Belief in Justice

Towards more inclusivity in and through the Freedom of Religion Case Law of the European Court of Human Rights

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“J'ai de sérieuses raisons de croire que la planète d'ou venait le petit prince est l'astéroide B 612. Cet astéroide n'a été aperçu qu'une fois au télescope, en 1909, par un astronome turc. Il avait fait alors une grande démonstration de sa découverte à un Congrès International d'Astronomie. Mais personne ne l'avait cru à cause de son costume. Les grandes personnes sont comme ça. Heureusement, pour la réputation de l'astéroide B 612 un dictateur turc imposa à son peuple, sous peine de mort, de s'habiller à l'Européenne. L'astronome refit sa démonstration en 1920, dans un habit très élégant. Et cette fois-ci tout le monde fut de son avis.”

Antoine de Saint-Exupéry (Le petit Prince)

Acknowledgment

Doing a doctoral dissertation is a journey difficult to describe. It has been an incredible life experience, containing both beautiful and difficult moments. It provides you with a mirror to the deepest parts of your personality. I am grateful for this opportunity that crossed my path. I am above all grateful for the fact that I did not have to walk this path on my own. I had people in front of me who led me by inspiration and I had people next to me who supported me. I hope I can do honour to all of you in this small acknowledgement section. This work I dedicate to you who crossed my path without leaving it unchanged.

How else can I start then by thanking the person who made all of this possible: prof. dr. Eva Brems. Literally, by successfully applying for this wonderful project, but also by being an excellent supervisor. Eva, not only your creativity and dedication are truly inspiring, but also your encouragement to explore the boundaries and try to pass beyond them. To ask questions where others put full stops and to think outside of the box. I am proud to have been part of your research group. I can easily say that the seeds of this work were planted already seven years ago in your human rights course. You reminded me at that time why I had chosen to follow legal studies in the first place. Not only because as a professor you introduced me to the world of human rights law, but also because of the role you played in the Belgian debates concerning discriminatory bans on the wearing of religious signs in schools and the workplace. Your voice gave me hope in dark times; that lawyers, and academics in particular, can play an important role in society. You spoke up when others were silent or silenced. Thank you Eva for everything. Thank you for your trust and for being an excellent mentor and supervisor.

I would also like to express my tremendous gratitude to the members of my Guidance Committee: Professor and Judge Françoise Tulkens and Professor Sébastien Van Drooghenbroeck. It was an honour having you as part of my Guidance Committee. I will remember your support, generosity and your positivity. Thank you for sharing your knowledge with us.

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time to time. Even though the climb seems to become more and more difficult the higher you go, you are becoming stronger as a researcher and stronger as a person.

A special warm thank you to my friends as well. Actually, I should also thank my PhD journey for getting to know some of my friends. A lot of whom I actually met through the PhD process. The space on my paper does not suffice to tell how important the messages, coffees, smiles and thoughts were. To my soul sisters, Maryam and Reyhan: thank you for keeping me sane.

Finally, I'm taking up the impossible task to express my gratitude towards my family. My mother and father, towards whom I will never be able to return what they have given to me. Thank you for dreaming big for your children and for always wishing the best for them. Zonder jullie zou ik vandaag niet zijn wie ik ben. Fa'inna ma3a el3osri, yousra. Dit werk draag ik in de eerste plaats aan jullie op. I wish to thank my brothers for their unconditional presence, support and for their strong shoulder. You always make me feel safe in so many ways. My sisters, my loves, you are the smile on my face and so much more. To all of you, I wish you big beautiful dreams, may your lives touch many hearts and may your beautiful hearts always discover and cherish the beauty of the small. I'm proud for being your sister, thank you for everything, this is also for you.

I dedicate this work also in memory of my grandmothers, mémé and 3aziza. They thaught me so much about life without even realizing it.

Finally, The last Word I can only utter in closure of this important chapter in my life is meant for the One who gave me hope and strength in times of difficulty and humility in times of success. All praise goes to Him. AlhamdouliLah.

Preface

"*Les droits de l'homme n'existent pas. Ce sont les droits de l'homme blanc*"

The debate on the universality of human rights is not only an academic or a political one. It is a deep concern that lives at the grassroots level, as the abovementioned quote by Fadma shows.

Fadma is a young French Muslim woman whom I met in a mosque a couple of years ago. When she learned that I was studying human rights law, she looked at me with surprise and gave me her critical opinion about my choice of study, using the above-mentioned wording. "Human rights don't exist. They are the rights of the white man". Her words struck me and stuck with me. For a long time. I remember feeling extremely uncomfortable, not immediately knowing how I could best reply. In retrospect, I see two reasons for that.

The first reason being that in front of me stood a young smart woman who had just explained to me that every morning she must remove her headscarf in front of her school's doors in order to be able to pursue her education. She told me she felt humiliated and powerless; not only because she was compelled to remove her headscarf, but also because she felt that her perspective, her feelings, her voice and her conviction were of secondary importance since the rule was imposed on her and on many other young women without giving them a say. Hence, I could not be surprised at her opinion about human rights. I unfortunately have to admit that, in the past years, I have met various other women who thought like Fadma. This dissertation project was written at a time during which regulations prohibiting the wearing of religious signs in schools and in public and private workplaces were (and are still) mushrooming in my country, Belgium, but also in other countries across Europe. The paradoxical and maybe even perverse side of this situation is that the more visible Muslim women become in society and the more they try to participate in society through work, education and even volunteering, the more limiting measures are imposed on them. Because of this context, bright young students are making educational and career choices not only on the basis of their dreams, but also on the basis of a mental checklist containing the limitations they have to take into account among which are the jobs that they will not be able to exercise without putting aside a part of their personality and the educational programs that they have to cross off their list since the chances of being selected for an internship are low or even non-existent for someone who is visibly religious. (I am focussing here on the limitations for Muslim women; needless to say that the problems of discrimination are much broader) Today, working at the university, I cannot recount the number of times I have been asked by young girls whether they will be allowed to study at the university despite the fact that they wear a headscarf, let alone their surprise when

they hear about the fact that I work at a university. This is (in Belgium at least) not an issue at all, fortunately. However, receiving these questions made me realise that the many limiting regulations issued in the course of the past decades and the many confrontational societal debates held during the past years on the topic of religion and on Muslims in particular have created a climate which has instilled in the minds of many young women and men the idea that limitations are the rule and their freedom the exception. In addition, as a human rights lawyer, I was also often confronted with questions such as "what about our human rights?" "do our rights count?" and "what about the courts? Do we count for them?" On a positive note, I have also observed a growing number of people expressing their indignation about oppression, racism, discrimination and stigmatization. They use their pen, their voice and other democratic tools, such as the court system, to express their voice with the hope that it will be heard and taken seriously.

This brings me to a second reason why I was experiencing feelings of discomfort when confronted with Fadma's story. At the time I met her, I was following an advanced course in human rights law which focused partly on the case law of the European Court of Human Rights. Every class had a particular human rights theme. I remember the class about the right to freedom of religion very well. It was my first confrontation with the Strasbourg Court's case law on this topic. I learned that day that the Court was convinced that a person who experiences a dilemma between his or her religious duties and his or her professional obligations in the workplace, has the freedom to resign. What is more, the Court also found that this 'freedom to resign' is the ultimate guarantee for that person's right to freedom of religion. I also learned that the Court thought that the headscarf is a symbol which is not reconcilable with important principles such as respect for others, tolerance and the principle of equality and non-discrimination. There I sat, in a university classroom, as a young ambitious student aspiring to become a human rights lawyer and who happened also to wear a headscarf. I was learning, as were all my fellow students (potential future lawyers, politicians, judges…), about the norms and principles that the supranational European human rights body was communicating to Europe about people's individual right to freedom of religion, while outside the university building at that time a struggle by young women and human rights activists was going on to convince municipal authorities in Belgium to not introduce bans on the wearing of religious signs in the workplace since that would discriminate against an entire segment of the population. I went home that day hoping that the authorities did not know much about the Court's freedom of religion case law and hoping that people belonging to religious minorities whose faith happens to be more visible would not know about these decisions of the Strasbourg Court. Indeed, I did not want the authorities to feel backed by the Human Rights Court's case-law in justifying their

discriminatory regulations and I did not want young activists to feel discouraged in their struggle for human rights protection.

My professor at that time, Eva Brems, who later became my PhD supervisor, always said that her role as a professor is not to give answers. Her role is to make students think critically. I took that pretty seriously. Many questions rushed through my head after this (and other) class(es). How can a supranational court that is supposed to be protecting human rights reason this way? Does the Court realize the problematic exclusionary aspect of the above-mentioned statements? Does the Court realize the message it communicates to many women across Europe and beyond with these lines of reasoning? Does it realize the message it sends to people who wish to participate in society through work, but at the same hope that they can do so without having to compromise their identity? Does the Court realize the impact these kinds of statements can have on people who are leading a democratic struggle to have their human rights recognized and respected? How often does the Court use similar exclusionary lines of reasoning in its case law? How can I convince people to trust courts and to rely on their fundamental rights to express their voice, while the Court is making statements that could actually sabotage their struggle for human rights protection? How can I, with the knowledge I received about the Court's case-law, convince Fadma that "les droits de l'homme" are also her rights?

Today, I believe that I do not have to dissuade Fadma of her conviction. Her opinion is a legitimate reaction to situations that she experiences in her life and she has the right to think the way she thinks and to feel the way she feels. This is why, in the title of my work 'Belief in Justice', I am not using the verb 'believe' followed by either a question mark or an exclamation mark. I do not have the intention to tell people that they should believe in justice. I also do not have the ambition to determine in a general sense whether justice can be believed in. I start, however, from the assumption that people such as Fadma should be able to believe in justice. They should be able to trust in the fact that courts will take them and their rights seriously and that their voices will be respected and treated in a just and fair way. Hence, this work aims at finding out how courts, and the European Court of Human Rights in particular, could make sure that people need not question the legitimacy of the human rights system and the value of their fundamental human rights.

"Only when human rights tribunals, attorneys and activists learn to patiently listen to the voices of the marginalized will the aneu logou [without a voice] realize their human rights"[1]

[1] William Paul Simmons, *Human Rights Law and the Marginalized Other* (2011), 2-3.

Articles of the Dissertation

This dissertation is built around four articles, as allowed by Chapter IV § 14 of Ghent University's 'Complementary Regulations Concerning the Doctorate for the Faculty of Law and Criminological Sciences'. According to this provision, the dissertation may consist of a series of related articles in periodicals or books. The number of articles can vary between three and five, the majority of which have to be approved for publication by the time the dissertation is submitted.

This dissertation contains four articles, of which three are already published and one is submitted for publication. As required by the regulations, the articles are accompanied by supporting and connecting texts. The dissertation starts with an extensive introductory chapter (situating the research in the societal and scholarly field, outlining the research aims and research questions and elaborately explaining the methodology employed), a theoretical chapter, prefaces to the different parts of the dissertation and a concluding chapter.

For reasons of structure, the headings of some articles are changed, the content however, largely remained unchanged. The original footnote styles of the already published articles are preserved. Since the published articles are reproduced in their original form, the small theoretical parts concerning procedural justice research may contain repetitions.

The **first article** is published under the title 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the ECtHR' in *K. Alidadi, M. Foblets and J. Vrielink, A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Ashgate, 2012.

This article forms the basis of Chapter IV. Its introduction and conclusion have been modified in order to situate it better within the broader dissertation. An addendum to this article has also been added to Chapter IV, discussing two important cases concerning religious accommodation in the workplace (*Sessa v. Italy* and *Eweida a.o. v. the UK)* which were issued after its publication.

The **second article** is '*Suku Phull v. France* rewritten from a procedural justice perspective: taking religious minorities seriously' in E. Brems, *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, Cambridge University Press, 2012.

This article is reproduced in Chapter V of the dissertation.

The **third article**, entitled 'Doing Minority Justice through Procedural Fairness: Face Veil Bans in Europe', is written jointly with my supervisor Eva Brems and published in the *Journal of Muslims in Europe 2 (2013),* 1-26. Both co-authors have made equal contributions.

This article is reproduced in Chapter VI and followed by an addendum discussing the case of *S.A.S. v. France*.

The **fourth article** is entitled ‘Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court’ and is submitted for publication in the form it appears in chapter III to the Human Rights Law Review and is currently under peer review.

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PART I

CHAPTER I - INTRODUCTION

> In the world imagined by both Williams and Locke, the majority does not say, "I'm the norm, now you fit in." It says, "I respect you as an equal, and I know that my own religious pursuits are not the only ones around. Even if I am more numerous and hence more powerful, I will try to make the world comfortable for you." It is the spirit of a gracious hostess. A good hostess needs a good imagination.
>
> — Martha Nussbaum[1]

Contemporary Western Europe is undeniably characterized by religious diversity.[2] This manifests itself in various aspects of public life. In the media, for example, topics related to religion regularly make the headlines. Whether in the labour market, schools or other public activities, individuals are also increasingly making religious accommodation claims. All the while, Western European societies are becoming ever more secular and anti-Muslim sentiments are on the rise.[3] It is thus not surprising to find that people are increasingly relying on the justice system, including the European Court of Human Rights, to settle disputes related to religion.

The existence of diverse religious and non-religious views and needs inherently contains a potential for conflict. Indeed, over the years numerous debates and controversies on the position of religion in society have been initiated. As such, public debates can be a healthy reflection of a dynamic and democratic society. Yet,

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[1] Martha Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*, (Harvard University Press, 2012), at 96.

[2] See also Group of Eminent Persons of the Council of Europe, 'Living Together: Combining Diversity and Freedom in 21st-century Europe', (Council of Europe, 2011), at 9, who state that 'Diversity is Europe's destiny' and it was always part of Europe.

[3] See for example the report of Amnesty International, 'Choice and Prejudice: Discrimination against Muslims in Europe', (2012) at https://www.aivl.be/sites/default/files/bijlagen/Rapportchoiceandprejudice.pdf; the statement of Thomas Hammarberg, 'Human Rights in Europe: no grounds for complacency', (Council of Europe Publishing, 2011, at 36; the report of the European Monitoring Centre on Racism and Xenophobia , 'Muslims in the European Union: Discrimination and Islamophobia', EUMC 2006 available at http:// fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf; the 'Observatory Report on Islamophobia' of the Organization of the Islamic Conference, available at http://www.oic-un.org/document_report/Islamophobia_rep_May_23_25_2009.pdf; and respectively the recommendation and resolution of the Parliamentary Assembly of the Council of Europe , Resolution 1743 (2010) 'Islam, Islamism and Islamophobia in Europe', available at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1743.htm and Recommendation 1927 (2010) 'Islam, Islamism and Islamophobia in Europe', para. 3.13, available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1927.htm (Sources last accessed on 28 April 2015)

they can also potentially lead to a disruption of social cohesion, since when religious issues are at stake, debates tend to be very sensitive, animated and often confrontational[4] and polarizing.[5] What is more worrisome is that they are often treated as outside the framework of human rights law and, rather, perceived as clashes between values and principles.[6] Meanwhile the (religious) concerns of individuals affected by certain measures or decisions are simply brushed away.[7] Their voices go unheard, their religious perspective are not understood and their needs unmet.

This religiously diverse context leaves society facing many challenges, but it also confronts one of its pivotal institutions, namely the justice system. It raises the important **question of how religious diversity can be dealt with, including by courts,** [8] **so that social cohesion is preserved and at the same time all members of society are and feel included.**[9]

In fact religious individuals are increasingly turning to the courts with their religious claims.[10] Hence, courts, and certainly the European Court of Human Rights, play an important role in this field. This study will focus particularly on the role of the European Court of Human Rights (hereinafter the 'Court' or 'Strasbourg Court') in this debate.

Being the supranational human rights body in Europe, the Strasbourg Court

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[4] Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), 28-29. The summary report is also available at http://www.religareproject.eu/content/final-summary-report-religare-project.

[5] Among others: Thomas Hammarberg, 'Human Rights in Europe: no grounds for complacency', (Council of Europe Publishing, 2011), 41.

[6] Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 28. (in particular with regard to the face-veil controversy)

[7] See for example the disdainful reaction of a Belgian MP — belonging to a respected liberal party— to a report issued by Amnesty International about discrimination against Muslims (see ref in note 3). One of the points in that report concerned the Belgian law banning the face veil in public spaces, in the drafting of which the aforementioned MP played an important role. The MP, Denis Ducarme, tweeted the following after the publication of the report: 'Amnesty International condemns the Belgian law on the wearing of face veils. Well we don't care!' (translation by the author) See: 'Amnesty et port du voile : Denis Ducarme s'en moque' at http://www.lavenir.net/cnt/dmf20120425_00150680. (Last accessed on 28 April 2015)

[8] It can be argued, however, that this question should be examined in the first place by actors at the grassroots level and at the policy level.

[9] See also Group of Eminent Persons of the Council of Europe, 'Living Together: Combining Diversity and Freedom in 21st-century Europe', (Council of Europe, 2011), at 53, who represent this as the challenge for the Strasbourg Court.

[10] See also Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms. Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30 *Netherlands Q. Hum. Rights* (2012), at 399, who refer to this as the 'juridification of multicultural conflicts'.

too is inevitably confronted with important questions concerning law and religion.

