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Bernadette A. Meyler

Cornell Law School, bernadette-meyler@lawschool.cornell.edu

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THE LIMITS OF GROUP RIGHTS: RELIGIOUS INSTITUTIONS AND RELIGIOUS MINORITIES IN INTERNATIONAL LAW

BERNADETTE MEYLER*

Scholars and advocates of religious liberty within the United States are beginning to suggest that our constitutional discourse has focused too intently on individual rights and that our attention should now turn to the interests of religious institutions and the notion of church autonomy. Rick Garnett, for instance, has contended that “authentic freedom of religion does not exist when its manifestation in and expression through the life of non-state institutions and communities is prohibited” and that “independence for such institutions and communities is both a feature of and a necessary condition for political freedom.”¹ The reorientation of jurisprudence on religious liberty that such proposals encourage is not without parallel in other national contexts. In Europe, for example, religious institutions have occupied a central place in discussions of religious liberty and have often been officially “recognized” by the state in a manner that affords them substantial latitude in organizing their internal affairs and al-

* Associate Professor of Law, Cornell Law School. For helpful comments and questions, I am grateful to Nelson Tebbe and the other participants in the 2007 St. John’s Journal of Legal Commentary Symposium on “Religion and Morality in the Public Square.” I have also benefited greatly from the research assistance of Jessica Felker and discussions with Doug Kysar.

¹ Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 66 (publication forthcoming 2008). See generally Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515 (2007); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (arguing in favor of the notion that religious entities occupy a somewhat—although not entirely—distinctive place within the U.S. constitutional system).

lows them to partner with the state as valued components of civil society.² This form of state recognition of religion has been heralded by its champions as increasing the autonomy of the church.³ Heeding calls to attend to church autonomy could thus bring the United States into closer harmony with its European counterparts.⁴

Placing priority on church autonomy might, however, generate unforeseen obstacles to the exercise of religious liberty. In particular, emphasizing religious institutions may lead to the unequal treatment of individuals and entities of minority religious persuasions. As Rik Torfs acknowledged quite frankly in arguing for a conception of church autonomy that would entail collaboration between religious entities and the state, "Relationships between the state and churches are always, to some extent, at the expense of complete equality among all religious groups."⁵ Bahia Tazib-Lie has likewise emphasized that recent religious registration laws appear unnecessarily restrictive and "seem to target small existing or new religious and belief communities in an effort to prevent them gaining appropriate legal status."⁶ Before endorsing an expansive vision of church autonomy in the U.S. context, it is therefore crucial to examine the nature and extent

² See *infra* notes 27-33, 77 and accompanying text.

³ See Roland Minnerath, *The Right to Autonomy in Religious Affairs*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 291, 319 (Tore Lindholm et al. eds., Martinus Nijhoff 2004) (describing the "concordat model" under which "the church institutions at canon law receive civil effect in civil law and are able to act in the juridical order of the state" as "probably the most advanced model representing state respect of the internal autonomy of churches").

⁴ See *infra* note 76 and accompanying text.

⁵ Rik Torfs, *Relationship Between the State and Religious Groups*, in LA PROTÉCTION INTERNATIONALE DE LA LIBERTÉ RELIGIEUSE (International Protection of Religious Freedom) 131, 139 (J-F. Flauss ed., 2002); see Tad Stahnke, *Equality and Religious Preferences: Theoretical, International and Religious Perspectives*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 87, 117 (Peter G. Danchin & Elizabeth A. Cole eds., Columbia University Press 2002) (concluding that "[d]ifferential treatment in state recognition of religious communities represents an important subset of problems in discrimination on the basis of religion").

⁶ Bahia Tahzib-Lie, in LA PROTÉCTION INTERNATIONALE DE LA LIBERTÉ RELIGIEUSE, *supra* note 5, at 57, 72; see Johan D. Van der Vyver, *Freedom of Religion or Belief and Other Rights*, in FACILITATING FREEDOM OF RELIGION OR BELIEF, *supra* note 3, at 85, 92 ("Perhaps the greatest assault upon the sovereignty of religious institutions derives from state-imposed regulations rendering the very existence, or at least the effective functioning, of such institutions dependent upon their registration with political authorities").

of religious inequality that the concept has helped to perpetuate in the international arena.

As an analysis of pertinent cases from the jurisprudence of international tribunals will demonstrate, the monolithic conception of religious associations that has emerged from an institutionally oriented approach to religious liberty has resulted in the neglect of the equality of free exercise on the individual level and, concomitantly, disregard for the freedom of religious dissent and sub-group formation. If one of the principal problems facing the contemporary U.S. jurisprudence of religious liberty is an excessive focus on the individual, rather than attention to the individual in relation to a religious collectivity, one of the obstacles to international human rights bodies' protection of religious freedom is, by contrast, a willingness to tolerate an excessively unitary conception of the religious institution.⁷ Two forms of this difficulty emerge from adjudication under the European Convention on Human Rights (hereinafter "Convention")⁸ and the International Covenant on Civil and Political Rights (hereinafter "Covenant").⁹ In the former context, states are accorded a significant—although not absolute—"margin of appreciation" when they choose to legitimate one particular version of a religion over others.¹⁰ In the latter context, religious minorities are defined in such narrow terms as to make the invocation of a "group" religious right both difficult to accomplish and apt to result in future

⁷ See Thomas W. Simon, *Prevent Harms First: Minority Protection in International Law*, 9 INT'L LEGAL PERSP. 129, 132 (1997) (positing that Article 27 of the International Covenant on Civil and Political Rights explicitly protects the rights of minorities as "the only global provision of a legally binding nature guaranteeing minorities their language, religion, and culture"); see also Universal Declaration of Human Rights, Art. 18, GA Res. 217A, UN Doc. A/810 (1948) (describing religious practice as occurring "either individually or in community with others"); Human Rights Committee, General Comment No. 22, Article 18, 48th Sess., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, CCPR/C/21/Rev.1/Add. 4, Sept. 27, 1993, available at <http://www.unhcr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15> (last visited Oct. 1, 2007) (explaining that religious practice also includes 'acts integral to the conduct by religious groups of their basic affairs'). See generally Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1992) (illustrating that it is important not to overestimate the extent to which international treaties actually do attend to group rather than individual rights).

⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (hereinafter "Convention").

⁹ 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (hereinafter "Covenant").

¹⁰ See *infra* notes 13-47 and accompanying text.

discrimination against emergent and less populous groups.¹¹ Both of these contexts might lead us to have reservations about the ancillary effects of placing priority on religious institutions for purposes of securing church autonomy despite the potential advantages that Garnett and others have identified.¹²

* * *

Despite the continuing predominance of individualism in international human rights law, the European Court of Human Rights (hereinafter "Court"), which adjudicates cases that applicants bring under the Convention, has, as some critics have observed, sometimes downplayed the individual's interest in free exercise.¹³ The Court has, however, been quite permissive in recent years in recognizing a variety of claims brought by religious institutions or their directors under Article 9 of the Convention, although this article, by its own terms, seems to protect the religious belief and practice of the individual—at most "in community with others"—rather than the activities of religious communities or institutions as such.¹⁴ Some of these cases have arisen

¹¹ See *infra* notes 48-61 and accompanying text.

¹² See *supra*, note 1.

¹³ See Javier Martinez-Torron, *The European Court of Human Rights and Religion*, in *LAW AND RELIGION* 185, 193 (Richard O'Dair and Andrew Lewis ed. 2001) ("The European Convention is like all other international documents [of human rights] . . . in that it treats freedom of thought, conscience, and religion as a right that belongs primarily to individuals. On a conceptual level, any right of a religious association appears as a 'product' derived from the individual's right. However, the strictly individual dimension of this freedom is one that, paradoxically, has been under-protected in the jurisprudence of the European Court").

¹⁴ "An ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention." *Cha'are Shalom Ve Tsedek v. France*, Application no. 27417/95 at para. 72, Eur. Ct. H.R. (2000), available at <http://www.echr.coe.int/eng/Press/2000/Jun/Cha'are%20jud%20epresse.htm> (last visited Oct. 1, 2007). It was only in 1979, however, that standing was granted to religious institutions under the Convention; they are now viewed as representing "an aggregation of the rights of their members." Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. REV. 1217, 1277-78 (2004).

According to Article 9 of the Convention:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protec-

from state intervention in the internal organization of a religion, and the applicants have complained of restrictions on their ability to worship resulting from the government's activity.¹⁵ For example, *Hasan & Chaush v. Bulgaria* concerns a situation in which Bulgaria took sides in a dispute between two rival Muslim groups, legitimating one rather than the other and allowing the former to forcibly evict the applicant from the premises of the Chief Mufti's office in Sophia.¹⁶

Despite an adverse decision by the Court, Bulgaria continued to insist upon a unitary Muslim leadership, leading to the more recent decision in *Supreme Holy Council of the Muslim Community v. Bulgaria*.¹⁷ Holding that Bulgaria had again violated Article 9 of the ECHR, the European Court explained:

[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the

tion of public order ["la defense de l'ordre"], health ["la protection de la santé"] or morals, or for the protection of the rights and freedoms of others.

Convention, *supra* note 8, at art. 9. The parenthetical phrases are taken from the French text of the Convention, which is equally authoritative. The fact that the two versions are equally authoritative does not, however, mean that they are always synonymous. See Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 622-23 (1997).

¹⁵ See Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 613-18 (2005) (analyzing the Court's treatment of these cases and suggesting that "[p]roblems arise . . . when the State provides a specific support or recognition to religious communities—which implies normally a certain degree of control of religious affairs—and those communities become divided").

¹⁶ Application no. 30984/96, Eur. Ct. H.R. (2000) available at <http://www.echr.coe.int/Eng/Press/2000/Oct/Hasan%20and%20Chaush%20jud%20epress.htm> (last visited Oct. 1, 2007).

¹⁷ Application no. 39023/97 Eur. Ct. H.R. (2004) available at <http://www.echr.coe.int/Eng/Press/2004/Dec/ChamberjudgmentSupremeHolyCounciloftheMuslimCommunityvBulgaria16122004.htm> (last visited Oct. 1, 2007).

possibility it offers of resolving a country's problems through dialogue, even when they are irksome.¹⁸

Here the Court seems to insist on the possibility of religious groups' autonomy and independence from the State, which must act neutrally across religious denominations. The proper functioning of democracy itself, the Court suggests, entails that the State refrain from requiring a single authorized version or representative of each religion.

If the protection of church autonomy and the self-organization of religious communities are implicit in the free exercise provisions of Article 9 of the Convention, a norm of non-discrimination arises from Article 14, a norm that the Court has also applied to religious institutions.¹⁹ When, for example, Greece refused to grant the Canea Catholic Church legal personality despite permitting legal standing to both the Jewish and Orthodox communities, the Court noted that a breach of Article 14 had occurred since "the applicant church, which owns its land and buildings, has been prevented from taking legal proceedings to protect them, whereas the Orthodox Church or the Jewish community can do so in order to protect their own property without any formality or required procedure."²⁰ When the government of Moldova refused to recognize a local, autonomous Orthodox church founded in 1992, the Court imported the equality norm into Article 9 in deciding in favor of the applicant and maintained that "the allegations relating to Article 14 amount to a repetition of those submitted under Article 9. Accordingly, there is no cause to examine them separately."²¹ The tight conceptual connection between Articles 9 and 14 also appears in the Court's reasoning in *Supreme Holy Council of the Muslim Community*; by

¹⁸ *Id.* at para. 93.

¹⁹ According to Article 14:

The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Convention, *supra* note 8, at art. 14.

²⁰ *The Canea Catholic Church v. Greece*, Application no. 25528/94, para. 47, Eur. Ct. H.R. (1997), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31838&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49> (last visited (Oct. 1, 2007)).

²¹ *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 0045701/99 at para. 134, Eur. Ct. H.R. (2001), available at <http://www.echr.coe.int/eng/Press/2001/Dec/MetropolitanChurchofBessarabiajudedpress.htm> (last visited Oct. 1, 2007).

invoking the desirability of state neutrality and impartiality with regard to disparate religious denominations, the Court in that case implicitly interpreted Article 9 in light of the non-discrimination norm of Article 14.

