted widely (thus avoiding some complex but important issues), this seemingly liberal approach to Article 9 has been undermined by the narrow scope that has been given to the right to have and to manifest a religion or belief.[86]

The Court has adopted a restrictive approach to the definition of a manifestation of religion or belief. This raises two main issues. Firstly, the Court seems to be oblivious to the problematic distinction between *forum internum* and *forum externum*. As was discussed in the last chapter the idea that beliefs and actions are separate and distinguishable notions is controversial, because the way a person acts on his or her beliefs may be part of the beliefs themselves. Thus, the restrictive definition of manifestation of religion or belief may have the effect of restricting religion or belief in *forum internum*. This would appear even more problematic if one considers that *forum internum* is theoretically an absolute sphere of autonomy. In fact, as this sphere is theoretically absolute, it should not allow the objective definition at all. It has to be noted that it is not clear from the ECHR practice whether the Court takes any notice of this problem.

Secondly, there is overall inconsistency and vagueness in the reasoning of the Court when it comes to deciding which practices are manifestations of religion or belief under Article 9.

---

[84] *X v Austria* (App no 1747/62) 13 Collections 42; *Hazar, Hazar and Acik v Turkey* (App no 16311/90, 16312/90 and 16313/90) (1992) 72 DR 200.

[85] C Evans (n 2 above) 392.

[86] Ibid 200.

> …at the heart of the interpretation of Article 9 (1) lies a test that is unclear in its scope, uncertain in its application, and inconsistent in its usage. The vagueness of the test opens up the potential for judges to determine cases based only on their own perceptions of the importance of actions for which protection is claimed.[87]

A few pertinent examples can be given to make the point.[88] Article 9 (1) states that the right to freedom of thought, conscience and religion includes freedom to manifest one's religion or belief in *worship*, *teaching*, *practice* and *observance*. There are different views as to whether words like worship, teaching, practice and observance indicate more traditional ways of manifestation of religion or belief or whether they can be applied to a wider range of beliefs. The list of ways of manifestation can be seen as limiting the scope of manifestation within Article 9 (1). In particular, worship, teaching and observance seem to imply a more conservative approach to the definition of manifestation. The dissenting opinion of Judge Valticos in the case of *Kokkinakis v Greece* can serve as an example of extremely conservative view.[89] One of the questions raised in this case was whether proselytism can be considered as a manifestation under Article 9 (1) of the ECHR. In his dissenting opinion Judge Valticos did not accept the majority's opinion of (proper) proselytism falling under the protection of Article 9 (1). He submitted that the term 'teaching' refers to religious teaching in schools or in religious institutions and not to 'door-to door canvassing'.[90] His reasoning seemed to follow the traditional notion of religion

---

[87] Ibid 202-203.

[88] It is not intended here to give full coverage of the case law to exemplify the aforementioned points. This case law is sufficiently analysed elsewhere. See C Evans (n 2 above); MD Evans (n 35 above).

[89] Dissenting opinion of Judge Valticos, *Kokkinakis v Greece* (n 72 above).

[90] Ibid.

in Europe[91] and was biased against new(er) religious movements.[92] The majority, however, found that freedom to manifest one's religion or belief includes in principle the right to try to convince one's neighbour, for example through teaching, failing which, moreover, freedom to change one's religion or belief, enshrined in Article 9, would be likely to remain a dead letter.[93]

Durham Jr. points out that 'worship', 'teaching', 'practice' and 'observance' should be viewed as being representative, and not necessarily exhaustive. 'These terms appear to describe in an expansive way general types of conduct embraced within the general category of religious activity.'[94] Their meaning ought to be wide enough to encompass a variety of non-traditional forms of manifestation of religion or belief. For example, the UN Human Rights Committee has stated that the 'freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts'.[95] In the fairly recent case of *Clement Boodoo v Trinidad and Tobago* the UN Human Rights Committee stated that:

> As to the author's claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad

---

[91] As explained above the traditional notion of religion is deriving from Christianity, Judaism and Islam.

[92] As emphasised before the expression 'new religious movements' in this thesis does not mean absolute or world novelty, but rather novelty in Europe (in this sense it includes, for example, nineteenth-century communities such as Jehovah's Witnesses or the Bahá'í. It is not used as a pejorative term. The choice of the term seeks to emphasise neutrality and is preferred to terms such as 'sects' or 'cults' which seem to have a clearly negative connotation in Europe.

[93] *Kokkinakis v Greece* (n 72 above) para 31.

[94] W Cole Durham Jr, 'Religious Association Laws' in T Lindholm, W Cole Durham, Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 358.

[95] General Comment No 22 (n 34 above).

> range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to beliefs, as well as various practices integral to such acts.[96]

Similarly Evans contends that:

> The United Nations material, especially the Krishnaswami study, indicates that the words were used to try to cover a wide range of manifestations of religions and beliefs and were not intended to be read in a limited manner.[97]

Although the majority decision in the *Kokkinakis* may suggest that the Court is prepared to apply a pluralistic approach to manifestation of religion or belief, the ECtHR has a tendency to construe these terms as the exclusive delimiters of the meaning of the manifestation of religion or belief, instead of taking a more inclusive approach. Evans explains that:

> ..in a number of cases that argued for the notion of manifestation to be extended to things such as the right to a divorce or a right to entry permits for religious believers into a State, the Commission has assumed that such extensions could not be manifestations. Thus the list tends to be interpreted as exclusive and the Court and Commission have been reluctant to extend Article 9 to allow for the creation of 'new rights' that are not explicitly mentioned in the Convention.[98]

In relation to these elusive delimiters the European Court of Human Rights and Commission have stated several times that the terms 'manifestation' or 'practice' do not cover every act which is motivated by religion or belief. Actions which do not

---

[96] *Clement Boodoo v Trinidad Tobago* (Comm no 721/1996) (UN Human Rights Committee, 2 Apr 2002) para 6.6. The committee found a violation of Article 18 in circumstances where a prisoner was forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him. However, a determining factor in this case was that there was an absence of any explanation from the State party concerning the allegations of the complainant.

[97] C Evans (n 2 above) 105.

[98] Ibid 106. Evans also points out that because relatively limited scope is given to Article 9 (1) only relatively few cases have been decided under Article 9 (2). Ibid 134; See also W Cole Durham Jr (n 94 above) 358.

actually express a belief cannot be considered to be protected by Article 9.[99] For example, the Commission stated in the *Arrowsmith* case that:

> It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned, they cannot be considered to be as such protected under Article 9.1, even if they are influenced by it.[100]

Miss Arrowsmith was distributing leaflets to soldiers urging them to refuse to serve in Northern Ireland. The Commission concluded that the distribution of leaflets was not the 'practice' of pacifist belief, as the leaflets were not about pacifism itself but rather about political opposition to government policy on Northern Ireland.[101] As pointed out by M. D. Evans, on the facts of the case it is difficult to see 'how the "practice" of a religion can embrace the distribution of leaflets explaining pacifism whilst not embracing actions which give practical expression to those views'.[102] He agues that 'if the leaflet at the centre of the *Arrowsmith* case had across its top the words 'Practical Pacifism' then, on the arguments of the Commission, it would have qualified as a practice of a protected belief.'[103]

> Different beliefs require different 'practices' of their adherence. What is a pacifist to do if not protest against violence? Contemplative religions may call their followers to prayer, whilst others will call for social actions…Similarly,

---

[99] See also P van Dijk, GJH van Hoof (n 55 above) 549.

[100] *Arrowsmith v UK* (n 82 above) para 71.

[101] Miss Arrowsmith in her application claimed that her rights under Articles 5, 9, 10 and 14 were violated. The Commission found no violation of any of the Convention articles.

[102] MD Evans (n 35 above) 306.

[103] Ibid 314.

> certain 'beliefs' could be excluded from the protection offered by Article 9 on the ground that they did not qualify as a 'religion' or 'belief' for its purposes because of the forms of manifestation that they took.[104]

In some other cases the Commission has accepted as manifestation acts which according to the parameters in the *Arrowsmith* case should not have been protected by Article 9 (1).[105] Vickers rightly contends that the question of what is necessary for a religion, and what is only motivated by it, can be difficult to determine. 'In some cases even adherents of the same religion may not agree. For example, the question of whether church attendance is obligatory is not one on which Christians agree.'[106] In reference to *Arrowsmith* C. Evans points out that:

> By excluding actions that are merely motivated or influenced by belief, the Commission suggested that a very direct link is needed between the belief and the action if the action is to be considered a 'practice' under Article 9.[107]

C Evans points out that this test has been assumed by the ECtHR to apply to worship, teaching and observance as well. However, she rightly contends that that: 'An examination of cases that have applied the Arrowsmith test demonstrate the lack

---

[104] Ibid 313-314. Evans argues, though, that this would mean adopting some sort of *a priori* understanding of the forms of practical manifestation that were to be deemed acceptable in a qualifying religion or belief. Although difficult he claims it is not impossible. However, he seems to suggest that 'perhaps the answer might lie in taking a more rigorous view of what was to count as a protected religion or belief in the first place'. Ibid 314.

[105] The Commission has accepted, for example, that conveying messages proclaiming dangers of pornography, fornication and alcohol by word of mouth or by placard amounts to a manifestation *X v Sweden* (App no 9820/82) (1984) 5 EHRR 297.

[106] L Vickers (n 3 above) 99. See also *R (Begum) v Head Teacher and Governors of Denbeigh School* where the House of Lords accepted the claimant's view that, as a Muslim, she was obliged to wear a full length jilbab was a religious belief notwithstanding the proliferation of different views on this issue among Muslims. However, it did not accept the fact that her freedom to manifest this belief had been interfered with by the imposition upon her of a school uniform policy when she was free to attend another school. *R (Begum) v Denbigh High School Governors* [2006] UKHL 15; [2007] 1 AC 100.

[107] Evans points out that this has come to be interpreted as some type of necessity test. Evans calls it the 'Arrowsmith test'. C Evans (n 2 above) 115.

of clarity and the difficulties inherent in applying this test in a coherent manner'.[108]

For example, in the complex and controversial case of *Pretty v UK*[109], the Court accepted the firmness of the applicant's views concerning assisted suicide. However, it decided it was not a manifestation of a belief. It observed that not all opinions or convictions constitute beliefs in the sense protected by Article 9 (1) of the Convention. The case was mainly decided under Article 8, (and also Article 14). No violation of any Convention articles was found. Mrs. Pretty was at the final stages of motor neurone disease. As she was frightened and distressed about the suffering and indignity that she would endure if the disease ran its course, she very strongly wished to be able to control how and when she would die. She wanted her husband to assist her suicide. She claimed that there was interference with her rights under Article 9. In her submission she referred to the fact that the right to freedom of thought has included beliefs such as veganism and pacifism. She stated that she believed in and supported the notion of assisted suicide for herself. In refusing to give the undertaking not to prosecute her husband, the United Kingdom had interfered with this right by imposing a blanket ban which allowed no consideration of her individual circumstances.[110] In the Court's opinion, her claims did not involve any form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph of Article 9.[111] The Court did not proceed to explain which parameters, apart from worship, teaching, practice

[108] Ibid.

[109] *Pretty v UK* (App no 2346/02) (2002) 35 EHRR 1.

[110] Ibid para 80.

[111] Ibid para 82.

and observance it used to determine why Mrs. Pretty's belief was not a manifestation of a belief. It simply referred back to the *Arrowsmith case*, which found that the term 'practice' as employed in Article 9 (1), does not cover every act which is motivated or influenced by a religion or belief.[112] M. D. Evans points out that the Courts' conclusion was 'utterly illogical':

> …in order to determine whether a form of belief is a religion or belief for the purposes of Article 9, the court looked not to the nature of those beliefs but to the narrower, second order question of the nature of the manifestation. This is… illogical since it could yield a different answer depending on the activity in question….In the *Arrowsmith* itself the Commission thought that whilst pacifism 'qualified' as a form 'belief'…the act in question – the distribution of leaflets…had not been a 'manifestation' of her beliefs as a pacifist, but was 'merely' motivated by them…Whatever one might think of the distinction, it is at least cogent approach that respects the structure of the article. If the reasoning in Pretty has been applied in *Arrowsmith*, however, pacifism would not have been considered to be 'protected' at all by the second element of Article 9 (1) simply because the nature of the act in question was not a manifestation on the facts of the case.[113]

Moreover, it could be argued that what should have been in focus here was whether the restriction was justified. The question as to whether Pretty manifested her belief in the sense of Article 9 was secondary. In a way the Court's statement that her belief was not a manifestation of a belief under the Convention was unnecessary and meaningless, especially when one considers the fact that there was no further explanation added. It could have effectively reasoned that there was a manifestation of belief involved; but that restrictions were justified/unjustified under the circumstances. The attempts at definition seemed to allow the Court to avoid dealing with

---

[112] *Arrowsmith v UK* (n 82 above) para 71.

[113] MD 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* (CUP, Cambridge 2008) 294.

justifications under Article 9 in this sensitive case.[114]

To conclude, there appears to be an overwhelming inconsistency in the Courts practice regarding defining/determining what is a manifestation of religion or belief. There is also a restrictive approach to what is manifestation of religion or belief, which does not seem to acknowledge the importance of manifestation to an individual believer and problematic distinction between beliefs and actions. The Court has tried without coherent explanation to define what the acts of religion or belief under the Convention are.

There is also a dangerous tendency in the Court's practice to substitute the Court's judgement for an individual's own views about the importance of his or her belief and also the manifestation of it. This is the point where problematic distinction between inner beliefs and manifestations of them becomes obvious and where the conflict between the Court's current approach and the right to religious autonomy is most visible. As Martínez-Torrón and Navarro-Valls point out:

> Naturally, it is necessary to verify – as far as possible – that practices are not deceitfully alleging moral convictions they do not really or sincerely hold in order to avoid fulfilling a legal duty. But this does not mean that a secular court is competent to elucidate when the beliefs of a person are sufficiently consistent from an "objective" point of view. This is a slippery slope.[115]

For example, in the twin decisions of *Efstratiou* and *Valsamis,* the Court

---

[114] Justifications were discussed under Article 8. The State was left with a wide margin of appreciation; no compelling reasons for restricting the freedom were required.

[115] J Martínez-Torrón, R Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 234.

contended that it could 'discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions'[116]. These cases concerned secondary school students, followers of the Jehovah's Witnesses, who refused on religious grounds to participate in school parades to commemorate the outbreak of war between Greece and Fascist Italy in 1940. They argued that their convictions prohibited them from being present in a civic celebration in which the war was remembered, and in which military and ecclesiastical authorities took part. However, the Court maintained that the parades that Jehovah's Witnesses morally disapproved of were merely civic acts without any particular political or ideological connotation, and as such could not offend the pacifist convictions of students.[117]

> Thus, the Court in effect substituted its judgement for the conscience of the persons involved, defining what was "reasonable" for them to believe with regard to their participation in a national commemorative ceremony.…This conviction that public authorities, in a neutral secular society, must refrain from pronouncing on the truth or falsehood of a religious dogma or a moral belief is deeply rooted in Western legal culture. Indeed, the European Court itself has affirmed that "the State's duty of neutrality and impartiality…is incompatible with any power on the State's part to assess the legitimacy of religious beliefs."[118]

It was discussed in the last chapter that the European Court of Human Rights has emphasised the State's role as the neutral and impartial organiser of the exercising of various religions, faiths and beliefs and has pointed out that this role is conducive to public order, harmony and tolerance in a democratic society. It was also argued that neutrality has been interpreted by the European Court of Human Rights as

---

[116] *Efstratiou v Greece* (App no 24095/94) (1997) 24 EHRR 294 para 32; *Valsamis v Greece* (App no 21787/93) (1997) 24 EHRR 294 para 31.

[117] *Efstratiou v Greece* (n 116 above) paras 32 – 33; Va*lsamis v Greece* (n 116 above) paras 31, 37.

[118] J Martínez-Torrón, R Navarro-Valls (n 115 above) 234

impartiality, that is, as an obligation to respect the religious choices of citizens, whether or not they adapt to the widespread religious beliefs in the country, and whether or not their beliefs are popular or unpopular.[119] It was suggested that, although the Court's practice refers to the duty of States to refrain from assessing the legitimacy of religious beliefs or the ways in which those beliefs are expressed, the same neutrality and impartiality principle ought to apply to the European Court of Human Rights itself. Thus, the Court ideally ought to respect choices/self-definition of individuals and communities.

3.6. Towards a better Definition of Religion or Belief

As seen above, there is a fair amount of uncertainty and lack of clarity over what is considered a manifestation of religion or belief by the ECtHR. The ECtHR has developed somewhat obscure objective criteria for identifying what is religion or belief, or the manifestation of it. These objective criteria are sometimes employed and sometimes not; there is no clarity or consistency in the Court's practice. It can be argued that neither individual nor collective autonomy is adequately protected when it comes to determining whether a manifestation of religion or belief is a manifestation of religion or belief under Article 9. Consequently, what ought to be the way forward? There are three questions to answer: (1) is there a need for an objective definition to separate religion or belief protected under Article 9 (1) from any other beliefs (for example the ones protected under Article 10); (2) is there actually a need for an objective definition; and (3) what does the subjective definition, favoured in this thesis, entail?

---

[119] See Ch II at 88; See also J Martínes Torrón (n 115 above) 106-107.

As to the first question, Evans contends that by referring to the freedom of 'thought, conscience and religion' but only to the right to manifest religion or belief, the Convention distinguishes one type of personal philosophy as enjoying a greater degree of protection than others.[120] This assumption, as noted above, is based on the wording of Article 9 and the Court's controversial attempts to distinguish between beliefs. This suggests that there is still a clearer or more sophisticated definition needed to distinguish between beliefs that are protected by Article 9, and beliefs protected by other articles like Article 10 which provides for freedom of expression. Evans's comment refers back to the problem of over-inclusiveness of the subjective, autonomy based definition. Nevertheless, as Barker suggests:

> While it is necessary for the existence of society that we know what we are talking about when we use the concepts with which we communicate with each other, exactly how we construct our definitions will always be to some extent *arbitrary*. Definitions are not more or less true; they are more or less useful – and their boundaries are more or less open to manipulation.[121]

The distinction between special beliefs protected under Article 9 and other beliefs (or opinions and ideas) is founded on the presumption of special status and perhaps *prima facie* primacy and the importance of these beliefs over any other beliefs. This line of argument is not considered to be appropriate for an international court dealing with the diversities of beliefs both religious and secular in nature: it was suggested in this chapter that the Court ought to adopt a broad and pluralistic view of

[120] C Evans (n 2 above) 53.

[121] E Barker, 'Why the Cults? New Religious Movements' in T Lindholm, WC Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004). 572. Although she is talking about the debatable definition of new religious movements, this thought of hers fits well into the present context as well.

religions or beliefs and manifestations of them. It also has to be emphasized that a definition which values religious autonomy cannot place any *prima facie* importance in any particular ideas or beliefs. The legal definition of religion or belief under Article 9, ought to be dependent on the legal context in which it is used. In this regard it cannot be divorced from the goal of the law which is advancing or restricting the manifestation of the belief. 'For example, a wider approach may be appropriate in considering a charity 'for the advancement of religion' than in the case of an exemption from criminal law.'[122] Thus, whether something is religion or belief for the purposes of Article 9 depends on careful balancing of individual autonomy and compelling state interests under Article 9 (2).

Moreover, the Convention should be interpreted coherently. Several Articles in the Convention can be relevant to freedom of religion (especially 8, 10, 11 and Protocol 1 Article 2). The Commission has stated in the case of *Campbell and Cosans v. UK* that 'the provisions of the Convention…"must be read as a whole" …Consequently, the provisions of Art. 2 of the Protocol "must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention'[123] Often cases involving freedom of religion, presented to the Court, are invoking different articles of the Convention and the Court may or may not find that several articles have been violated. Freedom of religion or belief has different aspects to it. It may, for example, invoke questions of privacy, freedom of expression, association and non-discrimination. A case might need to be scrutinised under several articles. The

[122] R Ahdar, I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005) 114.

[123] *Campbell and Cosans v UK* (n 61 above) para., 92; The same idea has been expressed, for example, in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (App nos 5095/71, 5920/72, 5926/72) (1979) 1 EHRR 71 para 52 and in the *Belgian Linguistics Case* (App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1968) 1 EHRR 252.

same, for example, applies to political or other beliefs or ideas, which can be primarily expressed under Article 10 of the Convention. The clear pre-demarcation of what sort of beliefs or manifestations of them fall under which article, is not necessarily helpful or possible. The pre-demarcation also goes against the logic of Article 9 itself as it is claimed in *Kokkinakis* to be there to protect various religions and beliefs (including non-religious). The application of articles to actual cases should be based on factual circumstances, the interpretation of the Convention as a whole and, as noted above, on careful balancing of individual autonomy and compelling state interests.[124]

As to the second and third questions, this thesis suggests that it is not appropriate for the ECtHR to decide that an applicant's belief is not a belief or religion or manifestation of it. The subjective, applicant's autonomy based interpretation of his or her belief is an appropriate approach for a court whose special task is the protection of human rights and fundamental freedoms. The Court needs to recognise explicitly the right to religious autonomy to determine, both at the individual and collective level, what one's belief is (*forum internum*) and the ways and importance of the manifestation of it (*forum externum*). The Court ought to take into account that the division between *forum internum* and *forum externum* is very problematic. The manifestation of religion or belief often embodies the most significant meaning for believers themselves. Moreover, as emphasised before, the Court has stated that 'it is of crucial importance that the Convention is interpreted and applied in a manner, which renders its rights practical and effective, not theoretical

[124] It also needs to be noted that because the Court is leaving States with a wide margin of appreciation in Article 9 cases the argument that Article 9 currently provides special protection to certain beliefs is not supported.

and illusory.'[125] In the case of *Wemhoff v Germany* the Court held that:

> Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.[126]

Any objective (content based) definition of religion or belief may carry deficiencies and not be adequate or flexible enough to take account of changes in society or in personal beliefs; and thus, would affect religious autonomy. In this regard the Court should start to take pluralism seriously, which is 'dearly won over the centuries'.[127] As Ahdar and Leigh have put it:

> Of the twin dangers, under-inclusiveness and over-inclusiveness, the latter would seem to be the lesser evil. It would appear preferable to err on the side of generosity, presuming most assertions of religion to be genuine subject only to clear evidence to the contrary.[128]

Martínez-Torrón and Navarro-Valls highlight that the ECtHR does not seem to be fully aware of the fundamental philosophy underlying the protection of religious liberty:

> The reason why the freedom of each individual conscience must be respected is not that it is objectively correct – the courts would then have to judge the truth of the alleged beliefs, as a sort of new Inquisition. Rather, freedom of conscience must be respected because it is considered a fundamental area of the individual's autonomy in democratic societies, and, consequently, the legal system has determined that nobody may interfere with the individual's conscience as long as other prevailing juridical interests are not endangered.

---

[125] *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8 para 136.

[126] *Wemhoff v Germany* (App no 2122/64) (1968) 1 EHRR 55 para 8.

[127] *Kokkinakis v Greece* (n 72 above) para 31.

[128] R Ahdar, I Leigh (n 122 above) 113.

> What freedom of religion or belief protects is, namely, the right to choose the truth in which one is willing to believe. Hence, article 9 (2) of the European Convention provides that the state may restrict the exercise of that freedom only when it is "necessary in a democratic society".[129]

However, it is appropriate for the Court to question the sincerity of the applicant. For example, inquiry about sincerity of beliefs may be relevant when a person seeks a particular privilege or exemption, which is available to particular religions or beliefs. [130] As Ahdar and Leigh point out, the question of definition and sincerity are two different matters.[131] For example, in the case of *Kjeldsen, Busk Madsen and Petersen,* which concerned Article 2 of the Protocol 1, Judge Verdross held that the Court had to verify the truth of the statements made by applicants about their religious beliefs, (to make sure that they were not acting fraudulently), but it also had to respect the ideology of the persons concerned once such ideology has been clearly made out.[132]

> This alternative, which respects the right of applicants to determine whether being forced into a particular activity or prohibited from some type of action affects their religious sensibilities, is a clearer test and does not require judges to make determinations about a person's religious beliefs or the requirements of a religion.[133]

The approach suggested by Judge Verdross is reasonable: the Court has to

---

[129] J Martínez-Torrón, R Navarro-Valls (n 115 above) 234-235.

[130] See eg *Kosteski v the Former Yugoslav Republic of Macedonia* (App no 55170/00) ECHR 13 Jul 2006. See also MD Evans (n 56 above) 13.

[131] R Ahdar, I Leigh (n 122 above) 124.

[132] Separate Opinion of Judge Verdross, *Kjeldsen, Busk Madsen and Petersen v Denmark* (n 123 above).

[133] C Evans (n 2 above) 124.

verify the truth of the statements made by applicants about their religious beliefs, (to make sure that they were not acting fraudulently), but it also has to respect the ideology of the persons concerned once such ideology has been clearly made out.[134] Sadurski, for example, contends that sincerity inquiry is 'not qualitatively different from any other judicial scrutiny of the individual state of mind, such as in the examination of criminal *mens rea*, or of legislative intent for the purpose of statutory interpretation'.[135] He makes a convincing point. However, when the Court deals with (subjective) religion or belief perhaps extra caution needs to be taken. As Lord Nicholls pointed out in *Williamson,* religion (but also belief)

> …is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed or static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.[136]

Some people may have sincere beliefs but lack the capability of articulating them clearly. Some people have sincere beliefs, but do not have the detailed knowledge of the requirements of their alleged belief. Some hold strong beliefs, but they are considered so bizarre that the Court may find itself wondering about their legitimacy. M.D. Evans, for example, also warns that the sincerity test needs to be approached with care in the context of wearing religious symbols as being potentially

---

[134] Separate Opinion of Judge Verdross (n 132 above).

[135] W Sadurski, 'On Legal Definition of "Religion"' (1989) 63 The Australian L J 834, 836; See also W Sadurski, 'Toward a Constitutional Definition of Religion' (1978) 91 Harv L Rev 1056.

[136] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246 [23] and [24].

too oppressive. He convincingly argues that by wearing a religious symbol a person is not only acting in a fashion which they consider to be consonant with their religious belief system, but that very act may itself demonstrate their *bona fides* adherence to that belief without any further exploration needed. [137] It is suggested here, that the burden of proof cannot be too high on applicants. Once it is understood as to what a claimant genuinely believes the onus of the burden to prove that their claim is fraudulent or unfounded shifts to the State. It is up to the Court then to assess the evidence *in corpore* and in relation to reasons why a particular religious activity is sought to be restricted.

One alternative is argued for here. This alternative is developed (or more precisely occasionally used) by the Court itself. The Court (and former Commission) have occasionally skipped over Article 9 (1) all together, and focused its attention on the justification of restrictions under Article 9 (2). For example, sometimes the Court has assumed that there was interference with the rights guaranteed in Article 9 (1) and went straight on to deal with Article 9 (2) issues.[138] In some cases where parties had not contested the involvement of Article 9 (1), the Court or Commission did not seem to see a need to identify whether there was a manifestation of religion or belief involved either.[139] The above discussion suggests that this approach is the best to avoid an objective definition of manifestation of religion or belief at the Article 9 (1) stage. For example, Gunn has proposed in the context of asylum law that more

[137] MD Evans (n 56 above) 13.

[138] *X v UK* (App no 7992/77) (1978) 14 DR 234.

[139] To a certain extent *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* belongs to this category. *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 Jun 2000.

important than an objective or scholarly definition of religion is the understanding of the religion from the perspective of the persons who are causing the persecution.[140] This can be considered as good advice in the context of the ECHR as well, not only in cases of persecution, but in any case involving restrictions on the manifestation of freedom of religion or belief. Reasons behind the exclusion of particular manifestations of religion or belief by States from the protection of Article 9, should be under scrutiny. In this regard the clinical division of determining whether Article 9 (1) is engaged (definition), and whether interference is justified seems unimportant. More attention should be given in order to identify why certain manifestations have to be restricted. Answering the question 'why' is not the ECtHR's strongest suit either.[141] In this regard, focusing on definition at the first stage takes its attention away from what is important. Potentially a restrictive definition can be used to avoid serious questions about reasons for limiting freedom of religion or belief.

C. Evans argues on the other hand that there are several advantages to the Court at least briefly addressing Article 9 (1) issues: (1) this would give a rough idea of the types of activities that are protected under Article 9(1)[142]; and (2) it gives both applicants and States a better idea of whether the applicant has a right that he or she is entitled to exercise.

---

[140] Gunn draws a parallel with persecution on the grounds of race and gender. TJ Gunn (n 1 above) 198.

[141] In fact, the limitation clause rather than the definitional issues caused a great deal of controversy already during the drafting stage of the ECHR. C Evans, 'Religious Freedom in European Human Rights Law: The Search for a guiding Conception' in MW Janis and C Evans (eds), *Religion and International Law* (Kluwer Law International, The Hague 1999) 388.

[142] MD Evans seems to take this even further and suggests that some forms of manifestation (eg improper proselytism) ought not to be equated with a legitimate manifestation at all. MD Evans (n 35 above) 332. This is considered here as a dangerous path to take. Problems related to improper proselytism can be more appropriately dealt with under Article 9 (2).

> Perhaps the most important reason, however, as to why the Court and Commission should be cautious in skipping over the Article 9(1) stage is that it is the stage that focuses on the position of the applicant...Moving to a consideration of Article 9 (2) with little or no discussion of Article 9 (1) can lead the Court to pay undue attention to the arguments of the government about its justifications for the law and its application, and to lose sight of the importance to the individual of the manifestation of religion in question.[143]

While this thesis concurs with this statement it does not see as problematic the emphasis on Article 9 (2), or even skipping 9 (1), as long as the subjective interpretation of the applicant's religion or belief is taken into account. The actual scope of the freedom should be defined by the balancing of State needs and religious needs. In truth, the issues of engagement, interference and justification are closely linked together.

3.7. Conclusion

In defining religion or belief and manifestation of it, the Court ought to respect the right to religious autonomy. This effectively means a more subjective definition of religion or belief and the manifestation of it. A subjective and thus pluralistic definition of religion or belief is the price we need to pay if autonomy linked to equal dignity and worth of all human beings is given any value at all. It also has to be emphasized that a definition which values religious autonomy cannot place any *prima facie* importance in any particular ideas or beliefs. This thesis argues that the legal definition of religion or belief under Article 9, ought to be dependent on the legal context in which it is used. In this regard it cannot be divorced from the goal of the law which is advancing or restricting the manifestation of the belief. Further, an

[143] C Evans (n 2 above) 136.

essentially subjective definition does not exclude restrictions on forms of manifestation which conflict with interests listed in Article 9 (2) of the Convention. The objective definition currently employed by the Court provides the unfortunate means of avoiding serious questions about the protection of freedom of religion. The subjective definition as developed in this thesis provides a better protection to individual believers in *forum internum* by recognizing the problematic distinction between internal beliefs and actions and emphasizing the importance that outward manifestation of belief may have for individual believers.

Chapter IV

The Scope of Religious Autonomy

4.1. Introduction

The last chapter put forward a subjective definition of religion or belief, and the manifestation of it. As was noted already, it is essentially a subjective definition which is in conformity with religious autonomy, but does not exclude restrictions on forms of manifestation which conflict with interests listed in Article 9 (2) of the Convention. The right to manifest freedom of religion or belief cannot be absolute. There may be very good reasons to restrict this freedom. Thus there is a limit to the autonomy of an individual or community. The autonomy to determine the way one manifests religion or belief cannot be absolute as external restrictions ultimately affect the scope of one's autonomy. It was argued that it is through the careful balancing of different interests under Article 9 (2) by which the relationship between the State and 'autonomy' or 'freedom' of an individual or community ought to get defined. Thus, not the definition of religion or belief and manifestation of it, but the reasons for limiting freedom of religion or belief should be the focus.

In this chapter it will be argued that, although it is inevitable that manifestation of freedom of religion or belief should be subject to limits, any such limits must be precisely defined, weighty in relation to the core freedom, and consistently applied. Core values such as respect for choice of the individual and autonomy of the community, the need for pluralism, neutrality and effective protection of rights are essential ingredients in the right of religion or belief, and should not be overridden except where there are very strong countervailing objectives, and there is no alternative but to curtail them. Respect for (right to) religious autonomy means that right holders deserve a proper, systematic explanation of exactly why their way of manifesting their beliefs can be limited. The ECtHR unfortunately, falls far short of this ideal. Its jurisprudence shows that it is quick to defer to contracting states; it frequently fails to articulate either the legitimacy of the end, or the necessity of the purpose; and its approach is vacillating and unpredictable. One reason for this is that the Court rarely pays enough attention to religious autonomy requiring respect for the equal worth, dignity and identity of a believer to choose and live out his or her beliefs. Therefore the arguments for limiting the right are not tested against any clear understanding of the nature of the right. The result is inevitably to create a set of limitations which are poorly articulated and frequently inconsistent. As Lewis has rightly noted: 'The Court's inability to pin down quite why religious freedom is valued, the absence of a clearly defined and universally accepted rationale, has contributed to the adoption of the margin of appreciation as a significant adjudicative tool in this area.'[1]

It is argued in this chapter that the ECtHR, firstly, has to give due regard to the right to religious autonomy. This ideally ought to determine the starting point for any further assessment. Secondly, it ought to develop a more systematic approach to assessing the limits applied by States to freedom of religion or belief. Evans has pointed out that the variety of religious demographics in different States makes it difficult for the Court to draw on universal or near universal European conceptions when determining the scope of deferral to States (width of the margin of appreciation)

[1] T Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 ICLQ 395, 405.

in Article 9 cases.[2] While it is true that States are sometimes in a better position to assess the local circumstances, this in itself should not be the determining element in the process of assessment of limits applied by States to the manifestation of religion or belief. After all, human rights are, first of all, rights against abuses by the State! It is argued in this chapter that the right to freedom of religion or belief is weighty enough to attract a narrow margin of appreciation. This means that there has to be strict European supervision, which in turn means that the Court ought to carefully balance different interests involved. As Greer contends, the margin of appreciation is a 'secondary constitutional principle' and in exercising this doctrine the State is constrained by an overarching primary principle of ensuring that there is 'a priority of rights'.[3] It is suggested here that strict European supervision means that the Court ought to check whether the State has convincing and compelling reasons to restrict freedom of religion or belief. This in turn means there ought to be tangible evidence for the need for the restriction. Where this need has been established, the Court ought to carry out a proportionality test between the means employed and the ends pursued to ensure that the State has chosen the least restrictive means to curtail the freedom.