By its very nature the Strasbourg Court has an important role to play in debates on religious freedom in Europe.[11] The Court's case law not only examines cases after debates have taken place at the societal level, as in the recent case of *S.A.S. v. France*[12] concerning the French face-veil ban. Occasionally it also ignites heated discussion with its judgments, as with the now famous *Lautsi* cases,[13] which concerned the presence of crucifixes in Italian public schools.[14] At the level of domestic legislative bodies, the Court's judgments and principles are also regularly invoked in the legislative process.[15]

The Court's case law is closely followed and scrutinized by different actors,[16] especially when it relates to freedom of religion, which tends to involve public debate and have many conflicting and sensitive interests at stake. This can put a great deal of pressure on the Court, as became apparent in the *Lautsi* cases. The latter attracted an enormous response from States and a range of organizations — both in favour of and opposed to banning the crucifix in schools — leading to the highest number of intervening third parties ever witnessed in the history of the Court.[17] Interventions came from the political realm, human rights organizations, scholars of law and religion and even the Vatican. This is surely a precarious and

[11] Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 15.

[12] ECtHR (GC), *S.A.S. v. France*, 1 July 2014.

[13] ECHR, *Lautsi v. Italy*, 3 November 2009 and ECtHR (GC), *Lautsi and Others v. Italy*, 18 March 2011.

[14] See discussion about the debate after Lautsi I: Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 7.

[15] In Belgium the case of *Leyla Sahin v. Turkey* (ECtHR (GC), 10 November 2005) was invoked in the Flemish Parliament by the extreme right wing party Vlaams Blok (currently Vlaams Belang) in 2004 in a proposal to ban the wearing of headscarves in Flemish public schools. See transcription of parliamentary debate at p.6: http://docs.vlaamsparlement.be/docs/handelingen_commissies/2004-2005/c0m024ond3-21102004.pdf (Last accessed on 28 April 2015) In the UK, the Court's judgment had an important impact on the famous case of *Begum v. Denbigh High School*, concerning the wearing of *jilbabs* (long dresses) in school. See the discussion on this case by Peter G. Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 *Michigan J. Int. Law 60* (2011), at 30-31.See also William Paul Simmons, *Human Rights Law and the Marginalized Other*, (Cambridge University Press, 2011), at 56-57, who criticizes the judgment in *Leyla Sahin v. Turkey*, arguing that 'instead of the ECHR serving as a check on democracies infringing on minority rights, the ECtHR's decision will serve as a catalyst for future infringements of minority rights. Indeed, several European countries have already taken steps to ban headscarves in various public spaces since the Sahin ruling. … This begs the question: If a human rights court refuses to uphold minority rights, who will?'.

[16] See e.g. the website of the *Strasbourg Consortium*, which comments on issues involving the freedom of religion at the ECtHR, http://www.strasbourgconsortium.org/. See also the *Strasbourg Observers*, who regularly comment on the case law of the Strasbourg Court: www.strasbourgobservers.com.

[17] Malcolm Evans, 'Neutrality in and after Lautsi v. Italy', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012).

burdensome position to be in,[18] especially as the Court cannot possibly meet everyone's expectations. In the highly diverse context that we witness today in Western Europe, it will simply not be possible to accommodate all and everyone's religious needs, despite the established fundamental right to freedom of religion.

However, I shall argue that what the Court is always able to and should do, is to make a maximum effort to be fair in its decisions and consider the viewpoints of all parties involved in a respectful and neutral manner, taking their rights and concerns seriously. In fact, a wide range of social psychology research has shown that people focus not only on the outcome of cases, but also on the process in which the outcome is reached. This aspect of the decision-making process is called 'procedural justice' or 'procedural fairness'.[19] What is even more interesting is the reason why people value the treatment of their case. The same social psychology research shows that people value being treated fairly and with respect, because this treatment signals that they are considered to be valued members of the group. In other words, it signals that they are included in the group.[20] Hence, not only the decision but also the decision-making process is an important factor to be taken into account when considering inclusion.

As a supranational human rights body, the Court should always aim to evaluate and examine conflicts from an objective point of view and address the concerns of all parties in its reasoning. Rather than a challenge, the Court's position can also be considered one of great privilege.[21] It is a position from which it can return to the essence of the debates and bring individuals and their rights back onto the map by offering a neutral and respectful context in which claims can be assessed. This is particularly important in cases related to freedom of religion that often involve minority voices, which are by definition less powerful or less likely to be heard by the mainstream.[22] It is my view that the Court can and should make an

[18] See for example Carla M. Zoethout, 'Rethinking Adjudication under the European Convention', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 417, who mentions the huge political pressure the Court had to endure with the Lautsi case. See also Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 29, who suggests that the political support 'probably carried out some weight on the decision of the grand chamber'.

[19] See for example a standard work in procedural justice research: Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 2006). Chapter II of this dissertation will give an overview of procedural justice research findings. Both the terms 'procedural justice' and 'procedural fairness' are in general used interchangeably, as is done in this dissertation.

[20] This finding is developed in the group-value model of Lind and Tyler: Allan Lind and Tom Tyler*, The Social Psychology of Procedural Justice* (Springer, 1988). See infra Chapter II.

[21] The Court is on the world map an important authority when it comes to human rights protection. See e.g. Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 1, who writes that the Court probably 'enjoys most authority and prestige around the globe in the realm of human rights'.

[22] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the*

effort to include these voices in its case law through its application of the right to freedom of religion, and in so doing stimulate inclusivity in society as a whole.

Although in some segments of its article 9 case law the Court has adopted an inclusive stance, thus far the Court has regularly failed to commit to the goal of inclusivity in its jurisprudence on the right to freedom of religion, and has been widely criticized for it. The Court has been criticized for not offering enough protection under this article,[23] of favouring States' interests above individual rights[24] and sometimes even of having double standards and being prejudiced.[25] This critique is not only expressed in the scholarly field, but also became very tangible in 2006 in the case of *Fazilet Partisi v. Turkey*.[26]

In 2006 a Turkish applicant, Fazilet Partisi, sent a letter to the Strasbourg Court asking for the withdrawal of its case.[27] Fazilet Partisi was a political party inspired by an Islamic ideology and for this reason was dissolved by the Turkish authorities. This case was similar to one involving its predecessor, Refah Partisi, a political party dissolved for the same reasons. The judgment in the case of *Refah Partisi v. Turkey*[28] in 2003, which found no violation, was widely contested, both by dissenting judges[29] in the case itself and by law scholars.[30] This judgment was one of the reasons for Fazilet Partisi withdrawing its claim. In their letter of withdrawal, they argue, referring to the judgements of *Refah Partisi v. Turkey* and *Leyla Sahin v. Turkey* (concerning a university student who challenged the prohibition on the wearing of religious apparel at her university), that these judgments show that the Court 'has prejudices towards Muslim communities' and that they are therefore 'convinced that they cannot have trust in the justice of [the] Court'.[31] What makes this letter so interesting is that the majority of the arguments refer to the way Fazilet Partisi perceives the Court's treatment of cases concerning Muslims, and much less

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Human Rights of Religious Minorities in Eastern Europe (Columbia University Press, 2002), at 206.

[23] E.g. Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012) and Peter G. Danchin, Islam in the Secular Nomos of the European Court of Human Rights, 32 Michigan J. Int. Law 663–747 (2011).

[24] Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2011), at 314-315.

[25] See a general discussion of legal scholarly critique infra 1.5.2.

[26] ECtHR, *Fazilet Partisi et Kutan v. Turkey*, 27 avril 2006.

[27] Idem.

[28] ECtHR (GC), *Refah Partisi The Welfare Party and Others v. Turkey*, 13 February 2003.

[29] Cf. dissenting opinion of Judge Kovler in ECtHR (GC), *Refah Partisi The Welfare Party and Others v. Turkey*, 13 February 2003.

[30] Among others Christian Moe, 'Refah Revisited: Strasbourg's Construction of Islam', in in Cole Durham et al. (eds.), *Islam, Europe and Emerging Legal Issues,* 235–271 (Ashgate, 2012); Dominic McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs From Generally Applicable Laws', 9 *Hum. Rights Law Rev.* 603–645 (2009); Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case', 1 *Essex Hum. Rights Rev*. 1–16 (2004) and Peter G. Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 *Michigan J. Int. Law* 663–747 (2011).

[31] ECtHR, *Fazilet Partisi et Kutan v. Turkey*, 27 April 2006.

their (unfavourable) outcomes.[32] They refer to the fact that the article 6 claim in the case of *Refah Partisi* is declared inadmissible 'without motivation'. They also refer to 'arbitrary interpretations' in the case of *Leyla Sahin.* They accuse the Court of being prejudiced and hostile towards Muslims. They conclude their letter by explicitly expressing their hope that this letter would encourage the Court to be 'more respectful in the future in its application of the European Convention on Human Rights' and 'careful and just in its examination of claims introduced by all individuals living in Europe'.[33] In other words, Fazilet Partisi in the first place distrusts the Court because of an alleged failure to treat applicants and their case in a fair way rather than for a failure to deliver favourable outcomes.

The Court cannot allow its functioning to be questioned like this, threatening its legitimacy as an important supranational human rights authority. The Court should prevent the alienation of people from the human rights system, especially when they belong to groups that are already marginalized in society.[34] The present study will demonstrate that although the substantive aspect of human rights protection remains the first task of the Court, the importance of the 'procedural' aspect, i.e. the way a case is treated, cannot be underestimated.

This introductory chapter will first discuss the aim and scope of the study. Secondly, it will situate the study in broader debates, at both the societal and legal levels. Thirdly, it will discuss the research questions and the premises underlying the study. Finally, it will explain in detail the chosen methodology and it will give an overview of the structure of the dissertation.

1.1. Aim of the research

The aim of this study is to explore what role the European Court of Human Rights can play in the context of religious diversity in Western Europe through its application of the right to freedom of religion (article 9) of the European Convention on Human Rights (ECHR). It will more specifically examine how the Court can contribute to social cohesion and to a deeper egalitarian understanding of inclusion. It starts from the idea that a full approach towards inclusion requires an inclusive approach towards religious claims not only at a substantive level, but also at a procedural level.

At a procedural level inclusion entails that individuals are treated fairly during the process in which their (religious) claims are examined, and that their concerns are genuinely taken into account in a respectful and neutral way. This study wants to put both the *human* and the *right* at the centre, in a field where balanced debates

[32] One argument, however, says that '[t]he Court constantly rejects claims introduced by Muslims'.
[33] ECtHR, *Fazilet Partisi et Kutan v. Turkey*, 27 avril 2006.
[34] See also: Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013), at 184.

are rather rare and emotions and symbolism risk transferring debates that are fundamentally human rights issues outside the human rights framework.

The aim of this study is both critical-analytical and normative-constructive.

At the analytical level this study aims to examine critically and thoroughly the Court's approach towards religious applicants, their claims and their right to freedom of religion in the text of its article 9 judgments. In this analytical stage, the article 9 jurisprudence is approached broadly, with particular attention given to the treatment of religious minorities. This critical assessment is conducted from the point of view of inclusion. Part II of the dissertation will mainly focus on inclusion at the procedural level, inspired by the social psychological model of procedural justice. In part III, the analysis pays attention also to inclusion at the substantive level.

At the normative level, the dissertation aims to formulate ways to improve the Court's article 9 case law with the aim of contributing to the debate of inclusion in a religiously diverse context.

At a methodological level, the dissertation aims to explore different and innovative methodologies that can contribute to a broader and deeper understanding of the case law of the Court.

1.2. Scope and premises of the research

1.2.1. Focus on improving the case law of the European Court of Human Rights

The research for this dissertation was conducted within the framework of the European Research Council-funded project entitled 'Strengthening the European Court of Human Rights. More Accountability through Better Legal Reasoning'.[35] This project aims to suggest how the case law of the Strasbourg Court can be improved and to propose innovative tools which can help with that process. Within the project, the research for this dissertation can be situated in a subsection entitled 'Mainstreaming diversity', which aims at integrating the specific concerns of non-dominant groups into the legal reasoning used by the European Court of Human Rights.

The case law of the Strasbourg Court is, in the framework of this project, a logical field of work. However, it is not the only or the main reason why the case law of the European Court of Human Rights has been chosen as the subject of study for this thesis.

It is undeniable that the Strasbourg Court plays, as the supranational human rights body in Europe, an important exemplary role both within the Council of

[35] Five other researchers worked on the same project: Laurens Lavrysen, Alexandra Timmer, Stijn Smet, Maris Burbergs and Lourdes Peroni.

Europe and beyond. Horizontally, its jurisprudence reaches other important international bodies[36] and vertically, the Court inspires domestic judicial bodies and, as pointed out earlier, it also impacts on public debates.[37] Hence, although the Court's jurisprudence is casuistic in nature, the impact of its decisions is much broader than the specific case in which the decision is taken.

Nevertheless, the framework of the project within which this research is conducted is essential for understanding the overall working method in this dissertation. The aim of the overarching project and of the dissertation is partly pragmatic. As the title of the project suggests, it aims to advance ways in which the reasoning of the Court can be improved. In my research, I particularly search for ways in which the Court can improve its article 9 case law so as to approach religious diversity in a more inclusive way. This study must therefore be seen as both critical and constructive. At an analytical level it aims to examine the case law from the perspective of inclusion and to establish whether problematic exclusionary patters can be discerned. At the same time, it also tries to constructively suggest feasible and tangible ways in which potential problematic exclusionary aspects could be improved in order to strengthen the Court's case law even more.

1.2.2. Focus on the right to freedom of religion under article 9 ECHR

The focus of this dissertation is on religious claims. Although several articles[38] in the European Convention on Human Rights allow claims concerning religion, this dissertation focuses on the right to freedom of religion protected by article 9 ECHR, which states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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

This choice is motivated by both methodological and practical considerations.

[36] See for example a discussion on the Court's influence on the Inter-American Court of Human Rights. Cf. Eduardo Andrés Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards', 3 *E.H.R.L.R*. (2009).
[37] See supra note 16.
[38] Article 14, which prohibits discrimination on the basis of (amongst others) religion; Article 1, Protocol 1, which focuses on the right to education, article 8 (for example in custody cases) and Article 11, which deals with the right of association, which also includes religious associations.

First, article 9 is the main and most important article in the ECHR, the *lex specialis,* in the domain of freedom of religion and most claims concerning religion are brought before the Court under this article.[39]

Second, the methodology applied, especially in part II of this dissertation, is designed to enable a deep and broad legal analysis of the right to freedom of religion to be conducted, involving an intensive and extensive methodological approach inspired by grounded theory.[40] Its aim is to acquire a comprehensive insight into the way the Court deals with religious claims. Including the other ECHR articles in the analysis would not have enabled me to analyse the case-law in the same rigorous manner within the time frame of the research project.

Third, the perspective from which the analysis is conducted, namely a procedural justice perspective, has allowed me to focus on article 9 alone, since the normative arguments made are connected to the nature of religious claims rather than to the right to freedom of religion itself. In general, principles such as neutrality, respect and participation are universally applicable to all cases, no matter which article is invoked. In this study, I specifically examine how these principles take shape in the context of religious claims.

1.2.3. Focus on inclusion and premises underlying this focus

This dissertation is written against the backdrop of the religiously diverse context of Western Europe. It aims at examining how the Court can contribute to social cohesion and the inclusion of this religious diversity in the mainstream society.

Inclusion can be interpreted in a multi-layered way. First of all, the most common focus on inclusion in a context of diversity relates to structurally or substantively creating conditions in which people can fully participate in society while keeping their own identity. Hirschl and Shachar, for example, use the concept of 'diversity as inclusion' to refer to 'claims that can reasonably be construed as demanding inclusion in the public sphere' and explain that inclusion 'is about creating a shared space for manifesting group-based identities and practices'.[41] Foblets and Alidadi use the notion of 'inclusive evenhandedness', considering 'diversity [as] an integral part of people's right to participation in society'.[42] Hence, in a religiously diverse context, this aspect of inclusion refers to enabling people to participate in different aspects of public life, such as the workplace, school or the

[39] Some chapters also contain references to case law under other articles when this was part of the methodology to suggest ways of improving the case law.

[40] See a detailed explanation of the methodology applied infra at 1.7.

[41] Ran Hirschl and Ayelet Shachar, 'The New Wall of Separation: Permitting Diversity, Restricting Competition', 30 *Cardozo L. Rev*. (2009), 2536-2538.

[42] Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 9.

public space, without having to sacrifice their own identity.[43] In terms of equality, this perspective on inclusion can be linked to the view of 'substantive equality', in contrast to the approach of 'formal equality'.[44] While formal equality considers that equal treatment entails that all people are treated in the same way, substantive equality takes possible differences into account in order to reach true equality between people.[45] It is in this context that some scholars advocate for applying the concept of reasonable accommodation of religious needs.[46] Accommodation is described by some as promoting the 'participation and inclusion ... [of] groups with different circumstances or forms of life . . . without shedding their distinct identities'.[47] In other words this aspect of inclusion, which is structural in nature, aims at accommodating differences in order to reach true equality between people and is thus particularly relevant in majority-minority relations.

A second focus on inclusion is a more subjective one, in the sense of creating a space where people *feel* included in the group and not marginalized.[48] This aspect of inclusion should not be neglected, especially since structural inclusion is not always possible for all religious needs.[49] For example, when a certain religious need cannot be accommodated in the workplace, for practical (and justifiable) reasons, it is still important to create a space where people feel included, despite the impossibility of structural inclusion. According to social psychology research, this aspect of inclusion depends on the social standing one receives.[50] People feel they belong to the group when they feel valued and respected.[51] This feeling of being

[43] This form of inclusion is sometimes also referred to as 'social inclusion'. See e.g. Julie Ringelheim, 'Adapter l'entreprise à la diversité des travailleurs: la portée transformatrice de la non-discrimination', 1 *Eur. J. Hum. Rights* (2013), 73.