Seemingly in conflict with the lofty rhetoric of *Supreme Holy Council of the Muslim Community* and the non-discrimination emphasis of *Canea Catholic Church*, the Court, in *Cha'are Shalom Ve Tsedek v. France*, upheld France's decision to grant authorization for ritual slaughter to one association of kosher butchers and not another, invoking the notion that states enjoy a substantial margin of appreciation "with regard to establishment of the delicate relations between the churches and the state" and explaining that "[organization] by the State of the exercise of worship is conducive to religious harmony and tolerance."²² This case represents the limit point of the Court's concern with the equal treatment of religious organizations; by emphasizing that France was operating to protect the "ordre public" and acting within its legitimate margin of appreciation,²³ the Court discounted the inequality of the government's treatment of the largest and most long-standing Jewish group in France, the Jewish Consistorial Association of Paris ("ACIP"), and the applicant association, the Jewish liturgical association *Cha'are Shalom Ve Tsedek*.²⁴ Furthermore, by framing the question of discrimination in terms of the treatment of the association as a whole rather than individuals' religious practice, the Court substantially downplayed the additional burden that the state had placed upon individuals whose religious beliefs required that they eat *glatt* meat slaughtered in accordance with the standards articulated by *Cha'are Shalom*.²⁵ Rather than inquiring as to whether individuals of other religious persuasions were allowed to engage in similar practices to those that the applicants were

²² *Cha'are Shalom* at para. 84.

²³ See *infra* notes 43-45 and accompanying text.

²⁴ For a description of the two organizations, see *Cha'are Shalom* at paras. 22-30.

²⁵ As the European Court observed, "For meat to qualify as '*glatt*', the slaughtered animal must not have any impurity, or in other words any trace of a previous illness, especially in the lungs. . . . [A]ccording to [*Cha'are Shalom*], the ritual slaughterers under the authority of the Beth Din, the rabbinical court of the *ACIP* . . . now no longer make a detailed examination of the lungs and are less exacting about purity and the presence of filaments so that, in [*Cha'are Shalom*'s] submission, butchers selling meat certified as kosher by the Central Consistory are selling meat which its members consider impure and therefore unfit for consumption." *Id.* at para. 32.

prohibited from exercising, the European Court simply asked whether it was absolutely impossible for the individual members of Cha'are Shalom to obtain *glatt* meat.²⁶

Underpinning the case lies the French version of the system of state organization of religious worship. Despite the separation of church and state instituted by the Act of 9 December 1905 and the reigning principle of "laïcité", France still requires recognition and authorization of religious bodies for the purpose of performing ritual slaughter of animals.²⁷ Of the various European regimes providing a particular legal status for religions, that of France appears to be among the more egalitarian.²⁸ Still, examination of the processes leading to the denial of authorization to Cha'are Shalom illuminates some of the residual connections between the criteria for recognition that other, less egalitarian countries deploy and that which France continues to invoke. Torfs has recently advocated in favor of five pre-requisites for granting special privileges to particular religions that he extrapolated from existing paradigms.²⁹ These include: assessing the number of adherents of the particular faith; attending to the history of the religious group; ensuring that the religion does not

²⁶ *Id.* at paras. 80-82.

²⁷ "[R]itual slaughter may be performed only by slaughterers authorized for the purpose by religious bodies which have been approved by the Minister of Agriculture, on a proposal from the Minister of the Interior." *Id.* at para. 48 (quoting Decree no. 80-791 of 1 October 1980, art. 10). The meaning of the term "laïcité" is notoriously elusive, although it functions as the pillar of the French conception of the relationship between religion and the state. See generally T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. REV. 419 (2004). According to the 2003 report of a commission appointed by French President Jacques Chirac, laïcité involves three principles, those of "liberty of conscience, equality of rights in spiritual and religious choices, and neutrality of political power." *Id.* at 462 (quoting Rapport au président de la république (2003), <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>). Laïcité is interpreted as requiring that "public spaces such as schools be set apart from religious activities and symbols." Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 20 (2005).

²⁸ Torfs has suggested that France fits within the paradigm of "unilateral" state treatment of religion, according to which "[t]he state establishes a system, which at least at first glance, is treating all religious groups equally." Torfs, *supra* note 5, at 137. A less egalitarian approach is that of Belgium, which possesses a two-tiered system according to which very few religions have managed to attain recognition and these are entitled to state financial support. See Willy Fautré, *The Protection of Religious Minorities in Belgium: A Western European Perspective*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE, *supra* note 5, at 408-34.

²⁹ Torfs, *supra* note 5, at 141-45.

encourage criminal activities; looking to the length of the religious group's presence in the particular country; and evaluating whether the religion in question shares democratic values with the state.³⁰ In denying Cha'are Shalom's attempt to obtain authorization for ritual slaughter, the French government emphasized several of the criteria that Torfs enumerated. The state suggested that Cha'are Shalom was not comparable with the ACIP because it possessed only 40,000 adherents rather than 700,000.³¹ Furthermore, the fact that the Central Consistory, of which the ACIP was an offshoot, "had been administering Jewish worship in France for two hundred years" rendered it "a legitimate negotiating partner" for the state.³² Finally, negotiating with the ACIP better served, according to the state, the interests of the "ordre public" (alternatively rendered in the English version of the opinion as "public policy" and "public order"), in particular by ensuring the protection of public health.³³ Despite the egalitarian thrust of the French laws, the rationale employed in implementing them tended, in the case of Cha'are Shalom, to militate in favor of long established and dominant denominations.

Some of the logic employed by the French government even resonated with Bulgaria's arguments in the *Hasan & Chaush* and *Supreme Holy Council* cases, insofar as France similarly emphasized the importance of identifying a single and representative negotiating partner for the particular religion. Thus, to France, the significance of the supposedly small number of members of Cha'are Shalom was that denying licenses to such splinter groups would avoid "a proliferation of approved bodies."³⁴ The government likewise argued for the authority of the Chief Rabbi, without apparent awareness of the favoritism that this stance might signal. Although maintaining that "it was not for the French authorities, bound as they were to respect the principle of secularism, to interfere in a controversy over dogma," the government nevertheless "observed that it could not be contested

³⁰ *Id.*

³¹ *Cha'are Shalom*, at para. 69.