One main point should be made here, however, before turning to discuss the above suggestions. It is not entirely clear what sort of role the ECtHR sees itself playing in freedom of religion or belief cases. As Gunn has pointed out:

---

[2] C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2003) 143.

[3] S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, Cambridge 2006) 195-230. Greer lists 'rights', 'democracy' and 'priority to rights' as primary and 'subsidiarity', 'positive obligations' and 'non-discrimination' as secondary constitutional principles in the context of the ECHR.

> If the court sees itself as a neutral and sceptical party that must be convinced by the evidence, then its decisions may tend in one direction. If the court sees itself as the zealous defender of human rights and as being sceptical of self-serving statements by governments, its decisions may veer in another direction. If the court perceives itself to be an unwelcome international interloper that is interfering in a domestic dispute, it may be inclined to be more deferential than rigorous when applying international law.[4]

The European Court of Human Rights is called upon to defend the freedom of religion or belief and perhaps to set a standard of protection along with keeping an eye on the protection provided by national authorities. In this regard, it should see its role if not as a 'zealous defender of human rights' at least as 'a neutral and sceptical party that must be convinced by evidence'. Lewis makes it even more explicit stating that:

> It is the function of the European Court to protect all the rights set out in the Convention and subject State restrictions of these rights to serious and detailed analysis. It should not adopt the intellectually lazy option of running for the cover provided by the margin of appreciation as a way of avoiding difficult issues.[5]

To start, this chapter will briefly describe and analyse the requirements for limiting freedoms under the Convention and Article 9 (2). It then turns to discuss the margin of appreciation by addressing factors that the Court considers (although not systematically) while deciding cases under Articles 8-11.[6] These factors are: (1) the importance of the right; (2) the character of 'democratic society'; (3) the European consensus; (4) the interest to be protected by the interference and (5) the resolution of

[4] TJ Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory Int Law Rev 465, 478.

[5] T Lewis (n 1 above) 414.

[6] Harris, O'Boyle, and Warbrick, call them principles which the Court uses 'to give some structure to its judgements in which it considers the exercise of the margin of appreciation by states' However, they point out that it is important not to ascribe too much weight to these principles as they are not rules. DJ Harris, M O'Boyle, C Warbrick, *Law of the European Convention on Human Rights* (Butterworth, London 1995) 293.

an eventual conflict between different factors (proportionality test). As was explained in the last chapter freedom of religion or belief has different aspects to it. It may, for example, invoke questions of privacy, freedom of expression and association. A case might need to be scrutinised under several articles.[7] Thus the case law of Articles 8, 10 and 11 besides Article 9 is relevant to acquire a fuller picture. Considering Articles 8-11 also shows that there seems to be a pattern (although not a complete one) in the Court's practice which restricts or widens the margin of appreciation depending on which aspect of freedom of religion or belief is at issue.

4.2. Limiting Religious Freedom under Article 9 (2) of the ECHR

As stated before freedom of religion or belief in *forum internum* is theoretically unlimited. Only freedom to manifest one's religion or belief can be limited. However, the limits can only be imposed if they meet three sets of requirements. Article 9 (2) reads as follows:

> Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[8]

Thus, under the ECHR, restrictions on manifestation of religion or belief must be prescribed by law, they have to have a legitimate aim listed in Article 9 (2), and they have to be necessary in a democratic society. However, the restrictions are

---

[7] Ch III at 157.

[8] Article 9 (2) ECHR.

mainly assessed through the test of being necessary in a democratic society. The latter is primarily determined through the principle of proportionality and margin of appreciation. The interpretation of the above requirements has been mainly developed with reference to Articles 8, (the right to private and family life), 10 (freedom of expression), and 11 (the right to assembly and association), rather than Article 9. This is mainly due to the fact that until the 1993 *Kokkinakis* case[9], most freedom of religion cases were declared inadmissible by the Commission. By the time the Court began to make judgements on the merits of applications based on religious freedom, there was a doctrine in place on the permissible limits to private and family life, freedom of expression, and freedom of assembly and association.[10] All these Articles have a two-paragraph structure which allows for a balance to be struck between the individual's right and the greater social good. The second paragraphs of Articles 8, 10 and 11 follow the same pattern as Article 9. Moreover, cases on freedom of religion or belief often involve rights protected under these Articles. There exists great interdependence between these protected rights, and thus it is important to consider the case law limiting rights under Articles 8, 10 and 11. Following is a brief account of the requirements for permissible limits under the Convention.

As to the first requirement, limitations are allowed if they are 'in accordance with the law' or 'prescribed by law'. There is a difference in wording between Article 9 (2), 10 (2), 11 (2) and 8 (2) of the Convention. Articles 9 (2) – 11(2) use the formulation 'prescribed by law'; and Article 8 (2) uses 'in accordance with the law'.

[9] *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397.

[10] J Martínes-Tórron, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) 19 Emory Int Law Rev 587, 594.

The Court has established that both formulations are to be read in the same way.[11]

The Court has also developed a few principles as to the quality of the law. The law has to be compatible with the rule of law, which is expressly mentioned in the preamble of the Convention.[12] It can be written or unwritten law.[13] The law has to be (sufficiently) accessible and foreseeable.[14] It must be formulated with sufficient precision to enable those concerned – if need be, with appropriate (legal) advice – to foresee, the degree to which it is reasonable in the circumstances, the consequences which a given action may entail (to enable those concerned to regulate their conduct).[15] It is not the aim of this thesis to carry out an in depth analysis of this requirement of restrictions on freedom of religion or belief.

As to the second requirement, Article 9 (2) allows limits to manifestation of freedom of religion or belief 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. This could be called a catalogue of justifications for limiting freedom of

---

[11] *Malone v UK* (App no 8691/79) (1984) 7 EHRR 14 para 66.

[12] Ibid para 67.

[13] *The Sunday Times v UK* (App no 6538/74) (1979) 2 EHRR 245 para 47. In this case it was pointed out that it would be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of common law is not 'prescribed by law' on the ground that it is not enunciated in legislation.

[14] *Silver and Others v UK* (App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) (1983) 3 EHRR 475 paras 87 and 88.

[15] *Wingrove v UK* (App no 17419/90) (1996) 24 EHRR 1 para 40; *Svyato-Mykhaylivska Parafiya v Ukraine* (App no 77703/01) ECHR 14 June 2007 para 115. The wording of these requirements varies in different cases. It is assumed here that this does not have substantial consequences. See also *Larissis and Others v Greece* (App no 140/1996/759/958-960) (1999) 27 EHRR 329 para 40.

religion or belief (or even a catalogue of exemptions to freedom of religion or belief). However, as van Dijk and van Hoof have pointed out:

> Emphasis is laid by the Strasbourg organs on the issue of the necessity of the interference. In fact, the examination of the question of whether the protection of a justifiable interest is at issue generally coincides with the examination as to the necessity. As a result, the interests listed as grounds for restrictions have received only scant independent attention in the case-law.[16]

Thus, relatively little can be said about the independent meaning of the particular justifications listed. The reason perhaps is that the justifications are part of the complex factual matrix – the listed restriction, the nature of the right or the circumstances in which its enjoyment is sought.[17] One has to agree with Evans, that while analysing justifications for restricting freedom of religion or belief, one should keep in mind that none of the aspects for restricting freedom of religion can be examined convincingly in complete isolation.[18] In consequence and in relation to the third requirement (necessary in a democratic society) the Commission has explained:

> It emerges from the case law of the Convention organs that the "necessity" test cannot be applied in absolute terms, but requires the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and degree to which it requires protection in the circumstances of the case.[19]

As noted above, the test of being necessary in a democratic society is primarily

---

[16] P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998) 771-772.

[17] MD Evans, *Religious Liberty and International Law in Europe* (CUP, Cambridge 1997) 322.

[18] Ibid.

[19] *X & Church of Scientology v Sweden* (App no 7805/77) (1979) 16 EComHR 78 para 5.

determined through the principle of proportionality and margin of appreciation. Neither of these principles can be found in the text of the ECHR. These are principles introduced into the Convention system by the European Court of Human Rights.[20]

The proportionality principle permeates the whole interpretation of the Convention and implies the need to strike a proper balance between various competing interests.[21] It has acquired the status of a general principle, which requires that deviations from the fundamental rights are not excessive in relation to the legitimate interests and needs that have occasioned the deviation.[22] In a narrower sense it means assessment of proportionality between means employed and ends (legitimate aims) to be achieved. The Court has often stated that the adjective 'necessary' implies the existence of a 'pressing social need'.[23] The idea is that a State should demonstrate a pressing social need that the right should be interfered with in the particular public interest identified by the State. In the case of *Handyside v UK* the Court stated (in respect of Article 10) that the adjective 'necessary' is neither synonymous with 'indispensable', nor does it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.[24] In the recent case of *Svyato-Mykhaylivska Parafiya v Ukraine* the Court stated that any interference with freedom of religion must correspond to a 'pressing social need' and added that

[20] P van Dijk, GJH van Hoof (n 16 above) 80-81; See eg *Soering v UK* (App no 14038/88) (1989) 11 EHRR 439. However, the proportionality principle *per se* is not a creation of the ECtHR, traces of it can be found as far back as in ancient Greece. See eg TJ Gunn (n 4 above) 465.

[21] P van Dijk and GJH van Hoof (n 16 above) 80.

[22] Ibid.

[23] *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 13 para 119.

[24] *Handyside v UK* (App no 5493/72) (1979) 1 EHRR 737.

therefore the notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'.[25] However, as Evans rightly points out: 'the Court has always been rather vague about the idea of proportionality, and the role that it plays in Article 9 jurisprudence is somewhat obscure'.[26]

As to the principle (or doctrine) of margin of appreciation[27], Lestas, for example, differentiates between a structural margin of appreciation and a substantive margin of appreciation. The structural margin of appreciation is reflected in the ideas of subsidiarity and State consensus in the international protection of human rights.[28] It can be seen as a tool to deal with the tensions between universality of human rights and state sovereignty. The substantive margin of appreciation, on the other hand, addresses the relationship between individual freedoms and collective goals. The substantive margin of appreciation can be seen as directly linked to the principle of proportionality. Arai-Takahashi has, for example, described the principle of proportionality as being 'the other side of the margin of appreciation'[29] and Matscher

[25] *Svyato-Mykhaylivska Parafiya v Ukraine* (n 15 above) para 116. This case was concerned with difficult legal wrangling between Orthodox Churches. The conflict involved matters of legal status, change of canonical subordination and property rights. The applicant claimed that the State interfered with its Article 9 rights by refusing to register changes and amendments to its statutes. It claimed that its right to change religious orientation (canonical subordination) was violated. The Court found violation of Article 9 as the interference was not justified.

[26] C Evans (n 2 above) 145 -146. In fact it could be said that the concept of proportionality is a vague concept, wherever used (for example, in international law, criminal law and public law). The detailed development of the proportionality concept in public law has been attributed to German scholars and jurisprudence. This concept involves three aspects. The government's measure under review has to be: (1) suitable, (2) necessary and (3) not excessive in achieving its claimed end. TJ Gunn (n 4 above) 465-471.

[27] For a comprehensive account on the doctrine see Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford 2002).

[28] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford 2007) 80-92. Lestas argues that distinguishing between these two concepts would enable the ECtHR to add clarity and transparency to its reasoning.

[29] Y Arai-Takahashi (n 27 above) 14.

describes it as 'corrective and restrictive of the margin of appreciation'.[30]

In the *Handyside* case the Court stated that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.[31] The margin of appreciation has been assumed to have importance as a major adjudicative tool, to be utilised whenever the Court needs to assess the proportionality of State interference with a right. The idea is that State authorities are in a better position to evaluate the need for measures which negatively affect the enjoyment of the Convention rights and freedoms. However, the Court has also repeatedly stated that the final say in interpretation and application of the ECHR is in principle with the European Court of Human Rights.[32] This seems to have created a schizophrenic atmosphere as regards freedom of religion or belief. Van Hoof and van Dijk have quite correctly and at the more general level observed that:

> Despite the rather long period of time during which the Court and the Commission have now applied the doctrine it is still very difficult to define in any precise way the conditions of its application because, although the doctrine is now well established in the Strasbourg case-law, "its exact ambit and role are far from being fully developed".[33]

Van Hoof and van Dijk have identified that throughout the Convention there

---

[30] F Matscher, 'Methods of Interpretation of the Convention' in RStJ Mcdonald, F Matscher, and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Boston 1993) 79. See also G Letsas (n 28 above) 86.

[31] *Handyside v UK* (n 24 above) para 48; This view was in principle expressed earlier in the judgment of 23 July 1968 on the merits of the 'Belgian Linguistic' case. *Belgian Linguistics Case* (App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1968) 1 EHRR 252 para 10.

[32] *Handyside v UK* (n 24 above) para 23.

[33] P van Dijk and GJH van Hoof (n 16 above) 85 (footnote omitted).

are various kinds of proportionality tests applied in different contexts.[34] This means that States are left with various degrees of margin of appreciation depending on the context of the case. It could be said that the Court has identified some rights or aspects of some rights as being more important than others.[35] Thus, there are different levels of scrutiny involved in testing the necessity of restrictions. However, this difference in scrutiny is often left without proper explanation. The Court has resorted to invoking a margin of appreciation without first providing proper analysis of the proportionality between the different interests involved. This leads to a certain lack of clarity, which is problematic. As Gunn has pointed out '…the degree of rigor that a court employs is not only important but can be dispositive of the outcome.'[36]

The Court generally tends to give States a wide margin of appreciation in Article 9 cases. Only in limited cases has the Court shown willingness to apply a narrow margin of appreciation and strict European scrutiny. However, as exemplified below, even in those cases there is no consistency in the Courts reasoning. The variations in the Court's approach have also not been explained.

For example, at one point the Court seemed to develop a concept of strict scrutiny, on the grounds that restrictions on religious freedom threatened religious pluralism. However, this approach has not been followed consistently in later cases. In the case of *Manoussakis and Others v Greece,* which concerned Jehovah's Witnesses who were prosecuted and convicted for having operated a place of worship without

---

[34] Ibid 81.

[35] DJ Harris, M O'Boyle, C Warbrick (n 6 above) 293.

[36] TJ Gunn (n 4 above) 480.

first obtaining the authorisation required by Greek law, the Court found that the restriction was not proportionate, and thus not necessary in a democratic society. It held that there was a breach of Article 9 of the Convention. The Court used the term 'strict scrutiny' to describe the standards it would apply in evaluating State's laws. The Court stated that the restrictions imposed on the freedom to manifest religion by the provisions of Greek laws on authorisation of places of worship 'call for very strict scrutiny by the Court'.[37] The Court linked its reasoning to the need to secure true religious pluralism by delimiting the extent of the margin of appreciation in this case. It further emphasised that considerable weight has to be attached to that need when it comes to determining, pursuant to paragraph 2 of Article 9, whether the restriction was proportionate to the legitimate aim pursued.

In a more recent case of *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*[38] the Court also linked its reasoning to the importance of pluralism in a democratic society. However, an applicable standard of rigor was not described as 'strict scrutiny'. In this case the applicants claimed that a prolonged failure to grant legal personality to their religious community (as a religious society) violated articles 9, 11, and Article 6. They also claimed that the status of the registered religious community, which was attributed to the community in 1998, was inferior to that of religious society and thus constituted discrimination under Article 14 (in conjunction with Article 9). Under Austrian law religious societies are entities in public law and enjoy privileged treatment in many areas (exemption from military service and civil

[37] *Manoussakis and Others v Greece* (App no 18748/91) (1996) 23 EHRR 387 para 44.

[38] *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (App no 40825/98) ECHR 31 Jul 2008.

service, reduced tax liability or exemption from specific taxes, facilitation of founding of schools, and membership of various boards).[39]

As to Article 9 (in the light of Article 11), the Court found it unacceptable that some 20 years had elapsed from the initial submission by the applicants of the request for recognition of their religious community as a legal person under the 1874 Recognition Act and before legal personality was eventually given to it. The Court linked its reasoning to the importance of pluralism in a democratic society and the importance of autonomous existence of religious communities. It also emphasised that in the light of the importance of the right to autonomy of religious communities 'relevant' and 'sufficient' reasons should have been put forward by the Government to justify the failure to grant legal personality. In the Court's opinion the measure employed by the Government went beyond 'what would have amounted to a "necessary" restriction on the applicants' freedom of religion'.[40] Although the Court restricted the margin of appreciation in this case it did not *expressis verbis* mention strict European scrutiny when dealing with alleged violation under Article 9. However, it did explicitly mention 'particular scrutiny'[41] while deciding whether there was discrimination involved due to the fact that Jehovah's Witnesses could not obtain the status of a religious society in public law. The Court stated that the imposition of a waiting period before a religious association that has been granted legal personality can obtain more consolidated status as a public-law body raises delicate questions, and

[39] Ibid para 92.

[40] Ibid para 79.

[41] Whether this type of scrutiny is the same or different from strict scrutiny is not clear however.

therefore calls for particular scrutiny on the part of the Court.[42] As the Court emphasised, this is because '…the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs'.[43] The Court decided by six votes to one that there had been a violation of Article 9, and six votes to one that there has been a violation of Article 14 of the Convention read in conjunction with Article 9.[44]

There is also an indication that a narrow margin of appreciation and strict European supervision may be applied when a freedom of religion case is ultimately decided under Article 11. For example, in the recent case of *Church of Scientology Moscow v Russia* the Court stated that:

> ...the restriction on the rights to freedom of religion and assembly, as contained in Articles 9 and 11 of the Convention, is exhaustive. The exceptions to the rule of freedom of association are to be construed strictly and only *convincing* and *compelling reasons* can justify restrictions on that freedom. In determining whether a necessity within the meaning of paragraph 2 of these Convention provisions exists, the *States have only a limited margin of appreciation,* which goes hand in hand with *rigorous European supervision* embracing both the law and the decisions applying it, including those given by independent courts.[45]

This case involved the refusal of authorities to re-register the Church of Scientology on the grounds that its purpose and activities were in contradiction with the law regulating religious associations and the Criminal Code, as there was an

---

[42] *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (n 38 above) para 97.

[43] Ibid.

[44] The applicants also invoked articles 6 and 13 of the Convention. The Court found unanimously that there has been a violation of Article 6 of the Convention, but no violation of Article 13.

[45] *Church of Scientology Moscow v Russia* (App no 18147/02) (2008) 46 EHRR 16 para 86 (emphasis added); See also *Svyato-Mykhaylivska Parafiya v Ukraine* (n 15 above) para 114. The same reasoning has been put forward in earlier case law. See *Wingrove v UK* (n 15 above) para 53.

ongoing criminal investigation against their president (the case was later closed in the absence of indications of a criminal offence). The applicant complained under Articles 9, 10 and 11 of the Convention. Similarly to the analogous case of the *Moscow Branch of the Salvation Army v Russia*[46], the case was decided under Article 11, but in the light of Article 9. The Court found that there was a violation of Article 11. There was no lawful basis for the restriction. Moreover, the Court found that the restriction imposed on the Church was disproportional, considering that the association had been a registered religious organisation since 1994 and that the community as a whole or its individual members had not been in breach of any domestic law. The Court emphasised that in these circumstances the reasons for refusing re-registration should have been particularly weighty and compelling.[47] It decided that the local authorities did not act in good faith and that they neglected their duty of neutrality and impartiality. The Court made a couple of other clarifying points in this case:

> When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion *reasonably*, *carefully* and in *good faith*; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "*relevant* and *sufficient*". In so doing, the Court has to satisfy itself that the national authorities applied standards which were *in conformity with the principles embodied in the Convention* and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.[48]

---

[46] *The Moscow Branch of the Salvation Army v Russia* (App no 72881/01) (2007) 44 EHRR 46.

[47] *Church of Scientology Moscow v Russia* (n 45 above) para 96-97.

[48] Ibid para 87 (emphasis added).

Similarly, in the case of *Barankevich v Russia*[49] where the Court considered the application of Article 11 in the light of Article 9, the Court emphasised the importance of convincing and compelling reasons as a general principle for restrictions of rights under Article 11. The reasoning of the Court was mainly based on the close relationship of these rights with democracy.[50] This case concerned a local authority's ban on public assembly of the Church of Evangelical Christians. The Court found that the Government violated Article 11 (interpreted in the light of Article 9). It reiterated the requirement of the State to exercise its discretion reasonably, carefully and in good faith and the importance of 'relevant and sufficient' reasons for restricting the right. It also added that the Court needs to satisfy itself that restrictions were in conformity with principles embodied in Article 11 and that the State based their decisions on 'an acceptable assessment of the relevant facts'.[51]

Thus, only in a limited number of cases has the Court been prepared to apply a narrow margin of appreciation. The Court has not provided a sufficiently reliable explanation for why it has operated with fluctuating degrees of European supervision. There have been cases which have also involved important questions about the principe of pluralism, neutrality or autonomy of religious communities (such as in the above ases), but no restriction on margin of appreciation was applied.[52] Even in the above cases the standard of rigour is seen to fluctuate. In some circumstances only

---

[49] *Barankevich v Russia* (App no 10519/03) ECHR 26 Jul 2007 para 25.

[50] Ibid.

[51] Ibid para 26.

[52] See eg *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8; *Dorgu v France* (App no 27058/05) (2008) 49 EHRR 8; *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37 EHRR 1; *Lamaiz El Majjaoui and Stichting Touba Moskee v the Netherlands* (App no 25525/03) ECHR 20 Dec 2007; *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 Jun 2000.

convincing and *compelling* reasons can justify the interference.[53] In other circumstances the Court needs to confirm that justifications given are *relevant* and *sufficient*.[54] There are also some more general requirements for the Court to make sure that the State had used its discretion *reasonably*, *carefully* and in *good faith*. References to the principles of the Convention have also been made. None of the requirements are clear; they are not applied in every case, and not in a uniform manner. This is a deficiency in current practice which needs dealing with by the Court. It should also be noted that the cases where the Court has applied strict(er) scrutiny involve violation of collective manifestation of religion.[55] While this is a welcome acknowledgement of the importance of the collective, it is not sufficient to protect individual rights. Martínez-Torrón has reflected that 'ironically, the strict individual dimension of this freedom has been disregarded more often and has arguably received less protection from the Strasbourg jurisdiction than the corporate dimension of the right.'[56]

The following sections will criticize some of the possible reasons for why the Court has tended to apply a wide margin of appreciation in Article 9 cases and put

---

[53] *Church of Scientology Moscow v Russia* (n 45 above) para 86.

[54] *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (n 38 above) para 79.

[55] There are some exceptions. See eg *Serif v Greece,* in which the Court found that the State did not demonstrate that there was a *pressing social need* (which presumably means strict(er) scrutiny) to convict the applicant (Mufti) for having usurped the functions of a minister of a known religion. *Serif v Greece* (App no 26695/95) (2001) 31 EHRR 20. The details of the case were discussed in the second chapter. See Ch II at 72-73. However, it needs to be noted, that although the application was made by an individual applicant the case in substance concerned collective religious autonomy to choose leaders for the community. See also similar cases *Agga v Greece* (No 2) (App nos 50776/99 and 52912/99) ECHR 17 Oct 2002; *Agga v Greece* (No 4) (App no 33331/02) ECHR 13 Jul 2006. The collective dimension of the case was also evident in the case of *Masaev v Moldova* where an individual applicant was convicted for manifesting his religion because his community was not registered. *Masaev v Moldova* (App no 6303/05) ECHR 12 May 2009. See also Ch II at 71.

[56] J Martínez-Torrón, 'Religious Liberty in European Jurisprudence' in M Hill (ed), *Religious Liberty and Human rights* (University of Wales Press, Cardiff 2002) 116.

forward some suggestions to improve the situation. It should be noted that all the factors discussed below are interrelated; dealing with them under separate headings is merely a matter of convenience.

4.3. The Nature and Importance of the Protected Right

On the basis of the Court's practice it can be said that one of the reasons States are left with a wide margin of appreciation in cases concerned with manifestation of religion or belief is the tendency on the Court's part to emphasise the primacy of the internal sphere of this freedom. The Court and Commission have often tended to rather mechanically recite that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*'.[57] This suggests that freedom of religion or belief is primarily protected in the private sphere. Lewis suggests that 'religious manifestation receives a very low level protection because of its public dimension – because the manifestation is, by definition, visible in public space'.[58] He makes an interesting comparison with the case of *Dudgeon v UK,*[59] which concerned criminalization of consensual homosexual behaviour in private. In this case the Court held that Northern Irish law criminalizing homosexual conduct breached the right for respect for private and family life protected by Article 8

[57] *C v UK* (App no 10358/83) (1983) 37 DR 142; *Valsamis v Greece* (App no 21787/93) (1997) 24 EHRR 294. In the more recent case of *Refah Partisi*, the Court used a slightly different formula stating that 'freedom of religion, including the freedom to manifest…is primarily a matter of individual conscience'. *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above) para 128.

[58] T Lewis (n 1 above) 401. His statement is valid perhaps with an exception regarding cases described above where the Court has applied stricter scrutiny when dealing with collective freedom of religion and freedom of association.

[59] *Dudgeon v UK* (App no 7525/76) (1982) 4 EHRR 149.

of the ECHR. The Court explained that since the case concerned a 'most intimate aspect of private life', there had to 'exist particularly serious reasons before interferences by public authorities could be legitimate'.[60] However, the mere fact that religion or belief extends to the public sphere cannot be seen as the sole reason for the wide margin of appreciation in manifestation cases. It was pointed out in the second chapter that the divides which are frequently invoked between beliefs/actions and public/private do not necessarily make any sense from a believer's point of view. Often the acts are part of a belief one has. Thus, if the ECtHR is to respect religious autonomy, then it ought to apply a narrow margin of appreciation when assessing justifications put forward to restrict manifestation of religion or belief.

Lewis suggests that another reason why cases dealing with manifestation of religion or belief under Article 9 have generally received more deference from the Court is that freedom of religion or belief itself is not considered as important as other rights to the effective operating of political democracy. He compares freedom of religion cases to cases protecting political and journalistic speech.[61] The same tendency can be noticed in cases which touch upon the right to assembly and association. The margin of appreciation tends to be narrower in the latter cases. Lewis observes that:

> The right to manifest religious belief, on the one hand, is not really about the communication of ideas (to facilitate the furtherance of the general good or otherwise). It is about enabling the right-holder to exercise her choice to perform what she sincerely believes to be her divinely ordained duty.

---

[60] Ibid para 52.

[61] T Lewis (n 1 above) 399. Lewis compares the case of *VgT Verein Gegen Tierfabriken v Switzerland* and *Murphy v Ireland*. *VgT Verein Gegen Tierfabriken v Switzerland* (App no 24699/94) (2002) 34 EHRR 10; *Murphy v Ireland* (App no 44179/98) (2004) 38 EHRR 10.

> Expressions may be critical to the attainment of ulterior objectives, but manifestation of religion is the *end itself*. It is the manifestation that counts – not any ulterior benefit that may be derived from it. Decreasing the level of protection because of the absence of an obvious societal good to be derived would seem to have the result of disproportionately devaluing the right in its own terms.[62]

However, it is not clear that this is the main reason why there is a predominantly wide (and fluctuating) degree of margin of appreciation in freedom of religion or belief cases. Lewis himself points out that the Court has emphasised the importance of this right in democratic society.[63] However, if it is one of the reasons, it cannot be seen as a sustainable or even logical ground for a wide margin of appreciation. The centrepiece of human rights talk and human rights law today is the idea (or ideas) of equal worth, dignity and autonomy of every human being. Religions and beliefs are important for people who form a democratic society. As Trigg puts it:

> A DEMOCRATIC country is one in which government is answerable to the people, and can be dismissed by them in an election. A pre-condition of exercising that democracy is an individual freedom according to which all citizens are free to form judgements about what is important, and to live life accordingly. A State in which citizens are told what to think, or conditioned through lack of information to accept certain things as true, is controlling its citizens rather than being controlled by them. Yet freedom is indivisible. Freedom to choose a government is linked to freedom to choose a religion or reject all religion. I cannot be free in one direction, but be controlled in another. I must either be able to see for myself what is true in every context, or am not allowed to think for myself.[64]

Martínez-Torrón and Navarro-Valls argue that government is not obliged to

[62] T Lewis (n 1 above) 399 (footnote omitted).

[63] Ibid 401. See also *Kokkinakis v Greece* (n 9 above) where the Court emphasised the contribution of religious freedom to the promotion of democratic pluralism and *Manoussakis and Others v Greece* (n 37 above) where the Court linked its reasoning to the need to secure true religious pluralism by delimiting the extent of the margin of appreciation.

[64] R Trigg, *Religion in Public Life: Must Faith Be Privatized?* (OUP, Oxford 2007) 130.

respect and protect religious freedom because it considers the convictions of citizens to be correct, or even convenient. It is obliged to protect the freedom to believe and to act accordingly because this freedom constitutes an essential element of a democratic system:

> The protection of that freedom is a paramount *public* interest and not merely a *private* interest of individuals and groups. This is something that is easily understood with regard to other liberties – for instance, the freedom of expression or the freedom of association – but is sometimes inexplicably ignored when dealing with religious liberty.[65]

Moreover, the manifestation of religion or belief often has a considerable social and communal aspect to it. As van Bijesterveld has emphasised:

> From the development of a modern fundamental rights theory and codified fundamental rights, attention is increasingly paid to the various levels at which fundamental rights function: not only at the (micro-)level of the individual but also at the (meso-)level of organizations and at the (macro-)level of the organization of society as a whole. This characterisation in terms of levels also makes clear that fundamental rights protection has aspects that go beyond the level of the single individual. It is evident that its acceptance has consequences for the effective protection of these rights by government.[66]

Van Bijesterveld expresses a need to have a more realistic view of religion as a complex social phenomenon: 'Religion influences culture, convictions, organizational structures and social relations'.[67] She rightly points out that religion has *social, educational, communicative*, and *institutional dimensions* as well. It needs to be

---

[65] J Martínez-Torrón, R Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 235.

[66] SC van Bijesterveld, 'Freedom of Religion: Legal Perspectives' in R O'Dair, A Lewis (eds), *Law and Religion* (OUP, Oxford 2001) 307.

[67] Ibid 305.

highlighted that seeing religion (or belief) and the public good as inevitably conflicting is not accurate. Every religion or belief can have some social and/or public dimension. As Vanaik states specifically about religion: to say that religions should be a private affair is to misunderstand religion.[68]

Thus, it is argued here that the nature and importance of the freedom of religion or belief in the democratic society is adequate enough to require a narrow margin of appreciation and strict European supervision. It is at least equivalent to the importance of the protection of free speech and freedom of association and assembly. It facilitates people in freely forming and developing their ideas as to what is good in a democratic society. The Court is therefore misguided in applying a predominantly wide margin of appreciation in Article 9 cases.

4.4. The Character of a Democratic Society

Expanding on the above observations, it is necessary to reflect at greater length on the nature of a democratic society as understood in the Convention. Article 9 (2) of the ECHR sets forth the requirement that restrictions must be 'necessary in a democratic society'.[69] The Court has stated many times that democracy is a fundamental feature of the European public order. The Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, in fact, is the only political

---

[68] A Vanaik, 'Reflections on Communalism and Nationalism in India' (1992) 196 New Left Rev 43, 56.

[69] Article 9 (2) ECHR.

model contemplated in the Convention and the only one compatible with it.[70] Thus, the only necessity which can justify interference with any of the rights enshrined in Article 9, or related articles, is one that may claim to spring from a 'democratic society'. By contrast, Article 18 (3) of the ICCPR lists the same public interests as grounds for limiting freedom of religion. However, it does not mention democracy in combination with the necessity requirement of the restriction.[71] Article 18 (3) of the ICCPR states that: 'Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[72] This is not surprising considering that not all the countries which have signed up for the Covenant follow the idea of democracy in their constitutional order.[73]

The concept of democracy is one of those concepts which seem to be obvious and clear, but are nonetheless hard to define in absolute terms. The European Court of Human Rights has given some guidance as to what the democracy requirement means in the Convention, and in relation to freedom of religion or belief. As mentioned before, it has been stated numerous times by the Court that pluralism is indissociable from a democratic society.[74] There can be no democracy without pluralism.[75]

---

[70] *Barankevich v Russia* (n 49 above); *The Moscow Branch of the Salvation Army v Russia* (n 46 above) para 60; *Christian Democratic Peoples Party v Moldova* (App no 28793/02) ECHR 14 Feb 2006 para 63; *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above).

[71] Article 18 (3) ICCPR.

[72] Ibid.

[73] This does not mean that some signatories to the ECHR do not struggle with the elements of democracy.

[74] This was first mentioned in the landmark case of *Kokkinakis v Greece* (n 9 above) para 31.

[75] *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above) para 89.

Tolerance and broad-mindedness are hallmarks of a democratic society.[76] In the case of *Refah Partisi (the Welfare Party) and Others v Turkey*, for example, the Court has also stated that democracy requires that the people should be given a role: 'There can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious.'[77] There is also a very close link between the rule of law and democracy. The rule of law, according to the Court, means that all human beings are equal before the law, in terms of both rights and duties. However, legislation must take account of differences, provided that distinctions between people and situations have an objective and reasonable justification, pursue a legitimate aim and are proportionate and consistent with the principles normally upheld by democratic societies.[78] Reference has also been made to the link between human dignity, human rights and democracy.[79] Thus, there are certain values which should encapsulate what democratic society means in the context of the Convention. These values should in turn indicate what sort of relationship between a State and religion or belief is to be envisaged under the Convention. Adding to the values identified above principles of neutrality and effective protection of rights, it should be possible to establish a framework as to how the Convention ought to operate in regard to the protection of freedom of religion or belief in a democratic society.

---

[76] *Leyla Sahin v Turkey* (n 52 above) para 108; *Dudgeon v UK* (n 59 above) para 53.

[77] *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) ECHR 31 Jul 2001 (Chamber Decision) para 43.

[78] Ibid.

[79] Ibid.