[44] Fredman, Sandra, 'Facing the Future: Substantive Equality under the Spotlight', *Oxford University Legal Research Paper Series*, (2010), Paper No. 57.

[45] Ibid.

[46] See for example Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality', 5 *Erasmus Law Rev.* (2012), 59–77 and Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?', 17 *Maastrich. J. Eur. Comp. Law* (2010), 137–161.

[47] Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', 99 *Ethics* (1989), at 273, as referred to by Ayelet Shachar, 'On Citizenship and Multicultural Vulnerability', 28 *Polit. Theory* (2010), at 65.

[48] Also referred to as the 'affective dimension of inclusion'. See: Howard Kislowicz, 'Law, Religion, and Feeling Included/Excluded: Case Studies in Canadian Religious Freedom Litigation', *Can. J. Law Soc.* (2015-forthcoming), 1–26, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560449. (Last accessed on 28 April 2015)

[49] See e.g. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2005), at 138.

[50] E.g. Tom Tyler, Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities, 25 Law Soc. Inq. 983–1019 (2000), 990-991. See infra chapter 2 for a theoretical overview of the findings of procedural fairness research.

[51] Tom R. Tyler, The Psychology of Procedural Justice: A Test of the Group Value Model, 57 J. Pers. Soc. Psychol. (1989), 830-831 and Yuen J. Huo, Kevin R Binning & Ludwin E Molina, Testing an

valued is, in turn, found to be influenced by procedural fairness aspects of the interaction with authorities.[52] Although this aspect of inclusion is universally important, it is particularly relevant for people belonging to minority groups since they are more likely to be marginalized. It is noteworthy that contrary to the structural focus on inclusion, this aspect of inclusion starts not from differences, but from sameness. Indeed, people in general want to be valued and respected as part of their human dignity.[53]

Legal research on the Court's case law on freedom of religion mostly reflects on the Court's reasoning from the perspective of substantive inclusion, criticizing, for example, the limited protection at a substantive level that the Court offers in cases concerning individual religious claims.[54]

This dissertation aims at complementing this vast body of literature by offering an analysis of the exclusionary patterns at the procedural level in the Court's article 9 jurisprudence.[55] As will be argued, these shortcomings at the procedural level are in themselves exclusionary, independent of shortcomings at the substantive level. However, part III of the dissertation will also show through case-studies how procedural and substantive aspects of inclusion are very often intertwined.

All religious claims under article 9 will be considered in this dissertation. All claims are valued, no matter whether the applicant is a Christian who wants to wear a cross at work, a Sikh pupil who wants to wear a turban in school or a Muslim woman wanting to be able to teach, wearing a headscarf.

Yet, the context of religious diversity inherently requires special attention to religious minorities. Hence, although I start from the perspective of individuals making religious claims and having equal rights, I pay particular attention to minority status, when applicable, since belonging to a minority group intrinsically entails a risk of exclusion and marginalization.[56]

I start from the premise that the human rights system, with the Strasbourg Court as one of the major institutions, has an important counter-majoritarian role to play, in correcting the inherent inegalitarian effects of a democratic system where people belonging to minority groups by definition have less weight in the scale and a voice less heard.[57] I consider the Court to be in a position to objectively assess

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integrative model of respect: implications for social engagement and well-being, 36 Pers. Soc. Psychol. Bull. (2010), 201.

[52] See in general E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988). See Chapter 2 for an extended discussion of social psychology research.

[53] Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol.* (2000), 123.

[54] Cf. infra 1.5.2.

[55] Cf. infra Chapter III.

[56] See infra, 1.3

[57] John Heart Ely, *Democracy and Distrust*, (Harvard University Press, 1980), at 103; Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 20-25. See also Patti Tamara Lenard, *Trust, Democracy, and Multicultural Challenges*, (Pennsylvania State University Press, 2012), at 2-3, who argues that '[h]uman rights law should find its inspiration from the Other, the marginalized person who, in most

religious claims and to transcend the so-called 'tyranny of the majority'.[58]

I will posit that in order to truly understand religious claims made by applicants belonging to religious minority groups and to come to a full understanding of inclusion, an awareness and recognition of these power imbalances is essential. I will argue that the Court's counter-majoritarian role should not only be considered at the (substantive) level of protection, as traditionally argued (controlling whether measures are in accordance with people's fundamental rights), but also at a procedural level, in the sense that the Strasbourg Court should offer a platform on which people are treated in an even-handed and fair way, and every voice is equally taken into account.

1.3. The gap between religiously motivated claims and human rights norms: a reflection on the societal context

In recent decades, debates on the place of religion in society, and more specifically religious practices, have increasingly emerged in the public arena. Besides the recent explosive controversy on face-veil bans,[59] several countries have also discussed prohibiting the wearing of other religious signs, such as turbans and headscarves.[60] Other practices, such as ritual slaughter,[61] male circumcision,[62] the

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cases, has no other place to turn. This premise should be self-apparent. After all, the raison d'être of human rights law should be the protection and empowerment of those who have been most marginalized, "to give voice to human suffering, to make it visible, and to ameliorate it"'. (with reference to Upendra Baxi, *The future of Human Rights*, (2002), 4). And Group of Eminent Persons of the Council of Europe, 'Living Together: Combining Diversity and Freedom in 21st-century Europe', (Council of Europe, 2011), at 35: 'All human beings are entitled to the protection of the law, and the most vulnerable, or those most frequently exposed to illegal abuse or exploitation, are entitled to expect the authorities to make a special effort on their behalf. It should be clear from the examples given in part one that this applies particularly to members of minorities – especially the Roma – and to immigrants and those of recent immigrant descent.' See also Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 50 where the authors argue that 'Freedom of religion and belief is also and should remain, if not primarily, a fundamental right of minorities'.

[58] See also John Heart Ely, *Democracy and Distrust*, (Harvard University Press, 1980), at 103. See also Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at.31, who argues that 'finding satisfactory balance between dictatorship of majority and a fundamentalist conception of human rights, is the condition upon which an effective protection of religious freedom is dependent'.

[59] See for an excellent collection of contributions on the debate on face-veil bans in several countries: Eva Brems (ed.), *The experiences of Face Veil Wearers in Europe and the Law*, (Cambridge University Press, 2014).

[60] Sarkozy recently supported the idea of banning the headscarf at French Universities: http://www.worldbulletin.net/news/156724/sarkozy-in-favor-of-headscarf-ban-in-universities; see also the report of Human Rights Watch on headscarf bans in Germany: Human Rights Watch, Discrimination in the Name of Neutrality Headscarf Bans for Teachers and Civil Servants in Germany http://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf. (Last accessed on 28

refusal to shake hands,[63] religious holidays,[64] dietary requirements,[65] burial practices and the building of minarets[66] have also not been spared from debate. Common to these debates is that they tend to be held in an emotional and often polarizing way.[67] Caroline Evans refers to them as 'shrill, heated, uninformed and simplistic, encouraging knee-jerk reactions'.[68]

This increase in debates can be understood from the perspective of several social evolutions and realities.

First, Western European countries are becoming increasingly religiously diverse.[69] This religious diversity inherently means that different religious needs and views occur in society, which will also inevitably lead to a rise of religious claims. This diversity is partly due to the growing popularity of new religious movements and 'spiritualities',[70] but its main origin is of course migration, not only because of the ongoing influx of migrants to Europe, but also because of the growing visibility of the already present European (religious) diversity.[71] Paradoxically, the more one tries to

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April 2015)

[61] E.g. the recent controversy in the UK: http://www.lawandreligionuk.com/2015/02/24/mps-debate-non-stun-slaughter-yet-again/ (Last accessed on 28 April 2015)

[62] E.g.in Germany http://www.spiegel.de/international/germany/new-circumcision-ruling-requires-doctors-to-discuss-procedure-a-924984.html. In Sweden: http://www.huffingtonpost.com/2014/01/27/circumcision-ban-sweden-denmark_n_4674547.html; in Denmark: http://www.thelocal.dk/20141022/denmark-circumcision-ban-support (Last accessed on 28 April 2015)

[63] See for example the ruling of the Dutch Commission of Human Rights (College voor de Rechten van de Mens) at https://mensenrechten.nl/publicaties/oordelen/2006-202/detail

[64] When in 2011 the 'Round tables on Interculturality' proposed in Belgium to open up the system of holidays so that non-Christian religions could also take a day off on their religious holidays, this created a storm of criticism. See for example: http://www.standaard.be/cnt/dmf20101108_104 (Last accessed on
28 April 2015)

[65] E.g. The debate on halal meat in French schools: http://www.lefigaro.fr/actualite-france/2013/07/01/01016-20130701ARTFIG00406-halal-et-ecole-de-plus-en-plus-de-cas.php (last accessed on 28 April 2015)

[66] In 2009 Switzerland organized a referendum on the building of minarets: http://news.bbc.co.uk/2/hi/europe/8385069.stm (last accessed on 28 April 2015)

[67] See also Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Peter Cumper and Tom Lewis (eds.), *Religion, Rights and Secular Society,* (Edward Elgar Publishing, 2012), who calls them 'ill-informed' and 'ill-mannered'.

[68] Carolyn Evans, 'Introduction', in Peter Cane, Carolyn Evans, and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context,* (Cambridge University Press, 2011), at 2. With the edited volume, the editors aim at playing a role 'in countering this type of shallow debate'.

[69] Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms. Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30 *Netherlands Q. Hum. Rights* (2012), at 389 speaks of 'Increasing religious heterogeneity'.

[70] See a.o. Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 5 and James T. Richardson, 'The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis', 67 *Sociology of Religion* (2006), at 276-277.

[71] While the first generation of migrants lived in a more segregated context, since they expected, and

integrate into society through education or work, the more likely it is that a person will be faced with conflicts related to his or her religious background.[72] Typical examples are prohibitions on the wearing of religious symbols in the workplace and requests concerning the adaptation of work schedules. Added to this is the backdrop in which the Western European societal order is still dominated by Christian influences.[73] Or in the words of Grace Davie: 'Europe is changing, but the legacies of the past remain deeply embedded in both the physical and cultural environment'.[74]

Indeed, official holidays, for example, and days of rest still fall together with Christian holidays.[75] In such a context, it is more likely that people who have particular needs will try to challenge these traditional mainstream norms, asking for accommodation of their own needs.[76] In essence, this can be seen as a request for inclusion in mainstream society while at the same time keeping one's own identity. Hence, the rise of religious claims is in the first place a mirror of the growing diversity

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were expected by the authorities, to return to their original country, now, with the next generations issued from migration, the segregation walls are starting to fall and diversity to find its way into different levels in society, which ignites new questions.

[72] See for example Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms. Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30 *Netherlands Q. Hum. Rights* (2012), at 401, who argue that the rise of religious claims is paradoxically a good sign of integration of societal diversity since this 'tendency implies the adoption or at least utilisation of the human rights system as a frame of analysis and evaluation'. However, at the same time numerous reports show that minorities still face significant exclusion and discrimination in the workplace, one of the reasons (but not the sole reason) being their religious background. For example Amnesty International, 'Choice and Prejudice.
Discrimination against Muslims in Europe', 2012, available at
https://www.aivl.be/sites/default/files/bijlagen/Rapportchoiceandprejudice.pdf. (last accessed on 28 April 2015)

[73] Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), at 253.

[74] Idem.

[75] Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), at 203. See also Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 7, who states that neutral laws will rarely conflict with the morality of major churches, while causing more frequent conflict with minority religious groups that engage in conduct which is 'socially atypical'. See also Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 296.

[76] Moreover, the growing diversity also leads to what Susanna Manicini calls 'deprivatisation' of religion: Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 7. Davie also argues that the growing religious diversity challenges the traditional public-private divide: Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), at 259. In the Christian tradition, religion is still considered to be private, something people mainly do in the privacy of their individual home, while other religions such as Islam and Sikhism conceive religion more as a way of life that you cannot abandon at your home's doorstep. See also Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 74 and Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), at 203.

of society and shows the need of a diversity of groups and people to be included in society.

Secondly, while Western European societies are becoming increasingly religiously diverse, religiosity is in decline. On the one hand, secularism is on the rise and on the other hand a process of 'de-traditionalisation' or 'unchurching' is taking place.[77] In this context, tensions are inevitable,[78] not only because of the differing views, but also because of what Davie calls a paradoxical situation in which this decline of religiosity in society also lead to a decline of knowledge and understanding about religion, while this knowledge is especially needed in a context where debates on religion are on the rise.[79] This results in the 'ill-informed' and 'ill-mannered' character of some debates.[80]

A third perspective from which the rise of debates on religion in Europe can be understood is related to identity. While some refer to secularism or 'laicité' to motivate limitations on the right to manifest a religion, others refer to the Christian heritage of Europe.[81] As a result, debates surrounding religious practices are often motivated by a wish to protect the established Christian traditions or secular values against the 'new' and 'other'.[82] Added to this is the fact that often religious claims are made by people with a migration background.[83] In this case this 'other' tradition is not only 'new' but also non-European or non-Western in the conception of 'us', the 'original' Europeans. The increase in religious diversity is therefore considered a threat to 'our' identity.[84]

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[77] Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 5. See also Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), who did groundbreaking research on the churchgoing behaviour of Europeans.

[78] See also Peter Cumper and Tom Lewis, 'Introduction: freedom of religion and belief-the contemporary context', in in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), at 5. See also Carolyn Evans, 'Introduction', in Peter Cane, Carolyn Evans, and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context,* (Cambridge University Press, 2011), at 2, who refers to the rise of atheism, agnosticism, humanism and secularism as challenging 'the idea that any religion should be influential in law and society or at least raises complex questions about equal treatment of religion and non-religion'.

[79] Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), at 267-269.

[80] Idem

[81] Idem, at 267 and Peter Cumper and Tom Lewis, 'Introduction: freedom of religion and belief-the contemporary context', in in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), at 5.

[82] See also Ekaterina Yahyaoui Krivenko, 'The Islamic Veil and its Discontents: How Do They Undermine Gender Equality', 7 *Relig. Hum. Rights* (2012), at 12.

[83] See also Carolyn Evans, 'Introduction', in Peter Cane, Carolyn Evans, and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context,* (Cambridge University Press, 2011), at 2, who specifically refers to the migration influx from Muslim countries in particular.

[84] Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), at 203 and 213, referring to Report of the Special Rapporteur of the

This 'other' is very often also Muslim, which leads us to a fourth element that must be taken into account when analysing the debates on religion. Several reports show that islamophobia is on the rise in Europe and beyond.[85] In this sense, when specifically Muslims are concerned — and this is often the case with most contemporary debates on religious practices— instead of being a purely identity matter, debates on religion can also take place out of a hostile reaction towards the Muslim-other.[86]

In this context, two main observations can be made on the way debates concerning religious practices are held. The first concerns the inherently exclusivist character of the debates. Debates held from an identity perspective (whether motivated by hostility or self-protection) start from a dichotomy between 'us' (the Christian traditionalists, the secular 'normativists' or the non-Muslims) v. 'them' (the others who do not correspond to the 'mainstream' norms). Surely, this kind of dynamics is not beneficial for social cohesion and for the inclusion of people holding non-dominant religious viewpoints and having corresponding religious needs. Moreover, this dichotomy often also contains a power imbalance since people challenging (what is considered) the norm mostly belong to religious (and often also ethnic) minority groups.[87] Against this background it is not self-evident that a debate can be held where all voices are equally taken into account and treated in a fair way.[88] The voice for freedom 'from' religion will by definition resonate stronger than the one 'for' freedom of religion. This might partly explain why during recent years

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Commission on Human Rights on Religious Intolerance, U.N. GAOR, World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Preparatory Committee, 1st Sess., Annex, Provisional Agenda Item 7, at 23, U.N. Doc A/CONE 189/PC. 1/7 (2000). See also Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 7.

[85] See amongst others European Monitoring Centre on Racism and Xenophobia , 'Muslims in the European Union: Discrimination and Islamophobia', (2006) at http://fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf See also Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 17.

[86] See also Grillo, Ralph and Shah, Prakash, 'Reasons to Ban? The Anti-Burqa Movement in Western Europe',
MMG Working Papers (2012) to be found at http://www.mmg.mpg.de/publications/working-papers/2012/wp-12-05/. See also Carolyn Evans, 'Introduction', in Peter Cane, Carolyn Evans, and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context,* (Cambridge University Press,2011), at, who refers to the 9/11 influence on the resurgence of debates on religion, which makes it move towards a debate over 'Islam and the West'. However, although 9/11 has an influence on the debates, Evans clarifies that the debates on Law and religion had already led to important questions before 9/11.

[87]See also Carla M. Zoethout, 'Rethinking Adjudication under the European Convention', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012).

[88] Cf Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 206, who speaks about politically 'powerless minorities'.

calls for 'de-accommodation'[89] have occurred more often than minority claims for accommodation.[90]

A second observation about the debates is that they often take place outside the realm of human rights. They are often formulated in ideological terms, using the language of, for example, *laicité*, pluralism and Judaeo-Christian values, which leads to a confrontational debate where little room is made for the concerns and fundamental rights of individuals.[91]

However, recent decades have also shown that people are increasingly turning to courts, among which the European Court of Human Rights, with their religious claims in search of a legal answer.[92] They frame their claims in terms of human rights such as freedom of religion and the prohibition of discrimination. This indicates a failure to deal with conflicts related to religion on a societal level, but at the same time this is also a positive evolution since it paradoxically also indicates that people rely on the judicial system to handle their claims in a fair way, which is a sign of integration into society.[93] The way courts deal with these kinds of sensitive case is therefore crucial. How can courts, and the Strasbourg Court in particular, deal with these claims in an inclusive way? The primary role the Court can play, when contrasted with the way religious claims are generally dealt with in public debates, is to bring human rights back onto the map and at least to offer a space where applicants and their claims are taken seriously and treated equally and respectfully, and where they receive an opportunity to voice their concerns.