³² *Id.* at para. 71.

³³ *Id.* at paras. 71, 84 (translating "ordre public" in paragraph 71 as "public policy" and in paragraph 84 as "public order").

³⁴ *Id.* at para. 69.

that the Chief Rabbi of France, whose opinion on the matter was based on the rulings of the Beth Din (the rabbinical court), was qualified to say what was or was not compatible with Jewish observance.”³⁵ Retaining the ACIP as the state’s negotiating partner—a negotiating partner with whom other groups like Cha’are Shalom could reach their own provisional arrangements—”guaranteed protection of the interests of the community and respect for the rules dictated by public policy [*ordre public*], particularly where health was concerned.”³⁶ Furthermore, because a Jewish entity had already been authorized to perform ritual slaughter, French courts deemed that authorization could not be granted to individual members of Cha’are Shalom in the absence of ACIP approval.³⁷ Cha’are Shalom could instead negotiate with ACIP to reach an accord through which its members could perform ritual slaughter under ACIP’s authorization.³⁸ By expressing a desire for religious subgroups to coordinate their practices through established religious institutions, these various statements echo, although somewhat more subtly, Bulgaria’s insistence upon a unitary Muslim leadership.

To a significant extent, the Court’s opinion accepted the French government’s arguments.³⁹ The decision itself oscillated between examining the religious liberty claims on the associational and individual levels. After determining that Cha’are Shalom, as an “ecclesiastical or religious body,” could bring the case on behalf of its adherents under Article 9,⁴⁰ the Court insisted upon defining the right at issue in narrowly individualist terms. As the Court held, although ritual slaughter fell within the protections of Article 9, “there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it *impossible* for ultra-orthodox Jews to eat meat from ani-

³⁵ *Id.* at para. 66. Alison Renteln has criticized this aspect of the opinion for allowing the “dominant legal system” to “decide[] which group to designate as the spokesperson for the minority group.” Alison Dundes Renteln, *Cross-Cultural Dispute Resolution: The Consequences of Conflicting Interpretations of Norms*, 10 WILLAMETTE J. INT’L L. & DISPUTE RESOL. 103, 113-15 (2002).

³⁶ *Cha’are Shalom*, at para. 71.

³⁷ *Id.* at paras. 40-44.

³⁸ *Id.* at para. 82.

³⁹ The French government had also contended that Cha’are Shalom’s activities were primarily commercial, rather than religious, a contention that the Court did not address. *Id.* at para. 69.

⁴⁰ *Id.* at para. 72.

mals slaughtered in accordance with the religious prescriptions they considered applicable.”⁴¹ Because *glatt* meat could be imported from Belgium, or Cha’are Shalom could negotiate with the ACIP to be able to engage in ritual slaughter under the latter’s approval, the religious liberty of the individual members of the association was not impeded.⁴² The Court thus neither accepted that Cha’are Shalom as an association could possess the right under Article 9 to engage in ritual slaughter nor contemplated that an individual member of a religious association might have a right to belong to a collectivity that would be entitled to determine and implement its own methods of ritual slaughter. The Court’s decision therefore endorsed a narrow view of both the individual and institutional rights protected by Article 9.

Furthermore, to the extent that an abridgement of the rights ensured by Article 9 of the Convention had occurred—which the Court declined to find—this abridgement would, the Court deemed, have conformed to the requirements that limitations be “prescribed by law” and “necessary in a democratic society” for the “protection of public order [ordre public]” and “health.”⁴³ Despite this conclusion, the Court did not articulate whether or precisely how the type of ritual slaughter in which Cha’are Shalom desired to engage would, in fact, pose a risk to public health greater than that which the state already accepted in the ACIP’s and Muslim organizations’ slaughter practices. The absence of any such evidence suggests that the Court simply opted to accept France’s representations about the necessity of its scheme of authorization for preserving the “ordre public.”

Turning to the non-discrimination provisions of Article 14, the Court determined that the applicant association was not entitled to absolutely equal treatment with the ACIP under Article 14, and that, “in so far as there was a difference in treatment, [the state] pursued a legitimate aim, and . . . there was ‘a reasonable relationship of proportionality between the means employed and

⁴¹ *Id.* at paras. 72, 80 (emphasis added).

⁴² *Id.* at para. 83.

⁴³ Convention, *supra* note 8, at art. 9, sect. 2. As Michel Levinet has observed, the European Court’s interpretation of the requirements of a “democratic society” has tended to approximate the French notion of “laïcité.” See Michel Levinet, *Société Démocratique et Laïcité dans la Jurisprudence de la Cour Européenne des Droits de l’Homme*, in LAICITÉ, LIBERTÉ E RELIGION ET CONVENTION EUROPÉENNE DES DROITS DE L’HOMME 81, 88 (Gérard Gonzalez ed., 2006).

the aim sought to be realized.”⁴⁴ France’s legitimate aim consisted in the “protection of public health and public order [“ordre public”]” through the “organization by the State of the exercise of worship.”⁴⁵ Nowhere did the European Court consider the implications of combining the individual’s Article 9 claim with the equality provisions of Article 14 and comparing the ability of other Jewish individuals to obtain meat slaughtered in the way they believed to be necessary with that of members of *Cha’are Shalom*.

Even the dissenting judges emphasized the Article 14 implications of the case on the associational rather than the individual level. Their opinion explained that “the main problem in the present case lies in the discrimination of which the applicant association complained.”⁴⁶ As they observed, “while it is possible for tension to be created where a community, and a religious community in particular, is divided, this is one of the unavoidable consequences of the need to respect pluralism. In such a situation the role of the public authorities is not to remove any cause of tension by eliminating pluralism, but to take all necessary measures to ensure that the competing groups tolerated each other.”⁴⁷ They focused, however, on the claims of *Cha’are Shalom* as an association rather than those of its individual members.