However, this myriad of principles which make up a 'democratic society' may sometimes be difficult to reconcile with each other. In the second chapter it was underlined that there appears to be a danger that it is the interests of the State which are now taking undue priority over the religious rights of individuals and communities.[80] On the one hand it can be seen in the fundamental secularist approach taken towards the religious symbols of minority religions (primarily Islamic symbols) and on the other in protecting religious/cultural sentiment of majority. States are left with a wide margin of appreciation to deal with 'delicate issues' related to relationships between religion and State.

This tendency can be interpreted in several ways. It may mean that in these times of serious outbreaks of religious fundamentalism, the Court finds it justified to defer to States as they are better placed to assess the local circumstances. It may suggest that conflict prevention is seen as a sufficient justification for applying a wide margin of appreciation. It may also mean that the Court envisages a type of European legal system with less room for individual or collective autonomy and religious diversity, and consequently even a weaker right to freedom of religion or belief. The main reason why the Court takes this stance seems to be that it regards some religions as intolerant and therefore anti-democratic. It therefore regards itself as preserving democracy by upholding the right of States to limit what it regards as threats to democracy by intolerant religious groups.[81] If these are the reasons for a tendency to prefer a wide margin of appreciation under the ECHR, then they need to be clearly

---

[80] See Ch II at 77 and 89; MD 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* (CUP, Cambridge 2008) 291, 315.

[81] See e.g. *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above).

articulated and justified. Most importantly they need to be squared with principles described by the Court itself as underpinning 'democratic society', including protection of individual freedom of religion or belief. However, acceptance of these broad and very general reasons for a wide margin of appreciation seems to be in serious conflict with the idea of human rights and religious autonomy as understood in this thesis. Factual circumstances in concrete cases may well dictate a need to restrict freedom of religion or belief. However, convincing and compelling reasons need to be given to justify interference.

4.5. The European Consensus

To identify what is or what is not necessary in a democratic society the Court has looked for evidence of a European consensus. In the *Dudgeon case,* discussed above, the Court decided that despite a wide margin of appreciation, the criminalization of homosexual conduct between consenting adults was not necessary in a democratic society. Amongst other reasons, it was pointed out that there is a more tolerant attitude emerging in Europe, which needs to be taken into account when determining the need for the restriction.[82] This case concerned Article 8 of the Convention and the extent to which this reasoning applies to Article 9 cases is not clear.[83]

---

[82] *Dudgeon v UK* (n 59 above) para 60.

[83] It also needs to be highlighted that even in Article 8 cases the role of the European consensus is obscure. For example, in the recent case of *A B and C v Ireland* the Court decided that although there is a substantial European consensus on abortion (only four countries – Malta, San Marino, Andorra and Ireland – have restrictive criminal laws on abortion), it does not limit the sovereign right of Ireland to prohibit abortion because of 'the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake'. *A B C v Ireland* (App no 25579/05) ECHR 16 Dec 2010.

In the case of morals or significance of religion or belief in society the Court generally points out a lack of European consensus as a reason for a wide margin of appreciation. Already in the case of *Handyside v UK* (which predates *Dudgeon* case) the Court took the view that where moral issues are concerned the views of States should be accorded a high priority because of the lack of a uniform concept of morals: 'The requirements of morals varies from time to time and place to place, especially in our era…'[84] In this case, the publisher of the Little Red Schoolbook, complained that his rights under Article 10 (freedom of expression) were violated. The book contained information on sexual matters for adolescents. It was seized and confiscated as obscene by the authorities, and Handyside was sentenced to pay the fine. The Court concluded by thirteen votes to one that there was no violation of Article 10. In the case of *Otto-Preminger-Institute v Austria,* mentioned in the second chapter, the Court considered that even in a single country conceptions of morals (in this case the importance of religion in society) may vary.[85] For that reason the Court concluded that it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. 'A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.'[86] Although in these cases the religious dimension was used as justification to restrict other rights[87], they are indicative of the fact that when the issue at hand touches local religious sentiment the

---

[84] *Handyside v UK* (n 24 above) para 48

[85] *Otto-Preminger v Austria* (App no 13470/87) (1994) 19 EHRR 34 para 50.

[86] Ibid.

[87] This thesis takes a symmetrical view as to the protection of other rights under the Convention. If the margin of appreciation needs to be limited in freedom of religion cases it also needs to be limited in cases which involve other rights (eg freedom of expression).

lack of European consensus plays a significant role in granting a wide margin of appreciation to States. Moreover, the arguments in the above cases have been recited in many cases concerning alleged violation of freedom of religion or belief.

It may be argued that the lack of a European consensus is the only reason clearly indicated by the Court for awarding States a wide margin of appreciation in cases dealing with religion or belief. As the Court reiterated in the Article 9 case of *Leyla Sahin v Turkey* :

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision making body must be given special importance…It is not possible to discern throughout Europe a uniform conception of the importance of the significance of religion in society…and the meaning or impact of the public expression of a religious belief will differ according to time and context…Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the needs to protect the rights and freedoms of others and to maintain public order…Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context…[88]

Although there are similarities between the Council of Europe member states in treatment and the role of religion or belief, there are also great differences. This is due to a combination of complicated social and historical factors. However, specific local circumstances may be the reason why an international Court ought to apply a narrow margin of appreciation. As Lewis has very rightly pointed out:

> There is a…fundamental problem with the granting of a margin of appreciation to States on the basis of there being an absence of a pan-European consensus on religious issues. For this argument tends to undercut the (albeit

[88] *Leyla Sahin v Turkey* (n 52 above) para 109.

> unsatisfactory) rationale for protecting the right to manifest religious belief in the first place. The predominant justification for the very existence of the right is to enable the right-holder to *depart from the consensus*, to pursue his or her own path. If there were an international consensus on this question of religion, if there were a single European faith akin to pre- Reformation Christendom, to whose creed and liturgy everyone adhered, there would be no need for the religious right. It is only because of diversity, because, indeed, of that *pluralism* so central to the whole scheme of the Convention, that the right is necessary and important. And yet the margin of appreciation is invoked, and its use is legitimized, precisely because of the very *absence* of consensus that makes the right so vital.[89]

Moreover, if one considers the interplay between religion, culture and law (especially the influence of relationships between dominant churches and the State), greater vigilance should be exercised in protecting minority religions or beliefs.[90] States have duties not only to represent the will of the majority, but also to protect minority religions or beliefs (in their individual or collective dimension). The Court itself has stated that by referring to the hallmarks of a democratic society the Court has attached particular importance to pluralism, tolerance and broadmindedness.

> In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position…the role of the authorities …is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[91]

In that regard, it would not be right for the Court to grant *a priori* a wide margin of appreciation to States insisting on the need to protect the will (religious or secular feelings) of the essential part of the population. It is in contradiction with the

---

[89] T Lewis (n 1 above) 405.

[90] See also discussion on the Crucifix case in the second chapter. Ch II at 94-106.

[91] *Barankevich v Russia* (n 49 above) para 30.

above aspect of international human rights/minority rights protection. The Court should not resort to the margin of appreciation, but carefully balance different interests involved.

4.6. The Interest to be Protected by the Interference

As was pointed out above specific headings of the legitimate interests listed in Article 9 (2) or related articles (Articles 8, 10, 11) have received only scant attention in the case law of the ECHR. Thus, it is not possible to provide an extensive account of their independent meaning. They are part of the complex factual matrix and cannot be examined in complete isolation from other elements in restricting rights under the Convention. In that regard, it is not suggested here that fixed concepts should be put forward for each of the grounds. However, adequate and in depth explanation and analysis of State's interests in restricting the freedom is important on a case by case basis. As Little points out:

> These…so-called "limitations" on the rights of fundamental belief are rather elastic and open ended, and provide, as they stand, a potential threat to human rights guarantees because they can so easily be used as a pretext for reintroducing unwarranted forms of interference and discrimination "based on religion or belief".[92]

It was suggested above that the Court ought to adopt a standard of rigor which requires that only convincing and compelling reasons can justify interference. This, in turn, means there ought to be tangible evidence for the need for such a restriction.

[92] D Little, 'Studying "Religious Human Rights": Methodological Foundations' in JD van der Vyver and J Witte Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Kluwer Law International, The Hague 1996) 60.

Where this is established, the Court ought to carry out a proportionality test between means employed and the ends pursued to ensure that the State has chosen the least restrictive means to curtail the freedom. However, the Court's jurisprudence shows that in Article 9 cases it has frequently failed to articulate the legitimacy of the aim of the interference and has been quick to defer to States by making recourse to the doctrine of margin of appreciation. Thus, the reasons for restricting the freedom have often not been properly investigated. As emphasised in this thesis, respect for (right to) religious autonomy means that right holders deserve a proper, systematic explanation of exactly why their way of manifesting their beliefs can be limited. The following will illustrate the above mentioned deficiencies in the Court's practice addressing specific headings of the legitimate interests in Article 9 (2). It will also discuss the problematic concept of inherent limitations which figures in Article 9 jurisprudence. It should be noted that cases in the ECtHR rarely refer to just one legitimate interest. Thus, addressing them below, one by one, is a matter of convenience.

Article 9 (2) allows limits only in the interest of 'public safety', for the protection of 'public order', 'health' or 'morals', or for the 'protection of the rights and freedoms of others'. Firstly, public order and public safety tend to be cited together, with public safety rarely used as a sole ground to limit the right.[93] The range of circumstances in which 'public order' or 'public safety' have been invoked is very wide (military discipline, internal order in prisons, planning laws, traffic rules, labour market, religious symbols, leadership of religious communities, registration of religious communities, etc.).

[93] C Evans (n 2 above) 150; MD Evans (n 17 above) 324.

Compared to Articles 8 (2), 10 (2) and 11 (2), Article 9 (2) refers to the 'protection of public order', whereas the other provisions use the term 'the prevention of disorder'. In the *Engel* case, the Court decided that 'disorder' refers not only to 'public order', but 'also covers the order that must prevail within the confines of a special social group.'[94] From this, van Dijk and van Hoof, have drawn the conclusion that 'public order' in Article 9 (2) does only refer to the notion of 'order in places accessible to everyone'.[95] However, Vermeulen suggests that in the recent Article 9 case law the Court has used a much broader concept of 'public order' which comprises the order within a specific group or organisation and also the maintenance of a peaceful order between rival religious factions. 'It may be assumed, therefore, that there is no fundamental difference between "prevention of disorder" in the restriction clauses of Articles 8, 10 and 11 and "public order" in the restriction clause of Article 9.'[96] Moreover, Nowak and Vospernik highlight that 'public order' ought to be construed narrowly to mean the prevention of public disorder.[97] 'It should not be confused with a similar sounding French legal expression used in civil and administrative law and private international law, *l'ordre public*, which relates to the

---

[94] *Engel and Others v the Netherlands* (App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (1976) 1 EHRR 647 para 98. This case concerned the application of Article 10 (2) in the context of military disciplinary proceedings.

[95] P van Dijk and GJH van Hoof (n 16 above) 554.

[96] B Vermeulen, 'Freedom of Thought, Conscience and Religion (Article 9)' in P van Dijk and GJH van Hoof, A van Rijn, L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn Kluwer Law International, The Hague 2006). Vermeulen has based his suggestion on the cases of *Leyla Sahin v Turkey* and *Supreme Holy Council of the Muslim Community v Bulgaria*. *Leyla Sahin v Turkey* (n 52 above) para 99; *Supreme Holy Council of the Muslim Community v Bulgaria* (App no 39023/97) (2005) 41 EHRR 3 para 92.

[97] M Nowak and T Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 152 (footnote omitted).

fundamental public policies of a society.'[98] Furthermore, Nowak and Vospernik seem to (and quite rightly) take the approach that only those restrictions on freedom of religion or belief under the heading 'public order' are permissible which are essential for the coexistence of human beings.[99] This highlights again the need for strict scrutiny.

However, the ECtHR's approach in most cases seems to be different.[100] For example, in the case of *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*[101] there was no scrutiny involved as to the public order argument put forward by the State. This case concerned ritual slaughter of animals and will be discussed to some length in the next sub-chapter. Nowak and Vospernik argue that although the protection of animals constitutes an increasingly important public and moral value, 'it is not so essential for the maintenance of public order that it could justify the prohibition of an act called for by an old religious rite and tradition.'[102]

---

[98] Ibid (footnote omitted).

[99] Ibid 153.

[100] As noted above there are very few exceptions. See eg *Buscarini and others v San Marino* (App no 24645/94) (2000) 30 EHRR 209. In this case the Government argued that a religious oath was necessary to maintain public trust in the legislature and therefore public order. The case concerned two MPs who refused to take the oath which was a precondition for them to assume the office. The public order argument was dismissed by the Court. However, the Court did not say why. It simply stated that such an oath was in any event incompatible with the Convention and thus not necessary in a democratic society. In another case, *Serif v Greece*, the Court did not accept the Government's arguments as to the need to prosecute a man claiming to be a Mufti of a local community because of the *potential* for public unrest and tension if two people claimed to be the legitimate leaders of the same religious community. *Serif v Greece* (n 55 above). The Court concluded that the government did not demonstrate the pressing social need for restrictions. No allusions were made to disturbances among the Muslims because of the two leaders, no evidence was provided as to the risk of tension between Muslims and Christians and between Greece and Turkey. See also Ch II at 72-73.

[101] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 52 above).

[102] M Nowak and T Vospernik (n 97 above) 153. Nowak and Vospernik were not referring to the case of the *Jewish Liturgical Association* but to a case in the Austrian Constitutional Court which concerned conviction of the applicant for participation in the slaughtering of sheep according to Islamic customs. The Constitutional Court found a violation of the manifestation of freedom of religion or belief. Judgement of the Austrian Constitutional Court, 17 Dec 1998 (Case No B 3028/97).

They also convincingly argue that mere *order public* rules, such as dress codes that prohibit the wearing of headscarves by Muslim women and girls, growing beards for Buddhists, or wearing turbans by Sikhs cannot be justified on the basis of the 'public order' clause.[103] The 'public order' was one of the legitimate interests put forward by the Government to justify restriction on university women wearing headscarves in the *Şahin* case.[104] There was no scrutiny as to the evidence that the applicant herself posed any threat to 'public order' ('public disorder'). It is problematic that mere reference to secularism allowed the Court to grant a wide margin of appreciation to the State in this case. Detailed discussion of this case follows in the next sub-chapter.

Restrictions on the grounds of protecting health could be invoked in several different circumstances, for example, in cases of drug use, refusing medical treatment, refusing blood transfusion, ignoring traffic safety and putting the health of others (such as children) in danger. Payne and Doe have pointed out that '…it can be observed that "public health" is a broad concept involving not only the individual's own personal life choices, but also the community, society, and environment in which these choices are made.'[105] One can say that when an individual's manifestation of freedom of religion or belief affects other people's health there is a need to restrict this freedom.

However, the ECtHR has not been consistent in investigating this legitimate aim in specific factual circumstances. For example, in the case where a Sikh

---

[103] M Nowak and T Vospernik (n 97 above) 153.

[104] *Leyla Şahin v Turkey* (n 52 above).

[105] H Payne, N Doe, 'Public Health and the Limits of Religious' (2005) 19 Emory Int Law Rev 538, 541.

motorcyclist was convicted and fined twenty times for failing to wear a crash helmet when riding his motor cycle the Commission found no violation of Article 9.[106] The applicant claimed that the crash helmet requirement interfered with his freedom of religion, because it obliged him to remove his turban. The interference could have been considered as perfectly reasonable taking into account that wearing a crash helmet on a motor bike is likely to be important not only for the safety of the person himself, but also for the health and lives of others.[107] Public costs such as health care in the case of a possible accident may also be taken into consideration.[108] However, in this particular case the domestic law was amended exempting Sikhs from wearing crash helmets before the Commission's decision. In spite of this more liberal attitude in domestic law, the Commission found that the State interference was justified. Furthermore, no arguments were provided as to whether the specific garment (in this case turban) actually constitutes a health risk and perhaps most importantly how the restriction squares with protection of minority religions. The above case has been recently referred to in the case of *Phull v France.*[109] In this case the applicant, a practising Sikh, complained that his rights under Article 9 were violated by the airport authorities requiring him to remove his turban to go through security checks. He argued that there was no need for the security staff to make him remove his turban,

[106] *X v UK* (App no 7992/77) (1978) 14 DR 234.

[107] However, this is a point of contention. For example, Nowak and Vospernik argue that the Court's decision was wrong because the safety risk was confined to the person himself and thus public safety grounds could not be relied on at all. M Nowak and T Vospernik (n 97 above) 151. See also Thazib's similar criticism of a case (*Bhinder v Canada*) involving the dismissal of the Sikh applicant (an electrician from the Canadian National Railway Company) as a result of his refusal to wear safety headgear during his work, as it would have required him to remove his turban. GB Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection* (Kluwer Law International, The Hague 1996) 294-300. *Bhinder v Canada* (Comm no 208/1986) (UN HRC 28 Nov 1989).

[108] The unclearity of the UN Human Rights Committee's approach on this matter in the Bhinder case has been criticized by Tahzib. GB Tahzib (n 107 above) 299-300. The issue was not raised in the Sikh motorcyclist case in the ECtHR.

[109] *Phull v France* (App no 35753/03) ECHR 11 Jan 2005.

especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector. The Court declared this case inadmissible. It firstly relied on the previously discussed case without explaining the connection between the two cases. Secondly, it simply stated that security checks in the airports are important for public safety and the arrangements fall within margin of the appreciation, particularly as the measure was only resorted to occasionally.[110] Once again no assessment, but most importantly no arguments were offered to show how not removing the turban constituted a security or health risk. Was removing the turban really necessary? Could the airport authority achieve its goals by less restrictive means? Were there any alternatives to avoid restricting this particular minority religion? Moreover, the current socio-political atmosphere and paranoia related to the more 'exotic' beliefs should make the Court more vigilant. In this regard, simply resorting to the margin of appreciation cannot be considered to be in compliance with religious autonomy as advanced in this thesis.[111]

The protection of morals was discussed above in the context of the European consensus. A couple of further points ought to be added here. The UN Human Rights Committee has emphasised that '…the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'.[112] Little points out that this

---

[110] Ibid.

[111] Cf *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [2006] 1 SCR 256. In this case the Supreme Court of Canada found that an absolute ban against wearing a kirpan (a religious object resembling a tagger) at school violated the freedom of religion of an orthodox Sikh student. The Court found that it was not shown that such a prohibition minimally impaired the student's rights to freedom of religion.

[112] General Comment No 22 (Art 18) UN GAOR Hum Rts Comm (1993) para 8.

'pluralistic' restriction on the public limitation of human rights 'would presumably create a significant obstacle against violating the rights of fundamental belief in the name of one particular religion or ideology'.[113] As discussed above, rather than taking this approach the ECtHR has usually seen pluralism of traditions and morals as a solid ground for a wide margin of appreciation.[114] It has to be noted that public morals are the most unclear and controversial ground in the list of legitimate ends. It has to be agreed with Martínes-Tórron that:

> …the morals of every society are strongly influenced by its religious history, and consequently the fact that freedom of religion or belief can be restricted on the ground of ethical ideas of a clear religious origin could raise some questions from the perspective of the interpretation of Article 9 ECHR.[115]

Letsas takes it even further and argues that: 'Allowing the requirements of communal morality to limit rights, either through the Court's own interpretation or by deferring to the judgement of national authorities, violates the moral values of human rights'.[116] He claims that moralistic preferences of the majority (as to what liberties people should be free to enjoy) cannot constitute a legitimate aim for interfering with a Convention right. 'When they are in play they should be blocked rather than balanced against the applicant's right. Proportionality there has no role to play'.[117] He admits that in extreme circumstances, where there is a clear and present danger that the ruling of the violation will trigger political turmoil and violence that will directly

[113] D Little (n 92 above) 60.

[114] See Section 4.3. above.

[115] J Martínes-Tórron (n 10 above) 604.

[116] G Letsas (n 28 above) 122-123.

[117] Ibid.

harm important interests of the people, the Court is morally justified granting a margin of appreciation to the respondent State. In this regard, Lestas refers to the specifically Turkish cases of *Refah Partisi*[118] and *Leyla Şahin*[119]. While he is making a relatively convincing point, it is argued here that a wide margin of appreciation is not justified if sufficient evidence of 'present danger' and 'direct harm' (or as used in this thesis: 'compelling and convincing reasons') is not presented. For example, the lack of sufficient evidence and scrutiny of the domestic situation was especially problematic in the case of *Leyla Şahin,* which will be discussed in the last section of this chapter.

Article 9 (2) also allows restrictions on freedom of religion or belief for the 'protection of rights and freedoms of others'. One of the first questions which comes to mind in relation to this ground of justification is what 'rights and freedoms of others' are being referred to. There has been some scholarly discussion on this issue. Evans has noted that one question that arises in interpreting the phrase is whether these freedoms are limited to those that are set out in the Convention. She has concluded that the Commission and Court have generally limited the meaning of the phrase in this way, 'but sometimes the vague way in which "the rights and freedoms of others" is used suggests that the limitation clause may have a wider scope than the rights under the Convention'.[120] One of the problems is that it is not always explained which rights and freedoms of others have been in question nor have they been linked

---

[118] *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above).

[119] *Leyla Şahin v Turkey* (n 52 above).

[120] C Evans (n 2 above) 161.

to the rights in the Convention.[121] Thus, it is not always clear against which rights of others the Court is balancing freedom of religion or belief. Geer contends that:

> The only rights which can legitimately limit express or implicit Convention rights are other express or implicit Convention rights. If it were otherwise, the privileged position of Convention rights would be undermined by rights which those who drafted the Convention chose not to include.[122]

Geer's reference to the intent of drafters of the Convention is not entirely convincing as many rights which probably even implicitly did not exist in the drafters' minds have since found protection under the Convention. However, spelling out what *fundamental* rights and freedoms are involved, where they are coming from and how they are threatened is important.

For example, the latter was an issue in the *Şahin* case discussed below, where the legitimate aim of a prohibition of the wearing of headscarves in university was found to be, amongst other grounds, the protection of rights and freedoms of others. It was relevant for the Court to prevent other students from being threatened in their religious sentiments because the applicant wore a headscarf. Bomhoff rightly argues that the judgement offers no discussion of either the factual urgency or normative value of this aim, where such discussion would seem to be required.[123]

> Who are these other students? How many of them were there? In what ways and how seriously were they threatened in the free exercise of *their* religious

---

[121] See eg *Vergos v Greece* where the restriction on building a prayer house was found justified to protect public order and rights and freedoms of others. The Court did not spell out what rights and freedoms of others where involved. *Vergos v Greece* (App no 65501/01) ECHR 24 Jun 2004.

[122] S Geer (n 3 above) 266.

[123] J Bomhoff, ' 'The Rights and Freedoms of Others': the ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights' in E Brems (ed), *Conflicts between Fundamental Rights* (Antwerp, Intersentia 2008) 625.

> beliefs by seeing other students wear a headscarf? And more fundamentally, was concern for *these specific students* really the crucial issue in this case? However one feels about these questions, it is clear that they would have merited a more extensive treatment by the Court than an unqualified assertion that 'the rights of others' – as agreed between parties – was legitimate aim pursued.[124]

In addition to the actual list of permissible limitations in Article 9 (2) there seems to exist an unfortunate misconception of 'inherent limitations' in the jurisprudence of the ECHR. The existence of the concept of 'inherent limitations' is somewhat awkward, especially if we take into account that the ECHR lists only one set of possible justifications for restricting freedom or religion or belief without ranking these limits for certain specific circumstances. As J. Martínes-Tórron has pointed out:

> An interesting point with respect to the general interpretation of permissible limitations on the rights enshrined in the ECHR is the fact that the Court has rejected that those limitation-concepts are necessarily univocal. On the contrary, they may acquire a particular meaning in certain reduced environments, with the effect of enlarging the margin of appreciation of State authorities.[125]

Van Dijk and van Hoof call these inherent limitations. For example, in cases concerning military or prison environments, the Court has been leaving States with a considerably wide margin of appreciation. For example, in the case where a Buddhist prisoner claimed that he was not able to exercise his religion by growing a beard and having a prayer chain, the Commission found the restriction necessary in order to maintain public order.[126] Only trivial justifications were put forward by the State - the

[124] Ibid 624.

[125] J Martínes-Tórron (n 10 above) 604.

[126] *X v Austria* (App no 1753/63) (1965) 16 Collection 20.

need to be able to identify the prisoner.[127] As Evans put it '…it is difficult to see just how the cultivation of a beard poses a challenge to internal prison order. It is even less clear how this can affect order in society as a whole.'[128] These relations were not clearly spelled out. The lack of scrutiny was also evident in the case of *Kalaç v Turkey.* This case concerned a military judge who was dismissed for allegedly being a member of a fundamentalist Islamic group. The government's main argument was that he had to be dismissed because he had 'manifested lack of loyalty to the foundations of the Turkish state, namely secularism, which it was the task of the armed forces to guarantee'.[129] The European Commission of Human Rights found a violation of Article 9 because the interference was not prescribed by law (the law did not provide adequate protection against arbitrary decisions). The Commission also found that there was no evidence that the applicant had any links to the sect. The ECtHR reversed the decision and found no violation of Article 9. Whatever way one feels about the result, the way the Court dealt with the case is highly problematic. It based its decision on three brief arguments. Firstly, it stated that by choosing to pursue a military career the applicant accepted of his own accord a system of military discipline that by its very nature implied the possibility of placing limitations on certain rights and freedoms of the members of the armed forces which could not be imposed on civilians. 'States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.'[130] While this can be

---

[127] C Evans (n 2 above) 152.

[128] MD Evans (n 17 above) 325.

[129] *Kalaç v Turkey* (App no 61/1996/680/870) (1999) 27 EHRR 552 para 25.

[130] Ibid para 28.

considered as a valid point it should not mean that military personnel waive their fundamental rights in totality by accepting the terms of office.[131] Moreover, it does not excuse the Court from scrutinising the evidence presented from the outset. A similar criticism was put forward by partly dissenting Judge Van Dijk in the case of *Larissis v Greece*[132] where he argued that it is difficult to understand why the Court accepted 'without any examination and supervision the domestic courts' findings with regard to proselytising of the airmen, while taking a critical view towards their findings concerning the proselytizing of the civilians'.[133] In this case the officers of the Greek air-force were convicted of having attempted religious conversion of some subordinates and also of some civilians. The difference in scrutiny in that case was especially problematic because the Court overlooked the fact that one of the subordinates (the airmen) converted to the Pentecostal Church by his own free will. There was no evidence that he was subjected to a form of harassment or undue pressure from his superior officers.

In support of its main argument in the *Kalaç v Turkey* case the Court also stated that the applicant was not restricted in fulfilling the obligations which constitute the normal forms of practicing the Islamic faith. In particular, he was not restricted from praying five times a day and performing his duties, such as keeping the fast of Ramadan and attending Friday prayers. The Court further stated that the applicant's dismissal was not based on his religious opinions but on his conduct and attitude, which according to authorities breached military discipline and infringed the principle

---

[131] Cf Ch V at 253 and 255, discussing the Courts own statements about individual rights of members of religious organisations.

[132] *Larissis and Others v Greece* (n 15 above).

[133] Partly Dissenting Opinion of Judge Van Dijk, *Larissis and Others v Greece* (n 15 above).

of secularism. The conduct and attitude which formed the basis of the dismissal was the adoption of unlawful fundamentalist opinions. However, as Evans highlights, 'vague allegations were made about the fact that his conduct was a breach of military discipline, but no details were given and it is not clear what acts (if any) constituted this indiscipline'.[134]

Thus, in the eyes of Strasbourg organs, restricted environments like prisons and military seem to put some inherent restrictions on freedom of religion or belief, which do not need to be strictly scrutinised. As regards prisons, this approach is tempting considering that having committed a crime these people have put themselves in the situation where personal liberties are restricted. However, restricting freedom of religion or belief should not be punitive on top of the sentence that these prisoners serve. Moreover, in isolated environments where abuses easily happen, strict scrutiny should be applied. The latter applies also to the military environment. Mere reference to a military environment does not excuse the Court from applying strict scrutiny.

4.7. The Resolution of the Conflict between the Different Factors

In this section two cases will be considered in order to suggest what the Court ought to do to give due regard to religious autonomy, and thus give due regard to the nature of freedom of religion or belief. The first case, *Leyla Şahin v Turkey*[135] concerns

[134] C Evans (n 2 above) 78.

[135] *Leyla Şahin v Turkey* (n 52 above).

individual autonomy; and the second, *Cha'are Shalom Ve Tsedek v France*[136] collective autonomy.

Probably the most complex case involving restriction on manifestation of freedom of religion in the interest of protecting public order and the rights and freedoms of others, was the case of *Leyla Şahin v Turkey*[137]. This case concerned a university student who claimed that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion under Article 9. She also claimed violation of Articles 8, 10, 14 and Article 2 of Protocol No. 1. The following will focus mostly on the alleged violation of Article 9.

The issue in this case emanated from a ruling of the Turkish Constitutional Court in 1989 which struck down a 1988 enactment about dress in universities.[138] The Constitutional Court held a veil or headscarf to be subversive to the constitutional guarantee of secularism, and thus a violation of underlying values and rights of conscience, of religious freedom and of equality.[139] In 1997 Leyla Şahin, a medical student, enrolled at the University of Istanbul. In February 1998 the Vice Chancellor of the University issued a circular prohibiting beards and Islamic headscarves on campus. Because Leyla Şahin continued wearing a headscarf she was refused access

---

[136] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 52 above).

[137] *Leyla Şahin v Turkey* (n 52 above).

[138] In 1988 an amendment to the Higher Education Act (Law no 2547) entered into force which provided that: 'Modern dress or appearance shall be compulsory in the rooms and corridors of institutions of higher education, preparatory schools, laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religious conviction.' Ibid para 38.

[139] Ibid para 39.

to lectures and examinations. She was subjected to disciplinary proceedings for participating in an unauthorized demonstration against the ban and was subsequently suspended from the university for a semester. Her applications for an order to set aside the circular by the Turkish courts failed. In 1999, in order to be able to continue her studies, she transferred to the University of Vienna. Meanwhile she submitted an application to the ECtHR. Both the Chamber and the Grand Chamber of the Court found that there was an adequate legal basis for restriction and thus the measure was 'prescribed by law'. The Grand chamber found sixteen votes to one that there was no violation of Article 9 of the Convention. The prohibition was found to serve the legitimate aim of protecting public order and the rights and freedoms of others.

The majority's approach in this case was based on the wide margin of appreciation given to States regarding relationships between religion and State. As pointed out earlier in this chapter, the idea behind the margin of appreciation is that State authorities are in a better position to evaluate the need for measures which negatively affect the enjoyment of the Convention rights and freedoms. The final say, however, in the interpretation and application of the ECHR is with the European Court of Human Rights. The problem with this case, however, is that the Court did not seem to exercise any European supervision. In upholding the Government's ban on religious symbols at the universities the majority relied on two main arguments: secularity in the Turkish constitutional framework and equality between men and women. However, the way these principles were interpreted and applied in this case is problematic. It should be also noted that in all cases involving Islamic headscarves the Court has found the ban on the religious symbol consistent with the Convention relying on the margin of appreciation. The *Şahin* case follows the pattern and can be argued to crystallise fundamental secularist approach in the Court's reasoning regarding Islamic symbols.

As to Article 9 (1), in the applicant's view wearing a headscarf was a manifestation of her choice and desire to comply with religious duties of the Islamic faith. This was not contested by the Government. The Court observed that her decision to wear the headscarf may be regarded as 'motivated or inspired by a religion'.[140] Thus, Article 9 (1) was engaged. It can be argued that at the definitional stage the Court's approach was in compliance with the subjective, autonomy based approach advanced in this thesis. For the Court to come to the conclusion that wearing of the headscarf may be regarded as motivated or inspired by religion, what mattered was that it was a *bona fide* manifestation of the applicant's religious belief. The Court quite rightly did not plunge into discussing the sincerity of the manifestation as the sincerity of the applicant's belief was not contested in this case.

Regarding restrictions under Article 9 (2), however, several deficiencies appear in the Court's reasoning which seriously undermine individual religious autonomy as defended in this thesis. As noted above there were two main arguments in this case: secularism and equality. As to secularism, the Court accepted the Turkish Constitutional Court's reasoning that, secularism is the guarantor of democratic values and a meeting point of liberty and equality. According to the Constitutional Court secularism is meant to prevent the State from manifesting a preference to a particular religion or belief. It is guiding the State in its role of impartial arbiter and necessarily entails freedom of religion and conscience. It is also meant to protect an individual

[140] Ibid para 78.

from pressure of extremist movements.[141] The ECtHR accepted this perception of secularism in Turkish constitutional law as being in conformity with the values underpinning the Convention.[142] The Court stated that upholding this principle

> which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey.[143]

By referring to the case of *Refah Partisi (The Welfare Party) and Others v Turkey*[144], which concerned the dissolution of an 'extremist' political party, the Court stated that 'An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion'.[145]

> Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.[146]

However, it was overlooked that this case actually involved the competing values of a democratic society, with individual freedom being one of them. Although

---

[141] Ibid para 113.

[142] Ibid para 114.

[143] Ibid.

[144] *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above).

[145] *Leyla Şahin v Turkey* (n 52 above) 114.

[146] Ibid 116.

secularism can be considered as an essential principle necessary for the protection of the democratic system in Turkey, so should religious freedom. 'In a democratic society…it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.'[147] In her sole dissenting opinion Judge Tulkens convincingly argues that the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from the obligation to establish that the ban on headscarf was necessary to secure compliance with that principle. She highlights that the pressing social need was not established in this case.[148] As was argued in the second chapter even if secularism *per se* is compatible with the Convention, it ought to comply (like establishment) with minimum requirements for the protection of freedom of religion or belief.[149] It was emphasised that effective protection of rights is not necessarily dependent on a particular model of the relationship between State and religious communities' (constitutional wording) in a particular European country. To a large extent it depends how these relationships work out in practice.[150] Meerschaut and Gutwirth highlight that principles of secularism and separation of Church and State are not specified moral principles, nor legal human rights, but contested meta-narratives. However, in actual debates regarding the foundations of a democratic constitutional State they have acquired a too broad and universalistic meaning.[151] They point out that historically in Western

---

[147] Dissenting Opinion of Judge Tulkens para 4, *Leyla Şahin v Turkey* (n 52 above).