In the next section, a closer look will be taken at how societal diversity translates into the case law of the Court under article 9 ECHR.

1.4. Freedom of religion at the Strasbourg Court: a quantitative insight

In this section I will first give a quantitative overview of the freedom of

[89] I borrowed this term from Markha Valenta, 'Pluralist Democracy or Scientist monocracy? Debating Ritual Slaughter', 5 *Erasmus Law Review* (2012), 27–41.

[90] See for example recent debates on prohibiting ritual slaughter, which was previously allowed. Or male circumcision. Other debates that are often held in terms of accommodation, such as the prohibition against wearing religious symbols, are also more about de-accommodation than accommodation, because these are practices that were allowed before, for example with regard to prohibitions on the wearing of religious signs in schools.

[91] See also Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 17 specifically on the 'burqa' ban debate.

[92] See Jeroen Temperman, 'Introduction', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 1.

[93] Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms. Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30 *Netherlands Q. Hum. Rights* (2012), at 401.

religion claims brought under article 9 since the reform of the Court in 1998. The numbers are limited to this period because they are based on the database I collected for my research in part II of this dissertation. When collecting and reading the cases for my qualitative case-law analysis, I additionally classified the cases according to information which is not available in Hudoc, the database of the Court. The most important information for gaining an insight into the cases brought before the Court under article 9 concerns the religious background of the claims brought before the Court under article 9. To my knowledge, this information has so far not been documented.[94]

Since the reform of the European Human Rights system of the Council of Europe in November 1998,[95] claims concerning freedom of religion (under article 9 ECHR) have multiplied. For the period of 48 years preceding November 1998, Hudoc gives 432 results for cases brought under article 9. From 1998 up to 1 July 2014 (16 years),[96] Hudoc gives 853 hits.[97] This is clearly a significant increase in freedom of religion cases compared to the number of cases before 1998.[98] After removing cases which were declared admissible,[99] struck off the list and the cases which are translated in other languages, 565 single article 9 cases remain for the period 1999-

[94] In 2012 Silvio Ferrari published an interesting quantitative study of the case law of the ECtHR. This study was based on a selection of 100 cases from the creation of the Court up to 2012. He classified the cases according to the religion of the countries against which cases were brought (basing himself on the majority religion according to studies of numbers of religious people in those countries). The research in my study is conducted differently. My analysis covers the cases from 1 November 1998 (starting date of the reformed Court system) until 1 July 2014 (the publication of ECHR, GC, *SAS v. France*); however, I include all cases from this period instead of making a selection. Moreover, I classified the cases according to the religion involved in the claim and not according to the religion of the country against which the claim was brought (e.g. claims against France can relate to both Christian claims and Muslim claims). See Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012)..

[95] See for more information on the reform of the Court in 1998:
http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=

[96] The first of July is the date ECHR (GC), *S.A.S. v. France* was published. This landmark case was chosen as the closure of my analysis for this dissertation.

[97] The selection of cases is conducted through the database of the Strasbourg Court, Hudoc (hudoc.echr.coe.int), where I selected only the article 9 cases. Only cases in English and French are selected. The numbers mentioned here are not single cases, since cases often (but not always) occur in both languages. In the next stage the double translated cases are kept out of the selection.

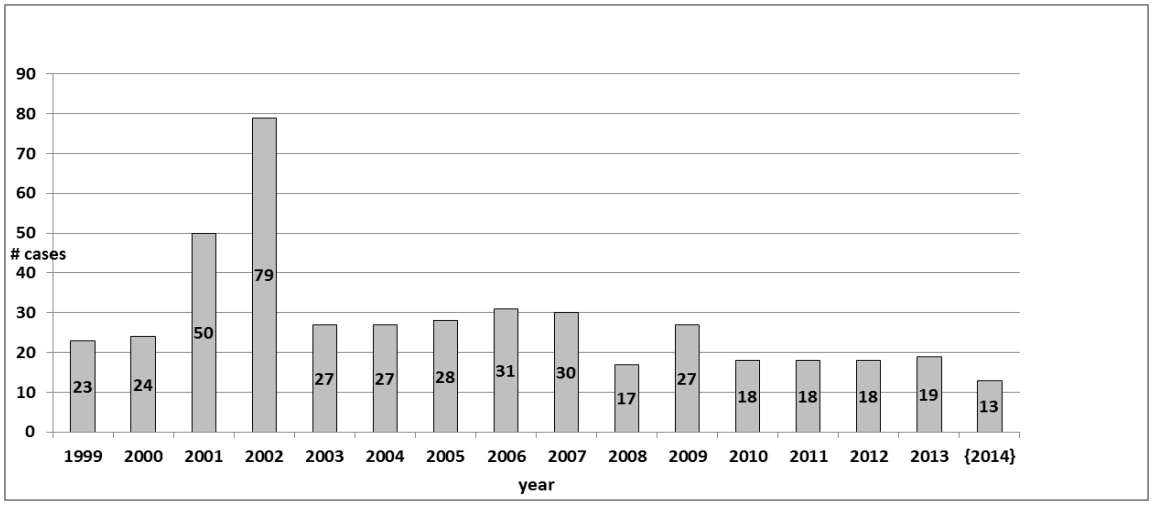
[98] Compared to the case law under other articles, the case law under article 9 is and remains relatively small. See also Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 19 and Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 2. Moreover, when compared to the total number of cases brought before the Strasbourg organs before and after November 1998, we see that proportionally, the growth in the number of cases is less quick. (+/- 15500 cases in total before 1998 v. +/- 70000 cases after 1998)

[99] Cases declared partly admissible-inadmissible are double-checked in order to ensure that cases where the article 9 claim is declared inadmissible are included.

2014.[100] And from these 565 cases, 299 cases contain religion-related claims.[101]

Figure 1 shows the evolution of article 9 claims concerning the religious aspect of the right from 1999 to July 2014. As the graphic shows, the claims are averagely spread at between 20 and 30 claims per year.[102]

Figure 1: Religion-related claims under article 9 over time



The exceptions to the average number of claims can be found in 2001 and 2002 with 50 and 79 claims respectively. However, this evolution can be explained by the numerous cases submitted by Turkish army officers concerning discharge from the army. These claims will be amply discussed in chapter III.

[100] No judgments were issued during the months of November and December 1998.

[101] The right to freedom of religion under article 9 ECHR protects the right to 'freedom of thought, conscience and religion'. This dissertation only covers the cases concerning religion, this is why I use the term 'religion-related'. No exact definition of religion exists (see i.e. Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), 191), therefore, to ensure that all relevant cases are covered, religion is interpreted broadly and cases concerning atheist claims are also included. Moreover, when naming the religion at stake I apply an applicant-oriented approach by citing the religion in the way the applicant does.

[102] Note that all the information in the figures of this section includes only claims brought under article 9 concerning religion and non-religious beliefs (306 cases in total). Cases not related to religion and claims concerning political, ethnic or artistic convictions are not taken into consideration in this study (see also methodological chapter). Also, the number of claims in 2014 is put between brackets because it does not represent all the claims made in 2014, but only the claims until 1 July 2014.

Figure 2: Religion-related claims under article 9 - an overview of geographical spread

COUNTRY	CLAIMS
Turkey	102
France	27
Greece	24
Russia	20
Bulgaria	14
Germany	13
Italy	8
Romania	9
UK	9
Austria	8
Ukraine	8
Poland	7
Moldova	5
Sweden	5
Armenia	4
Latvia	4
Spain	4
Switzerland	4
Croatia	3
FYROM[103]	3
Netherlands	3
Hungary	2
Luxembourg	2
Czech Republic	2
Azerbaijan	1
Cyprus	1
Denmark	1
Finland	1
Georgia	1
Iceland	1
Lithuania	1
Norway	1
San Marino	1

[103] Former Yugoslavian Republic of Macedonia.

The claims seem also to be geographically spread all over Europe, covering 33 countries (see **figure 2**). This also entails a diversity of systems related to the relationship between religion and State.[104] The most remarkable observation, though, concerns the large number of cases brought against Turkey (102), followed by France with many fewer cases (27). Taken together, France and Turkey supply almost half of the cases under article 9.

The number of cases against Turkey should again be set in context, since more than 60 concern claims from discharged military officers. But even then the number remains relatively high compared with the number of cases against other countries. This cannot come as a surprise taking into account the widespread debates in both countries concerning regulations in light of the principles of secularism and 'laicité'. This observation confirms one of the societal evolutions mentioned in the previous section about the tensions between religion and secularism.[105]

The Court's case law shows the wide variety of issues with which it has been confronted. It has had to deal with collective claims and individual claims and these claims cover a variety of fields, such as the recognition of religious organizations, the appointment of religious leaders and religion in the workplace,[106] public sphere,[107] schools,[108] prisons[109] etc.

However, until now, no information has been collected about the religious background to cases brought before the Court under article 9. This information is not available in Hudoc and was therefore gathered manually.[110] The result can be found in **figure 3**. Several Christian groups are merged together in order to have a better — less scattered — overview of claims concerning Christian issues. **Figure 4** shows of which faiths the category 'Christian' consists. The Jehovah's Witnesses and the Orthodox Christians are, however, kept as separate categories, because of the relatively large number of cases concerning these groups and because these cases concern very specific segments of the Court's case law.[111] As for the Muslim

[104] See also Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at.who in his quantitative study classified the countries according to their religious profile. See also Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism', 30 *Cardozo Law Rev*. (2009), who refers to the plurality of church-state systems.

[105] See supra 1.3.

[106] E.g. ECtHR, *Sessa Francesco v. Italy*, 3 April 2012 and ECtHR, *Eweida a.o. v. UK*, 15 January, 2013.

[107] E.g. ECtHR (GC), *S.A.S. v. France*, 1 July 2014 and ECtHR, *Ahmad Arslan and Others v. Turkey*, 23 February 2010.

[108] E.g. ECtHR, *Dogru v. France*, 4 December 2008, ECtHR, *Kervanci v. France*, 14 December 2008, ECtHR, *Jasvir Singh v. France* ,30 June 2009, ECtHR, *Ranjit Singh v. France*, 30 June 2009.

[109] E.g. ECtHR, *Jakobski v. Poland*, 7 December 2010 and ECtHR, *Kovalkovs v. Latvia*, 31 January 2012.

[110] In categorizing the claims according to religion, I take the self-identification of the applicants as the criterion.

[111] Orthodox claims most often concern collective claims and cases concerning Jehovah's Witnesses

category, I have kept separate categories for Alevis and Muslims, since one of the common claims made by Alevis is that although they are related to Islam, they want to be differentiated from 'traditional' Islam.[112]

Figure 3: Religion-related claims under article 9 - a view of their religious diversity

Religion	Cases
Islam	122
Christianity (see **fig. 4** for details)	**48**
Jehovah's Witnesses	30
Orthodox Church	24
Other (religion)[113]	12
Judaism	6
Atheism	5
Alevism	3
Sikhism	4
Scientology Church	3
Buddhism	2
Hare Krishna	2
Roma Church	2
Raëlism	1
Not mentioned[114]	35

most often concern conscientious objection.

[112] In ECtHR, *Sinan Isik v. Turkey*, 2 February 2010, for example, the applicant did not want 'Islam' to be mentioned on his ID card, but instead 'Alevi'.

[113] In this category are included religious groups or organizations which are less known and do not appear to be affiliated with any of the religions mentioned in this list. E.g. a case concerning Yezidis: ECtHR, *Katani and Others v. Germany*, 31 May 2001 or a religious association who 'claims affiliation to the Centro Eclético da Fluente Luz Universal Raimundo Irineu Serra' in the case of ECtHR, *Fränklin-Beentjes and Cefluluz Da Floresta v. The Netherlands*, 6 May 2014.

[114] This category refers to cases where the religion was not mentioned but where the claim was clearly religion-related. An example concerns the case of *Pichon et Sajous v. France*, 2 October 2001, concerning the refusal of pharmacists to sell contraceptives.

Figure 4: Diversity of faiths within the Christian family

CHRISTIAN	CASES
Catholic	17
Other (Christian)[115]	14
Christian	9
Evangelical	4
Adventist	2
Protestant	1
Baptist	1

The most obvious finding here is the large number of cases concerning Muslims (122), which is more than twice the number of cases concerning Christians (48). These are followed by Jehovah's Witnesses (30) and Orthodox Christians (24). When Jehovah's Witnesses and Orthodox Christians are included in the Christian family, the Christian claims cover 122 cases as well, which is an *ex-aequo* with the Muslim claims.

The large number of Muslim claims merits closer examination:

Figure 5: Claims related to Islam: an overview by country

Country	Muslim claims
Turkey	83
Greece	11
France	9
Bulgaria	5
Germany	3
Switzerland	3
Moldova	2
Russia	2
Azerbaijan	1
Denmark	1
FYROM	1
Luxembourg	1

The majority of Muslim claims, 83 of the 122, were brought against Turkey (**see figure 5**). More than 60 of these concern the aforementioned army cases against Turkey. Even if those claims are not taken into account, Muslim claims

[115] This category includes smaller less-known churches which are affiliated to Christianity. E.g. ECtHR, *Deschomets v. France*, 16 May 2006 (Brethren Movement) or ECtHR, *Nolan and K. v. Russia*, 30 November 2006 (Youth Federation for World Peace).

remain a large category. Also interesting is that Greece is the second country and France the third country against whom Muslims have filed religion-based complaints. The Greek cases concern mostly the appointment of religious leaders;[116] other cases concern the specific situation of Western Thrace.[117] The cases concerning Muslim-related claims against France, 9 in total, are of course also well-known; these concern mostly the bans on religious apparel in different contexts.[118] Interesting, though, is that the Muslim-related claims against France (9) make up a third of the 27 religion-related claims brought against France (see figure 3).

The cases concerning Christians (except Jehovah's Witnesses and Orthodox Christians) are far more widely spread across Europe (see figure 6). Turkey and France received only 3 complaints concerning Christian issues. This seems to suggest that rules motivated by the principle of secularism give less rise to claims issued by Christians than by Muslims.

Figure 6: Claims related to Christianity: an overview by country

Country	Christian claims
UK	8
Germany	5
Russia	5
Bulgaria	3
France	3
Spain	3
Turkey	3
Ukraine	3
Netherlands	2
Romania	2
Sweden	2
Italy	2
Poland	2
Austria	1
Croatia	1
Hungary	1
Luxembourg	1
Czech Republic	1

[116] Such as the ECtHR, *Agga v. Greece n° 4*, 13 July 2006.
[117] For example ECtHR, *Ouzoun v. Greece*, February 2003.
[118] For example cases concerning the prohibition on the wearing of religious signs in public schools such as the cases of ECtHR, *Dogru v. France*, 4 December 2008; ECtHR, *Jasvir Singh v. France*, , 30 June 2009 and a case concerning the ban on the wearing of face veils in public places: ECtHR, *S.A.S. v. France*, 1 July 2014.

This overview gives a clear insight into the diversity of cases concerning the religion-related claims with which the Court is confronted under article 9.[119] It also reflects some of the societal tensions and trends. First, the large number of Islam-related claims speaks for itself, despite the fact that the majority of claims concern Turkey. Another remarkable finding is that many claims were brought against France and Turkey (83 of the 105 cases) and many of those claims concerned Muslims (respectively 9 of the 27 cases and 83 of the 105 cases – see fig. 3 combined with fig. 5). This reflects the tensions between secularism and Islam in particular.

When the diversity of claims is examined through the lens of the outcomes of the cases, it is interesting to observe how the representation of the different religions (see fig. 3 and 4) is not mirrored in how the cases were decided.

Figure 7: An overview according to outcome and religion

Religion	Violation	Non-Violation	Manifestly ill-founded
Islam	8	6	81
Christianity	8	3	23
Orthodox Church	7	1	5
Judaism	0	2	4
Sikhism	0	0	4
Jehovah's Witness	12	1	3
Atheism	3	0	2
Alevism	1	0	1
Hare Krishna	0	0	1
Raëlism	0	0	1
Roma Church	0	0	1
Buddhism	2	0	0
Scientology	2	0	0
Other (religion)	4	1	3
Not mentioned	5	2	19
TOTAL[120]	54	16	148

A first remarkable observation is the high number of cases concerning Jehovah's Witnesses in which the Court found a violation. 12 violations means that

[119] See also Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism', 30 *Cardozo Law Rev*. (2009). .

[120] Only the violations, non-violations and cases declared manifestly ill-founded are represented in this grid. Cases declared inadmissible because of procedural reasons (e.g. non-exhaustion of domestic remedies and claims inadmissible ratione temporis) are left out. Also cases in which the Court decided not to examine the article 9 claim seperately is not represented in this grid.

the Court found a violation in almost half of the cases brought by Jehovah's Witnesses (see fig. 3, 30 cases in total). The second category with the highest number of violations found is shared by the Christians and Muslims. In cases concerning Christian issues, the Court found 8 violations, which is more than a fifth of all the claims brought by Christians (except Orthodox Christians and Jehovah's Witnesses). For the Muslim claims, 8 violations out of 122 cases means that in only one in 15 cases was a violation found. The third place is filled in by the Orthodox Christians in whose cases the Court found 8 violations. This means that in one out of the 3 cases Orthodox Christians brought before the Court a violation was found.