The Court’s jurisprudence, while focusing on groups, is thus insufficiently sensitive to the potential problems occasioned by state endorsement of a particular version of a certain religion or state insistence on religious uniformity within a broader religious tradition. Rather than generating a theory that would account for the possibility of dissent within religious groups or disputes about the identity of the group itself, the Court instead permits states to favor stable religious organizations and downplays individual claims for freedom of religious manifestation. Although this non-neutrality is most evident in *Cha’are Shalom*, it exists even in cases like *Supreme Holy Council*, despite strong rhetorical claims to the contrary. The ideals of state neutrality and church autonomy espoused in that case cannot simultaneously hold. As *Cha’are Shalom* rendered transparent, the practices of

⁴⁴ *Cha’are Shalom*, at para. 87.

⁴⁵ *Id.* at para. 84.

⁴⁶ *Id.* at para. 2 (Bratza, dissenting).

⁴⁷ *Id.* at para. 1 (Bratza, dissenting).

legitimizing and partnering with religious institutions that are entailed by the European conception of church autonomy lead states to sacrifice the religious liberties of individuals and minority groups in favor of administrative order and a particular vision of stable pluralist harmony.

* * *

Like the jurisprudence of Articles 9 and 14 of the Convention, the background and fate of Article 27 of the Covenant demonstrate a similar bias in favor of well-established groups and illuminate how privileging particular minorities may disadvantage others.⁴⁸ Remarkably, although Article 27 *should* protect the freedom of religious practice of minorities because it explicitly refers to the rights of religious minorities, no cases have yet arisen in which members of an exclusively religious minority were able to bring a successful claim under the provision. This situation may result, in part, from the narrow interpretation of what constitutes an “ethnic, religious, or linguistic minority” under Article 27. In debates over the phrase, several State parties—especially those accommodating of immigration—expressed concern that the rights of minorities would be invoked to prevent the assimilation of newcomer groups, occasion the formation of new minorities, and fragment society.⁴⁹ In addition, some countries feared

⁴⁸ Article 27 of the Covenant reads: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” Covenant, *supra* note 9, at art. 27.

Article 27 is often considered to be the provision in international law most accommodating of collectively articulated rights. See Thomas W. Simon, *Prevent Harms First: Minority Protection in International Law*, 9 INT’L LEGAL PERSP. 129, 132 (1997) (“Jurists have highlighted Article 27 since it is the only global provision of a legally binding nature guaranteeing minorities their language, religion, and culture”).

⁴⁹ See Marc J. Bossuyt, Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights 495 (1987) (“The provisions concerning the rights of minorities, it was understood, should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation It was felt that such tendencies could be dangerous for the unity of the State. . . .”); see also *id.* at 496 (internal citations omitted) (“Many delegations representing countries of immigration stressed, however, that persons of similar background who entered their territories voluntarily, through a gradual process of immigration, could not be regarded as minorities, as this would endanger the national integrity of the receiving States . . . while the newcomers were free to use their own language and follow their own religion, they were expected to become part of the national fabric. It was emphasized that the provisions of article 25

that articulating the rights to be accorded minorities in too broadly individualistic terms would permit everyone to claim the same benefits.⁵⁰ As a consequence, the clause was drafted to restrict invocation of minority rights to those in states where minorities were deemed to exist and to protect such rights only when practiced in collective contexts.⁵¹ One further implication of the collective enforcement of Article 27 rights is that the claims of individual members of a minority are evaluated against the interests of the minority as a whole. According to the Human Rights Committee (hereinafter "Committee"), the body that adjudicates claims brought by "authors" under the Covenant:

[W]here the rights of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.⁵²

The Committee thus examines the internal dynamics of the group to ascertain, according to a type of "best interests" approach, whether the claims of dissenting members of the minority are legitimate.

Such restrictions have manifold effects in the religious realm. The assimilationist preference voiced by some of the signatory States in the *Travaux Préparatoires* suggests that dispersed religions may not receive the protections of Article 27. Likewise, the bias against the creation of new minorities, encapsulated by

[27] should not be invoked to justify attempts which might undermine the national unity of any State").

⁵⁰ See *id.* at 495 ("Also rejected was a proposal that 'every person shall have the right to show freely his membership of an ethnic or linguistic group, to use without hindrance the name of his group, to learn the language of this group and to use it in public or private life' It was thought that disruptive tendencies might result if 'every person' were to claim the benefit of the rights of minorities. For this reason, it was decided to qualify the exercise of minorities' rights with the clause 'in community with other members of their group'").

⁵¹ *Id.*

⁵² *Mahuika v. New Zealand*, Communication No. 547/1993, U.N. GAOR, 47th Sess., para. 9.6, U.N. Doc. CCPR/C1701D/547/1993 (1992), available at http://www3.law.nyu.edu/kingsburyb/spring04/indigenousPeoples/classmaterials/class4/4H_Mahuikaetal_v_NewZealandBayefsky_com.htm (last visited Oct. 1, 2007).

the requirement of pre-existence, indicates that recently formed religions could be treated differently than traditional ones under the provision. The lower standard employed to evaluate limitations on the rights of dissenting members of minority groups could also be used to suppress the liberties of denominations within particular religions. Finally, the exclusive protection of minorities represents a severely underinclusive solution to the obstacles facing religious groups of all scales, and neglects the substantial alterations in religious demography over time that necessarily complicate efforts to recognize, or de-recognize, appropriate groups for protection.

The potential scope of some of these problems emerges with greater clarity in the adjudication of *Waldman v. Canada*, the only case in which a claim under Article 27 was brought by a member of a specifically religious group.⁵³ In *Waldman*, a Jewish father who enrolled his children in a private Jewish day school challenged Ontario's provision of separate school funding solely to Catholic institutions. The father brought the case under Articles 18 and 26—the articles of the Covenant respectively ensuring individual religious liberty and non-discrimination—as well as Article 27.⁵⁴ While the Committee decided the case in

⁵³ *Waldman v. Canada*, Communication No. 694/1996, U.N. GAOR, 67th Sess., U.N. Doc. CCPR/C/67/D/694/1996 (1999). Admittedly, the distinction between a religious and an ethnic group may be difficult to draw. Thus the author in *Waldman* might be considered Jewish ethnically as well as from a religious standpoint. Other cases involving ethnic minorities likewise include references to religion despite focusing primarily on cultural practices. For example, in *Mahuika*, the authors “emphasize[d] that fishing is a fundamental aspect of Maori culture and religion.” *Mahuika*, at para. 8.2.