[148] Ibid para 5.

[149] Ch II at 84.

[150] Ch II at 82-83.

[151] K Meerschaut and S Gutwirth, 'Legal Pluralism and Islam in the Scales of the European Court of Human Rights: the Limits of Categorical Balancing' in Brems E (ed), *Conflicts between Fundamental Rights* (Antwerp, Intersentia 2008) 443.

societies it aimed to combat too strong an intertwinement of Church and State. Today we see that secularism is predominantly used as a weapon against one religious group - Muslims.[152] Meerschaut and Gutwirth, alongside many other scholars[153] rightly argue that secularism is not yet an adequate and balanced conceptual framework. It needs conceptual elaboration.

> If the laïcité, neutrality or secularism are often seen as components of the freedom of religion, they are not the only ones. They exist next to the right to the free exercise of one's religion. These different elements of the freedom of religion can contradict each other and must be balanced by the Court.[154]

The biggest controversy in the *Şahin* case was the level of scrutiny or, actually, no scrutiny applied by the ECtHR. As Lewis points out: '[t]he consequence of the use of the margin of appreciation doctrine for Leyla Şahin was to diminish critically the rigour with which the Court addressed the question of whether the State's action was "necessary in a democratic society" in her particular case.'[155] As emphasised by the Court itself in previous case law true religious pluralism, which is also inherent in the concept of a democratic society[156], requires determining whether the interference corresponds to a 'pressing social need' and is 'proportionate to the legitimate aim pursued'.[157] Furthermore, 'the role of the authorities …is not to remove the cause of

---

[152] Ibid.

[153] For example, Weller points out that '…within a global historical and temporal perspective, it is worth remembering that it is the 'secular' that must be considered a new experiment in social organisation and integration.' P Weller, ''Human Rights', 'Religion' and the 'Secular': Variant Configurations of Religion(s), State(s) and Society(ies)' in N Ghanea and A Stephens (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden 2007) 169.

[154] K Meerschaut and S Gutwirth (n 151 above).

[155] T Lewis (n 1 above) 408.

[156] *Kokkinakis v Greece* (n 9 above) para 31.

[157] *Metropolitan Church of Bessarabia and Others v Moldova* (n 23 above) para 119.

tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[158]

The emphasis in this case, however, was put on the *potential* (religious) conflict that wearing an Islamic headscarf may cause in a Turkish context. There was no evidence that the applicant herself posed any threat to the principles of secularism (and equality). The Government did not dispute that she had no intention of calling the principle of secularism into question. As Judge Tulkens observed: 'Only indisputable facts and reasons whose legitimacy is beyond doubt - not mere *worries* or *fears* – are capable of satisfying that [pressing social need] requirement and justifying interference with a right guaranteed by the Convention'.[159] The Court has itself previously stated that mere affirmations do not suffice: they must be supported by concrete examples. [160]

Absence of European supervision in this case opens up the possibility in future cases for European States to rely on abstract danger to the public order to justify restrictions on freedom of religion or belief. This cannot be an acceptable approach especially when one sees it in the problematic socio-political context where fear about security and social cohesion has caused a great deal of paranoia regarding Islamic minorities and nostalgia for ethno-cultural unity.[161] Even in Turkey, a country with a Muslim majority, solutions should be a result of evidence based balancing of the

---

[158] Ibid para 116; *Serif v Greece* (n 55 above).

[159] Dissenting Opinion of Judge Tulkens para 5 (emphasis added) (n 147 above).

[160] *Smith and Grady v UK* (App nos 33985, 339) 29 EHRR 493 para 89.

[161] See also P Weller (n 153 above) and S Mancini, 'Power of Symbols & Symbols as Power' (2009) 36:6 Cardozo L Rev 2629-2668.

different interests involved.

The Court also focused in this case on the possible impact that wearing of the headscarf may have on those who do not wear it. As noted above the ban on wearing headscarves at the university was seen in the *Şahin* case to violate the rights and freedoms of others. The Court was relying on its reasoning in the case of *Refah Partisi (Welfare Party) and Others v Turkey*.[162] The Court accepted that in a Turkish context, religious symbols (specifically the Islamic headscarf), have taken on political significance in recent years. It was pointed out that there are extremist political movements in Turkey which 'seek to impose on society as a whole their religious symbols and the conception of a society founded on religious precepts'.[163] Thus, it was important to bear in mind the impact which Islamic headscarves *may* have on those who choose not to wear them. In this societal and historical context an absolute ban on wearing religious symbols at the university was felt justified. However, as Judge Tulkens points out:

> Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there was nothing to suggest that the applicant held fundamentalist views.[164]

One could argue that the Turkish situation is so special, considering its history and social composition (Islamic majority), that this justifies a considerable margin of

---

[162] *Refah Partisi (The Welfare Party) and Others v Turkey* (n 52 above).

[163] *Leyla Şahin v Turkey* (n 52 above) para 115. The Court specifically made a reference to *Refah Partisi and Others v Turkey*.

[164] Dissenting Opinion of Judge Tulkens para 10 (n 147 above).

appreciation. However, it could also be argued that especially in this type of case, strict scrutiny and European supervision under the ECHR are important. If the ECHR is called upon to set a standard, then the ECtHR should not deny itself an opportunity, in these circumstances, to take a closer look at the case. Strict scrutiny and proper analysis ought not to be sacrificed on the basis of relativistic arguments. As rightly pointed out in the dissenting opinion of Judge Tulkens the issue raised in the application is not merely a 'local' issue, but one of importance to all the member States. European supervision cannot be escaped from simply by invoking the margin of appreciation.[165]

Interestingly enough, the Court, in the same problematic Turkish context took a completely different approach to European supervision and expression of ones beliefs in the case of *Gündüz v Turkey*[166]. The applicant claimed that his conviction for a hate speech under Turkish law was a violation of his right to freedom of expression under the Convention. Although *Gündüz* and *Şahin* case were decided under different articles (Article 10 and Article 9 respectively), both cases concerned delicate issues relating to the balance between individual expression of religious views and other democratic values. The proximity of these cases is also evident in the fact that Leyla Şahin alleged *inter alia* violation of Article 10. However, the Court did not find any violation of her right to freedom of expression stating that arguments advanced by the applicant were mere reformulations of her complaint under Article 9.[167]

---

[165] Ibid para 3.

[166] *Gündüz v Turkey* (App no. 35071/97) (2005) 41 EHRR 5.

[167] *Leyla Şahin v Turkey* (n 52 above) para 164.

In the case of *Gündüz v Turkey* the applicant was a leader of an Islamic group named Aczmendis. He was convicted for openly (in public, on live television) inciting the people to hatred or hostility on the basis of a distinction founded on membership of a religion or denomination. The aim of the television broadcast was to give an opportunity to the participants to discuss the malfunctioning, usefulness and problems of institutions such as secularism and democracy in the context of social harmony, human rights and freedom of expression. It was found by the Turkish courts that Mr. Gündüz abused this opportunity stating, in the name of Islam, that such concepts as democracy, secularism and Kemalism are impious. He called children born from secular marriages *piç* (bastard). He acknowledged that the aim of his group is to set up a regime based on sharia, however, not by duress, or force, or weapons, but by convincing and persuading the people. Justifications for restricting his freedom of expression were: prevention of disorder or crime, the protection of morals, and particularly, the protection of the rights and freedom of others. The ECtHR found six votes to one that the applicants' rights were violated.

The Court has stated in its case law that freedom of expression constitutes one of the essential foundations of any democratic society.[168] However, States enjoy a margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[169] The Court emphasised that:

---

[168] *Handyside v UK* (n 24 above) para 49.

[169] *Gündüz v Turkey* (n 166 above) para 37; *Müller and Others v Switzerland* (App no 10737/84) (1991) 13 EHRR 212 para 35; *Murphy v Ireland* (App no 44179/98) (2004) 38 EHRR 10.

> …tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.[170]

In this case, however, the Court found that interference with the applicants' freedom of expression was not based on sufficient reasons for the purposes of Article10; the restriction at issue was not established convincingly. The Courts' main argument was that the aim of the program was to present the religious group of which the applicant was the leader. His extremist views were already known and discussed in the public arena. Moreover, they were counterbalanced by interventions from other participants and were expressed in the course of a pluralistic debate.[171] '[T]he mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as a "hate speech".'[172]

One could argue that rights involved in the *Gündüz* and *Şahin* cases were equally fundamental for a democratic society. It is not entirely clear why exactly the restriction in *Leyla Şahin's* was found necessary in a democratic society and restriction on freedom of expression of Mr. Gündüz was not. Leyla Şahin was manifesting her religion without any intention of challenging democratic principles or the rights and freedoms of others.[173] In the case of *Leyla Şahin* the State was left with a considerable margin of appreciation, as in *Gündüz v Turkey*, some analysis was

[170] *Gündüz v Turkey* (n 166 above) para 40.

[171] Ibid para 51-52.

[172] Ibid para 51.

[173] See eg Dissenting opinion of Judge Tulkens (n 147 above) para 7.

provided whether there was a pressing social need for the restriction or not. The difference in the extent of the margin of appreciation and European scrutiny in these cases is not justified. One can see that the ECtHR is not consistent in its own reasoning when it comes to defending democratic values (secularism and rights and freedoms of others in Turkish context). The decision made in the *Gündüz* case, discredits the decision made in the *Leyla Şahin* case.

The *Şahin* case highlights a further problem: the ECtHR's attitude towards religious symbols in the public square and specifically its attitude towards Islamic headscarves. Judge Tulkens makes an important generalisation in that the Court has been very protective (over-protective) of religious sentiment, for example, in cases such as *Otto-Preminger v Austria*[174] and *Wingrove v UK*[175]. It has, however, been less willing to intervene in cases concerning religious practices, which only appear to receive a subsidiary form of protection (*Cha'are Shalom Ve Tsedek v France*[176] and *Dahlab v Switzerland*[177]).[178] Mancini takes this point further and powerfully argues that it is suspicious that the Court used the margin of appreciation in the *Şahin* case in order to protect minorities for the first time (concerning religious symbols) when the majority belongs to the Islamic religion.[179] She points out that if this is read together with the legitimization of Turkey's militant anti-Islamic notion of secularism and with

---

[174] *Otto-Preminger v Austria* (n 85 above).

[175] *Wingrove v UK* (n 15 above). Today, one needs to add to this string of case law the *Crucifix* case discussed in the second chapter. *Lautsi v Italy* (App no 30814/06) ECHR 18 Mar 2011.

[176] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 52 above).

[177] Dissenting Opinion of Judge Tulkens (n 147 above) para 6.

[178] Ibid.

[179] S Mancini (n 161 above) 2660.

the statement in *Dahlab v Switzerland*[180] that the veil cannot be reconciled with certain fundamental principles, 'the Court seems to suggest a certain degree of incompatibility between Islam and liberal democracy (something that is explicitly stated in the case of *Refah Partisi*).'[181] She notes that all other cases in which the Court protected the privilege of mainstream Christianity (such as *Otto-Preminger*) suggest that the latter is fully compatible with democracy and with the values that underlie the Convention.[182] These observations refer back to the controversial categorisation of religions, discussed in the second chapter, where some religions are seen as promoting social cohesion, safeguarding traditions and identity and others impeding integration and denying fundamental western values.[183] As was emphasised, in the second chapter, a critical approach to the 'good-bad' polarisation is strongly needed.[184]

As to the equality argument in the *Şahin* case, the Court controversially accepts the reasoning that Islamic headscarves convey a message of fundamentalism and inequality between men and women, characteristics in conflict with values of a democratic society and, in the Turkish case, secularism. The ban on the headscarves is seen as promoting equality. However, Judge Tulkens rightly points out that the Court falls short of explaining the connection between the ban and sexual equality. She

---

[180] *Dahlab v Switzerland* (App no 42393/98) 2001-V ECHR. This case concerned a primary school teacher who converted from Catholicism to Islam. She began wearing an Islamic headscarf in class. The authorities prohibited her from wearing the headscarf while carrying out her professional duties as a teacher.

[181] S Mancini (n 161 above) 2660.

[182] Ibid.

[183] Ch II at 92-93.

[184] Ch II at 93.

rightly argues that what is missing in this debate is the opinion of women. The headscarf is worn for a variety of reasons, it has no single meaning. She criticises the Grand Chamber for referring to the most questionable part of the reasoning in the earlier case of *Dahlab v Switzerland*[185]. In this case the Court stated that the headscarf represents a powerful external symbol and appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality. 'It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.'[186] Tulkens rightly points out that:

> It is not the Court's role to make the appraisal of this type – in this instant a unilateral and negative one - of a religion or religious practice, just as it is not its role to determine in a general and abstract way the significance of wearing the headscarf or to impose its viewpoint on the applicant.[187]

It should be agreed with Judge Tulkens that 'paternalism' of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.[188] Wearing an Islamic headscarf by a Muslim woman does not *per se* mean that her liberties are suppressed. No evidence of a suppression of her liberties was presented to the Court. In fact, the applicant said that she wore the headscarf of her own free will. Her being a university student and adult woman adds weight to her argument. It is hard to 'see how the principle of sexual

[185] *Dahlab v Switzerland* (n 180 above).

[186] Ibid para 111

[187] Dissenting Opinion of Judge Tulkens (n 147 above) para 12

[188] Ibid.

equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted'.[189] Tulkens rightly draws attention to another contradiction in the overall argument about equality: if wearing a headscarf is seen contrary to equality between men and women, the State should prohibit it everywhere, public or private.[190]

There is a further structural issue in the equality argument in this case (and other cases involving the ban on wearing religious symbols by schoolchildren[191] or university students[192]). Excluding girls from schools (or universities) because of the headgear they are wearing may be counterproductive to the development of these girls as full and equal citizens equipped with the education needed in order to make their own choices. In this regard, the blanket ban on headscarves may undermine the very aim it is said to pursue – gender equality. Even if there is an alternative for girls to continue their education in religious schools this cannot be considered as being in conformity with desired gender equality, especially if their first choice was to receive secular education. Moreover, in the larger European context it can be argued that exclusions from schools contribute to the alienation of women who want to wear the headscarf by sending out a message of intolerance. In that way, the voices of women are being ignored which inhibits the dialogue between different beliefs and world views in society with the aim of achieving a compromise is inhibited. Even if there had been evidence in the *Şahin* case that other women felt accused of immodesty if

[189] Ibid.

[190] Ibid.

[191] *Dorgu v France* (n 52 above).

[192] See also earlier case *Karaduman v Turkey* (App no 16278/90) (1993) 74 DR 93; *Lamiye Bulut v Turkey* (App no 18783/91) ECommHR 3 May 1993.

they did not wear the headscarf it would not have excluded the need to balance the different interests involved.

For example, the Committee on the Rights of the Child in its second periodic report on France, expressed concerns about the alleged rise in discrimination, including that based on religion. It also pointed out concerns about legislation prohibiting the wearing of religious symbols[193] and clothing in public schools that may ignore the principle of the best interest of the child and the right of the child to access to education.[194] The Committee recommended that the State party should:

> consider alternative means, including mediation, 'of ensuring secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalised from the school system and other settings as a result of such legislation. The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children.[195]

The Committee further recommended that the State party to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure that they enjoy the right of access to education.[196]

Perhaps the most important thing is to prepare pupils for life in a pluralistic

---

[193] On March 3, 2004, the French Senate gave final approval for a bill prohibiting the wearing of conspicuous religious symbols in public schools. The law, entered into force in September 2004 and banned the Islamic headscarf and all other overt religious symbols (like Jewish skullcaps and large Christian crosses) from state schools. Law No 2004-228 of 15 March 2004, JO, 17 March 2004, p 5190.

[194] CRC/C/15/Add.240 paras 25-26.

[195] Ibid.

[196] Ibid. See also *Civil and Political Rights, including the Question of Religious Intolerance* Report of the Special Rapporteur on freedom of religion or belief, A Jahangir Economic and Social Council, Commission on Human Rights E/CN.4/2006/5 9 Jan 2006 para 46.

and multicultural world. As noted in the second chapter, this cannot necessarily be achieved by banning all religious symbols in the public sphere, but by exposure to such symbols coupled with an explanation of the importance they carry for the people wearing them.[197]

As to collective religious autonomy, the controversial case of *Cha'are Shalom Ve Tsedek v France*[198] offers food for thought as far as shortcomings in the Court's current approach are concerned. This case concerned a restriction on the Jewish liturgical association *Cha'are Shalom Ve Tsedek* to carry out ritual slaughter. The restriction was justified to be in protection of public health and public order. The applicant submitted that its rights under Article 9 were violated because of the French authorities' refusal to grant approval to access slaughterhouses in order to carry out ritual slaughter in accordance with the ultra-orthodox religious prescriptions of its members. The applicant also alleged violation of Article 14 of the Convention as only the Jewish Consistorial Association of Paris (ACIP), to which the large majority of Jews in France belong, had received the approval in question. The conflict arose from the fact that orthodox minorities did not consider the meat from animals slaughtered by slaughterers of the ACIP as sufficiently pure, or '*glatt*', from a religious point of view. In their view the ACIP no longer made sufficiently thorough examination of the lungs of slaughtered animals for any impurity or any trace of previous illness as required by strictest orthodoxy followed by members of the liturgical association *Cha'are Shalom Ve Tsedek*. Differing from the Commission's opinion, the Court decided twelve votes to five that there was no violation of Article 9 taken alone, and

---

[197] Ch II at 104.

[198] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 52 above).

ten votes to seven, that there had been no violation of Article 9 of the Convention taken in conjunction with Article 14.[199] This is case exemplifies how unsystematic the Court's reasoning can be. However, the division of votes shows that the Court itself was far from unanimous in this case. Far more adequate arguments were put forward by dissenting judges.

It is worthwhile to devote some attention to the reasoning of the Court in this controversial case in order to see how it would have benefited from following the scheme of strict scrutiny. Firstly the Court dealt with the question of whether ritual slaughter can be considered a manifestation of freedom of religion or belief. It was concluded that ritual slaughter must be considered to be covered by a right guaranteed by the Convention, namely the right to manifest one's religion in observance, within the meaning of Article 9. The most important factor in coming to this conclusion was the fact that it was not contested in this case. However, one should also notice that the Court was faced with the fairly well known and acknowledged form of manifestation of the Jewish religion. Despite this the Court found that there was no interference with the applicant association's right to the freedom to manifest its religion. The main argument that the Court put forward was that members of the applicant association were able to obtain meat from other sources (e.g. from Belgium). They also suggested that the association could reach an agreement with the ACIP to perform ritual slaughter under cover of the approval granted to the ACIP (both of these arguments

[199] The Commission found by fourteen votes to three that there had been violation of Article 9 taken in conjunction with Article 14 and by fifteen votes to two that no separate issue arose under Article 9 alone.

were rightly considered inappropriate by seven dissenting judges[200]). The Court concluded that the right to freedom of religion guaranteed in Article 9 of the Convention cannot extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process, given that the applicant association and its members are not in practice deprived of the possibility to obtain and eat meat considered pure according to their religious prescriptions.[201] Additional arguments to support its conclusion were that ritual slaughter is an exception from the general rule that animals must be stunned before slaughter. Thus, a measure to assure that ritual slaughter is performed only by authorised religious bodies does not in itself constitute interference into the manifestation of freedom of religion or belief. The general interest in play was to avoid unregulated slaughter carried out in doubtful hygienic circumstances. Granting an authorisation only to the ACIP, which is the most representative of Jewish communities in France, did not, in the Court's view, infringe the freedom to manifest one's religion.

It seems that the Court had difficulty in keeping separate determining as to whether there was interference into Article 9 (1) rights and determining whether the interference was justified in terms of Article 9 (2). This is a structure the Court has been trying to follow in cases involving Articles 8-11. One also needs to notice that autonomy of the Jewish liturgical association *Cha'are Shalom Ve Tsedek* was affected by this decision. In fact, the Court did not really weigh the nature and importance of the right involved. One can see the danger of confusing 9 (1) and 9 (2) as the

[200] Joint Dissenting Opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nicolovska, Panţîru, Levits and Traja, *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 52 above).

[201] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 52 above) para 82.

arguments set forth by the Court did not go through the test of being necessary in a democratic society. As it was in principle dealing with Article 9 (1), more attention should have been paid to the applicants' own understanding of the importance of the manifestation involved.

However, the Court noted that even supposing that the restriction could be considered an interference with the right to freedom to manifest one's religion (Article 9 (1)), the measure was prescribed by law and it pursued a legitimate aim, namely protection of public health and public order (Article 9 (2)), 'in so far as organisation by the State of the exercise of worship is conductive to religious harmony and tolerance'.[202] The Court found that the means employed fall within the margin of appreciation left to Contracting States, particularly with regard to establishment of the delicate relations between the Churches and State. Thus, the means were compatible with Article 9 (2) of the Convention and could not be considered excessive or disproportionate.[203] No further or more detailed elaboration was provided. This was superfluous to what the Court stated regarding article 9 (1). Thus no real test of the restriction being necessary in a democratic society was carried out. As to the proportionality of the measure it is not obvious what constituted the pressing social need in this case. The measure was explained to be necessary in order to protect public health and public order. Interestingly, no accusations were made that the Jewish liturgical association *Cha'are Shalom Ve Tsedek's* hygiene standards were poor. Quite contrary, there was no difference found in ritual slaughter carried out by the ACIP and the applicant (apart from inspection of lungs for religious purposes). The

[202] Ibid para 84.

[203] Ibid.

Court in principle accepted the Government's argument that refusal of the approval was necessary to avoid proliferation of approved bodies who can perform ritual slaughter. It is not entirely clear why that is problematic and how that endangers public health, especially considering that the mentioned religious bodies were performing ritual slaughter according to set standards. Moreover, as pointed out by the applicant and overlooked by the Court, a number of Muslim communities had obtained approval to carry out ritual slaughter, 'without it even being alleged that the number of approved bodies was such as to threaten public order or health'[204]. Reference to protection of 'public order' is even more conspicuous. The Court makes a reference to religious harmony and tolerance and to delicate relations between the Church and State. There is nothing more added to these 'mantras' to understand what is considered to be public order in this case, and how it is endangered.

Thus there is no analysis involved as to what actual interest is to be protected. It is not obvious, what the convincing, compelling, relevant and sufficient reasons were for restricting the manifestation of religion. This is quite common for the ECtHR to resort to repetition of main concepts underpinning the Convention avoiding difficult analysis of how these concepts are related to actual factual circumstances. At the same time the Court has not paid attention to one of the most important characteristics of a democratic society – pluralism. The seven dissenting judges rightly pointed out that 'the role of the public authorities is not to remove any cause of tension by eliminating pluralism, but to take all necessary means to ensure that the competing groups tolerate each other'[205]. Moreover, pluralism is a cornerstone of a democratic society.[206] It

[204] Joint Dissenting Opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nicolovska, Panţîru, Levits and Traja (n 200 above).

[205] Ibid.

could be concluded that the Court failed to secure religious pluralism or to ensure a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The court did not strike a fair balance between the general interests of the community and the interests of religious group. There was no strict scrutiny, in fact hardly any scrutiny involved. The State was left with a considerable margin of discretion.

To have addressed this appropriately, the Court should have put the emphasis on Article 9 (2) rather than 9 (1). Issues which should have been properly assessed under the restrictions clause were skimmed over at Article 9 (1) stage. The threshold for article 9 (1) should have been low, respecting the community's autonomy regarding the importance of performing ritual slaughter. Justifications on the other hand should have been adequately dealt with under Article 9 (2). Moreover, the Court would have benefited from systematically applying rigorous European supervision and a narrow margin of appreciation. Whatever the result would have been, it could have added analysis to this case, which is in fact missing.

4.8. Conclusion

It ought to be admitted that it is difficult to draw a balance between religious needs and the needs of a State. Although there has been an increase in Article 9 cases in the ECtHR since the *Kokkinakis* case in 1993, the quality of the reasoning in these cases is frustratingly fluctuating. It was suggested that the reason for this is that the Court

---

[206] See eg *Kokkinakis v Greece* (n 9 above).

rarely pays enough attention to the core meaning of the right to religious freedom, namely to autonomy, equal worth and dignity of all human beings. It was also argued here that the nature and importance of the freedom of religion or belief in a democratic society is adequate enough to require a narrow margin of appreciation and strict European supervision. Core values such as respect for choice of the individual and autonomy of the community, the need for pluralism, neutrality and effective protection of rights are essential ingredients in the right of religion or belief and should not be overridden except where there are very strong countervailing objectives, and there being no alternative but to curtail them. This in turn means there ought to be tangible evidence for the need for the restriction.

Chapter V

Collective Autonomy and Individual Rights: Conflict and Resolution

5.1. Introduction

The final theme which needs to be discussed in this thesis is the conflict between individual and collective autonomy. It is true that different interests involved may cause tensions in the triangle of state – individual – community. The question is what the ECtHR should do when dealing with these conflicting interests. The emphasis in this thesis has been on individual autonomy. It was argued that the principal justification of collective rights is that individual self-determination often requires a collective dimension: '…individual freedom of conscience for most is intimately tied to a community of belief, and if that community is not free to shape itself, the conscience of its individual believers is inevitably compromised'[1]. In this sense an individual right and a collective right cannot be dissociated. Collective religious autonomy as an instrumental right is needed for more effective or full protection of individual rights. However, collective religious autonomy may have intrinsic value as well.[2] The community dimension may be part of the religion or belief one has. Interference in matters of religious communities may affect not only collective religious autonomy, but also the autonomy of individual believers in *forum internum*.

---

[1] R Minnerath, 'The Right to Autonomy in Religious Affairs' in T Lindholm, W Cole Durham, Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 293.

[2] See also reference in Chapter I to Raz's conception of constituent goods. Ch I at 41.

As was argued in the first chapter this in fact should make a strong argument for the protection of collective/institutional autonomy in human rights discussion.[3]

However, conflicts do occur. As noted in the second chapter, religious liberty is just one right among several strongly advocated in liberal democratic states, especially freedom of speech, privacy and equality.[4] These rights of an individual may clash with the right to collective religious autonomy and pose the question as to what extent they need to be protected within religious communities. It is also possible that conflicts occur between individual and collective religious autonomy. In certain cases this conflict may evolve into conflict between minorities and the majority within the religious community. Thus, the principal question in this chapter is how to strike a fair balance between these competing rights and what the role of the ECtHR is in such cases. Furthermore, how should the State understand collective religious autonomy in the case of religious communities, which do not subscribe to values like democracy, tolerance, individual freedoms and rights (including gender equality)? What should the response be if the religious community violates the individual rights of its own members? Should there be exceptions to general rules to accommodate collective religious beliefs? Is there a duty upon the State to interfere even if an individual has not claimed that his or her rights have been violated?

Lagoutte and Lassen highlight that Western Europe has traditionally pursued what can be called the classical model for state intervention in religious matters. 'In this model, religious communities and individuals enjoy extended freedom to have

[3] Ch I at 47.

[4] Ch II at 69.

their own rules for personal behaviour and internal organisation'[5] The State intervention in the religious practices is limited to what is absolutely necessary.[6] They also rightly point out that recently there has been another tendency in European debate according to which religious traditions should no longer experience this privileged absence of State interference.

> In fact, the human rights community is caught in heated debates on state intervention in such religious practices which are incompatible with the norms of society at large…Among potential discrepancies between religious practices and human rights are issues concerning gender, family and children, as for example headscarves and other religious signs, female and male circumcision, ritual slaughter, religious divorce, and homosexuality.[7]

They point out that the question of whether the State has to interfere to establish harmony between religious practices and human rights has been gradually answered affirmatively. The reason is that it is seen as mandatory from a human rights perspective.[8] It can be added that to some degree this tendency can be witnessed in the practice of the ECtHR as well, for example, in controversial cases dealing with legal pluralism[9] and headscarves[10], but also in cases involving protection of children[11] and

---

[5] S Lagoutte and EM Lassen, 'The Role of the State in Balancing Religious Freedom with Other Human Rights in a Multicultural European Context' in F Francioni and M Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers, Leiden 2008) 208.

[6] Ibid 216.

[7] Ibid.

[8] Ibid 209; See also C McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the *JFS* Case Considered' (2010) Oxford Legal Studies Research Paper 72/2010, 4 -5 <http://ssrn.com/abstract=1701289> accessed 1 Jun 2011 (2011 Forthcoming in the ICON).

[9] *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37 EHRR 1.

[10] *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8.

[11] *Konrad and Others v Germany* (App no 35504/03) ECHR 11 Sept 2006.

the right to privacy[12]. Torfs, for example, argues that '[w]hereas religions enjoy more autonomy today than they did in the past as a result of their weakening political importance, they find themselves at the same time more strictly scrutinised, as a consequence of the ongoing horizontal application of fundamental rights within the current secular legal framework.[13]' It can also be argued that this tendency is to a certain degree accelerated by the controversial socio-legal concerns pointed out in the first and second chapter of this thesis.[14] However, regarding the practice under the ECHR, it has been argued by some authors that the Court puts a far greater emphasis (or value) on internal autonomy of religious communities than on individual rights. The strict individual dimension of this freedom has been disregarded more often and has arguably received less protection from the Strasbourg jurisdiction than the corporate dimension of the right.[15] Stuart takes this a step further and argues that 'the individual right to freedom of religion has been interpreted and understood, in the main, as the right of a religious institution to exist and have internal autonomy.[16] She, for example, contends that gender equality and women's right to freedom of religion

[12] *Schüth v Germany* (App no 1620/03) ECHR 23 Sept 2010.

[13] R Torfs, 'Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities' (2007) 1 Religious Studies Rev 70.

[14] Ch I at 48 and Ch II at 92-93.

[15] J Martínez-Torrón, 'Religious Liberty in European Jurisprudence' in M Hill (ed), *Religious Liberty and Human rights* (University of Wales Press, Cardiff 2002) 116. See also Ch IV at 182. The Court's practice is inconsistent. However, one can see that collective autonomy has received higher protection by the ECtHR. This can be witnessed in cases where the Court has narrowed the margin of appreciation given to States.

[16] A Stuart, 'Freedom of Religion and Gender Equality: Inclusive or Exclusive?' (2010) 10 (3) HRLR 429-459.

or belief has been largely denied in European jurisprudence (including under Article 9 of the ECHR).[17]

While it is true that the Court seems to value collective religious autonomy over individual rights,[18] a conflict between a religious community and individual rights of its members is a special case. It is argued in this chapter that the role of the ECtHR is to carry out the careful balancing of different interests in specific factual circumstances giving due respect to *both* individual and collective religious autonomy.[19] It is suggested here that increased legal intervention (and the departure from the 'classical model' described above) into the internal affairs of religious communities carries substantial risks of undermining not only collective religious autonomy but most importantly the autonomy of religious individuals. However, non-legal means of gradual facilitation of certain individual rights (for example, gender equality) within religious communities and continuous public-political dialogue is considered here to be important and not in conflict with individual autonomy as advanced in this thesis.

This chapter will firstly describe the current approach taken under the ECHR and point out problematic aspects of this approach. It needs to be mentioned, that there are not many cases involving a conflict between individual and collective

---

[17] Ibid. Stuart is making her argument from a feminist point of view. As will be explained later, there are several flaws in her argument, which make it impossible to accept her position on the issue.

[18] See also Ch IV at 182. It was discussed in the last chapter that the Court has applied stricter European scrutiny in cases involving religious communities while granting a considerably wider margin of appreciation to States in cases concerning individual religious freedom.

[19] For example, even in the 'classical model' described above, where intrusion is allowed when absolutely necessary, the Court needs to carry out a balancing of different interests taking into account principles the Court has developed itself and the specific factual circumstances of the case.

rights/religious autonomy. As the case law is scarce the Court's overall approach in these matters is not entirely clear. However, some critical remarks can be made on the basis of existing case law. It will then outline a theoretical framework for resolving conflicts based on the autonomy centred approach as advanced in previous chapters of this thesis. The final part of this chapter will discuss a specific case involving the conflict between individual rights and collective autonomy in an educational setting (hypothetical on the *Jewish Free School case* (hereinafter *JFS*[20]). However, to start with, some points need to be made about rights, but also duties of individuals and communities. In this regard important procedural aspects relevant for dealing with conflicts between individual rights and collective autonomy under the ECHR need to be pointed out.

5.2. Do Religious Communities have any Human Rights Obligations?

Human rights are traditionally understood as rights against State interference and the abuse of power by governments.[21]

> Some may say it is *obvious* that human rights are defined as rights exclusively applicable against the State, but no international definition states this in these terms. In fact…the Universal Declaration was carefully drafted to avoid suggesting that the state has specific duties, the rights are written in the form 'everyone has a right to…'. The focus is on the inherent possession of the right, and references to duties can be found to society, the state, groups and individuals.[22]

---

[20] *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15; [2010] 2 WLR 153.

[21] P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev edn Routlege, London 1997) 209.

[22] A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford 2006) 39-40. It has to be noted that Clapham does not specifically address the issue of religious communities. He focuses on non-state actors like international organizations, transnational corporations and armed opposition

For example, Article 2 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that no one shall be subject to discrimination by any State, but also by institution, group of persons or a person on grounds of religion or other belief.[23] Clapham contends that a case can be made that, as a rule, human rights are to be respected by all persons, groups and States. If there are exceptional additional duties for the State, they have been explicitly articulated.[24] He argues that '…to insist on the exclusive applicability of human rights law to governments generates a dangerous sense of impunity for those who are undermining people's rights'.[25] Moreover, fundamentality and importance of human rights adds more weight to the argument for their applicability to a broader range of subjects other than States. Thus, one can argue that at least theoretically both religious individuals and communities have human rights, but also obligations to respect the human rights of others. This approach is in conformity with the principle of religious autonomy as has been advanced in this thesis. It was argued that autonomy not only involves respect for one's own identity and dignity, but also for that of others. Autonomy for all individuals must mean that no one individual can use his or her freedom to deprive others of their autonomy (irrespectively of its individual or collective dimension).

---

groups. However, he makes statements which can be argued are applicable to a wider group of non-state actors and individuals.

[23] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA Res 36/35.

[24] A Clapham (n 22 above) 35.

[25] Ibid 54.