The high number of violations in cases concerning Jehovah's Witnesses and Orthodox Christians can partly be understood from the perspective of the kind of claims involved. Often the claims concerning these religions involve claims of recognition or registration of a church or organisation. Interestingly, 7 of the 8 violations in Muslim cases concern religious organisations or the appointment of religious leaders. The data in this study confirms observations made in the literature about the higher level of protection accorded to group claims.[121] At the same time, the small number of positive outcomes in cases concerning Muslim claims will most probably have to do with the Court's approach towards secularism, as will be discussed below. This is paradoxical since the number of claims shows how certain policies are clearly experienced as a problematic infringement in people's rights, which in itself contains an alarm signal, while it is exactly in those cases that the Court has adopted a hands-off approach.

As the foregoing figures show, the Court has increasingly dealt with a diversity of freedom of religion claims, brought by a diversity of religious applicants in a diversity of countries with diverse church-state contexts. However, an analysis of how the Court deals with this diversity cannot be made on the basis of numbers alone. In the next section an account will be given of how the Court deals with this diversity in its freedom of religion judgments, both at the level of principles and at the level of its actual reasoning.

1.5. The gap between human rights principles and judicial reality: religious freedom at the Strasbourg Court

In its case law concerning freedom of religion, the Court usually refers to a long list of general principles. Some argue that although these principles 'have the potential to give useful guidance on religious freedom cases'; they 'have not been sufficiently well developed to fulfill that role'.[122] In practice there is often a gap between the principles and the practice. Carolyn Evans, for example, argues that

[121] See infra 1.5.2.

[122] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *J. Law Relig.* (2010), at 340.

these principles 'often appear to be little more than not-particularly-pithy aphorisms-incantations aired in every judgment but often strangely disconnected from the specific reasoning in the case and/or from the result'.[123] In this section, a closer look will be taken at the principled position of the Court under the right to freedom of religion so as then to contrast these principles with the main criticism of the Court's article 9 case law.

1.5.1. Freedom of religion as a vehicle for inclusion

The Court has said this many times:

> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[124]

Read through this paragraph, the right to freedom of religion seems to value religious diversity positively and even advocates an inclusive approach towards diversity.

First, it recognizes the applicant's perspective through the conception of the right to freedom of religion as *one of the most vital elements* for believers' *identity* and their *conception of life*. At the same time it also refers to a diversity of non-religious voices within the diverse religious context, namely the 'atheists, agnostics, sceptics and the unconcerned'.[125] Hence, from the outset the Court not only acknowledges the important — vital— meaning of this right for individuals, but also recognizes the diverse landscape when it comes to religion or beliefs.

Secondly, the Court clarifies that freedom of religion is not only an asset for individuals, but also important to society.[126] More particularly, the Court emphasizes that pluralism, which it considers *indissociable* from a democratic society, depends on the protection offered by the right to freedom of religion. Also, '[p]luralism, tolerance and broadmindedness', says the Court in another paragraph, are

[123] Idem.
[124] ECtHR (GC*), S.A.S. v. France*, 1 July 2014.
[125] See also Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 286.
[126] See also Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 14 who argues that States are not considered to respect freedom of religion because they agree with people's beliefs, but they are obliged to protect the right to freedom of religion because 'it is an essential element of the democratic system'.

'hallmarks of a "democratic society"'.[127] Elsewhere, the Court calls pluralism 'the basic fabric of democracy'.[128] So while the right to freedom of religion serves pluralism, pluralism is considered in its turn to serve democracy.[129]

The concept of pluralism clearly plays an important role in the Court's conception of the principles guiding the right to freedom of religion.[130] Calo writes that in the Court's framing of religious pluralism it 'is not one democratic virtue among many. It is the cornerstone of a human rights regime and the norm by which other norms are to be assessed.'[131]

Being a goal of freedom of religion protection, the question arises what this notion of pluralism exactly means. The term pluralism is often interchanged with the term diversity;[132] nevertheless, both terms have different meanings. While diversity refers to a factual situation, pluralism refers to a way in which this diversity can be dealt with.[133] The Court makes this clear in *Gorzelik v. Poland*, a case concerning the refusal of recognition for an ethnic minority group organisation, where it says:

> pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.[134]

Hence, in the Court's view pluralism not only implies respect for or mere tolerance of diversity, but also requires a more active and inclusive approach, an 'engagement that creates a common society from all that diversity'[135] and where this diversity can truly be developed. Ringelheim interprets the Court's reference to pluralism as 'both an outcome and a condition of the exercise of certain individual rights',[136] stating that 'it is also a value. It conveys the idea that in a democracy the

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[127] ECtHR (GC), *S.A.S. v. France* , 1 July 2014

[128] ECtHR, *Holy Synod Of The Bulgarian Orthodox Church Metropolitan Inokentiy and Others v. Bulgaria,* 22 January 2009, at §148)

[129] See also Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *J. Law Relig*. (2010) and Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at, 4.

[130] Some call it even the core principle guiding the Court's religious freedom jurisprudence. See Zachary R Calo, Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Right'4, 26 *J. Law Relig*. (2010).

[131] Idem, at 261-263, with reference to Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism', 30 *Cardozo Law Rev*. (2009).

[132] Diana L. Eck, 'From Diversity to Pluralism, On Common Ground: World Religions in America', (2013) available at http://pluralism.org/encounter/challenges.

[133] Idem, where the author states that '[p]luralism is the engagement that creates a common society from all that diversity'.

[134] ECtHR, *Gorzelik v. Poland*, 17 February 2004, at §93, where the Court refers to the Council of Europe Framework Convention for the Protection of National Minorities)

[135] Diana L. Eck, 'From Diversity to Pluralism, On Common Ground: World Religions in America', (2013) available at http://pluralism.org/encounter/challenges.

Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 287.

diversity of opinions and worldviews individuals may hold as a result of the exercise of their freedoms should be respected and allowed to flourish.'[137]

Pluralism therefore clearly entails inclusion;[138] it requires states to 'realize the inclusion and participation of all' in the social, cultural economic and political context.[139] This vision of pluralism is essential for the structural inclusion of religious minorities[140] in society. It fosters a more egalitarian and reciprocal approach towards diversity, where inclusion takes place with respect for the personal identity of the members of society.[141] Hence, there is no doubt that the Court carries — in principle— an open and inclusive approach towards diversity and that it considers '[d]iversity of beliefs or convictions … a common good for the whole society'.[142]

Furthermore, the Court makes also clear that diversity sometimes involves limitations 'in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[143] Interestingly, the need for limitations is in this principle also formulated in inclusive terms since it aims at reconciling the interests of the *various* groups and respect for *everyone's* beliefs.

This part of the Court's principle is therefore particularly interesting from the perspective of religious minorities, because when issues arise in a context of conflicting religious needs or concerns, minorities will mostly be the first expected to make concessions and to 'conform to existing norms'.[144] Here, however, the Court's approach in this principle starts from a more egalitarian viewpoint, requiring that the interests of all are taken into account. Along the same lines the Court specifies that

> [a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of

[137] Idem, at 286. See also in a similar sense Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 Michigan J. Int. Law (2011), at 57.

[138] See also Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 20, who states that pluralism is 'by nature' inclusive.

[139] Julie Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, 2006), at 425. Quote translated by author.

[140] In fact it is relevant also for other minorities, such as cultural minorities, but because of the focus of this thesis on religion, only the viewpoint of religious minorities will be mentioned.

[141] Julie Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, 2006), at 405. This approach can be contrasted to assimilationist approaches, where inclusion of individuals also takes place, all the while expecting them to distance themselves from their own identity.

[142] Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 286-287.

[143] ECtHR (GC), *S.A.S. v. France*, 1 July 2014, at §126.

[144] Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 19, with reference to Sandra Fredman, 'Disability Equality: A Challenge to the existing Anti-Discrimination Paradigm?' in Lawson and Gooding (eds.), *Disability Rights in Europe: From Theory to Practice* (Hart, 2005), 203.

people from minorities and avoids any abuse of a dominant position.[145]

This quote shows that the Court recognizes the possible disparities between the majority — dominant — groups within a society and minority groups. In the field of freedom of religion, this is an important acknowledgment, since many accommodation claims involve rules that are shaped in a way that conforms to the needs of majorities, such as, for example, rules on holidays and work schedules.[146] Some also call this the 'tyranny of the democracy'[147] or the 'tyranny of the majority',[148] which refers to the inherent power imbalance that a democratic system based on majority rule entails for minority groups.[149] The structural or substantive inclusion of minorities in society will only be possible when awareness exists about this potentially exclusive nature of the system, which can lead to an *a priori* dominance of majority groups over minority groups.

The inclusive character of the general principles under article 9 not only refers to inclusion at a substantive level — requiring states to create a space where religious diversity is fully included where possible — but also contains an inclusive approach at the procedural level. In the general principles the Court emphasizes the State's duty of 'neutrality and impartiality', which is considered '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'.[150] Thus, the Court also requires States to treat people and their religion in a neutral way, without expressing value judgments on their convictions and practices, which is particularly important in cases concerning less well-known religions. The Court also stresses the importance of taking the voice of people into account as it states that '[p]luralism and democracy must also be based on dialogue and a spirit of compromise'.[151] With regard to the process of balancing, the Court says finally that '[i]t is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society"'.[152] Hence, the Court's emphasis on the *search for a balance* shows that the process of searching for a balance in itself is an important feature of democracy and not only what the result of this balancing

[145] ECtHR (GC), *S.A.S. v. France*, 1 July 2014.
[146] E.g. ECtHR, *Sessa Francesco v. Italy*, 3 April 2012.
[147] Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 779.
[148] Veit Bader, Katayoun Alidadi and Floris Vermeulen, 'Religious diversity and reasonable accommodation in the workplace in six European countries: an introduction', 13 *Int. J. Discrim. Law* (2013), at 72 with reference to Jelle Flo and Jogchum Vrielink, 'The Constitutionality of the Belgian Burqa Ban', 2013. Available at: www.openDemocracy.net (accessed 14 January 2013); Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 31 calls this the 'dictatorship of the majority'.
[149] See supra n 57.
[150] ECtHR (GC*), S.A.S. v. France*, 1 July 2014, at §127.
[151] Idem, at § 128.
[152] Idem.

exercise will be.

Hence, on a principled level the Court considers not only the substantive elements of inclusion, but also the procedural elements. It requires states to be neutral and impartial and to allow participation through dialogue, and it urges states to make an effort to search for a balance and for compromises.

These elements can be compared to the elements put forward by social psychologists in the framework of procedural fairness research, which will be fully discussed in this work.[153] Procedural fairness, the fairness of the decision making process, consists of involving the people concerned in the decision making process, in treating people in a neutral and respectful way and in genuinely make an effort to be fair in their case.[154] The Court's principles demonstrate its awareness of the importance of also striving for procedural fairness, through the procedural inclusion of people and their concerns, in the framework of fundamental rights.

In conclusion, at the level of principles the Court seems to foster an inclusive approach in its interpretation of the right to freedom of religion, requiring States to apply inclusivity in their dealing with religious diversity, both at the substantive level and at the level of the process. Freedom of religion can therefore — in principle— be considered to be a tool for achieving pluralism and a strong vehicle for inclusion. As will be discussed in the next section, however, at the level of its own reasoning, the Court regularly falls short of applying an inclusive approach.

1.5.2. Freedom of religion (un)protection: between principle and practice

A growing body of literature on the Court's article 9 adjudication has been published in recent years, in which the Court has often been criticized for not putting the principles mentioned in the previous section into practice[155] in its own reasoning.[156] Tom Lewis expresses his scepticism as follows: 'Europe has tied itself to principles it does not believe in'.[157] Calo in his turn speaks of a 'failure of pluralism'.[158] Malcolm Evans, criticizing the Court's reasoning, calls the principles

[153] See Chapter II and Chapters III, V and VI for the application of these elements.

[154] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007).

[155] In the first place by scholars, but also, for example, in the letter of withdrawal of Fazilet Partisi, where the applicant pointed out the inconsistency between the Court's proclaimed principles and its practice: 'elle se trouve en contradiction avec sa préoccupation de protéger le pluralisme', referring to the Court's position on legal pluralism. See ECtHR, *Fazilet Partisi and Kutan v. Turkey*, 27 April 2006.

[156] See also Javier Martínez-Torrón, 'Islam in Strasbourg: Can Politics Substitute for Law?', in Cole Durham et al. (eds), *Islam, Europe and Emerging Legal Issues,* (Ashgate, 2012), at 22, who argues that the Court often formally declares its attachment to the principles, 'but then it assesses the factual evidence with extreme concision and lack of detail'.

[157] Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation', 56 *Int. Comp. Law Q.* (2008), at 411, with reference to G Davies, 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v Denbigh High School', (2005) 1 *European Constitutional Law Review* (2005), at 511.

[158] Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *J. Law Relig*.

referred to by the Court a 'counter-intuitive mantra'.[159] In what follows, some of the main areas of criticism of the Court's approach to article 9 will be explored.

Several authors note that it took the Court a long time before it started to examine claims under article 9.[160] For many years freedom of religion cases were very rare and findings of violations of the right to freedom of religion even non-existent.[161] It was only in 1993 that the Court found its first violation under article 9, in the famous case of *Kokkinakis v. Greece*[162] concerning the right to proselytize. Until then, all claims had been declared inadmissible or no violation had been found.[163] Danchin attributes this 'lacuna'[164] of 48 years to a 'history of avoidance',[165] referring to the Court's inclination to handle religious claims under other articles, especially when they concern minorities.[166]

Although after 1993 more violations were found in article 9 cases and also more claims were handled by the Court under that article, the large number of inadmissibility decisions in contrast to judgments remains remarkable. For some claims, no interference was found while a large number of claims were declared manifestly ill-founded.[167]

(2010), at 263. See also Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 20 who, referring to the Court's reasoning, speaks of 'mutilated pluralism'.

[159] Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press,2011), at 312. See also Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press,2011), at 291, who argues that the way the right to freedom of religion is developing today is 'as likely to hinder as it is to assist' the realisation of the principles put forward by the Court.

[160] Cf. Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 207.

[161] See supra 1.4.

[162] ECtHR, *Kokkinakis v. Greece*, 25 May 1993.

[163] Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 23.

[164] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 199.

[165] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 206.

[166] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 199 and 206, see also Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative', in Jeroen Temperman (ed.): *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* (Martinus Nijhoff Publishers, 2012), at 23, who also refers to a 'reluctance' of the court to examine claims under article 9.

[167] Eva Brems, 'Human rights as a framework for negotiating protecting cultural differences An

The literature shows that the Court's freedom of religion jurisprudence is still considered to be 'un-protective'[168] and 'under-protective', [169] since despite the robust protection the Court offers in certain fields of the case law,[170] such as to group claims, other dimensions remain largely neglected or overlooked.[171]

The majority of the critical observations on the article 9 jurisprudence deals with the Court's reasoning in cases concerning the individual manifestation of

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exploration in the case-law of the European Court of Human Rights', in Foblets et al. (eds.), *Cultural diversity and the law : state responses from around the world,* (Francqui Scientific Library, 2010), at 675.

[168] Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012).

[169] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 202. On a general note, not limited to the ECHR, Heiner Bielefeldt, also argues that some interpretations in recent years of freedom of religion 'show a tendency towards marginalizing the very status of freedom of religion': Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', 35 *Hum. Rights Q.* (2013), at 34.

[170] Calo refers, for example, to the good reasoning in cases concerning the collective aspect of freedom of religion and to the significant protection offered to Jehovah's Witnesses: Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *J. Law Relig*. (2010), at 103-104. See also Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 294, who states that the Court is clearly more comfortable in scrutinizing cases concerning 'preserving the boundary between religion and public authority', such as state control of religious communities, but when individual expressions of religion in the public sphere are at stake, the Court shows more 'uneasiness'. See also Eva Brems, 'Human rights as a framework for negotiating protecting cultural differences An exploration in the case-law of the European Court of Human Rights', in Foblets et al. (eds.), *Cultural diversity and the law : state responses from around the world,* (Francqui Scientific Library, 2010), at 680, noting that article 9 has been effectively used to protect the autonomy of religious groups against state interference, which is considered 'an important garantee for the preservation of minority identity'. See also Kristin Henrard, 'A patchwork of "succesful" and "missed" synergies in the jurisprudence of the ECHR', in Kristin Henrard and Dunbar (eds.), *Synergies in Minority Protection. European and International Law Perspective,* (Cambridge University Press, 2009), at 347, who points at the strong protection accorded in cases concerning the appointment of religious leaders.

[171] Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *J. Law Relig*. (2010), at 103. See also Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 2-3 and Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *J. Law Relig.* (2010),at 322. See also Peter Cumper and Tom Lewis, 'Introduction: freedom of religion and belief-the contemporary context', in in Peter Cumper and Tom Lewis (eds.), *Religion, Rights And Secular Society,* (Edward Elgar Publishing, 2012), at 3, arguing that the very nature or article 9 itself disadvantages some religions because of the dichotomy between the public and private spheres.

Several authors also evaluate the protection of article 9 against the protection offered under other articles and conclude that the protection offered, for example, under article 10 is stronger than the protection under article 9. E.g. Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation', 56 *Int. Comp. Law Q.* (2008), at 409 and Peter Cumper and Tom Lewis, '"Taking Religion Seriously?" Human Rights and Hijab in Europe - Some Problems of Adjudication', 24 *J.L. Relig.* (2008), at 599-627, arguing that differences of protection lead to a hierarchy of rights.

religion, especially when minority practices are involved.[172] In particular, it is argued that the Court's case law disfavours minorities, often excluding them from the Court's protection under article 9.