⁵⁴ *Waldman*, at para. 3.1. Article 18 of the Covenant, which resembles Article 9 of the Convention, reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs 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.
4. The States Parties to the present Convention undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Covenant, *supra* note 9, at art. 18.

Article 26 of the Covenant is parallel to Article 14 of the Convention and proclaims:

Waldman's favor under Article 26, determining that Canada had discriminated by paying only for Catholic and not other religious schools, it did not address his Article 27 claim, finding that adjudicating the latter would be supererogatory given its Article 26 holding.⁵⁵

Judge Martin Scheinen's concurrence, however, objected to the majority's failure to consider the Article 27 implications of the case.⁵⁶ Although arguing in favor of deciding the case under Article 27, Judge Scheinen's opinion undermines its own position, to a certain extent, by illuminating some of the difficulties that could ensue from application of Article 27 in the context of religious minorities. Judge Scheinen emphasized that Ontario provided funding for Catholic schools for historical reasons; at the time of Confederation in 1867, "Catholics represented 17% of the population of Ontario, while Protestants represented 82%," causing concern that "the new province of Ontario would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority."⁵⁷ Given this historical backdrop, Judge Scheinen suggested that any apparent discrimination in favor of Catholics should be evaluated with reference to their status as minorities under Article 27. Rather than terminating the policy of supporting Catholic schools, he maintained, "The question whether the arrangement . . . should be discontinued is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant."⁵⁸ He also agreed with the author's assertion of the State's duties under Article 27, stating that, "When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions, and that providing

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Covenant, *supra* note 9, at art. 27.

⁵⁵ Waldman, at para. 10.7.

⁵⁶ See generally *id.* (Scheinen, concurring).

⁵⁷ *Id.* at para. 2.2 (Scheinen, concurring).

⁵⁸ *Id.* (Scheinen, concurring).

such education as an optional arrangement within the public education system is one permissible arrangement to that end.”⁵⁹ At the same time, he acknowledged that allowing such education for every religion might prove wasteful of state resources; his solution was for the State to base the decision about whether to provide this kind of education on whether, in any particular situation, “there is a constant demand.”⁶⁰ Judge Scheinen’s opinion thus highlights the temporally shifting status of religious groups, which may lead a religion previously considered a “minority” either to become a majority or at least to be accepted to the extent that it is capable of exercising repressive effects upon other “minority” religions.⁶¹

* * *

What conclusions, then, can we derive about church autonomy from the deficiencies in implementation of the Convention and the Covenant? One answer might be that a norm of church autonomy, when unaccompanied by the ideals of either separation or neutrality that have at various points been located within the Establishment Clause of the U.S. Constitution, can lead to state discrimination in favor of long-standing and majoritarian religious traditions. Even the presence of something like the Establishment Clause might, however, be insufficient to stem the tendencies toward inequality that a conception of church autonomy like that in Europe tends to generate, just as the non-discrimination provision of Article 14 of the Convention has proved inadequate in this respect. At the same time, however, the problems entailed by focusing on church autonomy should not be solved by simply resorting to an individualist notion of religious liberty; we should, rather, as the texts of the Convention

⁵⁹ *Id.* (Scheinen, concurring).

⁶⁰ *Id.* (Scheinen, concurring).

⁶¹ Rik Torfs has observed a similar temporal problem with the state recognition of particular religions. As he writes, “A particular problem seems to be the *loss* of a privileged position. What if certain historical elements become less important, are not any longer perceived as an urgent reason for different treatment? Is any legal degradation of religious groups possible? . . . The main problem concerning privileged treatment based on historical reasons is that it will often be a move in one direction, a move towards more support. The opposite is rather unlikely.” Torfs, *supra* note 5, at 143. Once granted a privileged status, religious institutions may thus become entrenched and difficult to displace.

and the Covenant themselves suggest, attend more to the mode of relation between individual and group in the sphere of religion.

Previously, I have argued in favor of an interpretation of the Free Exercise Clause of the U.S. Constitution that avoids considering religious liberty claims as simply matters for the individual. In *The Equal Protection of Free Exercise: Two Approaches and Their History*, I contended that, although the Free Exercise Clause has generally been construed as protecting *individuals'* rights to religious belief and practice, courts have historically been willing to interpret the scope of particular persons' constitutionally guarded ability to engage in religious practice more expansively when considering the individual in relation to the religious group with which she claims affiliation.⁶² This historical tendency may be conceptually linked to the fact that the meaning and significance of religious practices often become more apparent within a collective context.⁶³

On a doctrinal level, this group-centered construction of the activities protected by the Free Exercise Clause is correlated with a substantive rather than a formal conception of equality and the equal protection of the laws.⁶⁴ Courts considering religious groups are thus inclined to examine, as a substantive matter, the actual burdens placed upon the individual claimants' freedom of religious exercise, rather than upholding laws because, as a formal matter, they are generally applicable.⁶⁵

In the federal context, the "equal protection of free exercise" results from conjoining reasoning derived from the Fourteenth

⁶² Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 276-80 (2006).

⁶³ *Id.* at 288; see Jacob T. Levy, *Classifying Cultural Rights*, in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 22, 23-24 (Ian Shapiro & Will Kymlicka eds., 1997).

⁶⁴ Meyler, *supra* note 62, at 276-77. This conception of equality within the arena of religious liberty stands in contrast to the notion of "equal liberty" that Christopher Eisgruber and Lawrence Sager recently and eloquently espoused in *Religious Freedom and the Constitution*. See Christopher Eisgruber & Lawrence Sager, *Religious Freedom and the Constitution* 52 (2007) (stating as the three principles of "equal liberty" that "First, it insists in the name of equality that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects. . . . Second, . . . Equal Liberty insists that aside from this deep and important concern with discrimination, we have no constitutional reason to treat religion as deserving of special benefits or as subject to special disabilities. Finally, equal liberty insists on a broad understanding of constitutional liberty generally").

⁶⁵ Meyler, *supra* note 62, at 276-77.