One should mention here a complex theoretical concept of *Drittwirkung*. Van Dijk *et al* point out that there are two basic views about *Drittwirkung*. According to the first view, human rights provisions apply to legal relations between private parties. According to the second view *Drittwirkung* of human rights means the possibility for an individual to enforce these rights against other individuals.[26] They also emphasise that as to the second view no *Drittwirkung* can be directly effectuated via the procedure set up by the Convention.[27] It is not possible to bring a case against a private person (for example, religious community) under the ECHR. It is possible to lodge complaints only about violations of the Convention by one of the contracting States. A complaint directed against a private person is inadmissible for the reasons of incompatibility with the Convention *ratione personae.* However, an individual can bring up an alleged violation of his convention rights by another individual indirectly, for example, when a State can be held responsible for the violation in one way or another.[28] Only States, however, can be held responsible for violations of human rights under the ECHR.

> It is, therefore, no surprise that the Strasbourg case law provides little clarity as far as *Drittwirkung* is concerned. Any urgency for a more straightforward approach is not felt. In the *Verein gegen Tierfabriken* Case the Court even explicitly stated that it does not consider desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*. At the best a kind of 'indirect *Drittwirkung* is recognised in cases where from a

---

[26] P Van Dijk, GJH van Hoof, van A Rijn, L Zwaak, *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerpen 2006) 29.

[27] Ibid. The recognition of *Drittwirkung* of the Convention may still take place, (both in the first and second sense of its meaning), at the national (constitutional) level. This aspect of *Drittwirkung* has been sufficiently treated elsewhere. See eg P Van Dijk, GJH van Hoof, van A Rijn, L Zwaak (n 26 above) 30-32 and R Ahdar, I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005) 176-184.

[28] P Van Dijk, GJH van Hoof, van A Rijn, L Zwaak (n 26 above) 29. In that case the State is responsible for the way it has dealt with this private conflictual relationship but is not liable for the private violation itself.

> provision of the Convention – notably Articles 3, 10 and 11 – rights are inferred for individuals which, on the basis of a positive obligation on the part of Contracting States to take measures in order to make their exercise possible, must also be enforced vis-à-vis private third parties.[29]

Clapham points out that international law, (as a regime that focused on inter-state relations), has inevitably skewed the rules and procedures in one way, towards an examination of State action. It has also focused on prohibitions on States rather than demands for action.[30] However, as was noted in the second chapter the effectiveness principle has been relied upon many times in order to allow the European Commission of Human Rights or Court to interpretations that convention rights are not merely negative rights, but also positive rights which put positive obligations on States.[31] Although there is a controversy over the extent of positive duties to provide, the practice of the ECHR does not leave any doubt that the Court has to some extent recognised the positive obligations of States to protect individuals or communities in their enjoyment of their convention rights (including Article 9) against third parties.[32] Thus, the State becomes responsible under the Convention for the way it has dealt with the private conflictual relationship, but it is not liable for the private violation itself. For example, Thazib-Lie, also points out that there is an emerging (recent) international concept of due diligence in the area of international human rights protection, which indicates the threshold of effort which a State must undertake to fulfil its responsibility to protect individuals from abuses of their rights.[33] The

---

[29] Ibid 29-30. See also *VgT Verein Gegen Tierfabriken v Switzerland* (App no 24699/94) (2002) 34 EHRR 10.

[30] A Clapham (n 22 above) 35.

[31] Ch II at 110.

[32] See Ch II at 111-112; *Otto-Preminger v Austria* (App no 13470/87) (1994) 19 EHRR 34.

[33] BG Thazib-Lie, 'Dissenting Women, Religion or Belief, and the State' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus

requirement of due diligence is figuring in the practice of the ECtHR as well.[34] 'What due diligence essentially requires is that states take all reasonable and appropriate steps under the circumstances to prevent human rights violations.'[35] It can be discerned from the above that in the case of the conflict between rights of an individual and autonomy of a religious community both individuals and religious communities may need to *indirectly* comply with international human rights obligations. The extent of this obligation and the extent of State's duty to interfere, as already pointed out in the introduction to this chapter, is a matter of contention.

5.3. The Current Approach under the ECHR: Critical Observations

In the practice of the ECtHR there are several principles which appear to be applicable in cases of the conflict of individual rights and collective autonomy, most importantly: prohibition of coercion, voluntarism and the right to exit. There are some additional factors also, which may influence the outcome in these cases. The following will try to map out the current approach taken by the Court and explain the problematic aspects of it.

Nijhoff Publishers, Leiden 2004) 460. She does however, point out, that the term has not always been explicitly utilised. It has been interchanged with 'due care' and 'all appropriate steps'.

[34] See eg J-F Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Strasbourg, Council of Europe 2007). The term itself does not seem to explicitly figure in the practice of Article 9, however, 'all necessary measures', which is more commonly used, seems to carry the same idea in freedom of religion cases. See eg *Serif v Greece* (App no 38178/97) (2001) 31 EHRR 20 para 53.

[35] BG Thazib-Lie (n 33 above).

5.3.1. Prohibition of Coercion

The right to freedom of religion or belief protected under Article 9 of the ECHR includes the right to have and to change one's religion or belief. As noted in the second chapter, these rights belong to *forum internum* and are considered absolute. Nowak and Vospernik note, while States are under an absolute obligation to refrain from interfering with *forum internum* by means of religious or ideological indoctrination, brainwashing, or other forms of manipulation, they have a responsibility to prevent private parties, including religious groups, from engaging in coercive, manipulative, or fraudulent forms of indoctrination.[36] It should be added that the question of coercion may also arise regarding manifestation of religion or belief, if someone is forced to act against his or her beliefs. As discussed earlier, although not recognised by the ECtHR, the distinction between beliefs and actions is problematic.[37] Coercion in manifestation of religion or belief may affect a person's inner beliefs.

Thus, the abridgement of rights in the private sphere is not unlimited. It should be indisputable that an individual ought to be able to find protection at least in cases which involve violation of the most fundamental rights like the right to life, and protection against torture and slavery. In this regard one could invoke Articles 2, 3 and 4 of the Convention, when a State has failed to protect an individual against a religious community. These cases could be described as touching the *forum internum* of a believer. As Little has put it: 'Religious bodies would not be permitted to violate,

---

[36] M Nowak, T Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T Lindholm, W Cole Durham, Jr, BG Thazib-Lie (eds), *Facilitation Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 148-149.

[37] See also Ch II at 58-59.

in the name of their basic convictions, certain "primary" rights…'.[38] He also rightly points out that 'beyond that, considerable latitude is conceded, precisely in the name of honoring "freedom of conscience and religion or belief".'[39]

In this regard there are different opinions as to what constitutes coercion in matters of religion or belief. Is coercion regarding an individual's religion or belief something which could fall under ordinary criminal law? Or is it something that is or needs to be defined in a different way?

> How should one balance the right to teach religious views and to convince others with the "absolute" right of others not to suffer violation of their *forum internum?* At what point does the state have a right or even a duty to intervene in order to protect freedom of thought and religion?[40]

As to the ECHR, the arguments advanced by the Court and the dissenting judge Martens in the *Kokkinakis* case[41] can serve as a good example. Although *Kokkinakis* concerned conflicting rights of members of different religious communities, some analogy can be drawn for conflicts between the community and its individual member. Furthermore, although the case was decided in 1993 the concerns expressed by judge Martens have not been conclusively addressed in the Court's subsequent practice to this date.

---

[38] D Little, 'Studying "Religious Human Rights": Methodological Foundations' in Van der Vyver JD, Witte J Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Kluwer Law International, The Hague 1996) 60.

[39] Ibid.

[40] M Nowak, T Vospernik (n 36 above) 149.

[41] *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397.

As noted in the first chapter, this case concerned a Jehovah's Witness who was convicted for unlawful proselytizing, which is a criminal offence under Greek law. The case emanated from the fact that Mr. Kokkinakis and his wife called at the home of the cantor of a local Greek Orthodox congregation. The cantor's wife answered the door and invited the couple in. During a short conversation Mr. Kokkinakis talked about some of his religious convictions, quoted from and interpreted the Bible and explained to the cantor's wife his belief in pacifism. The cantor's wife later stated that she did not understand everything that Mr. Kokkinakis had said and that the visit did not affect her beliefs. When the cantor learnt about the visit he informed the police. Mr. and Mrs. Kokkinakis were immediately arrested and subsequently sentenced to a term of four months in prison. The Court of appeal quashed Mrs. Kokkinakis's conviction on the basis of insufficient evidence that she had attempted to proselytize. Mr. Kokkinakis's sentence and fine were reduced. His appeal to the Court of Cassation was unsuccessful. Mr. Kokkinakis submitted his case to the European Commission of Human Rights, which declared his application admissible.

In this case the Court had to address the question of balancing the right of the applicant to practice his religion by seeking to share his religion with others against the right of the State to place restrictions to protect others from unwanted exposure to his point of view. On the facts of the case, the Court decided six votes to three that the interference was unjustified and thus Article 9 had been violated. The Court based its decision on the fact that the Greek courts did not sufficiently specify in what way the accused had attempted to convince his neighbor by improper means.

The reasoning of the Court (not the ultimate result) has been repeatedly criticized. Gunn, for example, highlights that the Court did not consider the Greek anti-proselytism statute as a whole and ignored the fact that the law had been repeatedly used to incarcerate minority believers.[42] Judge Martens (in his partial dissent) criticized the Court for creating a distinction between 'proper' and 'improper' proselytism without trying to explain it.[43] He also argued that the very existence of a provision in Greek criminal law defining the offence of proselytism was in violation of Article 9. He argued that there is no justification in having a special provision making proselytism an offence in criminal law, while ordinary criminal law can be used to deal with matters of coercion.[44]

The right to proselytism is not explicitly mentioned in the text of the ECHR. However, it is part of the right to manifestation of one's religion or belief. As Judge Martens points out:

> There were good reasons for laying down in Article 9 (art. 9) that freedom of religion includes freedom to teach one's religion: many religious faiths count teaching the faith amongst the principal duties of believers. Admittedly, such

[42] TJ Gunn, 'Adjudicating Rights of Conscience' in Van der Vyver JD, Witte J Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Kluwer Law International, The Hague 1996) 325. The relevant criminal law in fact was adopted during the dictatorship of Metaxas and was designed to persecute non-Orthodox Church Christians.

[43] Partly Dissenting Opinion of Judge Martens, *Kokkinakis v Greece* (n 41 above). The Court by referring to the 1956 report of the World Council of Churches drew a distinction between 'bearing Christian witness' and 'improper proselytism' and expressed the view that while the former was 'an essential mission and a responsibility of every Christian and every Church,' the latter represented 'a corruption or defamation of it'. *Kokkinakis v Greece* (n 41 above) para 48. It is relevant to mention that only on 28 June 2011 a coalition of the Vatican and major Protestant and Evangelical churches announced new ethical standards for missionary activities. This was a result of consultations among the Pontifical Council of Interreligious Dialogue, the World Council of Churches and the World Evangelical Association. The new code represents a significant shift from earlier codes adopted by the World Council of Churches aimed at shoring up established churches against inroads by new religious movements banning a number of common mission activities. Strasbourg Consortium <http://www.strasbourgconsortium.org> accessed 18 Aug 2011. See also an interesting discussion in MK Richards, AL Svedsen and R Bless, 'Codes of Conduct for Religious Persuasion: the Legal Framework and Best Practices' (2010) 3:2 *IJRF* 65-104.

[44] Partly Dissenting Opinion of Judge Martens (n 43 above).

> teachings may gradually shade off into proselytising. It is true, furthermore, that proselytising creates a possible "conflict" between two subjects of the rights to freedom of religion: it sets the rights of those whose religious faith encourages or requires such activity against the rights of those targeted to maintain their beliefs.[45]

The State has a duty to interfere when a community is using improper means (coercion) to influence their members. However, the Court ought to be sceptical about the criminal law provisions specifically targeting the manifestation of religion or belief. This thesis concurs with Judge Martens's criticism in all aspects of it. Judge Martens observed that:

> …the State, being bound to strict neutrality in religious matters, lacks the necessary touchstone and therefore should not set itself up as the arbiter for assessing whether particular religious behaviour is "proper" or "improper". The absence of such a touchstone cannot be made good (as the Court attempts to do) by resorting to the quasi-neutral test whether or not the proselytism in question is "compatible with respect for the freedom of thought, conscience and religion of others". This is because that very absence implies that the State is lacking intrinsic justification for attributing greater value to the freedom not to be proselytised than to the right to proselytise and, consequently, for introducing a criminal-law provision protecting the former at the cost of the latter.[46]

However, it needs to be accepted that between activities that are clearly proper and clearly improper (coercive), there are activities that are hard to place. Conflicts which fall short of being treated under ordinary criminal law inevitably require balancing of different interests involved in given factual circumstances. For example, the Oslo Coalition on Freedom of Religion or Belief has pointed out that it is not just the activity in general that has to be assessed, but all the concrete aspects of the situation including characteristics of the parties involved, the way the message is

[45] Ibid.

[46] Ibid.

delivered and where the activity takes place (e.g. military, prison, hospital and school).[47] However, as suggested in this thesis the conflict between an individual and his or her community is a special case and in this sense caution needs to be applied. Interpreting 'improper means' too widely gives *carte blanche* to States in interfering with activities of a religious community in any case which could be defined as being 'improper'. So called new religious communities, as in the *Kokkinakis* case (but also Islamic minorities), especially, may become unjustifiably affected if there is an intolerant attitude towards them in society. In most cases, the best solution seems to be the existence of the right to exit a religious community, which will be discussed in the next section.

5.3.2. The Principle of Voluntarism and the Right to Exit

In less severe cases (falling short of coercion) where an individual has sought protection of his rights against a religious community under the ECHR, the solution is based on what can be called the principle of voluntarism.[48] This means that by accepting a membership or appointment/employment by the community, a person voluntarily waives certain rights.[49] According to the principle of voluntarism under the ECHR, individual rights are usually protected by the right to leave the community (the right to exit).

---

[47] 'The Right to Try to Convince the Other: Missionary Activities and Human Rights' Oslso Coalition on Freedom of Religion or Belief <http://www.oslocoalition.org/mhr_bacground_eng.php> accessed 18 Aug 2011.

[48] The term 'principle of voluntarism' is not as such used by the ECtHR.

[49] *X v Denmark* (App no 7374/76) (1976) 5 DR 157. See also *E/GR v Austria* concerning the levying contributions from church members, *E/GR v Austria* (App no 9781/82) (1984) 37 DR 42; *Williamson v UK* concerning Church of England priest opposing the decision of the Church to ordain women, *Williamson v UK* (App no 00027008/95) 17 May 1995; *Karlsson v Sweden* (App no 12356/86) (1988) 57 DR 172; *Rommelfanger v the Federal Republic of Germany* (App no 12242/86) (1989) 62 DR 151.

Protection of individual rights through the right to exit is probably the best solution in most cases. However, it can be seen as problematic in certain circumstances. One of the complications is that it may be difficult for an individual to manifest his or her religious beliefs outside a specific religious community. It is also arguable whether the possibility to exit a community in some cases can be considered meaningful. As Bielefeldt notes, 'one should not take the right to opt out for granted: it has been and, in parts of the world, continues to be a matter of controversy and resistance'.[50]

Furthermore, as Stuart argues the 'put up and shut up or leave policy' is problematic, because the policy is rooted in the liberal concept of autonomous people making rational choices and contends that the concept does not make allowance for the fact that individuals are members of various groups and rarely fully independent from their surroundings. 'It does not take account of the complex relationship between a believer and their religion.'[51]

For example, the principle of voluntarism is not quite adequate in describing the situation which arises when someone is born into a community and becomes a child member of it. Even when that person has a choice (legal option) later on in his life to leave the community, he or she is not necessarily capable of doing it because,

---

[50] H Bielefeldt, 'The Practical Priority of Secular Legal Order' in MLP Loenen & JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerpen 2007) 98.

[51] A Stuart (n 16 above) 438.

for example, he or she is not able to define himself outside his social construct.[52] As Cookson has put it:

> Standing in stark contrast to the liberal ontology of the self as having free choice over life's goods is the encumbered self of the religious adherent as she actually functions within her religious worldview and her religious community. What is lost in the voluntarist conception of religious liberty is the fact that a religious practice is not an isolated and optional act but an integral part of a belief system…[53]

In regard to the meaningful exit from religious communities, Stuart also emphasises the specific situation of women. She contends that women due to their status and position within society are more likely to be dependant on their family and religious community. Leaving is impractical when a person has little or no social, economic or personal independence from the religious group.[54] She points out that in Europe this is more likely to be an issue within minority religions or immigrant communities.[55]

---

[52] It can be argued that this issue was indirectly addressed in *Konrad and Others v Germany.* However, it needs to be emphasised that this case concerned the right to education and the reasoning in this case should not be extended to membership of children in religious organisations. The case concerned applicants, who, because of religious reasons wanted their children to be exempted from compulsory primary school attendance. The ECtHR decided that children were unable to foresee the consequences of their parents' decision to opt for home education because of their young age. As it would be very difficult for the children to take an autonomous decision for themselves at that age, the Court considered that respect for religious and philosophical convictions of parents is only due if it does not conflict with the child's right to education. *Konrad and Others v Germany* (n 11 above).

[53] C Cookson, *Regulating Religion – the Courts and the Free Exercise Clause* (OUP, New York 2001) 100. Cookson addresses theories, self-understandings and societal constructs that play a role in American free exercise conflicts (when religiously compelled behaviour conflicts with laws). Se refers to Taylor's framework theory. C Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, Cambridge Mass 1989) 26. This theory is important for this thesis only as far as to understand that there are different views as to how one understands the self. 'The framework theory is important…for its added insight into the psyche of the true believer, the religiously encumbered self, the person whose world construct cannot be easily altered by making a choice that is alien to that construct.' C Cookson 101.

[54] A Stuart (n 16 above) 438. See also C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2001) 129.

[55] A Stuart (n 16 above) 438-439. However, her main point is not that women necessarily want to leave the community, but that they should be treated equally and have a say in the content and structure of their religion.

It can be added that the principle of voluntarism may present equally severe challenges regarding ethnic and cultural societies/minorities.[56] Leaving that kind of minority may have serious implications for a person's social and property rights.[57] In these cases it is not a matter of just choosing one religion or the other, or no religion at all, but it may be a question of effectively losing other social definitions of personal identity and community ties. This chapter aims to focus on purely religious communities. However, it is acknowledged that religion cannot often be viewed in isolation from the other aspects determining individual or group identity.

Some may also argue that 'put up and shut up, or leave policy' does not provide adequate protection for minorities within the community to exercise their freedom of religion or belief. This policy may also hinder possible reforms inside the community (e.g. reforms regarding gender equality) if there are groups with more liberal interpretations of the doctrine. It can also be argued that by accepting this policy a State is taking sides in a religious dispute vesting higher value to protection of the unity and status quo in religious communities. However, this situation is not seen in this thesis as problematic in terms of individual autonomy as dissenting members still can collectively manifest their religious beliefs by forming a new

---

[56] Although the Convention does not contain a minority rights provision akin to Article 27 of the ICCPR, minorities are protected under the Convention. G Gilbert, 'The Burgeoning Minority rights Jurisprudence of the European Court of Human Rights' (2002) 24 Hum Rts Q 736-780. This chapter aims to focus on purely religious communities. However, it is acknowledged that religion cannot often be viewed in isolation from the other aspects determining individual or group identity.

[57] See eg *Lovelace v Canada* (Comm no 24/1977) (UN HRC 30 Jul 1981). In this case Sandra Lovelace lost her rights and status as an American Indian after having married a non-Indian. The Committee found that Canada was in violation of article 27 of the ICCPR (the right of minority members to practice their culture) by continuing to deny Ms. Lovelace the opportunity to live on the reservation, the only place that she could practice her culture in community with other members of the group. See also *Kitok v Sweden* (Comm no 197/1985) (UN HRC 27 Jul 1988). This case concerned the denial of traditional Sami rights to Kitok because of the loss of membership to a Sami village.

community. There are cases in the ECtHR practice which confirm the right of 'dissenters' to form their own religious community.[58] In this regard, the practice of the ECtHR does not present many difficult challenges for this thesis.[59] It also needs to be emphasised that a State can equally violate the principle of neutrality and non-discrimination in religious matters if it starts protecting minorities by means other than guaranteeing their right to leave the community.

As to the practice of the ECHR today, it can be argued that it is not just the principle of voluntarism which determines the case, but additional requirements have gradually emerged. For example, the Court has to test whether the demands of a community were reasonable. This test takes into account the fact that individuals have some inalienable rights, but it also takes into account the importance of the matter at issue for the community. Recent case law (*Schüth*) also indicates that specific circumstances of an individual have started to play a significant role as well.[60] Furthermore, especially in employment cases the status of an individual member within the community seems to be determinative. However, in many respects the approach of the ECtHR is still unclear.

In its earlier case law (*X v Denmark*) the Commission explicitly stated that priests' 'individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the

---

[58] Eg *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 13.

[59] However, there are and have been disputes in domestic courts over property rights after the schism of communities.

[60] *Schüth v Germany* (n 12 above).

church guarantees their freedom of religion in case they oppose its teachings.'[61] In the case of *Karlsson v Sweden* the Commission confirmed that in the case of a conflict between individual freedom of religion or belief and collective autonomy leaving the church is 'an ultimate guarantee of applicant's right to freedom of thought, conscience and religion'.[62] In both cases the Commission emphasized that Article 9 'does not oblige the High Contracting Parties to ensure that churches within their jurisdiction grant religious freedom to their members and servants'.[63] *Karlsson v Sweden* concerned a priest whose candidacy for the post of vicar was refused by the Church, because he did not demonstrate a willingness to cooperate with a female clergyman as an assistant priest. In this case the Commission also mentioned (however, without any elaboration) some of the specific circumstances of the applicant. It noted that there was nothing to show that the applicant should have feared dismissal from his post at the time. He also had not shown that he had been under any pressure to change his views or that he had been prevented from manifesting his freedom of religion or belief. On the contrary, his views on women priests were not held to disqualify him. He simply did not have qualifications necessary for the specific post he applied for as he made it clear that he would not work with female priests.[64] However, it can be argued that in earlier case law specific circumstances of an individual did not play much role in the deciding process, as no clarification of the importance of these

---

[61] *X v Denmark* (App no 7374/76) (1976) 5 DR 157. In this case a clergyman of the State Church of Denmark claimed that his rights under Article 9 were violated by the Church Ministry as he had been requested under threat of sanctions to abandon certain practices concerning christening. The clergyman had made a condition for christening that the parents attended five religious lessons. This practice was not accepted by the Church. The Commission decided that the clergyman did not have a right to go contrary to his Church authority and declared the application inadmissible.

[62] *Karlsson v Sweden* (n 49 above).

[63] Ibid para 1; *X v Denmark* (n 49 above) para 1.

[64] *Karlsson v Sweden* (n 49 above) para 1.

circumstances were provided.

From a human rights point of view it is not acceptable that a person surrenders his fundamental rights and freedoms in totality when becoming a member of a community. One has human rights simply because one is a human being. As long as a human being exists, he has some inalienable rights. Moreover, even if a person is ready to give his life to his community, it does not mean that the community has a right to do with that person whatever it likes. This means that religious customs and traditions which threaten the life or violate physical integrity of members of the religious group clearly exceed permissible confines of religious autonomy.[65] Neither can it be accepted from the human rights perspective that a person can be considered to have completely waived his right to privacy, freedom of expression, the right not to be discriminated against, etc. It needs to be noted that communities cannot dictate all aspects of their member's lives. This seems now to be accepted by the Convention practice. The European Commission of Human Rights has hinted that the community cannot subject an individual to 'unreasonable demands of loyalty'.[66]

For example, in the admissibility case of *Rommelfanger v the Federal Republic of Germany,*[67] the European Commission of Human Rights dealt with the question of State responsibility to protect freedom of expression (under Article 10) of a physician who was dismissed from a Catholic hospital for publicly expressing support for

[65] See also JD van der Vyver, 'Limitations of Freedom of Religion or Belief: International Law Perspectives (2005) 19 Emory Int Law Rev 537.

[66] *Rommelfanger v the Federal Republic of Germany* (n 49 above).

[67] Ibid.

women's right to abortion.[68] This case did not concern Article 9, but could be argued to have implications for the interpretation of it.

According to the facts of the case, the hospital provided medical care for the public without distinction of faith. It also employed people of different faiths, but about 80 % of their staff were Roman Catholics. The employment contracts of employees had a reference to behavioural guidelines provided by the umbrella organisation of Catholic Charities in Germany. The guidelines provided the possibility of terminating the contract for important reasons, in particular, for 'breaches of loyalty or gross violations of due respect towards…essential institutions of the church or against State law…'.[69] A group of about fifty people including Mr. Rommelfanger signed a letter to the editor of a weekly magazine. The letter was published under the title 'Physicians versus Physicians'. They were criticising the attitude of some leading medical professionals concerning the existing legislation on abortion. They expressed their disapproval of comparisons made between legal abortion and Nazi mass murderers in Auschwitz and the inability of some medical professionals to see a need for abortion in situations of social distress even in such a rich state as Germany. In fact, they were expressing their support for existing legislation.

Mr. Rommelfanger's contract was terminated as his employer explained that the views he expressed were diametrically opposed to the opinion of the church concerning the killing of unborn human beings. It was also noted that Mr.

[68] As noted in the second chapter the question of collective religious autonomy does not just concern the main body of a religious community, but also many kinds of affiliated entities, hospitals, schools, rehabilitation centres, publishing houses etc. Ch II at 67.

[69] *Rommelfanger v the Federal Republic of German* (n 49 above).

Rommelfanger expressed his views in a magazine with a very wide circulation. Later on Mr. Rommelfanger gave a television interview on his views on the matter and his dismissal. His application failed in the Federal Constitutional Court.

The main focus in this case was on the question of whether by entering into an employment contract the applicant waived his right to freedom of expression. The Constitutional Court took the broad view of interpreting the constitutional right to church autonomy and found that the constitutional guarantee was applicable not only to the recognised churches as such, but also to institutions affiliated to them which in the understanding of the church fulfilled religious functions. The churches could create employment relationships in the exercising of their private autonomy. Nevertheless, the Federal Constitutional Court held that there were limits to the right of the church to impose its views on its employees.

The European Commission agreed with the decision made by the German Federal Constitutional Court. It concluded that there was no basis for the assumption that the applicant waived his freedom of expression as such (by entering into an employment contract). The fact that he accepted the status of a doctor employed by a Catholic hospital could not deprive him of the protection afforded by Article 10.[70] Moreover, the Commission emphasised that it was the responsibility of the courts to ensure that no unreasonable demands of loyalty were made. However, in this case the requirement to refrain from making statements on abortion in conflict with the church's views was not seen as an unreasonable demand because of the crucial importance of this issue for the church. The Commission concluded that the

[70] Ibid.

application had to be rejected as manifestly ill-founded. In the Commission's view there was no failure on the State's part to comply with positive obligations resulting from the Convention.

In a more recent case, *Schüth v Germany*[71], the Court has tried to elaborate in more detail on what is required in deciding cases concerning the balancing of individual rights and collective autonomy. This case concerned an organist and choral conductor of a Catholic parish who was dismissed because he had breached bonds of loyalty to the Catholic Church. In 1994 he separated from his wife. The separation was made public in 1995. Since then he had lived together with his female companion who was expecting a child by him. In 1997 his children from a previous marriage told others in the kindergarten that their father was going to be a father again. This initiated communication between Mr. Schüth and the dean of the parish. The Catholic Church argued that it is a fundamental principle of the Church that marriage is indissoluble. They argued that the complainant, maintaining an extramarital liaison with his female companion who was expecting a child by him, had not only committed adultery, but was also guilty of bigamy.

In this case the question was raised whether the applicant (as an organist) was under an increased duty of loyalty. In the eyes of the German Labour Court he was not under a duty of increased loyalty because he worked neither in pastoral care nor in the catechism, he was not invested with a *missio canonica* and he did not occupy a leading function in the Church. The Labour Court nullified the dismissal and concluded that the parish should have first undertaken a clarification interview with

[71] *Schüth v Germany* (n 12 above).

Mr. Schüth or issued a warning before resorting to the most serious sanction especially given the many years he had worked for the parish, and as he had virtually no chance of finding employment in the secular labour market as an organist. Similarly, the appellate court dismissed the appeal filed by the parish, on the grounds of these procedural omissions. However, it was established in later proceedings that the clarification interview did take place between parties. The Federal Labour Court stated that the labour courts had the duty to ensure that religious societies did not require excessive loyalty from their employees. However, it emphasised the autonomy of religious communities under German constitutional law. It pointed out that the particularity of the obligations of loyalty reside in the fact that these do not concern so much professional obligations as they do the comportment of secondary duties, even in the domain of private life. 'The pre-eminent importance of marriage is an integral part of the basic principles of religious and moral requirements of the Catholic Church.'[72] Thus the centrality of the issue to Catholic doctrine played an important role in the domestic court.

Mr. Schüth filed an application to the ECtHR under Article 8. In this case the ECtHR unanimously decided that there was a violation of Article 8.[73] The fact that Schüth had only limited opportunities because of his specific qualification as an organist to find another job was of particular importance in this case. Although, he had in the meantime found a part-time job in a Protestant parish, the Court noted that according to the rules of the Protestant Church musicians outside the Protestant Church may only be employed in exceptional cases. The fact, that an organist and

---

[72] Ibid.

[73] Ibid.

choirmaster did not fall within the group of employees who in the case of serious misconduct had to be dismissed, played a determinative role as well. The ECtHR criticised the domestic court for not critically assessing the employer's (Church's) statement that Schüth's functions were so closely connected to the Catholic Church's mission that the parish could not continue employing him without losing credibility. The ECtHR also found that the interests of the Church employer were not balanced against Schüth's right to private and family life, but only against his interest in keeping his job. The domestic court made no mention of his *de facto* family life or legal protection afforded to it. In the Court's opinion a more detailed examination was required when weighing competing interests.

Regarding the principle of voluntarism, the ECtHR accepted that by signing the employment contract Mr. Schüth entered into a duty of loyalty restricting his right to private and family life to some degree. However, his signature in the Court's opinion cannot be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce. Moreover, in the Court's view the German labour courts had given only marginal consideration to the fact that Schüth's case did not receive media coverage and after fourteen years of working in the parish he had not challenged the position of the Catholic Church as in the earlier case of *Rommelfanger* described above. It can be argued that compared to *Rommelfanger* the Court has added a little more detail to the test that needs to be carried out while balancing different interests. Although not explicitly evident in the Courts reasoning, the reasonableness test seems to take into account whether there was actual harm caused to the community.

On the same day when the *Schüth* case was decided the Court delivered a decision in another case involving the individual right to privacy and collective autonomy, but with a completely different result. The case *Obst v Germany*[74] involved a member of a Mormon Church who was excommunicated and dismissed from his post as a director of public relations for Europe after he had told to his pastor that his marriage has been deteriorating for years and that he had had an affair with another woman. The lower courts initially declared the dismissal void. However, this decision was reversed by the Federal Labour Court and Obst's complaint to the Federal Constitutional Court failed.

The ECtHR unanimously decided that there had been no violation of Article 8. The ECtHR noted that the requirements of the Mormon Church (as with the Catholic Church in the *Schüth* case) regarding marital fidelity did not conflict with the fundamental principles of the legal order, because marriage was also of pre-eminent importance under German Basic Law. However, the most important factor determining the case was Obst's position in the Church as a director of public relations for Europe. The Court reasoned that having grown up in the Mormon Church, he had been aware (or should have been aware) when signing the employment contract of the importance of marital fidelity for his employer and of the incompatibility of his extra-marital relationship with the increased duties of loyalty due to his post. The credibility of the Church was at issue. The Court also noted the German courts observations that the injury suffered by Mr. Obst as a result of his dismissal was limited. Interestingly, in this regard, his relatively young age was

[74] *Obst v Germany* (App no 425/03) ECHR 23 Sept 2010.

pointed out.[75]

Thus, on the basis of the (limited) case law, the current approach of the ECtHR concerning a conflict between individual rights and collective religious autonomy can be summarised as follows: a person's rights are primarily protected by the right to exit. However, the membership has to be free from coercion, and religious communities cannot expect members to waive their rights entirely. The centrality of the matter to a religious doctrine may play an important role. However, the demands of religious communities have to pass the reasonableness test and specific circumstances of the individual involved have started to play a role in this test. However, as the case law is scarce, the applicability and interplay between these different principles and factors in various circumstances where the conflicts may occur is not clear. Some authors have also highlighted that the ECtHR generally does not make use of a steady or explicit method to solve conflicts among fundamental rights.[76]

5.3.3. Prohibition of Legal Pluralism

The ECtHR has outlawed one of the solutions or models of dealing with conflicts between individual rights and collective religious autonomy: namely legal pluralism, which allows sub-systems (autonomy regimes[77]) within a State that are directed or

[75] Ibid.

[76] See eg K Meerschaut & S Gutwirth, 'Legal Pluralism and Islam in the Scales of the European Court of Human Rights: the Limits of Categorical Balancing' in E Brems (ed), *Conflicts between Fundamental Rights* (Antwerp, Intersentia 2008) 431.

[77] For the meaning of autonomy in this context as a delegated right see Ch I at 42.

administered by a minority or its members.[78] In these systems members of a defined group are governed by a body of law, usually religious in character, for example, in matters of personal law regarding marriage, divorce, perhaps adoption, succession and so on.[79] Historically, a version of legal pluralism was instituted in the millet system of the Ottoman Empire. For various reasons the Ottomans allowed minorities (the Greek Orthodox, the Armenian Orthodox and Jews) not only to practice their religion, but a more general freedom to govern themselves in purely internal matters, with their own legal codes and courts.[80] However, as Kymlicka describes it, 'the millet system was in effect, a federation of theocracies' as there was no or very little recognition of individual freedom of conscience or dissent within the millet.[81]

Today, one can detect various forms of functioning autonomy regimes in different States globally on the continuum from strong to weak.[82] Religious law can be applied by religious or secular courts and members of the group may or may not have the option to opt out from the religious law by selecting a nationwide secular law.[83] The growing numbers of Muslim communities in Europe have drawn attention to the possibilities of legal pluralism. However, as Meerschaut and Gutwirth rightly point

---

[78] See eg HJ Steiner & P Alston, *International Human Rights in Context: Law, Politics, Morals. Text and Materials* (2nd edn OUP, Oxford 2000) 491.