A first observation made by different authors in this regard is that the Court's interpretation of article 9 privileges Christian religious experiences,[173] in that it offers better protection to the inner and private dimensions of religion.[174] For example, the traditional dichotomy between the *forum internum* and the *forum externum* primarily considers religion as 'an inward feeling',[175] which suggests, according to Julie Ringelheim, that the outward manifestation of religion is seen 'as of secondary importance'.[176] Along the same lines, a distinctive protection is accorded to religion in the private sphere *versus* the public sphere, where the public manifestations of religion are less obviously protected.[177] The primacy accorded to the internal and private dimension also neglects the fact that some people consider religion to be 'a way of life',[178] something that cannot simply be left at the doorstep of one's private

[172] E.g. Eva Brems, 'Human rights as a framework for negotiating protecting cultural differences An exploration in the case-law of the European Court of Human Rights', in Foblets et al. (eds.), *Cultural diversity and the law : state responses from around the world,* (Francqui Scientific Library, 2010), at 675, who observes that 'the case-law shows a manifest reluctance of the Court to accommodate minority religious practice'. See also Kristin Henrard, *The Ambiguous Relationship Between Religious Minorities and Fundamental (Minority) Rights,* (Eleven International Publishing, 2011); Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 6-7; Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 207-208 and Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *J. Law Relig.* (2010), at 342.

[173] See e.g. Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 Michigan J. Int. Law (2011) at 59; Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms. Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30 *Netherlands Q. Hum. Rights* (2012), at 414 and Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 75. See also Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press,2011), at 313-314 who rather talks in more general terms about 'mainstream religions'.

[174] Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 293.

[175] Idem.

[176] Idem. See also Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 74-75: Carolyn Evans argues that this distinction between internal and external conceptions of religion, and more particularly the primacy accorded to internal belief, is Christianity-based.

[177] Julie Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, 2006), 169-170. See also Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg', *Oxford J. Law Relig*. 1–23 (2013).

[178] Idem. See also Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception', in Mark Janis and Carolyn Evans (eds.), *Religion in International Law* (Martinus Nijhoff, 2004), at 393-395 and Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), at 213.

home but which can also be part of daily life activities, including in the workplace and in schools.[179]

This conception of religion and religious practice as primarily an inner and private matter also *a priori* disfavours religious minorities whose manifestation of religion has an important external and public dimension, such as Sikhs and Muslims.

Moreover, these minorities are more likely to be confronted with dilemmas between their religious dictates on the on hand and the expectations of public life on the other, since, as noted earlier, Western European society is inherently organized according to historical Christian traditions.[180] For example, in the workplace context, this means that non-Christian employees will more likely be confronted with conflicting interests when it comes to work schedules and holidays, while Christian employees will not often be faced with similar dilemmas.

Several authors therefore argue that the role religion plays in a person's life must be better taken into account.[181] Yet the Court has often been criticized for not sufficiently taking the individual's interests into account and for doing exactly the opposite by granting States a wide margin of appreciation when it comes to sensitive issues relating to minority religious claims.[182] Malcolm Evans, for example, states that

> [w]hilst the traditional focus of human rights thinking has been to ensure that the interests of the individual are not engulfed by those of the state, there appears to be a danger that it is the interests 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.[183]

Malcolm Evans is not alone with his concern. Different aspects of the Court's reasoning are criticized for not taking the perspective of the applicant sufficiently

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[179] Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 3.

[180] Cf. Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 296.

[181] Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 75. See also Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), at 205, who argues that '[t]he adjudicator should seek to understand the religious facets of such cases not from the perspective of a person who might attend religious services a few times a year, but from the perspective of those who have chosen to devote their lives fully to their religion as they understand it'; and Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', 35 *Hum. Rights Q.* (2013), at 37 who stresses that 'a human rights approach to freedom of religion or belief must start with respecting the self-understanding of human beings in this field'.

[182] See also Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *J. Law Relig.* (2010), at 342.

[183] Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2011), at 315.

into account. A first aspect concerns the Court's approach towards secularism and neutrality.

Several measures limiting individuals' right to manifest their religion are motivated by principles such as secularism and neutrality. The best known examples of this are rules banning the wearing of religious apparel, such as the Islamic headscarf. As discussed above, a large number of cases under article 9 were brought against France and Turkey, two countries where these principles play an important role.[184] Authors especially criticize the Court's uncritical approach towards the notions of secularism and neutrality underpinning bans on religious symbols introduced by several European countries,[185] arguing that the reasoning in these cases insufficiently takes into account the applicants' concerns and leads to a lack of protection for religious minorities.[186] The Court indeed regularly stated that secularism 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'[187] and thus *a priori* endorses the view that secularism is compatible with human rights law, while applicants' complaints concern precisely how the state's application of those principles affects their individual rights. Malcolm Evans argues in this regard that with this approach the Court oversteps its duty of impartiality and states that the Court embraces a form of 'secular fundamentalism'.[188] Peter Danchin in turn argues that the Court's acceptance of the perspective that secularism requires banning religious differences 'defines neutrality in terms of the "essential" collective identity of the majority while denying public recognition of the "essential" collective identity of a religious minority'.[189]

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[184] See supra 1.4.

[185] Most restrictions on the wearing of religious symbols/attire must be seen in light of the 'privatisation' of religion with the aim of secularism. (Calo calls this the 'forced privatisation of religion': Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *J. Law Relig*. (2010) at 107) See also Lourdes, Peroni, 'Minorities before the European Court of Human Rights. Democratic Pluralism Unfolded', in Boulden, Jane and Kymlicka, Will (eds.), *International Approaches to Governing Ethnic Diversity,* 25-50 (Oxford Scholarship Online, 2015) Other restrictions are imposed for security reasons. Examples in the Court's case law of the latter cases are: ECtHR, *Phull v. France*, 11 January 2005 and ECtHR, *El Morsli v. France*, 4 March 2008. Relying on these principles, States advocate a 'privatization' of religion, requiring the removal of visible religious signs from the public sphere.

[186] E.g. Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 7.

[187] ECtHR, *Leyla Sahin v. Turkey*, 10 November 2005, at 114.

[188] Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press,2011), at 312.

[189] Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 Michigan J. Int. Law (2011), at 29 and Malcolm Evans, 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press,2011), at 312, who writes that the Court, with this approach, is overstepping its duty of impartiality and argues that the Court is embracing a form of 'secular fundamentalism'. See also Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *J. Law Relig*. (2010), at 268 who argues that

A second concern deals with the Court's non-recognition of the discriminatory impact of certain general rules that seem neutral at face value, but that in practice disproportionately affect minorities.[190] Various scholars point to the Court's reluctance to find an interference with article 9 in this kind of case. They criticize the Court for mainly putting the burden on applicants to find ways in which conflicts between their religious needs and general rules can be overcome,[191] while passing over the fact that this burden in itself might already consist of interference with an individual's rights.[192] The non-recognition of the potentially restrictive nature of some neutrality rules affects in the first place religious minorities. Peter Danchin convincingly argues that '[t]he fact that the Court has fashioned an approach whereby "neutral" laws will automatically prevail, whereby the state is under no obligation to justify that its refusal to grant exemptions from the application of such laws is a measure that is "necessary in a democratic society", constitutes a significant risk for the rights of minorities'.[193] A typical example of cases where this occurs can be found in the field of religion in the workplace, where the Court has often found no interference with the applicant's right to manifest his religion and where it has ruled that applicants are not limited in their right since they can find an alternative for fulfilling their professional duties in a way that they can still manifest their religion,[194] or since they are always free to resign.[195] This line of reasoning has been highly criticized, but recent developments in the case law, with the judgment in *Eweida and others v. the UK*, shows a shift in the Court's reasoning.[196]

Another important line of criticism concerns the Court's approach to cases involving Islam. The Court has been criticized for being too lenient in cases

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the Court locks pluralism 'within the bounds of a secular narrative'.

[190] See e.g. Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 7 and Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe. Debates and Dilemmas*, (Cambridge University Press, 2012), at 296.

[191] Kristin Henrard, *The Ambiguous Relationship Between Religious Minorities and Fundamental (Minority) Rights,* (Eleven International Publishing, 2011), at 57-58; Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 212.

[192] Kristin Henrard, *The Ambiguous Relationship Between Religious Minorities and Fundamental (Minority) Rights,* (Eleven International Publishing, 2011), at 58, where the author questions whether 'making a particular religious observance more difficult and complicated would not even count as an interference?'. Compare with Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 208.

[193] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 212.

[194] E.g. ECtHR, *Sessa Francesco v. Italy*, 3 April 2012.

[195] See discussion of these types of case in chapter IV and the addendum attached to the chapter with a discussion of *Eweida a.o. v. UK*, which shows a shift in this traditional way of reasoning.

[196] See addendum to Chapter IV of this dissertation.

concerning individual Muslim claims, in accepting States' arguments without requiring any evidence[197] and in according too broad a margin of appreciation.[198] In particular, the cases against Turkey, in which the Court showed 'implicit support for the Turkish view on secularism',[199] and the cases against France, in which the Court endorsed 'French policies aimed at restricting the use of religious garments in public schools, fueled by the interest in diminishing the visibility of Islam',[200] received a large amount of attention in the literature. Several authors argue that some cases reveal a prejudiced Court position towards Muslim applicants,[201] or 'at least insufficient familiarity with Islam',[202] and they criticize inaccurate statements made by the Court about Islam or Muslim practices.[203] Indeed the (in)famous statements made in cases such as *Refah Partisi v. Turkey*,[204] *Dahlab v. Switzerland*[205] and *Leyla Sahin v. Turkey*[206] remain a continuing subject of criticism.[207] Others also refer to the

[197] Javier Martínez-Torrón, 'Islam in Strasbourg : Can Politics Substitute for Law?', in Cole Durham et al. (eds), *Islam, Europe and Emerging Legal Issues,* (Ashgate, 2012) at 41-44 with regard to army cases and 49-59 with regard to headscarf cases.

[198] Idem, at 51. See also Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 Michigan J. Int. Law (2011), at 32.

[199] Javier Martínez-Torrón, 'Islam in Strasbourg: Can Politics Substitute for Law?', in Cole Durham et al. (eds), *Islam, Europe and Emerging Legal Issues,* (Ashgate, 2012), 52.

[200] Idem, at 56 and 59.

[201] Ekaterina Yahyaoui Krivenko, 'The Islamic Veil and its Discontents: How Do They Undermine Gender Equality', 7 Relig. Hum. Rights (2012), at 19-22; Isabelle Rorive, Religious Symbols in the Public Space: In Search of a European Answer, 30 Cardozo Law Rev. (2009), at 2697 and . See also Eva Brems, 'Human rights as a framework for negotiating protecting cultural differences An exploration in the case-law of the European Court of Human Rights', in Foblets et al. (eds.), *Cultural diversity and the law : state responses from around the world,* (Francqui Scientific Library, 2010), at 678 who states that the Court's reasoning in *Dahlab v. Switzerland* 'barely rises above the level of prejudice and certainly does not do justice to the real experiences and beliefs of those wearing headscarves in Europe'.

[202] Eva Brems, 'Human rights as a framework for negotiating protecting cultural differences An exploration in the case-law of the European Court of Human Rights', in Foblets et al. (eds.), *Cultural diversity and the law : state responses from around the world,* (Francqui Scientific Library, 2010), at 713.

[203] Javier Martínez-Torrón makes clear that not all the cases where Islam is involved show a differential treatment compared to other religions. Collective claims, for example, including by Muslim groups, are fairly well protected. However, certain segments of the case law, in particular cases concerning the army in Turkey and cases concerning 'the use of personal religious symbols in public places', are found to be problematic: Javier Martínez-Torrón, 'Islam in Strasbourg : Can Politics Substitute for Law?', in Cole Durham et al. (eds), *Islam, Europe and Emerging Legal Issues,* (Ashgate, 2012), 20 and 49.

[204] Kevin Boyle, 'Human Rights , Religion and Democracy : The Refah Party Case', 1 *Essex Hum. Rights Rev*. 1–16 (2004), at par 123: '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.'

[205] ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

[206] ECtHR, *Leyla Sahin v. Turkey*, 10 November 2005.

[207] With the recent case of *S.A.S. v. France* however, the Court is clearly changing its discourse on Muslim women as argued in the addendum to Chapter VI and here: Saïla Ouald Chaib and Lourdes Peroni, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil', *Strasbourg Observers,* 3 July 2014, available at http://strasbourgobservers.com/2014/07/03/s-a-s-v-

impact on the broader societal context of the 'fear of Islam' or 'fundamentalism,' arguing that '[i]n many of the judgments, particularly those dealing with Muslim applicants, there is an underlying sense that religion is more of a threat than an asset – a problem to be contained rather than something of inherent value.'[208]

In sum, this overview reveals some problematic aspects of the Court's article 9 reasoning, which in particular affect religious minorities. The majority of this criticism refers to the inadequate protection of individual manifestations of religion and to exclusionary patterns in the Court's case law. Hence, scholars in law and religion seem to agree that the Court should accord 'a higher protection for individual conscience rights'[209] and that 'if the Court wants to be more effective in its objective of promoting and protecting religious pluralism, it must take stronger steps to protect the right to practice'.[210]

1.5.3. Towards inclusive freedom of religion jurisprudence: a complementary procedural perspective

In view of the criticism summarised above, which refers to the lack of protection accorded under article 9 and the exclusionary consequences of the Court's reasoning, especially towards minorities, suggestions for improving the case law often focus on substantive aspects of the reasoning. The most obvious example is the many contributions in favour of introducing the concept of reasonable accommodation in the Court's article 9 adjudication.[211] These suggestions aim at redressing the exclusionary effects of the Court's reasoning at a substantive level due to, for example, applying too wide a margin of appreciation or by privileging certain dimensions of religion above others;[212] and instead advocate for a more protective approach towards individual religious claims under article 9, in particular when minority claims are involved.

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france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/ (last accessed on 28 April 2015)

[208] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *J. Law Relig.* (2010), at 341. See also Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism', 30 *Cardozo Law Rev*. (2009).

[209] Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig.* (2012), at 25.

[210] Peter Danchin, 'The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities', in Elizabeth A. Cole and Peter G. Danchin (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, 2002), at 207.

[211] See for example Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality', 5 *Erasmus Law Rev.* (2012), 59–77 and Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?', 17 *Maastrich. J. Eur. Comp. Law* (2010), 137–161.

[212] See supra 1.5.2

Some scholars also highlight flaws at the procedural level of the Court's reasoning, such as biased reasoning or neglect of applicants' arguments. The entry point of this procedural critique is, however, often the substantive aspect of freedom of religion protection. Carolyn Evans, for example, strongly notes the absence of the applicant's perspective in the headscarf cases, observing that:

> In the three headscarf cases, … there is no discussion of the religious beliefs of the applicants, no consideration of the considerable hardships that this ruling might cause them, and no serious justification for why the religious practice was considered inimical to other Convention values such as gender equality or State ideologies such as secularism. Individual religious freedom therefore tends to be compromised fairly easily when brought into conflict with other values that the Court implies (without explanation) are more important to the human rights agenda.[213]

Hence, although Evans convincingly refers to serious flaws at the procedural level — e.g. the absence of the applicant's perspective in the Court's reasoning — this critique is ultimately coupled with the limitations she observes regarding the individual's religious freedom. Without any doubt, procedural flaws in the reasoning, such as bias, inaccuracy or a neglect of the applicant's perspective, risks affecting the substantive aspect of a case and curtailing the potential for coming to substantively fair and inclusive reasoning and outcomes in cases.

However, complementing this approach, the study in this dissertation aims at going beyond the substantive entry point. It will offer a comprehensive analysis of the procedural aspect of the Court's adjudication under article 9 and examine how this aspect of reasoning can in itself contribute to more inclusivity in a religiously diverse context. In other words, instead of examining how the case-law under article 9 can be improved in order to advance the actual inclusion of a diversity of religious views and needs in society – something which should remain a primary concern of the Court — this study will look at how inclusion can be enhanced at the procedural level.

An illustration of the different possible levels of exclusion/inclusion can, for example, be found in the case of *Sessa v. Italy.*[214] This is a case concerning a Jewish practising lawyer who complained about the fact that the domestic court refused to adjourn a hearing of a case in which he had to represent his client, while the proposed new dates of the hearings fell on Jewish religious holidays. The Court in this case first questioned whether an interference with his right to freedom of religion took place, since the applicant in the end decided to celebrate the holiday instead of representing his client during the hearing. At the same time, the Court stated that even if it could be supposed that interference had taken place, no

[213] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *J. Law Relig.* (2010), at 341.
[214] ECtHR, *Sessa Francesco v. Italy*, 3 April 2012.

violation could be found since the applicant could always look for replacement by a colleague at the hearing. This reasoning was in the first place exclusionary towards the applicant at the substantive level, in that it forced him to make a choice between his religion and his professional duties and as such, his right to freedom of religion was applied in a restrictive way. Hence, in practice the applicant was not accommodated and as a matter of fact the applicant as a Jew practising law in a society organized according to the precepts of the majority Christian tradition was in practice not truly included.

But at the same time, another exclusionary aspect of this reasoning can be found at a procedural level, in the way the Court approached the applicant and his religious claim. The reasoning showed a lack of understanding of the applicant's situation and it did not demonstrate that his arguments and concerns had been truly taken into account. Ultimately, what this reasoning said to the applicant was 'this is how society is organized; you must find a solution yourself in order to be able to fit in'. No matter whether or not in this case an actual inclusive and accommodating solution was possible,[215] insensitive reasoning like this is in itself already not communicating an inclusive message.

In fact, actual substantive or structural inclusion will not always be possible in a diverse society,[216] contrary to procedural inclusion, which can always be applied no matter what the outcome of cases will be. It is not always possible to accommodate everyone's religious needs, but it is possible to have an understanding and genuinely caring approach towards everyone's concerns.