Amendment equal protection context with that coming out of the First Amendment's Free Exercise Clause.⁶⁶ State constitutions had, however, as Philip Hamburger has extensively documented and analyzed, incorporated their own versions of equal protection and equal privileges and immunities clauses.⁶⁷ As I have argued, early state courts deployed the conjunction of free exercise and equal protection to effectuate some of the aims that might otherwise have been achieved by an establishment clause, including that of avoiding discrimination among religious groups.⁶⁸

More recently, the U.S. Supreme Court placed substantial limitations upon free exercise claims in *Employment Division v. Smith*,⁶⁹ holding that neutral laws of general applicability are valid against free exercise challenges.⁷⁰ As the resolution of *Church of the Lukumi Babalu Aye v. Hialeah* demonstrated, however, the Court's invocation of neutrality and general applicability in *Smith* did not constitute mere verbiage.⁷¹ In striking down the city ordinances prohibiting animal sacrifice as targeting the Santeria church, Justice Kennedy also remarked that the legislation exempted Kosher slaughtering from its purview.⁷² Although he declined to consider whether this unequal treatment constituted an independent constitutional violation, the Supreme Court has on many occasions insisted upon the notion that analogous religious practices must be treated equally.⁷³

The Supreme Court's jurisprudence has, some scholars maintain, shifted towards a paradigm of neutrality in the Establishment Clause context as well, leaving behind the goal of a wall of separation between church and state.⁷⁴ Varying on this theme, Doug Laycock has suggested considering the change as one in the relevant conception of neutrality, where "the Court has sometimes measured neutrality from a baseline of government inac-

⁶⁶ *Id.* at 278-79.

⁶⁷ *Id.* at 277-78. See generally Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295.

⁶⁸ Meyler, *supra* note 62, at 278.

⁶⁹ 499 U.S. 160 (1991).

⁷⁰ 494 U.S. 872 (1990).

⁷¹ 508 U.S. 520 (1993).

⁷² *Id.* at 541.

⁷³ Meyler, *supra* note 62 at 327-31.

⁷⁴ See generally Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

tivity, and sometimes from a baseline of how government treats analogous secular activities,” and is increasingly preoccupied with the latter.⁷⁵

The approach to religious liberty that the Supreme Court has recently adopted has brought American jurisprudence closer to that of Europe but has not succeeded in merging the two.⁷⁶ This is because European countries, unlike the United States, still often permit the state to act explicitly as an organizer of religious practice and to respect church autonomy by granting recognition to varying extents to religious institutions.⁷⁷ Such concern for the administration of religion and the concomitant attention to the institutional over the individual level of religious liberty conduces in a number of circumstances to a lack of equality between individuals of different denominations or sub-denominations that would be viewed as undesirable within the American framework

⁷⁵ Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 73 (1997).

⁷⁶ Some European scholars appear to believe that this harmonization is already occurring. While remaining agnostic about whether the United States will move towards a more institutionally-oriented approach to religious liberty, Rik Torfs indicates that this trajectory would certainly be possible. See Torfs, *supra* note 5, at 152. Elisabeth Zoller is, however, more skeptical, opining that the Establishment Clause renders the U.S. context fundamentally different from the European. See Elisabeth Zoller, *Les rapports entre les Églises et les États aux États-Unis: Le Modèle américain de pluralisme religieux égalitaire*, in LAICITÉ, LIBERTÉ DE RELIGION ET CONVENTION EUROPÉENNE DES DROITS DE L'HOMME, *supra* note 43, at 13, 48.

⁷⁷ See Pierre-Henri Prelot, *Définir Juridiquement la Laïcité*, in LAICITÉ, LIBERTÉ DE RELIGION ET CONVENTION EUROPÉENNE DES DROITS DE L'HOMME, *supra* note 43, at 115, 140-41 (explaining the means by which the French Law of December 9, 1905 on the separation of church and state assured the collective status of religious communities and state respect for the organization of these entities); Scharffs, *The Autonomy of Church and State*, *supra* note 14, at 1248-53, 1258-62 (distinguishing between three visions of church autonomy, those of independence and inter-independence that have characterized the U.S. model of religious liberty, and that of interdependence, which has held sway in Europe); Tahzib-Lie, *supra* note 6, at 57, 72 (detailing the modes of registration of religious institutions and elaborating that “Two main levels of registration can be distinguished. In some states, registration provides religious and belief communities rudimentary forms of legal personality that are sufficient to carry out their affairs. This base level of registration typically lacks more extensive rights and privileges. Basically, it is a precondition for being tolerated or accepted as a religious or belief community. In other states registration functions as a precondition for obtaining certain additional rights and privileges, such as subsidies or taxes; the levying of church contributions; the performance of wedding ceremonies and the recognition of such marriages by law; permission to engage in ritual slaughter; exemption from military service. There are different forms of this upper tier level of registration”); Torfs, *supra* note 5, at 143 (contrasting the privileged relationship between the state and religious groups in Europe with the treatment of religious institutions in America).

of religious liberty. The contrast between the Supreme Court's approach in *Church of the Lukumi* and the French government's stance in *Cha'are Shalom* demonstrates the gap that still remains despite the relaxation of the wall of separation in the United States. Whereas the Supreme Court attempted to assure that restrictions had not been placed upon the religious practice of members of the Church of the Lukumi that were not applied to individuals of other denominations, the French government insisted that it was appropriate to treat *Cha'are Shalom* differently than the ACIP.

In the context of international law, a number of treaties and the bodies adjudicating them attempt to protect religious liberty through combining free exercise and equal protection reasoning in a fashion quite similar to that of early American state courts.⁷⁸ Thus, cases are often brought and evaluated under both Articles 9 and 14 of the Convention and under Articles 18 and 26 of the Covenant.⁷⁹ This strategy results in simulating something like an establishment clause but, as *Cha'are Shalom* illustrates, it has not succeeded in ensuring government neutrality. There are two principal reasons for this failure in the context of the Convention. First, the Court has been willing to accord a wide "margin of appreciation" to states when they allege that placing restrictions upon particular religious practices is either conducive to public order or "necessary in a democratic society."⁸⁰ Second, and relatedly, the Court has endorsed a conception of pluralism

⁷⁸ See Malcom D. Evans, *The Evolution of Religious Freedom in International Law: Present State and Perspectives*, in LA PROTECTION INTERNATIONALE DE LA LIBERTÉ RELIGIEUSE, *supra* note 5, at 15, 33 (speaking of "the well-established pattern of combining the expression of freedom of religion or belief . . . with the norm of non-discrimination . . .").