[79] Ibid.

[80] See eg W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford 1995) 156-157. He admits, however, that during the 500-year history periodically some liberal reforms were enforced by members on millet leaders.

[81] Ibid 157.

[82] It is beyond the scope of this thesis to provide comparative analysis of different possibilities of accommodating religious practise by allowing some legal pluralism. However, some further comments will be made in the next section of this chapter.

[83] HJ Steiner & P Alston (n 78 above) 491.

out the legal-institutional and policy debate about the rights and wrongs of legal pluralism is complex and has so far not been extensively covered by legal scholars from a human rights perspective.[84] Debate is vibrant concerning multiculturalism or minority rights. The popular and political reaction to the possibilities of legal pluralism has been primarily negative, but also un-modulated without recognition of variations, nuances and realities. One can point to the outcry caused by the lecture of the Archbishop of Canterbury in February 2008, in which he suggested that a degree of formal legal recognition of religious law in the religiously pluralist context of England and Wales seems unavoidable.[85] He linked his argument to the fact that some exemptions from generally applicable laws have already been given to religious communities.[86] He also drew attention to the fact that the question is not only about Islam, but about other faith groups as well. He emphasised that he was not talking about parallel systems without the possibility of opting in or out, but about supplementary jurisdictions, which allow accommodation of certain religious practices and which are subjected to a degree of transparency.[87] As to the realities of the situation, Hill, for example, in his account on legal pluralism points to the question of effectiveness of the law and the legal system against the reality of an unofficial legal pluralism that sees particular normative codes being adopted *de facto* for certain

[84] K Meerschaut & S Gutwirth (n 76 above) 433. They admit thou that since the seventies, legal pluralism is a favourite subject in legal anthropology and sociology.

[85] R Williams, 'Civil and Religious Law in England: A Religious Perspective', Foundation Lecture at the Royal Courts of Justice 07 Feb 2008 <http://www.archbishopofcanterbury.org/1575> accessed 25 Mar 2011.

[86] For the convenience the exemptions from generally applicable laws will be discussed in the next section of this chapter.

[87] See the Transcript of the Question and Answer Session Following the Lecture, <http://www.archbishopofcanterbury.org/1575> accessed 25 Mar 2011.

members of the UK community.[88]

The European Court of Human Rights laid out its opinion against legal pluralism in the controversial case of *Refah Partisi (the Welfare Party) and Others v Turkey.*[89] In this case the ECtHR had to decide whether there was a violation of a Convention right in relation to the dissolution of the Welfare Party, due to the alleged risk of it undermining democratic principles. The Welfare Party was alleged to have had the intention of introducing Sharia law, and therefore a plurality of legal systems, leading to discrimination based on religious beliefs; and the intention to use force to achieve its political goals. Although violation of articles 9, 10, 14, 17, 18 and Article 1 and 3 of the First Protocol were also invoked by *Refah Partisi*, the case was mainly decided under Article 11. In the first judgement, a narrow majority of four decided that there was no violation of Article 11. Three dissenting judges found the Turkish measure disproportionate.[90] The Grand Chamber, however, unanimously decided that there was no violation of Article 11 (there were two concurring opinions). The Court decided that 'taking into account the importance of the principle of secularism for the democratic system in Turkey', the dissolution pursued legitimate aims of protecting public safety, national security, rights and freedoms of others and prevention of disorder or crime.[91] It was found that a plurality of legal systems, as proposed by

[88] RW Hill, 'Legal Pluralism in the Liberal State: A Defence of the Archbishop of Canterbury or a Human Rights Impasse?' (2010) 165 Law & Justice 124.

[89] *Refah Partisi (The Welfare Party) and Others v Turkey* (n 9 above) para 93.

[90] The dissenting judges did not find any compelling or convincing evidence to suggest that the party, whether before or after entering Government, took any steps to realise political aims which were incompatible with Convention norms, namely to destroy or undermine the secular society, to engage in or to encourage acts of violence or religious hatred, or otherwise to pose a threat to the legal and democratic order in Turkey. Joint Dissenting Opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza, *Refah Partisi (The Welfare Party) and Others v Turkey* (n 9 above).

[91] *Refah Partisi (The Welfare Party) and Others v Turkey* (n 9 above) para 67.

Refah Partisi, cannot be considered to be compatible with the Convention system. It is not compatible with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of various beliefs or religions. Secondly, it infringes on the principle of non-discrimination between individuals as regards their enjoyment of public freedoms. The plurality of systems which categorizes individuals according to their membership of a particular religious movement imposes on individuals the obligation to obey not the rules laid down by the State but those imposed by the religion concerned. In the Court's view a difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention.[92]

Thus, the ECtHR's position on legal pluralism appears to be clear. The European Convention prohibits a plurality of legal systems.[93] The Court took the view that legal sub-systems based on *Sharia* are difficult to reconcile with the fundamental principles of democracy, as set forth in the Convention. The Court stated that:

> It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts…In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.[94]

The Court further emphasised that:

---

[92] Ibid para 119.

[93] S Lagoutte and EM Lassen (n 5 above) 218.

[94] *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 9 above) para 123.

> …a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles.[95]

Although the decision of the Court in this case may seem reasonable[96], one should take seriously the concern expressed by the concurring Judge Kovler in *Refah*. He contended that the concept of plurality of legal systems was not adequately analysed in this case. He rightly pointed out that:

> Not only legal anthropology, but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status…But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of such a compromise from the outset.[97]

Commenting on *Refah,* Evans and Thomas rightly point out that '…the Court could have at least demonstrated greater awareness of the operation of such systems in practice, and particularly the way in which such systems try to allow for the very plurality that the Court said is at the heart of a democratic society.[98] Moreover, as Meerschaut and Gutwirth highlight, legal pluralism cannot abstractly be coined

---

[95] Ibid para 47.

[96] Some authors have expressed serious doubts that there were compelling and convincing reasons to dissolve the Welfare Party. It is considered not necessary to analyse the specific facts of this particular case here. These facts are sufficiently analysed elsewhere. See eg C Moe, 'Refah Revisited: Strasbourg's Construction of Islam' (Emerging Legal Issues for Islam in Europe, Budapest, June 2005) <http://www.strasbourgconsortium.org/document.php?DocumentID=3878> accessed 22 Aug 2011.

[97] Concurring Opinion of Judge Kovler, *Refah Partisi (The Welfare Party) and Others v Turkey* (n 9 above).

[98] C Evans and CA Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) 3 BYU L Rev, 699, 711. See also P Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-determination' 4(3) (2006) Int J Const Law 488-516.

incompatible with the Convention or inherently discriminatory, as the Court seems to assume. 'It depends on the scope of legal pluralism as well as on the form and content of the parallel religious or customary law to be practiced'.[99] They also criticize the Court for not examining the merits of the case in reference to religious freedom (Article 9) or the right of minority groups to live according to their own tradition (Article 8). 'Nowhere in the judgement, is there any reference to the strong Convention-based arguments in defence of the accommodation of legal pluralism on the ground of religious freedom, the principle of equality and the right of minorities to live according to their own traditions.'[100] Moreover, independently of this case, the Archbishop of Canterbury warned about general ignorance regarding Sharia. He emphasized that there are a few myths about Sharia as a monolithic, pre-modern system of detailed rules where human rights have no role.[101] Similar concern has been expressed by Moe, stating that in the *Refah* case the ECtHR pronounced on the meaning of key Islamic concepts such as Sharia and Jihad, and on their incompatibility with human rights and democracy, 'in a way that ignores the diverse interpretation of these concepts by Muslims'.[102] He also quite rightly points out that this case establishes a problematic precedent for future cases involving Islam and Muslims generally.[103] It can be added that the Court's un-modulated account of Sharia conflicts with the Court's own statement about the importance of dialogue. The Court has stressed that a principle characteristic of democracy 'is the possibility it offers of

---

[99] K Meerschaut & S Gutwirth (n 76 above) 447.

[100] Ibid 439.

[101] R Williams (n 85 above). See also T Ramadan, *Western Muslims and the Future of Islam* (OUP, New York 2005); A Sachedina, *Islam and the Challenge of Human Rights* (OUP, New York 2009).

[102] C Moe (n 96 above) 1.

[103] Ibid. The evidence of this can be seen, for example, in the *Leyla Sahin* case discussed in the last chapter. *Leyla Sahin v Turkey* (n 10 above).

resolving a country's problems through dialogue…the role of the authorities…is not to eliminate pluralism, but to ensure that the competing groups tolerate each other'.[104]

Therefore, similarly to Meerschaut and Gutwirth it is argued here that legal pluralism (and in the above case Sharia) cannot abstractly be coined incompatible with the Convention. It depends on the scope of legal pluralism as well as on its form and content. Application of legal pluralism and/or accommodation of religious needs need to be assessed in given factual circumstances with due regard to freedom of religion or belief and protection of minorities. Furthermore, as dissenting judges in the Chamber decision in the *Refah* case noted, Article 11 should be read together with Article 10. 'It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.'[105] Surely, not all forms of speech should be allowed, however, debate over legal pluralism and the way it may contribute to individual freedom should not have been outlawed by the ECtHR without critical analysis.

5.3.4. Exemptions from Neutral Laws

The question of legal pluralism goes to some degree hand in hand with various exemptions from generally applicable laws provided for religious communities in most European legal systems. The exemptions from generally applicable laws are, in principle, tightly connected with effective protection of rights and non-discrimination,

---

[104] *Metropolitan Church of Bessarabia and Others v Moldova* (n 58 above) para 116.

[105] Joint Dissenting Opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza (n 90 above).

but also with principles of pluralism and autonomy of religious communities as figuring in the Convention practice.[106] As Doe has reflected:

> As with religious autonomy, the provision of special protection would seem to be a micro-principle of religious freedom; people cannot practise their religion freely if rules of general applicability disadvantage them in particular ways by virtue of their religious needs.[107]

A similar idea was expressed in the second chapter above: freedom of religion or belief cannot be effectively protected if reasonable accommodation of religious needs is not provided. This is important as some religious individuals or communities may otherwise lack the opportunity to fully (effectively) enjoy their freedom.[108] This view is consistent with concerns about equality and especially providing substantive equality rather than only formal equality. In this regard, it is also consistent with the requirement of State neutrality.

It should be noted that the practice of the European Court of Human Rights, or former Commission, does not offer a consistent approach to general and neutral laws under Article 9. In cases involving individual freedom of religion or belief,[109] the Court primarily seems to support the view that general and neutral laws do not breach Article 9.[110] Martínes-Torrón and Navarro-Valls summarise the prevailing reasoning

---

[106] See also Ch II at 116.

[107] N Doe, 'Towards a 'Common Law' on Religion in the European Union' (2009) 37 (1) Religion, State & Society 155.

[108] Ch II at 117.

[109] The cases which involve alleged violation of freedom of religion by a State, not conflict between an individual and religious community. There have been no cases which involve conflict between an individual and a community regarding generally applicable laws.

[110] See eg *Stedman v UK* (App no 29107/95) (1997) 23 EHRR CD 168. The applicant complained that her exercise of the Christian faith, which was manifested in her refusal to work on Sundays, resulted in

in the ECtHR as follows:

> It is not necessary to consider whether the state can provide a legitimate justification for the legislation under attack (according to the 9[2] because the right to freedom of thought, conscience, and religion (according to the description of its content in article 9[1] has not actually been (directly) violated.[111]

Even if the Court has found that there was an interference into the rights protected under 9 (1), it has been found justified under Article 9 (2).[112] As Evans notes, in these cases the Commission and Court tend to look at whether the law as a whole is justified in a democratic society. She suggests that alternatively the Court could determine whether the law, while pursuing a legitimate end, could have been drafted more narrowly to prevent the conflict with freedom of religion, or whether exemptions are appropriate. She convincingly argues that: 'While the Court and Commission do not take such an approach, this would be more compatible with the protection of religious freedom than the current approach'.[113]

Another noticeable tendency in the Court is that when a case can be decided under the main Article, then alleged breach of Article 14 (discrimination), is usually

---

the termination of her employment. She invoked among other articles, Articles 9 and 14 of the Convention. The European Commission of Human Rights decided that her application did not disclose any 'arguable claim' of a violation of Convention rights and found it manifestly ill-founded in terms of the Convention. The Commission argued that dismissal was not based on her religious convictions as such, but on the fact that she refused to sign a contract which contained terms (working on a Sunday), with which she disagreed.

[111] J Martínes-Torrón and R Navarro-Valls, 'Protection of Religious Freedom in the System of the Council of Europe' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 232.

[112] Eg *Chappell v UK* (App no 12587/86) (1987) 53 DR 241; *X v UK* (App no 7992/77) (1978) 14 DR 234; *X v Austria* (App no 1753/63) Yearbook VIII (1965).

[113] C Evans (n 54 above) 169.

simply skimmed over without any analysis.[114] It can also be argued that in most cases the Court has not recognised the possibility of indirect discrimination on the grounds of religion.[115] Different legal systems have produced variations on definitions of indirect discrimination.[116] The concept of indirect discrimination is related to the substantive equality approach. Indirect discrimination may occur when apparently neutral laws have a discriminatory effect on a certain individual or group. The problem with neutral laws is that although they may appear neutral and general, they could have the hidden purpose of repressing certain religious groups, but they may be also passed without any knowledge or with indifference of its adverse effects on religious individuals or particular religious groups. In the case of *D H and Others v the Czech Republic* the ECtHR noted that 'difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group…such a situation may amount

[114] Eg *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 Jun 2000*; Kosteski v the Former Yugoslav Republic of Macedonia* (App no 55170/00) ECHR 13 Jul 2006. Article 14 of the ECHR requires that the enjoyment of rights and freedoms set forth in the ECHR shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[114] Article 14 is not a freestanding right. No claim of religious discrimination can be made except in conjunction with one of the convention rights. It is as if Article 14 forms an integral part of each of the provisions laying down the specific rights and freedoms. It is not necessary to show an actual breach of a convention right. Nevertheless, in the absence of the convention right there cannot be recourse to Article 14.

[115] Some authors have described the prevailing approach of the ECtHR, (until *Thlimmenos* case), as a formal equality approach. OM Arnardóttir, *Equality and Non-discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, The Hague 2003) 40; T Loenen, 'Rethinking Sex Equality as a Human Right' 12 (1994) 3 NQHR 253, 263.

[116] The concept of indirect discrimination was developed in the USA case law (*Griggs v Duke Power Co* 401 US 424, 91 S Ct 849 (1971)) under Title VII of the Civil Rights Act 1964 (which covers discrimination on grounds of religion or creed). The concept has later been introduced in the various legal systems, e.g. in the United Kingdom legislation (Sex Discrimination Act 1975, Race Relations Act 1976, Fair Employment and Treatment (Northern Ireland) Order 1998, and later on in the Employment Equality (Religion or Belief) Regulations 2003). See B Hepple, *Tackling Religious Discrimination: Practical Implications for Policy-makers and Legislators* (Home Office Research, Development and Statistical Directorate, Feb 2001) 34. The concept of indirect discrimination has also been elaborated in the practice of the European Court of Justice and in EU legislation. For more elaborated analysis see S Fredman, *Discrimination Law* (2nd edn OUP, Oxford 2011) and R Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality* (Martinus Nijhoff, Leiden 2007).

to "indirect discrimination", which does not necessarily require a discriminatory intent.'[117] The case concerned a violation of Article 14 in conjunction with Article 2 of Protocol No 1 and its influence on cases involving freedom of religion or belief remains obscure.

However, there is some indication in the ECtHR's practice that there is a developing duty to accommodate religious needs when to do otherwise would mean discriminating on the grounds of religion or belief. The case of *Thlimmenos v Greece*[118] (which predates *D H and Others)* was discussed in the second chapter above.[119] It could be called a landmark case developing an understanding of discrimination and exemptions from generally applicable laws in the context of Article 9 and 14 of the ECHR. In the *Thlimmenos* case the Court stated that: 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'[120] However, as was noted already in the second chapter, the influence of this case remains obscure.[121] This is true even when taking into account the development of the concept of indirect discrimination in the practice of the ECtHR as

---

[117] *DH and Others v the Czech Republic* (App no 57325/00) ECHR 13 Nov 2007 para 184. The case concerned Roma children who were indirectly discriminated against as compared to non-Roma children who were in an analogous situation. This case emanated from the fact that most Roma children were placed in special schools for children with special needs (for example, with mental or social handicap). The placement was decided on the basis of disputable (objective) psychological tests.

[118] *Thlimmenos v Greece* (App no 34369/97) (2001) 31 EHRR 411.

[119] Ch II at 113-116.

[120] *Thlimmenos v Greece* (n 118 above) para 44.

[121] Ch II at 116.

described above.[122]

Compared to individual freedom, collective freedom of religion or belief seems to be better protected in relation to generally applicable laws. This protection is primarily built on the principle of autonomy of religious communities coupled with the need to protect religious pluralism and most importantly on the recognition that autonomous existence of religious communities is necessary for the protection of individual religious freedom. The Court has stated that the autonomous existence of religious communities does not only concern the organisation of the community as such, 'but also the effective enjoyment of the right to freedom of religion by all its active members'.[123] However, the Court's approach to exemptions from generally applicable laws is not consistent or clear in the case of collective religious autonomy either. This inconsistency can be found in cases which have concerned protection of minority religious communities, such as in the case of *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* discussed in the last chapter.[124]. The Court argued that ritual slaughter is an exception from the general rule that animals must be stunned before slaughter. Thus, a measure to assure that ritual slaughter is performed only by authorised religious bodies does not in itself constitute interference into the manifestation of freedom of religion or belief. The dissenting judges rightly pointed out that the question of discrimination against the Jewish Liturgical Association (by not granting permission to ritual slaughter), was at the crux of this

[122] See *DH and Others v the Czech Republic* (n 117 above).

[123] *Hasan and Chaush v Bulgaria* (App no 30985/96) 34 EHRR 35 para 62.

[124] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 114 above); Ch IV at 225-231.

case.[125] However, as noted before the case was primarily decided under Article 9 (1). No interference was found as the association was not completely deprived of the possibility of eating meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.[126] The Court failed to notice that the Jewish Liturgical Association was actually in an analogous situation compared to the Jewish Consistorial Association of Paris (ACIP), which was granted permission to slaughter animals. The only noticeable difference was the size of these communities.

However, as mentioned above, religious communities enjoy various exemptions from generally applicable laws provided for religious communities in most European legal systems. The exemptions which probably are most relevant regarding the possible conflict between individual rights and autonomy of a religious community are the exemptions from anti-discrimination laws, especially in the area of employment. These exemptions figure in the constitutional or legal framework of the parties to the Convention. For example, in the European Union, where 27 Convention members are from, the EU Employment Directive prohibits direct and indirect discrimination on grounds of religion or belief (along with disability, age or sexual orientation).[127] However, according to this directive, religious discrimination may be permitted in ‘the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief’; this applies

---

[125] Joint Dissenting Opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nicolovska, Panțîru, Levits and Traja *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 114 above).

[126] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (n 114 above) para 80.

[127] Council Directive (EC) 2000/78 on Employment Equality [2000] OJ L195/16. For an overview of EU law relevant in the field of religion see N Doe, ‘Towards a ‘Common Law’ on Religion in the European Union’ (2009) 37 (1) Religion, State & Society 147-166. See also N Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP, Oxford 2011).

'where, by reason of the nature of these activities or the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.[128] The directive further states that: 'This difference of treatment shall be implemented taking account of member states' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.'[129] However, provided that its rules are otherwise complied with, the directive does not prejudice the right of churches and other public or private organisations, 'the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.[130]

There is no case to date in the ECtHR which involves individuals challenging these exemptions for religious communities from anti-discrimination laws. For example, it is not clear how the gender equality argument upheld in the case of *Leyla Sahin v Turkey* or in other cases involving headscarves, discussed in the previous chapter, would be reflected if a woman claims a breach of her right to freedom of religion or belief and gender equality in hiring priests.[131] Stuart rightly points out, regarding *Leyla Sahin v Turkey* and *Dahlab v Switzerland*[132], that the Court is not valuing gender equality in these cases but merely deferring to the State's views. She

---

[128] Article 4 (2) Directive 2000/78/EC.

[129] Ibid.

[130] Ibid.

[131] *Leyla Sahin v Turkey* (n 10 above).

[132] *Dahlab v Switzerland* (App no 42393/98) 2001-V ECHR.

further contends that it is likely that in the case of hiring priests, 'the power of relevant religious institutions and the consequent State "societal peace" argument would hold sway, as opposed to gender equality'.[133] She therefore argues that regardless of the weight the Court attaches to gender equality, it is not gender equality but the stance of the State that would determine the outcome of such a clash.[134] She sees it as problematic because institutionalised religions are patriarchal, and women are unable to directly influence the content and structure of the religion they belong to – 'women have been effectively denied their right to freedom of religion'.[135] She therefore suggests that not only non-legal measures (as proposed in the introduction to this chapter) but also legal measures are needed to guarantee gender equality within religious communities to protect the freedom of religion or belief of women in these communities. Although focusing mainly on gender equality issues, she extends her argument to apply to all protected grounds (incl. sexual orientation and transgender status) and argues that the content of all human rights (in this case collective freedom of religion or belief) needs to be interpreted in the light of the duty to guarantee non-discrimination.[136]

While Stuart's arguments as to headscarves cases are convincing, her stance regarding autonomy of religious communities' vis-à-vis gender equality is not in full compliance with religious autonomy as developed in this thesis. Although, she admits

---

[133] A Stuart (n 16 above) 436. Stuart points out, on the basis of *Hasan and Chaush v Bulgaria*, that the Court links pluralism and public order within a State with autonomous existence of religious communities. Ibid 433.

[134] Ibid 436.

[135] Ibid 431.

[136] Ibid 447.

that not all women want to be 'rescued,' she rebuts this argument by questioning whether women have 'free choice' at all because they are 'socialised' into obedience of male understanding of religion.[137] Firstly, this argument goes against her own criticism of the *Leyla Sahin* case where the Court was treating women as victims, as opposed to agents of their own free will. As Thazib-Lie puts it: 'Paternalism among human rights advocates should not be allowed to violate the rights of or to discriminate on religious (or antireligious) grounds against the very women they ostensibly seek to protect'.[138] Secondly, Stuart makes a couple of disturbing suggestions based on, what can be called, the democratic majority argument. She points out that there is no procedure within either the legislation or legal jurisprudence to determine whether gender discrimination is justified by reference to a religious doctrine or members' views (assertions of religious leaders are taken at face value). She insists that a more sophisticated mechanism is needed to determine the doctrines or whether a conviction is strongly held by *a significant* amount of religious followers.[139] She further states that once the State has ascertained through consultations, surveys and research that *society is agreeable* to gender equality within religions it can move to abolish the current legislative equality exemptions for religion.[140]

There are two main reasons why her majority argument does not fully fit with the autonomy approach in this thesis. Firstly, it needs to be agreed with Ahdar and Leigh that in placing restrictions on religious freedom (or in this case removing

---

[137] Ibid 442.

[138] BG Thazib-Lie (n 33 above) 492.

[139] A Stuart (n 16 above) 454.

[140] Ibid.

exemptions) it does not help to ask whether the belief in question is shared by 'the majority' or 'the fringe' of the community. 'Minority or peripheral beliefs within religions are, we submit, equally deserving of respect as majority or central beliefs.'[141] This is reflected in the more general scholarly debate about protecting freedom of religion or belief, on the basis of whether it touches core or peripheral matters of religion or belief.[142] The reasoning is that only central beliefs are protected, but not the peripheral ones. Ahdar and Leigh contend that: 'The overriding objection to the core/periphery distinction is that, once more, it entangles the courts in answering questions that they have no competence to resolve'.[143] Secondly, although many religious communities have hierarchical and non-democratic structures, questioning the autonomy of a religious community because of its structure is questioning the very essence of that community. The internal structures of a religious community belong to the very core of religious autonomy and must be respected and protected as such, because these internal structures are important for both men and women who believe in them. A further related point should be made here. For believers (leaders or ordinary members) it is not necessarily the gender equality or oppression of gender equality which is in their minds, but their religion or belief. Thus, the gender equality argument has to work in both ways. It should cater for women (or men) who want to be 'rescued' and for those who are perfectly happy with so called conservative views within religious communities. At least it should not be ignored that there are competing rights to equality in play.

---

[141] R Ahdar, I Leigh (n 27 above).

[142] See more general discussion in R Ahdar, I Leigh (n 27 above) 168-170. The idea is similar to the distinction between compelled and motivated actions.

[143] Ibid 169.

Her second argument for a change in law if general societal attitudes indicate that there is an agreement about gender equality is problematic as well. It is not entirely clear how the democratic majority argument in this case fits with the protection of minorities and their equal right to freedom of religion or belief. Following this argument any 'peculiar' religious practices of religious communities can be 'voted down' by an overwhelming majority in society. This may lead to dictatorship of (liberal) ideas imposed on believers and their communities, which ultimately conflicts with the principle of pluralism important in a democratic society, state neutrality and with autonomy as advanced in this thesis. As reflected by Rosenblum: '…liberal democracy does not subject religious groups to the Lockean requirement that they preach toleration – as either a religious duty or civic obligation'.[144]

However, there is some validity in Stuart's argument too. There is a strong European and international commitment to the gender equality programme (broadly construed[145]). Although Stuart does not draw a parallel, for example, with racial discrimination; however, this parallel cannot be ignored. It can be argued that gender equality is ranked almost as highly in the international agenda (or at least in the European agenda) as prohibition of racial discrimination is.[146] Although the latter

---

[144] NL Rosenblum, 'Religious Autonomy and Pluralism' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 187.

[145] Although there are differences between sex discrimination, transsexual discrimination and sexual orientation discrimination, they are all connected under the conception of gender. Gender is a social construct. There is a very close connection between questions of sexual identity, gender role, marital status, sexual orientation and sexual behaviour. See also J Rivers, 'Law, Religion and Gender Equality' (2007) 9(1) ECCLJUK 24-52.

[146] As highlighted in the third chapter there are some forms of belief which might be considered incompatible with Convention values altogether and so cannot benefit from its protection at all. This means that these beliefs may be held but not manifested at all. Article 17 of the Convention, although

suggestion cannot be viewed without substantial hesitation[147], it is clear that there has been a significant shift in morals or ethos on how gender issues are viewed today. In this paradigmatic shift religious organisations have started to be viewed by some as 'bastions of gender inequality and obstacles to moral progress'.[148] It has also resulted with calls to construct exemptions from anti-discrimination laws narrowly or abolish them completely (at the legislative level). Even in cases where there is no legal obligation or there is uncertainty as to the exact scope of the anti-discrimination law there is a social pressure at least from the part of the human rights community to foster quick changes. As Rivers has quite rightly observed (mostly in the contest of the United Kingdom):

> [I]t seems that a new moral establishment is developing, which is being imposed by law on dissenters. Those filling public offices are well advised to avoid challenging it, and even the most measured and reasoned public questioning of its truth can trigger formal investigations. This new orthodoxy masks itself in the language of equality, thus refusing to discuss its premises and refusing to articulate its conception of the good… Churches and religious associations find themselves boxed in by its obligations, benefiting only from narrowly drafted exceptions narrowly interpreted by an unsympathetic judiciary. Of course, sight has not been lost entirely of freedom of religion, but it is now an open question whether our legislators and judges will be able to rediscover a liberal view of religion even while pursuing a liberal view of gender equality.[149]

He argues that, although the language of balancing two rights of equal constitutional status is still used, the rationale, from the human rights perspective, has

---

never used in freedom of religion cases, can be potentially utilized for that purpose. It can be imagined that racial discrimination would fall into the category of these beliefs. See Ch III at 138.

[147] It can be argued that racial discrimination has definitely obtained a status of a peremptory norm in general international law (*ius cogens*). However, gender discrimination does not rank as high yet.

[148] See eg J Rivers (n 145 above) 24, 34.

[149] Ibid 52.

been reversed. Instead of asking whether the religious freedom of individuals and organisations has been proportionately limited in pursuit of the legitimate state aim of achieving gender equality (which would be the normal approach indicated by Article 9 of the ECHR), the Court (in the UK) considers whether equality rights have been proportionately limited in pursuit of the legitimate aim of protecting religious liberty. Rivers concludes that in this regard, there seems to be a new priority to equality.[150]

Stuart takes the emphasis on equality even further and argues that in order for a manifestation of belief to be protected under the right to freedom of religion, it must pass the non-distinction test. If the practice is gender discriminatory it should not fall within the protection of human rights law at all.[151] Following this argument, most world religions would fall outside the protection of Article 9 of the ECHR. One cannot avoid thinking that from the human rights perspective something is wrong with this approach. Perhaps more moderate means are needed to facilitate gender equality. This in turn indicates that some compromise is needed, which allows communities to live according to their conceptions of 'the good', but also which facilitates gender equality. The following section will elaborate as to what this compromise might be.

5.4. A Theoretical Framework for Conflict Resolution under the ECHR

The discussion above showed that the conflict between collective religious autonomy and individual rights is primarily solved relying on the principle of voluntarism and right to exit. However, this does not mean that collective religious autonomy is never

[150] Ibid 47.

[151] A Stuart (n 16 above) 455.

qualified when it conflicts with individual rights. As was shown above requirements such as no coercion, no unreasonable demands of loyalty and specific circumstances of an individual having inalienable rights set restrictions to this autonomy. On the basis of the above, the contours of the Court's approach have emerged. This approach seems to be balanced enough to be in compliance with religious autonomy as developed in this thesis. However, the practice of the Court is scarce regarding conflicts between collective autonomy and individual rights and the applicability and interplay between these different principles and factors in various circumstances where conflicts may occur, is not clear. In these circumstances it is also unclear what the Court's approach would be considering the increasing pressure, at least of a part of the human rights 'community', to strip religious traditions from the privileged absence of State interference, for example, regarding gender equality.

Lagoutte and Lassen convincingly argue that increased legal intervention to eradicate discrepancies between human rights and religious practices is not desirable. They point out three reasons why. Firstly, the intervention is largely pointless as the conflict between religious practice and human rights practices is not necessarily a human rights violation *per se*, provided that the religious practice does not have legally binding consequences.[152] They rightly criticize advocates of increased state intervention for presenting certain religious practices as posing proper human rights violations.[153] Secondly, States cannot change religious law and hence the foundation

[152] S Lagoutte and EM Lassen (n 5 above) 217.

[153] See e.g. F Raday, 'Culture, Religion and Gender' (2003) 4 ICON 710. As de Jong has put it, the basic question here is whether one can speak of discrimination if the women concerned do not object to such practices. Jong suggests that women who object to certain practices have the right to establish a new organisation based on the same religion but with differing practices. 'Their freedom of religion is therefore not necessarily violated. This would only stop being the case if coercion were exerted upon them to remain within the religious organisation.' D de Jong, 'Freedom of Religion in the Light of

from which the problems arise. The latter is here understood to mean that increased legal intervention is largely incapable of changing the belief system itself and in some cases may cause counter reaction. A similar idea has been advanced by Kymlicka, who argues that liberal institutions can only really work if liberal beliefs have been internalized by the members of the self-governing society.[154] Thirdly, the intervention risks putting pressure on all religious movements to become reformist and in some cases endangers the very existence of a particular theology. '[T]his is a limitation or even serious violation of religious freedom. Thus state intervention may well prove highly counterproductive in relation to the very religions the state set out to protect.'[155] It needs to be added here that increased state intervention is not in conformity with religious autonomy as developed in this thesis. As stated in the first chapter: 'When we tell people that they cannot define the ultimate meaning of life in their own way – even if we are sure we are right and that their way is not a very good way – we do not show full respect for them as persons'.[156]

However, as Lagoutte and Lassen note, continuing on the road of the classical model does not necessarily meet the challenges and needs of modern European societies. Firstly, it is not in the interest of society to let the divide between religious norms and State norms progressively widen. Thus, some assistance is needed in building bridges between the two spheres. Secondly, even if 'an individual's human

---

Recent Challenges' in N Ghanea and A Stephens (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden 2007) 193.

[154] W Kymlicka (n 80 above) 167.

[155] S Lagoutte and EM Lassen (n 5 above) 218.

[156] MC Nussbaum, 'Religion and Women's Equality: the Case of India' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 343.

rights are not violated *per se* because a religious practice is not in compliance with human rights, such discrepancy might nevertheless put the individual in a very difficult position, and the state may wish to assist improving the situation'.[157]

Lagoutte and Lassen convincingly put forward a third approach: a modified and more open-ended version of the classical model in which the principle of legally limited state intervention blends with the state's primarily non-legal support of religious communities and individuals in their attempts to reduce discrepancies between human rights and religious practices.[158] They see systematic dialogue as a key element to the solution of conflict between religious norms and individual human rights.[159] This emphasises the importance of finding an overlapping consensus, but also recognising the areas where such consensus does not exist. It needs to be added also, that in popular debate especially, far too much attention is drawn to what divides, while areas that are in common and unifying are played down.

Similarly to the Lagoutte and Lassen, it is argued here that heightened protection of equality (including gender equality) and other individual rights within religious communities may be better achieved by gradual facilitation of human rights through, provision of information, education and most importantly dialogue and

---

[157] S Lagoutte and EM Lassen (n 5 above) 218.

[158] Ibid.

[159] Ibid 222. It needs to be noted that initiatives for dialogue between faiths and faiths and states at the domestic, regional and global level have been taking place. For example, the need for cooperation and dialogue seems to be one of the principles recognised now by the European Union. See eg N Doe, 'Towards a 'Common Law' on Religion in the European Union' (2009) 37:1 Religion, State & Society 147-166.

encouragement of internal reforms.[160] However, caution needs to be applied to avoid initiatives becoming too intrusive (coercive).[161] The non-legal approach of (slow) gradual facilitation is seen as being in conformity with the principle of individual autonomy as advanced in this thesis recognising the importance of the communal dimension for one's religion or belief (even if the community can be in broader terms described as patriarchal, non-democratic or even intolerant).