This study starts from the assumption that treating people in a respectful and unbiased way, regardless of their background and the religion they profess, is inherently inclusive, while the opposite, the use of biased and disrespectful statements in itself can communicate exclusion and should therefore be avoided. In fact, as will be explained in the next section, this is confirmed by a significant body of social psychology research on 'procedural fairness', which shows that in their contact with legal authorities, people not only care about the outcome they receive in their case, but also accord significant importance to the way this outcome is reached.[217] **Therefore, the thesis I will argue in this dissertation is that a deeply inclusive approach towards diversity requires a focus not only on the substantive level, as many authors have already convincingly argued, but also on the procedural aspects in the case law itself.**

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[215] In fact, in my opinion this is a case where accommodation was indeed possible. See for a comment on this case Saila Ouald Chaib and Lourdes Peroni,
'Sessa v. Italy: A Dilemma Majority Religion Members Will Probably Not Face' available at http://strasbourgobservers.com/2012/04/05/francesco-sessa-v-italy-a-dilemma-majority-religion-members-will-probably-not-face/ (Last accessed on 30 April 2015)

[216] See also Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms. Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30 *Netherlands Q. Hum. Rights* (2012), at 398-399.

[217] See infra chapter II for a detailed account on procedural justice research.

1.6. Research questions

This dissertation aims to complement the vast body of literature on law and religion by offering a comprehensive analytical and normative point of view on the procedural aspect of the case law under article 9 ECHR.

At the analytical level, the study will investigate the following questions: How does the Court deal with religious claims in its case law under article 9 of the European Convention on Human Rights? More particularly, it will examine how the Court approaches the religious applicants, their religious convictions and their right to freedom of religion.

At the normative level, this study will examine the following questions: How can the Court improve its reasoning under the right to freedom of religion protected by article 9 of the ECHR so as to contribute to inclusion in a religiously diverse context? What techniques can be used for this improvement? What role can procedural justice criteria play in this process?

1.7. Methodology

The methodology employed in this dissertation is in the first place both legal-analytical and normative. The dissertation primarily draws on the legal literature and in-depth analysis of the case law of the European Court of Human Rights. Yet, this research is not conducted on a legal island, since, as Cotterrell says, research on law and religion cannot easily be seen as a '"purely" legal' matter.[218] Therefore, in this work I also draw on other disciplines, both at the theoretical and at the methodological levels. In this section I will explain why some methodological decisions were taken, turning then to a detailed account of the methods employed in each chapter. But first I will share some reflections on the research journey.

1.7.1. A preliminary reflection on the research journey and methodological decisions: a dissertation as a living instrument

1.7.1.1. The living field of law and religion

The European Convention is a living instrument, says the Strasbourg Court. Time changes, social reality changes and the interpretation and application of the

[218] Roger Cotterrell, 'Socio-Legal Studies, Law Schools, and Legal and Social Theory', Queen Mary School of Law Legal Studies Research Paper No. 126/2012, (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154404 (last accessed on 30 May 2015). The author writes: 'It seems obvious to most academic and practising lawyers working on questions of law and religion and legal problems of minority groups that these issues are never "purely" legal in some positivist sense, but thoroughly socio-legal, so that legal matters can be addressed only by seeing them as deeply immersed in cultural understandings and concerns'.

Convention — as a living instrument — should adapt to this change.[219] This is especially true in the dynamic domain of religious diversity. Similarly, this dynamic context also influenced the way my research took its final shape.

In recent years, important developments have taken place in the field of (law and) religious diversity, both in the case law of the Court through some important judgments (such as *Eweida a.o. v. the UK*[220] and *S.A.S. v. France*[221]) and outside the case law where important societal debates about religion were (and are still) taking place in Western Europe.

Doing research on the right to freedom of religion in a context where religion in society is subject to debate almost on a daily basis was both a challenging and an enriching task. It was challenging because despite the clarity and consistency of the research aims and questions, it required flexibility in research plan(ning). Moreover, it forces the researcher to present the research findings in a concise way.

But it was above all enriching in that it obliged me as a researcher to constantly reflect on the strength and relevance of my arguments in light of societal developments. It was also enriching in the sense that it allowed me to try to participate as a researcher in ongoing debates on topics concerning law and religion.

One of the most important developments in the field of religious diversity in the past five years in Europe that influenced my research has been the debate on the face-veil bans introduced by France and Belgium. The exclusionary nature of the debate, both at the societal and legislative levels — which disregarded the women concerned and their fundamental human rights — and the absence of empirical knowledge on the subject matter, led to the start of inter-university empirical research conducted by Eva Brems (UGent), Jogchum Vrielink (KULeuven) and myself.[222] The aim of this research was to gain and to share first-hand knowledge on women wearing a face veil in order to encourage an accurate and fair decision-making process in accordance with fundamental human rights.

Additionally, during the course of my research I was privileged to follow the entire decision making process on face-veil bans, from the debates at the legislative level[223] to the domestic judicial level[224] and ultimately at the level of the Strasbourg

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[219] See for a discussion on this notion George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy', (2012), available at http://ssrn.com/paper=2021836. (Last accessed 28 April 2015)

[220] ECtHR, *Eweida a.o. v. UK*, 15 January, 2013.

[221] ECtHR, (GC), *S.A.S. France*, 1 July 2014.

[222] The results of the empirical research are published in Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaib, Victoria Vandersteen and Jogchum Vrielink, 'The Belgian 'burqa ban' confronted with insider realities' in Eva Brems (ed.), *The experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014), 77-114.

[223] Eva Brems, Jogchum Vrielink and Saïla Ouald Chaib, 'Uncovering French and Belgian Face Covering Bans', 2 *Journal of Law Religion State* (2013), 69-99; Jogchum Vrielink, Saïla Ouald Chaib and Eva Brems , 'The Belgian 'burqa ban' Legal aspects of local and general prohibitions on covering and concealing one's face in Belgium' in Alessandro Ferrari and Sabrina Pastorelli (eds.) *The Burqa Affair Across Europe: Between Private and Public*,,(Ashgate, 2013); Jogchum Vrielink, Eva Brems and Saïla Ouald Chaib, 'Il divieto del «burqa» nel sistema giuridico belga', *Quaderni Di Diritto e Politica*

Court, where together with my colleagues at the Human Rights Centre of Ghent University I had the opportunity to play an active role in the proceedings of the case of *S.A.S. v. France*[225] by submitting a third party intervention.[226]

The research conducted on the face-veil bans exercised an important influence on my work, both at the substantive level, since it led to chapter VI of this thesis, and at the methodological level, since the empirical research conducted in the framework of the research on face-veil bans significantly influenced my analytical approach towards the Court's article 9 case law in chapter III, as will be further explained below.[227]

1.7.1.2. The benefits and challenges of a dissertation based on articles

The fact that the Law Faculty of Ghent University allows dissertations based on articles— a practice that is increasingly being applied — made room for creativity, enabling the research plan to be adapted to important developments. Moreover, an important benefit of writing a dissertation through articles is that it enables the researcher to disseminate the research findings at an earlier stage, a stage when these findings might be the most relevant. Moreover, the format of a dissertation through articles forces the researcher to write at an early stage of the research process, which very soon leads to insights into gaps in the research field and the need to explore certain domains further. This is how my research evolved from a general analysis of the case law (in the particular context of claims concerning the accommodation of religion in the workplace)[228] to a specific focus on the procedural level of article 9 case law in the remainder of my research.

The downside, however, is that working on a dissertation based on articles in a field where case law constantly change, implies that some already published works

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Ecclesiastica (2012), 161-191, Jogchum Vrielink, Saïla Ouald Chaib and Eva Brems, 'Het 'Boerkaverbod' in België', *NJCM-bull* (2011), 623 – 638, Jogchum Vrielink, Saïla Ouald Chaib en Eva Brems, Boerkaverbod : juridische aspecten van lokale en algemene verboden op gezichtsverhulling in België, *NJW* (2011), 398-414 and Saïla Ouald Chaib, 'Het verbod op gezichtsverhullende kledij ontsluierd', 8 *Tijdschrift voor Mensenrechten* (2010), 11-14.

[224] See e.g. Saila Ouald Chaib, 'Belgian Constitutional Court says Ban on Face Coverings does not violate Human Rights', *Strasbourg Observers,* http://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/ (Last accessed on 30 April 2015)

[225] ECtHR, GC, *S.A.S. v. France*, 1 July 2014.

[226] The text of the third party intervention can be found here: https://www.ugent.be/re/epir/en/researchgroups/public-law/department/humanrights/publications/sas.pdf

[227] See infra 1.7.4.

[228] See Chapter IV, which is based on the publication Saïla Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights,' in: Katayoun Alidadi, Marie Claire Foblets and Jogchum Vrielink (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, (Ashgate, 2012), 33.

need to be updated by the time the dissertation is submitted. This was especially the case with the publications in chapters IV and VI. Chapter IV, for example, concerns the Court's case law dealing with religion in the workplace. At the time of writing, the important case of *Eweida a.o. v. the UK,*[229] partly concerning the wearing of religious symbols in the workplace, was still pending before the Court. Publishing my critical analysis of the case law concerning that subject was therefore at that time most relevant. The same counts for the case of *S.A.S. v. France,*[230] the subject of chapter VI. However, next to the fact that, as such, the publications appear at the most relevant time, this way of conducting research is also interesting from an academic perspective. Instead of critically analysing cases after they are issued, this methodology of working on articles offered the possibility to reflect on the judgment afterwards in light of the arguments made in the already published work and vice versa, reflect from hindsight on the arguments made in earlier work from the perspective of the new judgments. Indeed, it is interesting to examine how the cases of *Eweida a.o. v. the UK* and *S.AS. v. France* both contain certain lines of reasoning which are similar to certain arguments that were made in the articles. However, after the publication of the judgments both articles remain relevant, partly because not all their arguments were incorporated into the judgments. Respecting the format of a thesis through articles, I reflect on the judgments published in the fields of my case-studies and reproduced in chapters IV and VI of this dissertation in the form of addendums.[231]

1.7.2. Social psychology and human rights law: an intuitive union

The research on procedural justice, or procedural fairness, which played an important role in shaping the theoretical framework of my research,[232] is probably one of the most developed research areas within the interdisciplinary field of psychology and law.[233] The combination of law and psychology is not surprising since, as Tyler and Darley write:

> a better understanding of the psychology of human motivation is of great interest to legal authorities, members of the legal profession, and to those working within legal institutions such as the courts, the police, and prisons.[234]

The work of social psychologists, including in the field of procedural justice, is mainly empirical; they examine the psychological underpinnings of law-related

[229] ECtHR, *Eweida a.o. v. UK*, 15 January, 2013.
[230] ECtHR (GC), *S.A.S. v. France*, 1 July 2014.
[231] See addenda to chapter IV and chapter VI.
[232] See Chapter III for an overview on the social-psychology research on procedural justice.
[233] See Rebecca Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts', 63 *Hastings Law J*. 127–178 (2011), at 133-134.
[234] Tom R. Tyler and John M. Darley, 'Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law', 28 *Hofstra Law Rev.* (2000),709

behaviour and attempt to find an explanation for their empirical findings. Hence, their main concern is not normative in that it does not aim to explain how the legal system should function and how procedural justice findings should be implemented.[235]

In this dissertation, the empirical findings of procedural justice research formed the foundations of my normative framework.[236] I built on the work of Eva Brems and Laurens Lavrysen, who applied procedural justice findings to the case law of the European Court of Human Rights in general. The study in this dissertation deepens their framework in the specific context of religious freedom claims.

The way in which I apply a procedural justice framework in this dissertation is normative, not empirical. As a matter of fact, no empirical knowledge exists yet on procedural justice perceptions of the Strasbourg Court. However, the lack of specific empirical knowledge on the Strasbourg Court does not make the findings of procedural justice research less valuable, for several reasons. First, the procedural justice findings have been confirmed in an impressive body of literature, in different contexts within and beyond the judicial system.[237] Secondly, Tyler and Mitchell, eminent social psychology researchers in the field, conducted wide-ranging research (with 502 respondents) on the American Supreme Court in the context of abortion rights to examine how people evaluate authorities in cases dealing with controversial and divisive issues. The findings of this research confirmed earlier findings that in their evaluation of authorities people care about procedural justice even more than about the favourability of the outcome.[238] For the European Court of Human Rights, which, similarly to the US Supreme Court, is also confronted by controversial and sensitive issues and also deals with fundamental rights, these findings are particularly relevant.[239] Thirdly, I also concur with Brems and Lavrysen in their argument that in any event the procedural justice criteria of neutrality, respect, participation and trustworthiness are inherent to the value system the Court represents.[240] In fact, as mentioned earlier, the Court in its general principles under article 9 requires States to be neutral and impartial and to take people's perspectives

[235] It should be noted, however, that Tom Tyler, the most prominent researcher in the field of procedural justice, wrote important articles in which he took a normative stance. For example in Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) and Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000).

[236] See Chapter II.

[237] See an overview in Rebecca Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts', 63 *Hastings Law J.* 127–178 (2011), at 133-134 (with references)

[238] Tom R. Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights', 43 *Duke Law J.* 703–815 (1993).

[239] See Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013), at 189.

[240] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013), at 185. See also the excellent work of Melton, where he argues that especially in the field of Human Rights Law, psychological research can be of particular importance. Gary B. Melton, 'The law is a good thing (psychology is, too): Human rights in psychological jurisprudence', 16 *Law Hum. Behav*. 381–398 (1992).

into account through, for example, dialogue. As argued earlier in this introductory chapter, these principles are closely related to the procedural justice elements which shape people's fairness perceptions about authorities.[241] The least that can be expected is thus that the Court itself applies these principles in its own case law.

1.7.3. Case law selection

The study conducted in this dissertation is built around the case law of the European Court of Human Rights, mainly the Court's case law under article 9. The selection of case law is undertaken differently for each chapter.

In **Chapter III** the case-law analysis is conducted in depth, covering all the article 9 cases issued since the reform of the Court in November 1998 up to 1 July 2014, the day the judgment in *S.A.S. v. France* was issued. This landmark case was chosen as the closure of my research. The selection was conducted through Hudoc, the Court's database. Both judgments and inadmissibility decisions[242] were included, both in French and English. In a first selection round, I eliminated the cases declared inadmissible on procedural grounds such as non-exhaustion of domestic remedies or inadmissibility *ratione temporis*. The cases struck out of the list were also left out. The cases declared partly admissible-inadmissible were retained in order to make sure that the cases where the inadmissibility referred to the article claim are included in the analysis.[243] Finally, the cases appearing in both languages were left out. After the first elimination round, I retained 565 cases for deeper analysis.[244]

The case law in **Chapter IV** covers a segment of case law dealing with religious accommodation in the workplace with a focus on worktime-related cases and cases concerning the wearing of religious symbols in the workplace. These two categories were not predefined at the start of the research undertaken for this chapter. They were selected after a first round of analysis of the case law of the Court concerning the workplace, in which it was observed that the most important accommodation claims concerned these two domains. The method applied in selecting the case law was twofold. Contrary to the case law covered in Chapter III, Chapter IV also looks at cases of the former Commission of Human Rights. The Commission cases were selected on the basis of the general literature on article 9

[241] Supra 1.4.1

[242] This also includes decisions on partial admissibility-inadmissibility when the inadmissibility refers to the article 9 claim.

[243] In a later stage, the partly admissible-inadmissible cases which are declared admissible with regard to the article 9 claim were removed.

[244] The selection of cases is based on the Hudoc database. Hudoc gives for article 9 428 results in English and 425 results in French. Although a lot of cases appear in both languages, this is not the case for all of them. Both languages are therefore taken into consideration.

and specific studies of cases concerning the workplace.[245] Since the aim of the research was to examine how the case law concerning accommodation claims in the workplace evolved after the famous Commission cases in the field, the subsequent cases of the European Court of Human Rights were selected manually[246] through Hudoc covering the period 2000-2010.[247] Also here, cases in both French and English were covered and both inadmissibility decisions and judgments were taken into account. An addendum to the chapter includes an update of the cases of *Sessa v. Italy*[248] and *Eweida and others v. the UK,*[249] which were issued after the publication of this work.

Chapter V revolves around one particular case: *Suku Phull v. France.*[250] This chapter is written in the framework of the international conference 'Mainstreaming Diversity: Rewriting Judgments of the European Court of Human Rights'. This conference was organized in Strasbourg in the premises of the Court and led to a book published with Cambridge University Press, in which the article on which chapter V is based is included.[251] In the framework of this conference, authors were asked to select one specific judgment or decision of the Strasbourg Court concerning a diversity issue which the authors considered could be improved, and to rewrite it. My choice of *Phull v. France*, which was an inadmissibility decision, was motivated by the fact that this case represents various problematic aspects common in freedom of religion adjudication. One aspect was the fact that in freedom of religion case law, claims are often declared manifestly ill-founded, the perspective of the applicant is missing, the arguments of the applicant are not examined, etc. I also specifically made a choice of an inadmissibility decision, since those cases might in my opinion often be the most problematic. I analysed this case specifically from a procedural fairness perspective.

The legal analysis also contains references to other Court cases selected on the basis of relevance to the arguments made. Additionally, this chapter also refers

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[245] Amongst others, Lucy Vickers, *Religious Freedom, Religious Discrimination at the Workplace* (Hart Publishing, 2008) and Carolyn Evans, *Freedom of religion under the European Convention on Human Rights,* (Oxford University Press, 2001).