⁷⁹ See *supra* notes 19-21, 54 and accompanying text.

⁸⁰ See Peter Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE, *supra* note 5, at 192, 206-16 (criticizing the wide margin of appreciation that the ECHR has applied and its negative impact on the rights of minority religions); Levinet, *supra* note 43, at 87-88 (explaining that the ECHR grants a substantial margin of appreciation to states in the area of religious liberty as long as they have assumed the task of attempting to ensure religious pluralism within a democratic society as well as, more generally, protecting the individual religious liberty of their members); Patrice Rolland, *Ordre Public et Pratiques Religieuses*, in LA PROTECTION INTERNATIONALE DE LA LIBERTÉ RELIGIEUSE, *supra* note 5, at 231, 237 (noting that the ECHR allows for a wide margin of appreciation with regard to states' assessment of what kinds of restrictions on religious practice are necessary to preserve the "ordre public").

that does not simply entail self-sustaining sub-state groups, but rather implicates the state itself in managing relations among potentially conflicting entities.

The slippage between the English phrase “public order” and the French notion of “ordre public” in adjudication under the Convention illuminates the nature of the problem. Within various international law documents, including the Convention, “public order” is rendered not as “ordre public” in the French versions, but instead as “ordre.” The significance of this seemingly small linguistic variation lies in the fact that “ordre public” possesses a particular meaning within French law, one that refers to the society’s public policies.⁸¹ Stating that religion should be limited only by concern for “order” as opposed to “ordre public” implies that it should not be restricted on account of mere public policy, but rather only on account of some actual disruption of the polity. In the *Cha'are Shalom* case, however, the French opinion, in justifying any limitation upon the association’s religious liberty that the government had imposed, invoked not simply “ordre” but “ordre public”—rendered in the English opinion as both “public order” and “public policy.” The Court has deployed this broader notion of “ordre public” to rationalize other restrictions that states have placed upon religious practice.⁸² Generally, activities may disrupt the “ordre public” if they disturb religious peace and tolerance, affect public hygiene, or fail to demonstrate respect for the convictions of others.⁸³ Maintaining the “ordre public” thus consists in ensuring that religions remain within what the state deems appropriate parameters without offending others;⁸⁴ under this conception, pluralism requires that the state

⁸¹ See Tahzib-Lie, *supra* note 6, at 83 n. 93 (asserting that, in the international human rights context, “Public order’ should be narrowly construed to mean the prevention of public disorder. 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 fundamental public policies of a society”); see also Alain Garay et al., *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France*, 19 EMORY INT’L L. REV. 785, 803-6 (2005) (comparing the French and Convention limitations upon religious freedom based upon “public order”).

⁸² See generally Rolland, *supra* note 80.

⁸³ *Id.* at 250-70 (defining “ordre public” as the rule that is imposed upon all will and stating that protecting the “ordre public” may include, among other things, maintaining security in the form of religious peace and tolerance, public hygiene, and respect for the convictions of others).

⁸⁴ See Leyla Sahin v. Turkey, Application 44774/98, Eur. Ct. H.R. (2005), available at <http://www.echr.coe.int/Eng/Press/2004/June/ChamberjudgmentsSahinandTekin.htm>

determine the proper boundaries of religion and assiduously police these limits.

It is hardly surprising under this scheme for managing religions that states would choose to focus upon religious institutions rather than individuals; the institution can thereby become the locus for controlling the free exercise of its individual adherents.⁸⁵ By emphasizing the necessity of maintaining a pluralistic society and the harmonious co-existence of religions within the democratic state, international law thus considers the institutional dimensions of religious practice more than the individual ones. A different and, I would argue, superior, framework for assessing free exercise claims is, however, provided by the texts of the Convention and the Covenant themselves. Both documents focus their attention upon the individual's right to religious liberty, yet acknowledge the relevance of the group to which she belongs to the establishment of her claim. Article 9 of the Convention contemplates that the individual will be able to "manifest his religion or belief" "either alone or in community with others," while Article 27 of the Covenant speaks not simply of the rights of religious minorities but instead those of "persons belonging to such minorities." Rather than oscillating between restrictive accounts of individuals' religious liberty and consideration of religious institutions broadly conceived, international tribunals should take seriously the relationship *between* individual and group in the exercise of religious freedom. Had the Court in *Cha'are Shalom* done so, it might have considered the significance to the individual adherent of being a member of a religious group that articulated and implemented its own procedures of ritual slaughter. Expressing the right at issue in the context of collective practice might have rendered it more significant and allowed a thicker description of the alleged inequality between

(last visited Oct. 1, 2007) (upholding the Turkish ban prohibiting university students from wearing Islamic headscarfs, citing the "impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it"); see also Sylvie Langlaude, *Indoctrination, Secularism, Religious Liberty, and the ECHR*, 55 INT'L & COMP. L.Q. 929, 929-38 (2006) (discussing the Court's view of the state's role in preventing religious indoctrination and protecting individuals against others' religious views).

⁸⁵ Thus, in conjunction with advocating for church autonomy, Rik Torfs suggests that religions engage more assiduously in such activities by entering into agreements to refrain from proselytizing and establishing "a mechanism concerning enforcement, agreed upon by the religions involved." Torfs, *supra* note 5, at 146-48.

Cha'are Shalom and ACIP members. It might even have led the Court to affirm the rights of Cha'are Shalom members to manifest their religion through ritual slaughter.

* * *

While the individualist approach to rights prevalent in the United States may not reflect all the dimensions of religious liberty, the group and institutionally focused paradigms found elsewhere possess their own problems. In particular, as the *Cha'are Shalom* and *Waldman* cases demonstrate, state recognition of certain religions or attempts to provide benefits for religious minorities may lead to unequal treatment of dissenting sub-groups and recent entrants into the religious arena. An approach more salutary for religious liberty might be to remain focused on the individual claimant, not as a cardboard cutout, stripped of context, but as a three-dimensional protagonist whose beliefs and identity are inexplicable outside of the rich dramatic form provided by the religious group within which her character has developed.