It is necessary to add here that theoretical observations on human rights problems these days often try to at least acknowledge the 'bigger picture'. The resolution of the conflict between individual rights and collective autonomy, although discussed above in the context of the ECHR, should at least recognise factors and possibilities way beyond what the Court can or should be doing. It is suggested here that the resolution of the conflict between individual rights and collective religious autonomy needs a more holistic approach which considers, in addition to dialogue, a whole bundle of factors and measures (such as education, integration and economic), which may help to resolve the conflict. One needs to be realistic in this regard. Spelling out this holistic approach, however, is beyond the scope of this thesis and will be dealt with in future research.

---

160 Frotman, for example, takes it a degree further and argues that: 'Church and State together need human rights as modern standards of legitimacy.' DG Fortman, 'The Regulae Juris and Human Rights' in H Warnink (ed), *Legal Position of Churches and Church Autonom*y (Peetes, Leuven 2001) 231.

161 See a similar thought expressed by Kymlica. W Kymlica (n 80 above) 168.

5.5. The Hypothetical Case: The JFS Case in the European Court of Human Rights[162]

This last section takes up one of the most controversial cases in recent domestic practice in the United Kingdom, and tries to make some predictions as to how this case would be decided under the ECHR if ever considered by the European Court of Human Rights. It will place the case into the theoretical framework discussed above to suggest some solutions to the conflict that arose between the Jewish Free School and a Jewish boy whose father claimed that his son had been racially discriminated against. The following will not explore peculiarities of anti-discrimination law in the UK, rather, it will analyse the case from the perspective laid out in this thesis.

In December 2009 the Supreme Court[163] in the UK delivered a decision on a case that, according to the Guardian (a daily newspaper), was described by lawyers to be the most controversial ruling since the court was created.[164] As noted by Weiler: 'It is not every day that the Chief Rabbi of Britain, Sir Jonathan Sacks, is found by the

---

[162] This section is published in the European University Institute Working Paper Series. However, substantial changes have been made to this working paper for the purposes of this thesis. M Kiviorg, 'Collective Religious Autonomy under the European Convention on Human Rights: the UK Jewish Free School Case in International Perspective (EUI Working Papers, Max Weber Programme 2010).

[163] In October 2009, The Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom. The Supreme Court's 12 Justices maintain the highest standards set by the Appellate Committee, but are now explicitly separate from both Government and Parliament. The Court hears appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases. Additionally, it hears cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1988 and the Government of Wales Act 2006. This jurisdiction was transferred to the Supreme Court from the Judicial Committee of the Privy Council. The Supreme Court, <http://www.supremecourt.gov.uk/about/the-supreme-court.html> accessed 12 Mar 2010.

[164] J Shepherd and R Butt, 'Jewish School Loses Appeal' *The Guardian* (London 16 Dec 2009) <http://www.guardian.co.uk/education/2009/dec/16/jewish-school-loses-appeal> accessed 15 Feb 2010.

Supreme Court of the United Kingdom to be guilty of racial discrimination, but that is what happened in the recent Jewish Free School (JFS) Case.'[165]

The JFS, founded in 1732, is designated by the Secretary of State under UK School Standards as having a Jewish religious character. It is a successful school. As the number of Jewish applications exceeds places available, non-Jews are excluded. The school gives precedence in admission to those children recognized as Jewish by the Office of the Chief Rabbi (OCR). Designated faith schools are permitted to discriminate on grounds of religion, but not on grounds of race or ethnicity.[166] For example, Catholic schools can give priority to Catholics, Muslim schools to Muslims. The law allows such schools to determine eligibility by reference to religious membership or practice, but not to ethnicity or race.

The case was sparked off by the fact that the JFS denied a Jewish boy (M) a place because M's mother (who is Italian) converted from Catholicism to Judaism under a non-Orthodox authority, meaning the Chief Rabbi did not recognize her as Jewish. It is a fundamental tenet of the Jewish religion that the child of a Jewish mother is Jewish (matrilineal test).[167] The OCR only recognises a person as Jewish if that person is descended in the matrilineal line from a woman whom the OCR would recognise as Jewish; or he or she has undertaken a qualifying course of Orthodox

[165] JHH Weiler, 'Discrimination and Identity in London: The Jewish Free School Case' (2010) 1 Jewish Review of Books <http://www.jewishreviewofbooks.com> assessed 12 Mar 2010; *R v Governing Body of JFS* (n 20 above).

[166] S Fredman, *Discrimination Law* (n 116 above) 207.

[167] There are nuances. Liberal Judaism in Britain regards a child as Jewish when either parent is Jewish. Liberal Judaism represents about 8 % of synagogue affiliations. 92 % of Jews follow the tradition of the maternal line. The Response to a request for information from the Treasury Solicitor by Rabbi Dr. Tony Bayfield (Head of the movement of Reform Judaism). Cited in *R v Governing Body of JFS* [2009] UKSC 15, Lord Phillips [40].

conversion. M's family are Masorti Jews. M's mother had chosen to convert under Masorti authorities. Masorti Judaism has its origins in Orthodox Judaism, but its beliefs and practices are no longer the same. The conversion of M's mother is recognised by the Masorti and Reform synagogues, but not by Orthodox authorities. Consequently, M was treated as a non-Jewish applicant.

The boy's father brought an action against the JFS under section 1 of the Race Relations Act 1976 on the basis that the 'Jewish by birth' policy constituted either direct discrimination on the basis of M's ethnic[168] origin or indirect discrimination as it was disproportionate to the justifiable aim of ensuring that a faith based school serves a particular faith. The lower court upheld the school's right to deny M a place. However, this decision was reversed on appeal and came before the Supreme Court.

The majority of the Supreme Court found that the exclusion of M amounted to prohibited racial discrimination. Five Lords found direct discrimination, which by law in the United Kingdom cannot be justified or excused. Motive does not matter and no proportionality test can be carried out between the means employed and the ends pursued by the State. Selection on the sole basis of genetic descent by the maternal line from a woman who is Jewish is, according to Lord Phillips, direct racial discrimination, irrespective of any overlying religious reasoning. Similarly, Lord Clark emphasized that: 'the fact that a decision to discriminate on racial grounds is based upon a devout, venerable and sincerely held religious belief or conviction cannot inoculate or excuse such conduct from liability under the 1976 Act.' [169] In the

[168] The law in the UK includes 'ethnic origins' as a proxy for race. Race is understood to be wider than the strictly racial or biological. The meaning of 'ethnic origins' were given in the case of *Mandla v Dowell Lee. Mandla v Dowell Lee* [1983] 2 AC 548 (HL).

[169] Lord Clark [129]-[131].

eyes of the majority, thus, the JFS committed a statutory tort by selecting prospective pupils by reference to their ‘ethnic origins’.

Differently from the majority, two Lords (Lord Hope and Lord Walker) found indirect discrimination, which can be justified or excused, but was not justified in their eyes.[170] Lord Hope recognized the right of the OCR to define Jewish identity in the way it does as a matter of Jewish religious law: ‘to say [its] ground was a racial one is to confuse the effect of the treatment with the ground itself’.[171] Lord Hope, together with Lord Walker, nonetheless found that the policy adopted by the OCR had the indirect effect of disadvantaging certain Jews. Whilst noting that the aim of the policy was wholly legitimate (‘a faith school is entitled to pursue a policy which promotes the religious principles which underpin its faith’[172]) he concluded that it was a disproportionate means of securing the objective. ‘In other words, a less discriminatory means could have been adopted which would still not have undermined the religious ethos of the school’.[173]

Only two Lords (Lord Rodger and Lord Brown) found for the School and Synagogue. Lord Rodger did not find that there was any discrimination involved on racial grounds. He argued that the crux of the matter was whether the governors actually treated M less favourably on grounds of his ethnic origins (race). He argued that M’s mother ‘could have been as Italian in origin as Sophia Loren, and as Roman

[170] Lord Hope [212]-[215] and Lord Walker [235].

[171] Lord Hope [201]; See also M Hill, ‘What the JFS Ruling Meant’ *The Guardian* (London 21 Dec 2009) <http://www.guardian.co.uk/commentisfree/belief/2009/dec/21/judaism-jfs-faith-schools-discrimination > accessed 1 Jun 2010.

[172] Lord Hope [209].

[173] M Hill (n 171 above).

Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices. It was her resulting non-Jewish religious status in the chief Rabbi's eyes that was deemed the most important factor in the decision making process, not the fact that her ethnic origins were Italian and Roman Catholic'.[174] In other words, she could have chosen to convert under the Orthodox authority, but she did not. As to indirect discrimination Lord Rodger and also Lord Brown argued that the objective pursued by JFS's admission policy - educating those children recognized by the OCR as Jewish - was irreconcilable with any approach that would give precedence to children not recognized as Jewish by the OCR in preference to children who were so recognized. JFS's policy was therefore a rational way of giving effect to the legitimate aim pursued and could not be said to be disproportionate.[175] Lords Rodger and Brown also quite rightly pointed out an interesting fact regarding how much the religious side of the story was downplayed - denigrated into 'mere motivation' or even being irrelevant.[176]

The majority seemed to get entangled in the peculiarities of English anti-discrimination law and practice without giving any consideration to collective freedom of religion or belief as, for example, enshrined in Article 9 of the ECHR or as spelt out in other human rights instruments including the 1989 Vienna Concluding Document discussed in the second chapter.[177] The issue of collective freedom of

---

[174] Lord Rodger [228].

[175] Lord Rodger [233], Lord Brown [256].

[176] Lord Brown [239] and [248], Lord Rodger [227].

[177] The Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (adopted 17 Jan 1989). Similar commitments to collective religious autonomy are recorded in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA

religion or belief was not raised in this case. The outcome of this case provokes general theoretical and practical questions about the scope of autonomy of religious organisations and their affiliated institutions (like schools); as well as the court's role in determining this scope in conflict with individual rights (in this case non-discrimination).

As to the possible application of the ECHR, it is difficult to predict with certainty how the ECtHR would decide this case. This is because its case law has not been consistent regarding freedom of religion or belief. However, some arguments can be put forward as to how it may or should decide the case taking into account the principles developed by the Court itself and the existing case law.

If the JFS submits its case to the ECtHR, it should be brought under Article 9 (freedom of religion or belief) of the ECHR and possibly under Article 14 (non-discrimination). Lord Rodger, for example, pointed out that the majority decision 'produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong'.[178] The JFS could also make use of Article 11 in combination with Article 9, as this combination seem to have provided better protection to autonomy of religious communities under the ECHR than sole reliance on Article 9.[179] Thus, it can be

---

Res 36/35. One has to be reminded that, like the 1989 Vienna Concluding Document, the 1981 Declaration is politically binding and not a legally binding document. However, these documents constitute a manifesto of corporate rights of religious organizations, as the general right to self-government is implied and specified in considerable detail. See also R Minnerath, 'The Right to Autonomy in Religious Affairs' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 311.

[178] Lord Rodger [226].

[179] See Ch IV at 179.

suggested that the case would also be viewed under Article 9 but in the light of Article 11.

The Court will first need to decide whether this case is admissible at all. It is assumed here that the case will be submitted by the JFS. There is also an option that the case might be submitted by the Chief Rabbi and the Orthodox Synagogue. Only the first option will be considered below. It needs to be re-emphasised that it has been long established in case law that both petitions from individuals and religious associations can be accepted. Not only is the religious freedom of an individual protected, but also a religious community under Article 9.[180] Although there is no case law under the ECHR where a religious school has submitted an application because of the infringement of its convention rights, it would go against the grain of the case law regarding religious organisations if the application is declared inadmissible on that ground. After all the JFS is a faith school.

Assuming that all other requirements for the admission are fulfilled the second question would be whether the matter falls under Article 9 of the Convention. As noted before, the European Court of Human Rights and Commission have stated several times that the terms, 'manifestation' or 'practice' do not cover every act which is motivated by religion or belief. Acts which do not actually express a belief cannot be considered to be protected by Article 9.[181] As the matrilineal test is a well known fundamental tenet of the Jewish religion, it would most likely be considered as a

[180] It has not always been the case. In early case law the Commission considered applications from religious associations inadmissible. Eg *Church of X v UK* (App no 3798/68) (1968) 29 CD 70. Subsequently it adopted a position that 'when a church body lodges an application under the convention it does, in reality, on behalf of its members.' *X and Church of Scientology v Sweden* (App no 7805/77) (1979) 16 DR 68. The Court seems to have clearly moved on from these early approaches, accepting applications from religious communities in their own right.

[181] See also MD Evans, *Manual on the Wearing of Religious symbols in Public Areas* (Martinus Nijhoff Publishers, 2009) 11-14.

religion or belief for the purposes of Article 9.

However, some scholars have also suggested 'that there are some forms of belief (manifestations) which might be considered incompatible with Convention values altogether and so cannot benefit from its protection at all.'[182] Evans, for example, points in this regard to Article 17 which expressly seeks to prevent Convention provisions being used to undermine essential Convention values.[183] Although the Court has not used Article 17 to deny protection of Article 9 to (religious or non-religious) believers, this remains possible in appropriate cases.

The UK Government can argue that racial discrimination is exactly one of these 'beliefs' which is by its very nature incompatible with convention values and does not deserve its protection. It can be argued that racial discrimination is widely condemned by the international community and has obtained the status of a peremptory norm in general international law (*ius cogens*). Thus racial discrimination should be eradicated wherever it happens (in public or in the private sphere). In addition it can rely on the concept of human dignity which, although not well developed, figured in the case of *Campbell and Cosans v UK*[184] discussed in the third chapter.[185] In this case the Court stated that in regard to the Convention as a whole (including Article 17) the expression 'philosophical convictions' denotes such

[182] Ibid 9-10.

[183] Ibid 10. Article 17 'Abuse of Rights' states that: No one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where states seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights (for example where an individual issues a death threat).

[184] *Campbell and Cosans v UK* (App nos 7511/76, 7743/76) (1982) 4 EHRR 293.

[185] Ch III at 139-141.

convictions as are worthy of respect in a 'democratic society' and are not incompatible with 'human dignity'.[186] As McCrudden highlights, certain manifestations of religious associations may be so unacceptable as to take the associations outside the protection of Article 9 altogether.

> We can think of various examples in other jurisdictions of potentially unacceptable practices, such as the refusal of the Dutch Reformed Church in South Africa, until recently, to accept black members, or the practice, also now changed, of refusing to permit certain racial minorities to be confirmed as elders in the Mormon Church. It seems probable that the ECtHR would not be willing to accept an argument that Article 9 protects a racist religion. Such a religion is unlikely to survive the threshold requirement that the Court has applied of 'consistency with human dignity', which is the test set out in *Campbell and Cosans* v. *United Kingdom*, and accepted in the British Human Rights Act context in *R (Willamson)* v. *Secretary of State for Education and Employment* by Lord Nicholls.[187]

He quite rightly admits, however, that this test is not uncontroversial, and it is not fully tested in the practice of the ECtHR.[188] McCrudden points out that when the ECtHR in *Campbell and Cosans* adopted this test, the Court developed the test in the context of interpreting the limits of philosophical 'convictions' in Article 2, Protocol 1, and not explicitly as a set of criteria by which to judge major world religions for the purposes of protection under Article 9. He further emphasises that some British judges have expressed concern with the *Campbell and Cosans* threshold test. Judges in UK domestic practice have pointed out that religion is a controversial subject and there would be many who would argue that undoubted religious convictions are not worthy

---

[186] *Campbell and Cosans v UK* (n 184 above) para 35.

[187] C McCrudden (n 8 above) 30 (footnotes omitted). In his article McCrudden is discussing developments in British constitutional thinking from the pre-multiculturalists and multiculturalists pragmatic approaches which looked for an appropriate place for accommodation of religion to a post-multiculturalists approach, which he terms 'constitutional idealism' forcing those who wish to defend particular religious or ethnic practices to do so in liberal, principled, constitutional terms rather than in terms of any legislative compromise.

[188] The controversial nature of the idea of dignity was pointed out in the first chapter. See Ch I at 32.

of respect or are not compatible with human dignity. 'It is in part to guard against such controversy that the Convention guarantees religious freedom'.[189] It should be added that in the light of the controversial socio-political concerns today discussed in previous chapters and in the atmosphere of seeing religion (or some religions) primarily in negative terms, the applicability of Article 17 of the Convention becomes problematic. For example, Lord Walker in *Williamson* has stated that 'the requirement that an opinion should be "worthy of respect in a 'democratic society'" begs too many questions, and that 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals'.[190] McCrudden concludes that:

> That unease, however, is unlikely to lead to a situation where the Churches are guaranteed significant degrees of autonomy in the way they organize themselves where what they are attempting to protect shocks the conscience of the Court. It is more likely that the focus of attention will continue to fall on whether the religion's practice is regarded as being 'consistent[…] with human dignity.'[191]

While this is a valid point, the reasoning of some of the judges (including majority judges) in the *JFS* case, and also its factual circumstances, cast doubt that this particular form of manifestation of religion in this particular case falls under the parameters of 'shocking the conscience of the Court' and is profoundly 'inconsistent with human dignity'. As McCrudden himself notes, several members of the Court in the *JFS* case who upheld the direct discrimination claim 'were also clearly somewhat troubled by the implications of their decision, which was in effect to hold that the criteria for identifying membership in a major world religion were discriminatory

---

[189] *R (Williamson and others) v Secretary of State for Education and Employment* [2003] QB 1300 (CA) [151].

[190] Ibid [60].

[191] C McCrudden (n 8 above) 31.

under the Race Relations Act.'[192] It is important to note that several members of the Court emphasized that 'their judgments should not be read as criticizing the admissions policy of JFS on "moral" grounds or suggesting that any party to the case could be considered "racist" in the commonly understood, pejorative, sense.'[193] Thus, the Court was almost apologetic that it had to decide this case in such a way. The possibility of the exemption was also hinted at by some of the justices. For example, Lady Hale pointed out that it may be arguable that an explicit exemption should be provided from the provisions of the 1976 Act in order to allow Jewish faith schools to grant priority in admissions on the basis of matrilineal decent. However, formulating this exemption is a matter for Parliament not for the Court.[194] Lord Phillips, for example, writes that this case 'demonstrates that there may well be a defect in our law of discrimination'.[195]

These concessions, made by justices, themselves indicate that Article 17 should not come in to play and the case should not be barred at the definition stage (Article 9 (1)), without applying the proportionality test to determine whether the restriction was necessary in a democratic society. As already noted in the third chapter, when it comes to freedom of religion or belief the matter can be more appropriately decided not at the definitional stage, but at the second stage when limits to restrictions are assessed under the second paragraph of Article 9. This does not

---

[192] Ibid 32.

[193] Ibid. See *R v Governing Body of JFS* (n 20 above) [9], [54], [124] and [156].

[194] Lady Hale [69] - [70]. McCrudden argues that this indicates that the Court is reverting to the (older) pre-multicultural approach leaving accommodation of religious needs to be more appropriately dealt with by legislature (a characteristic of the pre-constitutional idealist, and multicultural phases in the constitutional thinking of the UK).

[195] Lord Phillips [9].

exclude the possibility of the application of Article 17, when a manifestation is truly and undoubtedly shocking for the Court's conscience (for example, human sacrifice, torture, female genital mutilation). However, caution should be applied when broad concepts are at play. There is a danger otherwise that any religious community, whose beliefs can be broadly construed not to comply with democratic values like non-discrimination (e.g. on grounds of gender), tolerance etc., will be automatically excluded from the protection of Article 9.[196] The definition should not become a matter of convenience in Convention practice to avoid (disregard) difficult questions relating to balancing religious autonomy and other interests. Moreover, as was emphasised above, whether racial discrimination was at issue at all was at the crux of this case.

As to the application of Article 9 (2), assuming that the first two requirements (prescribed by law and legitimate interest[197]) of the three-prong test of permissible limitations are met, the Court needs to tackle the question of whether the restriction was necessary in a democratic society. As to the extent of the margin of appreciation in this case, the ECHR case law does not give firm answers to make predictions for the *JFS* case. In cases concerning Article 9 the Court has predominantly left a wide margin of appreciation to States. However, as exemplified in the last chapter, in cases involving collective religious autonomy, the Court has been prepared to apply stricter scrutiny taking into account the importance of the autonomous existence of religious communities for pluralism and democratic society.[198] Following the approach taken in

[196] Ch III at 138.

[197] The Government may justify the restriction as being necessary for the protection of morals, rights and freedoms of others and/or public order, considering the broad usage of it in Article 9 cases.

[198] Ch IV at 176.

the fourth chapter of this thesis, it is suggested here that the Court should apply strict scrutiny in this case. The nature of the right invoked is weighty enough to justify this approach. Moreover, the issue at hand is of significant importance to the application of the principle of collective religious autonomy in the Convention practice generally. As Mancini highlights, the UK Supreme Court by applying a concept of equality that implies a homogenization of behaviours and values, ended up restricting the room for diversity that is necessary for the preservation of a genuinely pluralistic society.[199] She also quite rightly emphasizes that 'at the core of the JFS decision there is a major difficulty, that affects the treatment of religious diversity in all European democracies in an era of globalization and mass-scale migration'.[200] In this regard the ECtHR, if ever given a chance, should not restrain itself from taking a very critical look at the matter. This in turn means that the government has to produce convincing and compelling reasons to justify interference and show that no less restrictive alternatives are available.

The Government may argue that it had a fundamental and overriding interest in eradicating racial discrimination in education[201], which outweighed all other considerations. In other words, religious belief could not be used as an excuse for engaging in behaviour that violated a compelling governmental interest (for example in protecting 'public order', 'rights and freedoms of others' and 'morals'). It could further argue that racial discrimination cannot be justified by invoking the principle of pluralism and state neutrality. There is no alternative available to reconcile racial

---

[199] S Mancini, 'To Be or Not To Be Jewish: The UK Supreme Court Answers The Question' (University of Bologna, 2010) < http://ssrn.com/abstract=1693127> accessed 01 Mar 2011.

[200] Ibid 14.

[201] See eg *Bob Jones University v US,* 461 US 574 (1983).

discrimination and collective religious autonomy. There is no compromise possible as these two rights are fundamentally irreconcilable.

The JFS on the other hand, could argue that the State violated its freedom of religion or belief by deciding that its admission policy was directly discriminatory on racial grounds. By doing this the State forced upon it an admission policy which is in stark contradiction with fundamental tenets of its religion. The religious understanding of who is a Jew substantially differs from religious understanding of membership, for example, in mainstream Christianity. The Court imposed on the JFS an admission criterion, which is influenced by a Christian cultural background and thus was discriminative against the minority religion. Weiler, for example, takes it even further and argues that the UK Supreme Court's reasoning was underwritten by a profoundly Christian understanding of religion and religious membership: '…you are Christian if and only if you believe in Christ. This idea of religion as a matter of doctrinal conviction has shaped the Western sensibility as to what religious membership means'.[202] Weiler argues that what is troubling about the majority is its sheer incomprehension and consequent intolerance of a religion whose self-understanding is different from that of Christianity. In similar lines Mancini highlights that 'in the Western legal world, it is difficult to reason in terms of "religion" and "religious freedom" without applying a Christian understanding of the concept, and, as a consequence, a Christian logic of belonging'.[203] She points out that opinion expressed by Lady Hale in the JFS case is very revealing in this regard. Lady Hale writes that:

[202] JHH Weiler (n 165 above).

[203] S Mancini (n 199 above) 9.

> M was rejected, not because of who he is, but because of who his mother is. … It was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected. This was because of his lack of descent from a particular ethnic group. In this respect, there can be no doubt that his ethnic origins were different from those of the pupils who were admitted. It was not because of *his* religious beliefs. The school was completely indifferent to these. They admit pupils who practise all denominations of Judaism, or none at all, or even other religions entirely, as long as they are halachically Jewish, descended from the original Jewish people in the matrilineal line.[204]

She further submitted that no other faith schools in the United Kingdom adopt descent-based criteria for admission. 'Other religions allow infants to be admitted as a result of their parents' decision. But they do not apply an ethnic criterion to those parents. The Christian Church will admit children regardless of who their parents are.'[205] Mancini rightly notes that this comparison makes little sense, as the task of an Orthodox Jewish school is to educate (halachically) Jewish children, and no autonomous parents' decision can turn a gentile child into a Jewish one.[206]

As a result of the UK Supreme Court case, the JFS and other Jewish schools had to change their admission policies. Faith schools still have relative freedom as to their ethos and admission. However, now they have to base their admission policies on genuine religious adherence and practice. Some experts have welcomed this solution.[207] Some authors have considered this contradictory and challenging. Brawer points out that Orthodox Judaism has always defined its members on the basis of birth to a Jewish mother or sincere conversion through a recognized rabbinical court, which

---

[204] Lady Hale [66].

[205] Ibid.

[206] S Mancini (n 199 above) 9.

[207] M Hill (n 171 above).

is a very arduous process. He further argues:

> Even if we could conceivably devise a test that would encompass the full range of Jewish practice it would in no way help to define who is a Jew. That is because Judaism is a state of being…It is not conferred on the basis of ticking boxes on a form. Nor for that matter does the inability to tick such boxes, due to lack of practice, mean that a born Jew is to lose his or her Jewishness. Any practice test would be devised simply to comply with what had become the law. No one remotely acquainted with Orthodox Jewish theology believed for even a moment that it was a genuine method of determining Jewish identity.[208]

The problematic change in the admission policy of Jewish schools as a result of the *JFS* case became obvious not long after the case was decided. For example, a Jewish girl (K. C.), who applied to King David High School in Liverpool, was the only Jewish applicant denied admission. 'K. C. was born of a Jewish mother, who had actually even been an alumna of King David High School. However, her family is not religiously observant and it was therefore not able to satisfy the 'Jewish Religious Practice Test.''[209]

In the ECtHR, the JFS could rely on *Thlimmenos v Greece*[210] and argue that its situation is significantly different from other faith schools and, thus, different treatment is required by the State. In this regard, it could also point out that the

---

[208] N Brawer, 'There's much to Regret in this Ruling', *The Guardian* (London 17 Dec 2009) <http://www.guardian.co.uk/commentisfree/belief/2009/dec/17/jfs-appeal-ruling-jewish-school> accessed 1 Jun 2011.

[209] S Mancini (n 199 above) 10-11; J Kalmus, 'Jewish girl's King David place goes to non-Jew,' The Jewish Chronicle (11 Jun 2010) <http://www.thejc.com/node/32947> accessed 8 Aug 2010. McClean points out another controversy: church schools (faith schools) of all types are very popular with parents and there are often more applications for admissions than there are places available. 'It is often said that parents will attend church solely to enhance their children's chances of admission to a popular church school.' Thus ticking the boxes even in a Christian school does not necessarily mean that the school admits actual believers. D Mcclean, 'Religion in Public Education – United Kingdom' (European Consortium for Church and State Research Conference on Religious Education, Trier, Nov 2010).

[210] *Thlimmenos v Greece* (n 118 above).

purpose of laws prohibiting racial discrimination is to protect vulnerable minorities (and Jews most certainly are one of them) from the racial attitudes of the majority. By deciding that the JFS's admission policy was racially discriminatory the State went against the purpose of these laws. Mancini, for example compares the *JFS* case to a case in the Israeli Supreme Court ('Immanuel parents' decision)[211] and to two other cases mentioned in the *JFS* decision. The South African case concerned a church that held on to the sincere belief that God had made people of colour inferior and had destined them to live separately from whites, and a case where the US Supreme Court revoked the tax-exempt status of a school that, based of its interpretation of Biblical principles, instituted a racially discriminatory admissions process against African Americans.[212] She convincingly argues that:

> In the South African case, in the Bob Jones University case, as well as in the Immanuel Parents case a group (blacks in the USA and South Africa, the Sephardim in Israel) is discriminated against on religious grounds. In all three cases the discriminated against group happens to be a traditionally marginalized one and the discrimination is by the traditionally dominant group (whites in South Africa and the USA, Ashkenazim in Israel). This kind of discrimination is hardly coincidental. Instead, though motivated by sincere religious beliefs, it has roots in a social structure of marginalization that is reflected at different levels in the social, economic and cultural life of the country in question. Thus, tolerating this kind of discrimination on account of its being linked to genuine religious beliefs, ends up reinforcing generalized marginalization, negative stereotyping, and the understanding that racism has 'acceptable' justifications.[213]

She concludes that unlike in these cases, in the JFS case the 'ethnic' character of the test fully and completely overlaps with the religious one and not with any other

[211] *Noar KeHalacha v Ministry of Education* (2009) HCJ 1067/08. This decision is also mentioned by Lord Hope (minority judgment) in the *JFS* decision. *R v The Governing Body of JFS* (n 20 above) [159].

[212] S Mancini (n 199 above) 12; *Bob Jones University v US* (n 201 above).

[213] S Mancini (n 199 above) 12-13.

kind of mainstream discriminatory attitude. 'In fact, in the JFS case those who discriminate are a historically marginalized minority (the Jews), and those who are discriminated against are some of those who belong to or identify with that minority.'[214] She rightly points out that the JFS case demonstrates that the strict application of non-discrimination provisions, without taking account of the actual circumstances of the case at hand, can produce undesirable results. She adds to it a secondary, but by no means insignificant point that the consequences of the discrimination policy practiced by the JFS are very limited 'as Jews belonging to non-Orthodox streams of Judaism have many other educational opportunities in the United Kingdom, including that of establishing their own faith schools'.[215]

In the light of the above arguments the JFS should be able to defend the position that the restrictions placed by the State were not necessary in a democratic society. It could further emphasise that in essence the matter was an internal religious dispute between different strands of Judaism. The State violated the principle of neutrality by interfering with an internal matter of the religious community and thus undermined the principle of pluralism so important in a democratic society. The interference was not justified as at the crux of the case was the fact that M's mother did not chose to convert to Judaism under the Orthodox authority. In that respect the question of whether the JFS was placing unreasonable demands of loyalty on its potential members should not come in to play at all.

There is no case law relevant to a situation where one wants to become a

---

[214] Ibid.

[215] Ibid.

member of the community and is refused on religious grounds. On the basis of the case law, membership would most likely fall under the competences of a religious community. There is also no case law under the ECHR relating to refusal of a place in a faith school. According to the limited case law, internal dissent is usually protected by the right to leave the community. Thus, in most cases where an individual has claimed his rights against a religious community under the ECHR, a solution is based on what can be called the principle of voluntarism. Based on this case law, the JFS could argue that the fact that M's mother or M himself had not chosen to convert under Orthodox Jewish authority made it clear that they did not want to belong to this (Orthodox) community. Thus, it was their own decision (based on their beliefs as Masorti Jews) which deprived M of the possibility of being admitted to the JFS. This also shows that it was a religious, rather than an ethnic/racial distinction. They could have chosen to undergo an Orthodox conversion but did not. As pointed out by Lord Rodgers, conversion under Orthodox auspices would have involved M adhering to a set of beliefs that are materially different from those of Masorti Judaism.[216] Moreover, the ECtHR practice is very clear that 'in democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership.[217] It would be against this case law to argue that all Jews and Jewish schools have to adopt a unified genuine religious adherence and practice test to determine who is a Jew and who is not.

The JFS case has brought into light once again that there are more controversial issues related to freedom of religion or belief than just the Islamic veil,

---

[216] Lord Rodger [222].

[217] *Metropolitan Church of Bessarabia and Others v Moldova* (n 58 above) para 117.

which has been dominating the debate in recent years. It has also highlighted questions of individual or collective autonomy that can arise regarding religious communities themselves and their schools. Conflicts can occur between individual rights (including non-discrimination) and collective religious autonomy. In such cases, due regard needs to be given to both individual and collective self-determination. However, the collective dimension is often the dimension which is the most important for individual believers individually or collectively. Without the autonomy of a religious community, many aspects of individual religious freedom may be jeopardized. However, drawing the line in the case of a conflict between an individual and religious community is not an easy task. A principled assessment of the facts of the case is crucial, as shown here. No ultimate predictions can be made as to the outcome given the inconsistencies in the ECtHR's own case law. Ideally, considering the arguments put forward in defence of the JFS the Court ought to find violation of Article 9 (in the light of Article 11) and in conjunction with Article 14.

There were radically different public reactions to the *JFS* case in the UK Supreme Court. The United Synagogue, which represents Orthodox Jews in the UK, announced it was extremely disappointed with the ruling. It stated further that the decision interfered with the Torah-based imperative on the education of Jewish children, regardless of their background. A different reaction came from the Equality and Human Rights Commission, which said that the verdict confirmed that no school will be allowed to discriminate based on the ethnic origin of an individual. The British Humanist Association (BHA) went even further controversially arguing the verdict should trigger an investigation into all state faith schools' admission policies. Andrew Copson, the BHA's director of education and public affairs stated that: 'There's absolutely no reason why what is essentially a public service should be denied to any children, whatever their beliefs or the beliefs of their parents.'[218] The arguments have been advanced for faith schools to be more inclusive generally. The awkward question here is to what extent faith schools should be required to give up their autonomy and ethos as regards admissions to meet the needs of the larger community. One aspect which seems to create debate (and not only in the UK) is the public financing of faith schools. All the above concerns have been channelled into broader questions regarding the aims of education in a multi-religious/cultural society generally and religious education specifically.

The decision in the UK Supreme Court, or potential decision in the ECtHR should by no means be interpreted as a conversation stopper for further public-political debate in the UK as regards faiths schools. There are broader (substantial and structural) issues involved regarding education and faith schools generally and the admission policies of these schools specifically. This indicates that there is further public-political debate needed to find a compromise.

5.6. Conclusion

There are a few important principles which are needed to determine the outcome in cases of conflict between individual and collective autonomy. Firstly, in most cases individual rights are protected by leaving the community. However, from the human rights perspective, individuals have some inalienable rights. Even when they have

[218] J Shepherd and R Butt, 'Jewish School Racially Discriminated against Boy, Court Rules', *The Guardian* (London 16 Dec 2009) <http://www.guardian.co.uk/education/2009/dec/16/jewish-free-school-dsicrmination-ruling> accessed 1 Jun 2011.

accepted membership or employment by religious organisations they cannot be viewed as giving up their rights completely. Secondly, the autonomy of religious communities to determine their own affairs is paramount for individual autonomy. Thirdly, it is incompatible with the principle of neutrality and impartiality if a State or an international Court enters into a dispute about what is doctrinally important for a religious community. Fourthly, the principle of pluralism ought to guarantee that views which might not comply with mainstream views in society are respected. In cases of conflict, the Court needs to carry out the careful balancing of different interests in specific factual circumstances giving due respect to *both* individual and collective religious autonomy. Although, the emphasis on collective religious autonomy in the practice of the ECtHR can be criticized otherwise, the conflict between a religious community and its individual members is a special case requiring (in the absence of coercion and unreasonable demands of loyalty) that a compromise is made to guarantee that everybody's beliefs are respected.

Conclusion

Although several authors have drawn attention to the fact that the European Court of Human Rights lacks theoretical consistency in its reasoning when dealing with freedom of religion or belief cases, this issue has not been resolved to this date. This inconsistency has resulted in the Court placing its focus on the role of the State and not on individual freedom. As a result, neither individual nor collective freedom of religion or belief is adequately protected. It has also been pointed out that the principle of personal autonomy could be the principle which would most appropriately clarify *why* freedom of religion or belief should be protected under the Convention. Although the principle of autonomy figures in the practice of the ECtHR, for example in cases dealing with Article 8 (the right to private and family life) it is underdeveloped in the jurisprudence of Article 9. To some degree it is not surprising. The principle of autonomy (or right to autonomy) does not have a solid meaning in the case law of Article 8 either. It has been used together or interchangeably with other elusive concepts like dignity, identity and moral integrity. Neither does autonomy have a unitary meaning in political philosophy which could help to determine its content. There has been no intention here to provide an answer to all the ills in the theoretical framework of the ECHR. However, it was argued that the principle of autonomy can address some of the issues and serve to clarify ambiguous notions used in the Convention practice in order to make sense of freedom of religion or belief and help the Court to get its focus right when dealing with the right to freedom of religion or belief. The principle of autonomy draws attention to the importance of respecting individuals as having equal worth, dignity and identity (the ideas underpinning the human rights protection today) to choose and live out their beliefs. It requires respect for the importance of religion or belief for an individual believer and protects its value to the individual from State interference. It also emphasises that freedom of religion or belief may not just happen, but sometimes requires facilitation if we are to take seriously the equal worth of human beings and value pluralism of ideas as being important in a democratic society. It also provides a framework to deal with possible clashes between individual rights and collective autonomy. In this framework the need for protection of collective autonomy is explained through the importance of the collective dimension for individual believers.

The focus on autonomy is ever more important considering the negative image that religion has gained in recent years due to various outbreaks of religious fundamentalism, child abuse cases, and the fact of increased diversity afforded by economic globalisation and immigration. Both majorities and minorities in Europe struggle with identity related questions, and with integration and tolerance. The global economic crisis has probably contributed a great deal towards the tensions involving religion in the last few years. In the current environment there seems to be a tendency to circumvent manifestation of religion or belief just in case it might cause trouble. This tendency is quite clearly evident in the ECtHR's practice concerning Islam. With a twist, it is also evident in the Court's practice which seems to respond to nostalgia for ethno-cultural unity and to the fear that Europe is losing its values or soul or coherence due to individualism or immigrant minorities bringing in traditions alien in Europe. It is easy in this highly charged environment to blame religion or belief for all the ills in society and lose focus on what freedom of religion or belief was set out to protect in the first place.

Moreover, linked to the above, the developments in human rights discussion, especially regarding equality rights, have painted a picture of collective (organisational) religious autonomy as of something which fundamentally conflicts with individual rights. Of course, there are manifestations of religion or belief which do not comply with principles underpinning the Convention. The principle of autonomy does not mean that people can express their beliefs, whatever they might be, without any restrictions. The principle does not only involve respect for one's own identity and dignity, but also for that of others. This in turn means that there are external standards which filter out (religious) behaviour not acceptable in a democratic society. According to important international standards, such as the UNDHR, free development is conditioned, but also dependant on the fact that a person is a member of society. Thus, there is a requirement for a certain degree of solidarity, which would enable free development of everybody. However, this does not mean that any trivial reasons can be put forward for limiting freedom of religion or belief. The principle of autonomy requires articulated, weighty and evidence-based reasons to be put forward to justify restrictions on this freedom.

In the ECtHR's practice the problem of autonomy, first of all, manifests itself when the ECtHR has to address the question of whether a particular religion or belief is protected under the right to freedom of religion or belief. The ECtHR has developed some rather obscure criteria in order to identify what religion or belief, or the manifestation of it really is. The Court often ignores subjective views of individual believers about their religion or beliefs and does not seem to acknowledge the problematic distinction between beliefs and actions. There is also a tendency to deny that certain aspects of life are religious, and thus within the scope of freedom and equal rights. A further problem is manifested in the fact that the Court sometimes employs the criteria and sometimes not, with no consistency in its practice. The criteria currently used are not clearly explained and are in their current state incomprehensible. This also means that virtually no one can be sure that their religion or belief is protected by the Convention.

Secondly, as there is no clear understanding of the nature of the right the result is inevitably to create a set of limitations to freedom of religion or belief which are poorly articulated and frequently inconsistent. The Court's inability to pin down why religious freedom is valued, and the absence of a clearly defined and universally accepted rationale has contributed to the adoption of the margin of appreciation as a significant adjudicative tool in this area. In some cases, mainly relating to collective religious autonomy, the Court has narrowed the margin and used strict scrutiny to assess justifications put forward by the State to limit freedom of religion or belief. However, the fluctuating degree of European supervision has not been convincingly explained.

Thirdly, although the Court has not dealt with many cases involving the conflict between individual rights and collective autonomy, the contours of the Court's approach to the conflict have emerged. However, it is not clear what the Court's response would be, considering the increasing criticism of at least part of the human rights 'community' about the protection of individual rights within religious communities. The lack of attention to individual religious autonomy in the Court's practice today leaves it without a good argument to protect communal life so important for many individual believers. The importance of collective religious autonomy has been defined in this thesis through the value it has for individual believers. The institutional expression of religion is often the most important for individuals. It is for this reason that institutional/church autonomy is important. Institutional autonomy for the sake of institutional autonomy makes no sense in the context of human rights protection. This stance differs from the understanding of collective religious autonomy as having a value in itself (e.g. stemming from a divine order).

Towards a Better Understanding of Religious Freedom

Thus, even if autonomy is one of the underlying principles of the interpretation of the Convention, it seems that it has not been valued in the practice of Article 9. More often than not the Court has neglected the autonomy of individuals and communities without adequate explanation, while a more elaborate approach would have been appropriate. In this thesis it was argued that while the concept of freedom of religion or belief itself is opaque and difficult to define, the right to religious freedom must contain certain basic factors – most importantly the right to religious autonomy. This thesis was aimed at making autonomy a visibly protected right. As Arcot Krishnaswami observed over fifty years ago in his influential study of religious liberty:

> …the right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life.[1]

It was suggested that the right to religious autonomy creates a framework

[1] A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc E/CN.4/Sub.2/200/Rev 1 (United Nations, New York 1960).

which allows the ECtHR to decide religious freedom cases in a more consistent and robust manner than it has done so far. A strong right would ideally fortify religious freedom not only at the international, but also at the domestic level. As van Bijsterveld rightly points out: 'International *fora* are increasingly being discovered by individuals pleading their cases and, whatever the domestic reception of international law, international decision-making is bound to have effects at the national level.'[2] The ECtHR is called upon to set a standard for the protection of freedom of religion or belief. One who is required to set a standard needs to have an idea of what the standard is. This thesis has aimed to contribute to a better understanding of freedom of religion or belief under the ECHR. The following will summarise the (practical) suggestions made in this thesis.

Firstly, it was suggested that the ECtHR needs to adopt a subjective (autonomy based) definition of religion or belief, and forms of manifestation of them. This definition is potentially over-inclusive, but is, however, the price which needs to be paid if the right to religious autonomy is given any meaning at all. As Ahdar and Leigh have put it: 'It would appear preferable to err on the side of generosity, presuming most assertions of religion to be genuine subject only to clear evidence to the contrary'.[3] Although potentially over inclusive, this is the correct approach for an international court dealing with diversities of different religions and beliefs. It was also emphasised that essentially a subjective definition does not exclude restrictions on forms of manifestation which conflict with interests listed in Article 9 (2) of the Convention. More important than an objective definition of religion or belief under

[2] SC van Bijesterveld, 'Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments' in RJ Ahdar (ed) *Law and Religion* (Aldershot, Ashgate 2000) 163.

[3] R Ahdar, I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005) 113.

Article 9 (1) are justifications as to why one limits religious autonomy under 9 (2). The questions of definition and justification cannot necessarily be decided *seriatim*.

It was also pointed out that the question of definition and sincerity are two different matters. While it is not appropriate for the Court to define religion or belief for an individual, it is appropriate for the Court to question the sincerity of the applicant (for example in cases when a person seeks a particular privilege or exemption, which is available to particular religions or beliefs). However, caution needs to be applied as individuals, depending on their charachteristics or capabilities, may have difficulty in articulating their beliefs. Some beliefs, although strongly held, may also be so bizarre that the Court may find itself wondering about their legitimacy. Therefore, it was suggested that the burden of proof cannot be too high on applicants. Once it is understood as to what a claimant genuinely believes the onus of the burden to prove that their claim is fraudulent or unfounded shifts to the State. It is up to the Court then to assess the evidence *in corpore* and in relation to reasons why a particular religious activity is sought to be restricted.

As noted above, the emphasis on autonomy does not mean that there is an unlimited right to manifest one's religion or belief. In this regard, it was suggested that the limitations-clause is the point at which the relationship between the state and 'autonomy' ought to be defined. Thus, it is not the definition of religion or belief and manifestation of it, but reasons for limiting freedom of religion or belief that should be in focus. It was argued that, although it is inevitable freedom of religion that should be subject to some limits, any such limits must be precisely defined, and weighty in relation to the core freedom, and consistently applied. Core values such as respect for an individual's choice and autonomy of the community, the need for pluralism, neutrality and effective protection of rights are essential ingredients in the right of religion or belief, and should not be overridden except where there are strong countervailing objectives, and there being no alternative but to curtail them. It was argued that the ECtHR, firstly, has to give due regard to the right to religious autonomy. This should ideally determine the starting point for any further assessment. Secondly, it ought to develop a more systematic approach to assessing the limits applied by States to freedom of religion or belief. It was suggested that the right to freedom of religion or belief is weighty enough to attract a narrow margin of appreciation. This was understood to mean that there has to be strict European supervision, which in turn means that the Court ought to carry out an adequate balancing of the different interests involved. Respect for, (the right to), religious autonomy means that right holders deserve a proper systematic explanation of why exactly their way of manifesting their beliefs can be limited. It was suggested that strict European supervision means that the Court ought to check whether the State has convincing and compelling reasons to restrict freedom of religion or belief. This in turn means there ought to be tangible evidence for the need for the restriction. When this is established the Court needs to carry out a proportionality test between the means employed and the ends pursued, to ensure that the State has chosen the least restrictive means to curtail the freedom.

It is not entirely clear what sort of role the ECtHR sees itself playing in freedom of religion or belief cases. As Gunn has observed, if the Court sees itself to be an unwelcome international interloper, (that is interfering in a domestic dispute), it may be inclined to be more deferential than rigorous when applying international law.

If the Court sees itself as a neutral and sceptical party that must be convinced by the evidence, then its decisions may tend to go in another direction.[4] The European Court of Human Rights is called upon to defend the inalienable freedom of religion or belief and perhaps to set a standard of protection along with keeping an eye on the protection provided by national authorities. To this end, it should see its role if not as a 'zealous defender of human rights' then at least as 'a neutral and sceptical party that must be convinced by evidence'.

Thirdly, in times of a conflict between individual and collective autonomy there are a few important principles which need to determine the outcome of the case presented to the ECtHR. First of all, it was argued that collective religious autonomy is necessary since it may be both intrinsically and instrumentally important for individual believers. It is intrinsically important, because the collective dimension may be part of the religion or belief one has. It was argued that the conflict between a religious community and its individual member(s) is a special case. It is a special case in the sense that the principle of religious autonomy has to cater *both* for those who want to follow settled religious precepts and for those who 'dissent' or call for reforms in the religious community. If we do not allow people their identity and their own conception of 'good' we do not show full respect to them as persons.[5]

Thus, in the case of a conflict the Court needs to carry out careful balancing of different interests in specific factual circumstances giving due respect to *both*

[4] TJ Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory Int Law Rev 465, 478.

[5] See MC Nussbaum, 'Religion and Women's Equality: the Case of India' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 343.

individual and collective religious autonomy. In some cases it can be seen as an absolute conflict of completely incommensurable interests. It was argued that this indicates that some compromise is needed. Although there are not many cases involving the conflict between a religious community and its individual members yet, the Court seems to have developed some tools to deal with the problem. The following will explain what these tools are.

First of all the membership in religious communities has to be free from coercion. Secondly, in most cases individual rights are protected by leaving the community. Thus, when an individual cannot anymore comply with the beliefs of the community, his or her rights are primarily protected by the option to leave this particular community. This does not mean, however, that religious communities are free to restrict individual freedoms *in corpore*. From the human rights perspective, individuals have some inalienable rights. Even when they have accepted membership or employment by religious organisations they cannot be viewed as giving up their rights completely. Thirdly, the demands of religious communities have to pass the test of reasonableness. In this regard centrality of the matter to a religious doctrine may play an important role. The specific circumstances of the individual involved seem to have started to matter in this test as well. The Court also appears to pay some attention to whether and to what extent there was any actual harm or damage caused to the community.[6]

However, as the case law involving conflicts between individual members and the community is scarce, the applicability of these different principles and factors in

[6] Cf *Obst v Germany* (App no 425/03) ECHR 23 Sept 2010 and *Schüth v Germany* (App no 1620/03) ECHR 23 Sept 2010.

various circumstances where a conflict may occur, is not clear. The increased attention and pressure of a part of the human rights 'community' to protect human rights and liberal values within religious communities presents a significant challenge. Socio-political concerns about minority groups and specifically the Muslim population in Europe also seem to fuel the desire to make the internal life of religious communities' comply with liberal principles. This may incline the Court to provide greater protection to 'dissenters' and ignore the rights of those who follow their communities' 'conservative' beliefs. As noted above, it is not clear what the Court's response would be considering this increasing criticism of religious communities. The autonomy based approach taken in this thesis should to some degree be able to set the focus point for the Court in such a way that religious freedom is protected *both* in its individual and collective dimension.

It was argued that increased legal intervention to eradicate discrepancies between human rights and religious practices is not desirable. The heightened protection of individual rights (e.g. gender equality) within religious communities may be better achieved by slow, gradual facilitation of human rights through provision of information, education and most importantly dialogue. These tasks go beyond what the ECtHR can and should do. In this regard, there is a need for on-going socio-political discourses where all the voices can be heard, and hopefully agreements achieved.

To conclude, some may argue that considering the sensitivities involved regarding religion in different States and conflicts that have occurred in the past, but also potential conflicts that may occur we should be satisfied with the *status quo*.

Some may also argue that we should celebrate the fact that the Convention exists at all and operates as well as it does. 'Given the political sensitivities involved, it is nothing short of amazing that an institution such as the European Court of Human Rights even exists.'[7] The ECHR has been in force since 1953 and has been considered to be one of the most effective international instruments for the protection of human rights. It is indeed remarkable for this kind of international body to function, and it is true that considering political sensitivities it is very difficult to deal with freedom of religion or belief. However, it is a fact that the European Court of Human Rights is facing mounting criticism from all sides. This in itself is indicative of the fact that keeping to the *status quo* is not necessarily an adequate approach for the Court. Moreover, the Court itself may find itself to be torn in different directions trying to respond to criticism or societal attitudes and this is not necessarily good for the individual freedom the Court has set out to protect in the first place. Thus, a more principled understanding of freedom of religion or belief is needed. The individual autonomy centred approach in this thesis was intended to provide the Court with a necessary tool for keeping its focus on *why* freedom of religion or belief has to be protected.

[7] BG Scharffs, 'The Autonomy of Church and State' (2004) Brigham Young U L Rev 1217, 1227.

Bibliography

Books

Ahdar R, Leigh I, *Religious Freedom in the Liberal State* (OUP, Oxford 2005).

Ahdar RJ (ed), *Law and Religion* (Ashgate, Aldershot 2000).

Alexy R, *A Theory of Constitutional Rights* (OUP, Oxford 2002).

An-Na'im AA (ed), *Proselytization and Communal Self-Determination in Africa* (Maryknoll, New York 1999).

Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford 2002).

Arnardóttir OM, *Equality and Non-discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, The Hague 2003).

Bamforth N, Richards David AJ, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (CUP, Cambridge 2008).

Barry B, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press, Cambridge 2001).

Barzilai G (ed), *Law and Religion* (Ashgate, Aldershot 2007).

Brems E (ed), *Conflicts between Fundamental Rights* (Antwerp, Intersentia 2008).

Cane P, Evans C and Robinson Z (eds), *Law and Religion in Theoretical and Historical Context* (CUP, Cambridge 2008).

Clapham A, *Human Rights Obligations of Non-State Actors* (European University Institute, OUP, Oxford 2006).

Cookson C, *Regulating Religion – the Courts and the Free Exercise Clause* (OUP, New York 2001).

Craig R, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality* (Martinus Nijhoff Publishers, Leiden 2007).

Danchin PG, Cole EA (eds), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, New York 2002).

Doe N, *Law and Religion in Europe: A Comparative Introduction* (OUP, Oxford 2011).

Dworkin G, *The Theory and Practice of Autonomy* (CUP, Cambridge 1988).

Dworkin R, *Taking Rights Seriously* (Duckworth, London 1978).

Edge PW, Harvey G (eds), *Law and Religion in Contemporary Society : Communities, Individualism and the State* (Ashgate, Aldershot 2000).

Edge PW, *Legal Responses to Religious Difference* (Kluwer Law International, The Hague 2002).

Edge PW, *Religion and Law : An Introduction* (Ashgate, Aldershot 2006).

Evans C, *Freedom of Religion or Belief under the European Convention on Human Rights* (OUP, Oxford 2001).

Evans MD, *Religious Liberty and International Law in Europe* (CUP, Cambridge 1997).

Evans MD, *Manual on the Wearing of Religious symbols in Public Areas* (Martinus Nijhoff Publishers, 2009).

Ferrari S, Durham WC Jr (eds), *Law and Religion in Post-Communist Europe* (Peeters, Leuven 2003).

Fredman S, *Discrimination Law* (2nd edn OUP, Oxford 2011).

Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford 2008).

Freeman M, *Human Rights: An Interdisciplinary Approach* (Polity, Cambridge 2002).

Friender L (ed), *Churches and Other Religious Organisations as Legal Persons* (Leuven, Peeters 2007).

Geer S, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, Cambridge 2006).

Gewirtz P, Peck A (ed), *Global Constitutionalism. Religion. Executive Power* (Yale Law School, 1997).

Ghanea N, Stephens A (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden 2007).

Greenawalt K, *Religion and the Constitution: Free Exercise and Fairness* (Princeton University Press, Princeton 2006).

Gunn TJ, *A Standard for Repair: The Establishment Clause, Equality and Natural Rights* (Garland Publishing, New York 1992).

Hamilton MA, *God vs. the Gavel: Religion and the Rule of Law* (CUP, Cambridge 2005).

Hannum H, *Documents on Autonomy and Minority Rights* (Martinus Nijhoff Publishers, Dordrecht 1993).

Harris DJ, O'Boyle M, Warbrick C (eds), *Law of the European Convention on Human Rights* (Butterworth, London 1995).

Harris DJ, O'Boyle M, Warbrick C (eds), *Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009).

Hepple B, Szyszczak EM, *Discrimination: The Limits of Law* (Mansell Publishing, London 1992).

Hill M (ed), *Religious Liberty and Human Rights* (University of Wales Press, Cardiff 2002).

Hosen N, Mohr R, Law and Religion in Public Life: The Contemporary Debate

(Routledge, New York 2011).

Janis M, Evans C (eds), *Religion and International Law* (Kluwer Law International, The Hague 1999).

Kiviorg M, Religion and Law in Estonia (Kluwer Law International, The Netherlands 2011).

Knights S, *Freedom of Religion, Minorities, and the Law* (OUP, Oxford 2007).

Kymlicka W, *Liberalism, Community and Culture* (Clarendon Press, Oxford 1989).

Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford 1995).

Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford 2007).

Lindholm T, Durham W Cole Jr, Thazib-Lie BG (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004).

Locke J, *Two Treatises of Government* (CUP, Cambridge 1970).

Loenen MLP, Goldschmidt JE (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerp 2007).

Marshall J, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, Leiden 2009).

Madood T (ed), *Church, State and Religious Minorities* (Policy Studies Institute, London 1997).

McGoldrick, *Human Rights and Religion – the Islamic Headscarf Debate in Europe* (Hart Publishing, Oxford 2006).

Meyer LH, Paulson SL, Pogge TW (eds), *Rights, Culture, and the Law: Themes form the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford 2003).

Motzkin G, Fisher Y (eds) *Religion and Democracy in Contemporary Europe* (London, Alliance Publ Trust, 2008).

Mowbray AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, Oxford 2004).

Nickel JW, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press, Berkeley 1987).

O'Dair R, Lewis A (eds), *Law and Religion* (OUP, Oxford 2001).

Pentassuglia G, *Minorities in International Law: An Introductory Study* (Council of Europe Publishing, Strasbourg 2002).

Perry MJ, *Religion in Politics: Constitutional and Moral Perspectives* (OUP, Oxford 1997).

Platvoet JG, Molendijk AL (eds), *The Pragmatics of Defining Religion: Contexts, Consepts and Contests* (Brill, Lieden 1999).

Poulter S, *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press, Oxford 1998).

Raz J, *The Morality of Freedom* (OUP, Oxford 1988).

Rawls J, *A Theory of Justice* (OUP, Oxford 1999).

Renucci J-F, *Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion* (Council of Europe Publishing, Strasbourg 2005).

Robbers G (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001).

Robbers G (ed), *State and Church in the European Union* (2th edn Nomos, Baden-

Baden 2005).

Rosenblum NL (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000).

Sajo A, Avineri S (eds), *The Law of Religious Identity: Models for Post-Communism* (Kluwer Law International, The Hague 1999).

Saunders D, *Anti-lawyers: Religion and the Critics of Law and State* (Routledge, London 1997).

Scolnicov A, The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights (Routledge, New York 2011).

Shweder RA, Minow M, Markus HR (eds), *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (Russell Sage Foundation, New York 2002).

Steiner HJ, Alston P, *International Human Rights in Context: Law, Politics, Morals. Text and Materials* (2nd edn OUP, Oxford 2000).

Steiner HJ, Alston P, *International Human Rights in Context: Law, Politics, Morals. Text and Materials* (3rd edn OUP, Oxford 2007).

Suksi M (ed), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998).

Tahzib GB, *Freedom of Religion or Belief: Ensuring Effective International Protection* (Kluwer Law International, The Hague 1996).

Taylor C, *Varieties of Religion Today: James Williams Revisited* (Harvard University Press, Cambridge MA 2002).

Taylor PM, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005).

Torfs R, *A Healthy Rivalry: Human Rights in the Church* (Peeters, Louvain 1995).

Trigg R, *Religion in Public Life: Must Faith Be Privatized?* (OUP, Oxford 2007).

Uitz R, *Freedom of Religion in European Constitutional and International Case Law* (Council of Europe Publishing, Strasbourg 2007).

Van der Vyver JD, Witte J Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Kluwer Law International, The Hague 1996).

Van der Vyver JD, Witte J Jr (eds), *Religious Human Rights in Global Perspective: Religious Perspective* (Kluwer Law International, The Hague 1996).

Van Dijk P, van Hoof GJH, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998).

Van Dijk P, van Hoof GJH, van Rijn A, Zwaak L, *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerpen 2006).

Vickers L, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, Oxford 2008).

Warnink H (ed), *Legal Position of Churches and Church Autonom*y (Peetes, Leuven 2001).

Witte J Jr, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Eerdmans, Cambridge 2006).

Chapters

Choper JH, 'Defining "Religion" in the First Amendment' in W Sadurski (ed) *Law and Religion* (Ashgate, Dartmouth 1992).

Clements B, 'Defining "Religion" in the First Amendment: A Functional Approach' in W Sadurski (ed), *Law and Religion* (Ashgate, Dartmouth 1992).

Donnelly J, 'Human Rights, Individual Rights and Collective Rights' in J Berting et al (eds), *Human Rights in a Pluralistic World: Individuals and Collectivities* (Meckler, London 1990).

Doyle N, Hill M, 'Justifications to Church Autonomy' in R O'Dair, A Lewis (eds), *Law and Religion* (OUP, Oxford 2001).

Evans MD, 'Religious Liberty and Non-Discrimination' in T Loenen, P Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer Law International, The Hague 1999).

Evans MD, '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* (CUP, Cambridge 2008).

Ferrari S, 'Religious Communities as Legal Persons: An Introduction to the National Reports' in L Friender (ed), *Churches and Other Religious Organisations as Legal Persons* (Leuven, Peeters 2007).

Heintze HJ, 'On the Legal Understanding of Autonomy' in M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998).

Jong DJ, 'Freedom of Religion and Belief in the Light of Recent Challenges: Needs, Clashes and Solutions' in N Ghanea, A Stephens (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden 2007).

Kiviorg M, 'Church Autonomy in Estonia' in G Robbers, (ed), *Church Autonomy: A Comperative Survey* (Peter Lang, Frankfurt am Main 2001).

Kiviorg M, 'State and Church in Estonia' in S Ferrari, W Cole Durham Jr. (eds), *Law and Religion in Post-Communist Europe* (Peeters, Leuven 2003).

Lagoutte S and Lassen EM, 'The Role of the State in Balancing Religious Freedom with Other Human Rights in a Multicultural European Context' in F Francioni and M Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers, Leiden 2008).

Little D, 'Studying "Religious Human Rights": Methodological Foundations' in Van der Vyver JD, Witte J Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Kluwer Law International, The Hague 1996).

McConnell MW, 'Believers as Equal Citizens' in NL Rosenblum (ed), *Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000)

Minnerath R, 'Church Autonomy in Europe' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001).

Nussbaum MC, 'Religion and Women's Equality: the Case of India' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000).

Rivers J, 'Religious Liberty as a Collective Right' in R O'Dair, A Lewis (eds), *Law and Religion* (OUP, Oxford 2001).

Sheinin M, 'Article 18' in G Alfredsson, A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law Internatinal, The Hague 1999).

Tamir Y, 'Against Collective Rights' in LH Meyer, SL Paulson, TW Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford 2003).

Van Bijesterveld SC, 'Freedom of Religion: Legal Perspectives' in O'Dair, R, Lewis

A (eds), *Law and Religion* (OUP, Oxford 2001) 307.

Van Bijesterveld SC, 'Religion, International Law and Policy in the Wider European Arena: New Dimentions and Developments' in RJ Ahdar (ed), *Law and Religion* (Aldershot, Ashgate 2000).

Van Bijsterveld SC, 'Equal Treatment of Religions? An International and Comparative Perspective' in MLP Loenen, JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerpen 2007).

Ventura M, 'Religious Pluralism and Human Rights in Europe: Equality in the Regulation of Religion' in MLP Loenen & JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerpen 2007).

Weller P, ''Human Rights', 'Religion' and the 'Secular': Variant Configurations of Religion(s), State(s) and Society(ies)' in N Ghanea and A Stephens (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden 2007).

Articles

Baker A, 'Comparison Tainted by Justification: Against a "Compendious Question" in Art.14 Discrimination' (2006) PL 476.

Clements B, 'Defining "Religion"', (1989) 74 Cornell Law Review 532.

Cullen H, 'The Emerging Scope of Freedom of Conscience' (1997) EL Rev 32.

Davis J, 'Forbidding Dwarf Tossing: Defending Dignity or Discrimination Based on

Size?' (2006) 9 YBNZ Juris 238.

Dickson B, 'The United Nations and Freedom of Religion' (1995) 44 ICLQ 327.

Doe N, 'Towards a 'Common Law' on Religion in the European Union' (2009) 37 (1) Religion, State & Society 155.

Durham C, 'The United States' Experience with New Religious Movements' (1998) 5 European Journal for Church and State Research 213.

Edge PW, 'Current Problems in Article 9 of the European Convention on Human Rights' (1996) Jurid Rew 42.

Evans C, Gaze B, 'Between Religious Freedom and Equality: Complexity and Context' (2008) 49 Harvard ILJ 40.

Evans C, Thomas A, 'Church and State in the European Court of Human Rights' (2006) 3 Brigham Young U L Rev 699.

Evans MD, Petkoff P, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 Religion, State and Society 205.

Feldman D, 'Human Dignity as a Legal Value: Part 1' (1999) PL 682.

Garet RR, ' Three Concepts of Church Autonomy' (2004) Brigham Young U L Rev 1349.

Gilbert G, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' (2002) 24 Hum Rts Q 736.

Gunn TJ, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory Int Law Rev 465.

Gunn TJ, 'Majorities, Minorities, and the Rights of Religion and Belief' (1998) 3 Helsinki Monitor 38.

Gunn TJ, 'The Complexity of Religion and the Definition of "Religion" in

International Law' (2003) 16 Harv Hum Rts J 191.

Hamilton MA, 'Religious Institutions, the No-Harm Doctrine, and the Public Good' (2004) 4 Brigham Young U L Rev 1099.

Kiviorg M, 'Church and State in Estonia' (2000) 7 European Journal for Church and State Research 317.

Kiviorg M, 'Law, Religion and Politics' (2001) Rechtstheorie. Zeitschrift für Logik, Methodenlehre, Kybernetik und Soziologie des Rechts (Berlin: Duncker-Humblot).

Kiviorg M, 'Legal Status of Religious Communities in the Realms of Public and Private Law' (2001) VI Juridica International, L Rev University of Tartu 169.

Koch IE, 'The Justiciability of Indivisible Rights' (2003) 72 Nord J Intl L 3.

Lester A, Uccellari P, 'Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution' (2008) 5 EHRLR 567.

Lewis T, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 ICLQ 395.

Macklem P, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-determination' 4(3) (2006) Int J Const Law 488.

Macklem T, 'Faith as a Secular Value' (2000) 45 McGill LJ 1.

Mancini S, 'Power of Symbols & Symbols as Power' (2009) 36:6 Cardozo L Rev 2659.

Mancini S, 'To Be or Not To Be Jewish: The UK Supreme Court Answers The Question' (University of Bologna, 2010) < http://ssrn.com/abstract=1693127> accessed 01 Mar 2011.

Margalit A and Raz J, 'National Self-determination' (1990) 87(9) Journal of

Philosophy 439.

Martínes-Tórron J, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) 19 Emory Int Law Rev 587.

McColgan A, 'Class wars? Religion and (In)equality in the Workplace' (2009) 38 ILJ 1.

McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655-724.

Nickel JW, 'Who Needs Freedom of Religion' (2005) 76 U Colo L Rev 941.

Payne H, Doe N, 'Public Health and the Limits of Religious' (2005) 19 Emory Int Law Rev 538.

Peńalver E, 'The Concept of Religion' (1997) 107 The Yale L J 791.

Raday F, 'Culture, Religion and Gender' (2003) 4 ICON 663.

Rivers J, 'Law, Religion and Gender Equality' (2007) 9(1) ECCLJUK 24.

Rorive I, 'Religious Symbols in the Public Space: in Search of a European Answer' (2009) 30(6) Cardozo L Rev 2669.

Sadurski W, 'On Legal Definition of "Religion"' (1989) 63 The Australian L J 834.

Sadurski W, 'Toward a Constitutional Definition of Religion' (1978) 91 Harv L Rev 1056.

Sajó A, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 ICON 605.

Scharffs BG, 'The Autonomy of Church and State' (2004) 4 Brigham Young U L Rev 1217.

Stuart A, 'Freedom of Religion and Gender Equality: Inclusive or Exclusive?' (2010) 10 (3) HRLR 429.

Torfs R, 'Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities' (2007) 1 Religious Studies Rev 67.

Tulkens F, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism' (2009) 30 Cardozo L Rev 2585.

Van der Vyver JD, 'Culture and Equality: An Egalitarian Critique of Multiculturalism' (2002) 17 Connecticut J Int'l L.

Vanaik A, 'Reflections on Communalism and Nationalism in India' (1992) 196 New Left Review 43.

Weller P, ' 'Human Rights', 'Religion' and the 'Secular' ' (2006) 1 Religion and Human Rights 17.

Whitte J Jr, 'Religious Dimensions of Law, Human Rights and Democracy' (1996) 26 Israel YB Hum.Rts 87.

Wicks E, 'The Right to Refuse Medical Treatment under the European Convention on Human Rights' (2001) 9 Medical L Rev 17.

Reports

Annual Report on International Religious Freedom, Department of State (Washington: U.S. Government Printing Office, 2000).

Boyle C, Sheen J (eds), *Freedom of Religion and Belief: A World Report* (Routlege, London 1997).

Durham W Cole, *Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities* (OSCE Review Conference September 1999, ODIHR Background Paper. Warsaw 1999 No 4).

Ferrari S, 'The Italian Pattern of Law and Religion Relations: Catholicism as the Italian Civil Religion' in *Convictions Philosophiques et Religieuses et Droits Positifs*, *Textes Preséntés Au Colloque International de Moncton 24-27 Août*

2008 (Bruxelles 2010).

Fredman S, *The Future of Equality in Britain* (Equal Opportunities Commission 2002).

Gunn JT, *Discrimination on the Basis of Religion and Belief in Western Europe* (Testimony of Dr T Jeremy Gunn before the House International Relations Committee, US House of Representatives June 14, 2000).

Hepple B, *Tackling Religious Discrimination: Practical Implications for Policy-makers and Legislators* (Home Office Research, Development and Statistical Directorate, February 2001).

M Kiviorg, *Expert Opinion on Compatibility of Provisions of the Churches and Congregation Act with the Estonian Constitution* (Office of Legal Chancellor, 2003).

Krishnaswami A, *1960 Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (United Nations, New York 1960).

Roosevelt E, *The Universal Validity of Man's Right to Self-Determination* (US Dept of State Bulletin, 27, 8 December 1952).

The Right to Freedom of Religion and Religious Associations. Survey with Recommendations. (The Council of the Baltic Sea States: January 1999).