[246] With manually, I mean that the cases were not selected through key words, but by going through the judgments and decisions published in Hudoc since 2000. This choice was made in order not to miss potentially important/relevant cases.

[247] 2000 was chosen as the start of the selection since no workplace cases were issued between November 1998 (reform of the Court) and 1 January 2010. 2010 as an end date was not purposefully chosen, but happens to be the date of the presentation and publication of the research findings. (The article on which chapter 4 is based was presented at a conference in Leuven in January 2011: International Symposium "Religious Diversity in the European Workplace", 13 January 2011, Leuven, Belgium.

[248] ECtHR, *Sessa Francesco v. Italy*, 3 April 2012.

[249] ECtHR, *Eweida and Others v. The United Kingdom*, 15 January 2013.

[250] ECtHR, *Phull v. France*, 11 January 2005.

[251] Saïla Ouald Chaib, 'Suku Phull v. France rewritten from a procedural justice perspective: taking religious minorities seriously' in Eva Brems, *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, (Cambridge University Press, 2012).

to the case law of the Canadian Supreme Court,[252] which dealt with a claim comparable to *Phull v. France* (limitation on the right to manifest one's religion for safety reasons), from which inspiration was drawn for the rewriting exercise.

The article incorporated in **Chapter VI**, co-authored by Eva Brems and myself, took a challenging but original path in that it builds its analysis in the framework of a pending case. This chapter deals with the controversy concerning face-veil bans and is based on a critical analysis of the bans and the debates surrounding them. It anticipates the (at the time of writing) pending Grand Chamber judgment in the case of *S.A.S. v. France*[253] concerning the French ban on the wearing of the face veil. As noted earlier, the authors also submitted a third-party intervention to the Strasbourg Court in this case.[254]

Other Court cases were referred to in this publication, based on their relevance to the arguments made. Moreover, this article also contains references to domestic jurisprudence concerning the face-veil bans.[255]

Finally, an addendum is written to the article contained in this chapter, in which the judgment of *S.A.S. v. France,* which was issued on 1 July 2014, is broadly discussed in light of the arguments made in the article. The case of *S.A.S. v. France*, as noted earlier, closes the case law analysis conducted for this dissertation.

1.7.4. Social science methods and tools in law

This dissertation employs (next to traditional legal analysis, consisting of case-law analysis and literature review) literature and sociological methods and tools from other disciplines. As explained earlier, the social psychology research played an important role in my dissertation.[256] Additionally, sociological sources have been used for several chapters in this dissertation. The introductory chapter contains, for example, sketches of the societal context of religious diversity in Western Europe. Other chapters of this dissertation, mainly chapter VI, also refer extensively to sociological reports and analyses. This research choice is made from the point of view that an understanding of social realities is essential in the field of law and religion.

This is also one of the reasons why chapter VI partly draws on empirical research on the social lived realities of women wearing a face veil. This empirical

[252] Supreme Court of Canada, *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.
[253] ECtHR (GC), *S.A.S. v. France,* 1 July 2014.
[254] The text of the third party intervention can be found here: https://www.ugent.be/re/epir/en/researchgroups/public-law/department/human-rights/publications/ sas.pdf
[255] Belgian Constitutional Council, 6 December 2012, no. 145/2012, B 20.2; French Constitutional Council, 7 October 2010, no. 2010-613 DC; "Etude relative aux possibilités juridiques d'interdiction du port du voile integral", Rapport Assemblée générale plénière du Conseil d'Etat, 25 March 2010.
[256] See supra 1.7.2.

research contributed not only substantively to the study in this thesis, but also significantly influenced the methodology used in chapter III. In this section I will first give a short description of how the empirical research was conducted before explaining how it influenced methodological choices made in part II of this dissertation.

1.7.4.1. Empirical research as inspiration for legal analytical research

Between September 2010 and September 2011, 27 women were interviewed in the framework of an empirical qualitative research project on the face veil (ban) in Belgium.[257] The in-depth interviews were conducted in a semi-structured way and additionally two focus group discussions were organized.[258]

Of particular importance for methodological decisions made in this dissertation, in particular for chapter III, is the way the transcripts of the interviews and focus groups discussions were analysed. The analysis of the transcripts was inspired by the qualitative method called 'grounded theory'. For this analysis, the data analysis program 'Nvivo', which is typically used for the analysis of interviews, was employed.

Both elements of the analysis, (the analytical method inspired by grounded theory and the use of the software Nvivo) inspired me to reflect critically on the way legal scientists approach case law analysis.

Central to grounded theory is the inductive approach, involving a bottom-up mindset where the theory emerges from the data[259] instead of starting from a hypothesis to then deductively turn to the data in search of illustrations or confirmations of the hypothesis[260] (an approach which is more common in the legal sciences).

In chapter III, I decided to apply a similar inductive approach to analyse the Court's case law. Instead of approaching the case law in a traditional way, starting

[257] The results of this empirical research are published in Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaib, Victoria Vandersteen and Jogchum Vrielink, 'The Belgian 'burqa ban' confronted with insider realities' in Eva Brems (ed.), *The experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014), 77-114. The results of this research and other empirical research conducted in different European countries are referred to in chapter IV.

[258] For more detailed information on the subjects the women were asked about and on the profile of these women, see Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaib, Victoria Vandersteen and Jogchum Vrielink, 'The Belgian 'burqa ban' confronted with insider realities' in Eva Brems (ed.), *The experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014), 77-114.

[259] Initial theory developed by Barney Glaser and Anselm Strauss, The *Discovery of Grounded Theory: Strategies for Qualitative Research*, (Transaction Publishers, 2009) and refined by other authors such as Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis*, (Sage Publications, 2006) and Matthew B. Miles, A. Michael Huberman and Johnny Saldaña, *Qualitative Data Analysis: A Methods Sourcebook* (Sage publications, 2013).

[260] Harvey Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (AltaMira Press, 2006) at 493.

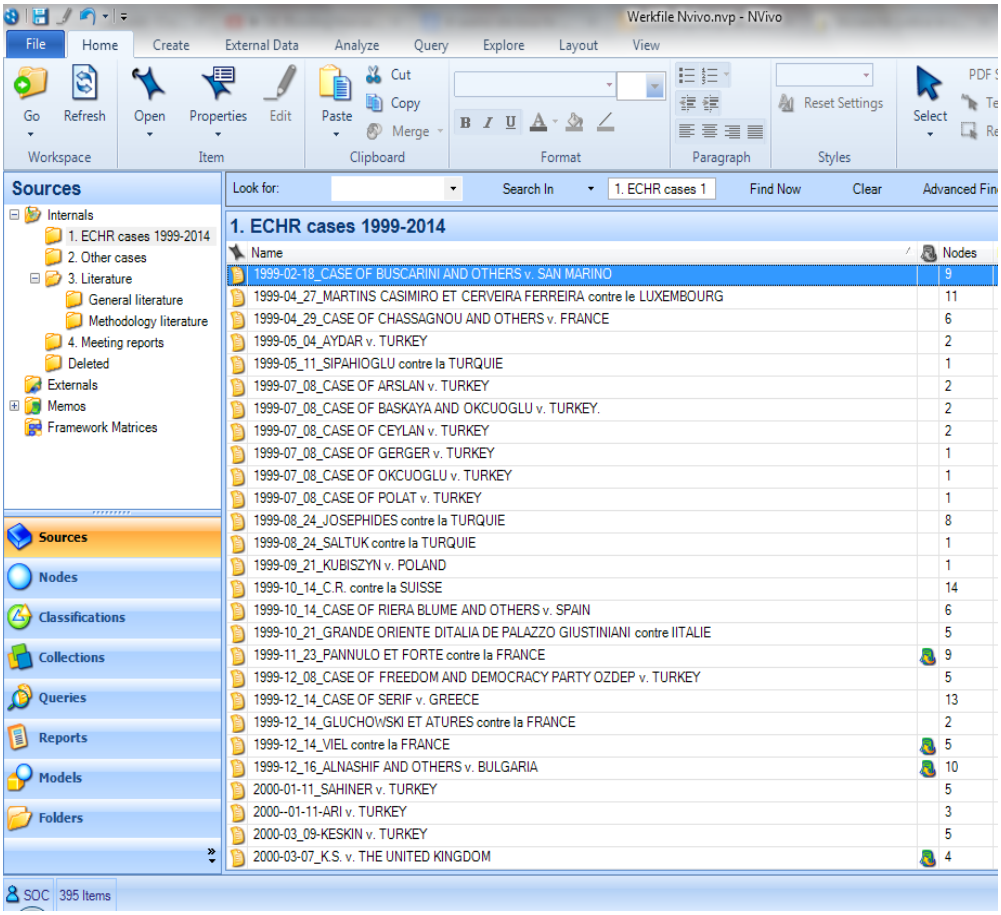
from certain arguments or a theory, I decided to conduct an in-depth and broad analysis of the article 9 case law asking the general questions 'how is the Court approaching the applicant believer?' 'How is the Court approaching the religious aspects of the case?' and 'how is the Court interpreting freedom of religion?'. Only in a second phase did I analyse the results of the first phase through the concepts of procedural fairness. Additionally, I also decided to conduct my analysis through the data analysis software program Nvivo. A detailed account of how this analysis took place can be found under section 3.3. in chapter III. In the next sections I will attempt to give an impression of the benefits and limits of using Nvivo, based on my own experiences.

1.7.4.2. Case law analysis in Nvivo

Based on my experiences with Nvivo for the analysis of interviews, I decided to experiment with the program for case law analysis. In this section I will explain the potentials and limitations of the software based on my experience in using it for case-law analysis.[261]

When I was using this program for the analysis of interviews I realized that it could be helpful for the analysis of case law in the legal sciences. The way interviews are examined can also be applied to the way case law is analysed. And in my view, Nvivo, as a qualitative analysis program, contains several aspects which can benefit legal scholars as well. It can be an excellent tool to organize, classify and analyse case law. With this motivation in mind I uploaded the body of cases which needed to be analysed for Chapter III of this dissertation into the program. I named the files starting with the date in order for them to appear in a chronological order since I wanted to read the cases chronologically:

[261] I found only one other researcher who used the program for case-law analysis. However, increasingly researchers in the legal field are using/exploring it, including at the research centre I work at: Sara L. McKinnon, *The discursive formation of gender in women's gendered claims to U.S. asylum*, 2008.

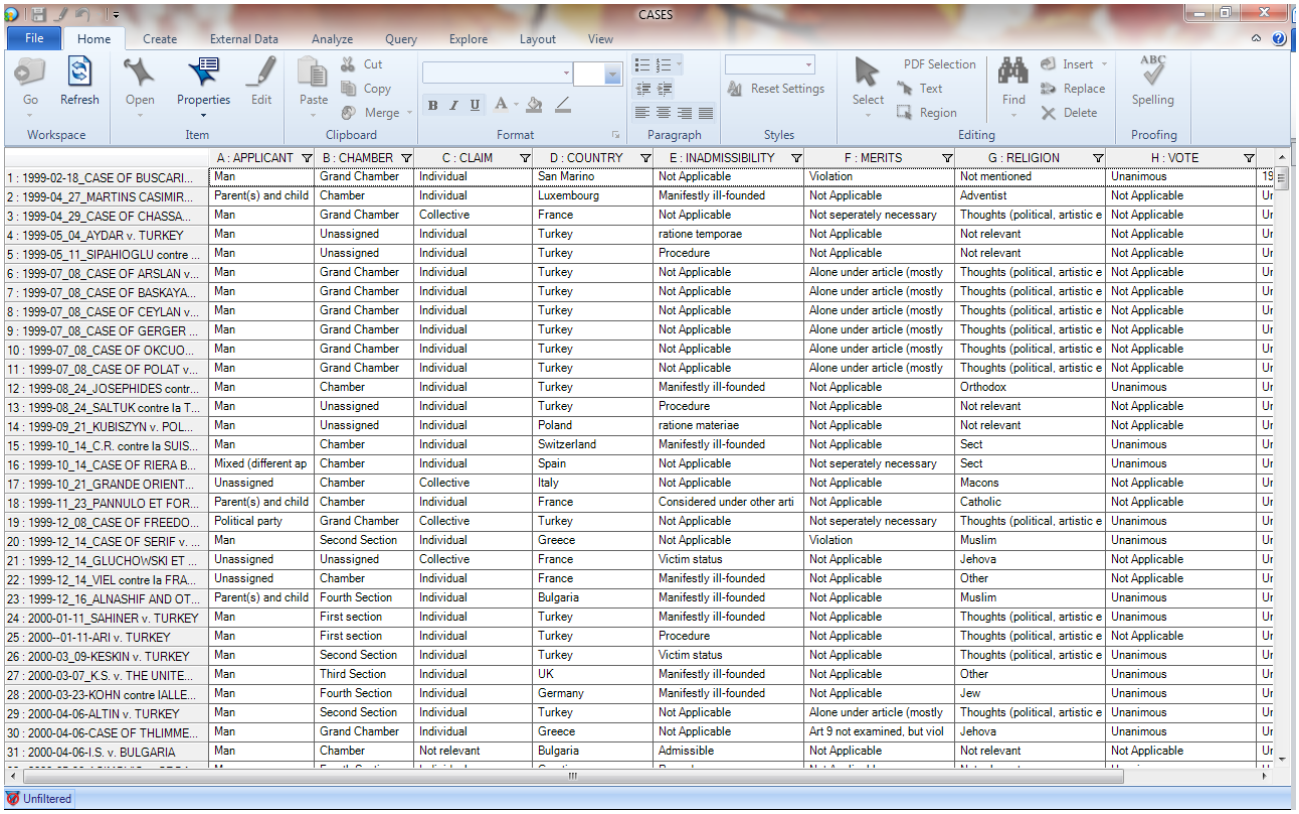


Having the case law in one place facilitated access to the cases in that I could use search functions to look up the cases easily. Moreover, it also provided a way of organizing the cases according to particular themes or dates. For me this was more efficient than downloading judgments from Hudoc and save them in folders on my computer. The downside, however, is that sufficient storage space on the computer is needed, otherwise the program will crash or at least work very slow.

Subsequently, I used the program both to classify and to analyse the case law.

A. Data classification

With classification I mean attributing information to every case in terms of several criteria. For every case, I kept information about the Year, Chamber, Gender ('Male', 'Female', 'Parents & Children', 'Church', 'Religious Organisation', 'Political Party' and 'Different Applicants'), Religion, the Vote (unanimous/majority), and on the decisions on the merits or inadmissibility. This classification is presented in a grid comparable to an Excel sheet and can also be exported to Excel:



	A : APPLICANT	B : CHAMBER	C : CLAIM	D : COUNTRY	E : INADMISSIBILITY	F : MERITS	G : RELIGION	H : VOTE
1 : 1999-02-18_CASE OF BUSCARI...	Man	Grand Chamber	Individual	San Marino	Not Applicable	Violation	Not mentioned	Unanimous
2 : 1999-04_27_MARTINS CASIMIR...	Parent(s) and child	Chamber	Individual	Luxembourg	Manifestly ill-founded	Not Applicable	Adventist	Not Applicable
3 : 1999-04_29_CASE OF CHASSA...	Man	Grand Chamber	Collective	France	Not Applicable	Not seperately necessary	Thoughts (political, artistic e	Not Applicable
4 : 1999-05_04_AYDAR v. TURKEY	Man	Unassigned	Individual	Turkey	ratione temporae	Not Applicable	Not relevant	Not Applicable
5 : 1999-05_11_SIPAHIOGLU contre ...	Man	Unassigned	Individual	Turkey	Procedure	Not Applicable	Not relevant	Not Applicable
6 : 1999-07_08_CASE OF ARSLAN v...	Man	Grand Chamber	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Not Applicable
7 : 1999-07_08_CASE OF BASKAYA...	Man	Grand Chamber	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Not Applicable
8 : 1999-07_08_CASE OF CEYLAN v...	Man	Grand Chamber	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Not Applicable
9 : 1999-07_08_CASE OF GERGER ...	Man	Grand Chamber	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Not Applicable
10 : 1999-07_08_CASE OF OKCUO...	Man	Grand Chamber	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Not Applicable
11 : 1999-07_08_CASE OF POLAT v...	Man	Grand Chamber	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Not Applicable
12 : 1999-08_24_JOSEPHIDES contr...	Man	Chamber	Individual	Turkey	Manifestly ill-founded	Not Applicable	Orthodox	Unanimous
13 : 1999-08_24_SALTUK contre la T...	Man	Unassigned	Individual	Turkey	Procedure	Not Applicable	Not relevant	Not Applicable
14 : 1999-09_21_KUBISZYN v. POL...	Man	Unassigned	Individual	Poland	ratione materiae	Not Applicable	Not relevant	Not Applicable
15 : 1999-10_14_C.R. contre la SUIS...	Man	Chamber	Individual	Switzerland	Manifestly ill-founded	Not Applicable	Sect	Unanimous
16 : 1999-10_14_CASE OF RIERA B...	Mixed (different ap	Chamber	Individual	Spain	Not Applicable	Not seperately necessary	Sect	Unanimous
17 : 1999-10_21_GRANDE ORIENT...	Unassigned	Chamber	Collective	Italy	Not Applicable	Not Applicable	Macons	Not Applicable
18 : 1999-11_23_PANNULO ET FOR...	Parent(s) and child	Chamber	Individual	France	Considered under other arti	Not Applicable	Catholic	Not Applicable
19 : 1999-12_08_CASE OF FREEDO...	Political party	Grand Chamber	Collective	Turkey	Not Applicable	Not seperately necessary	Thoughts (political, artistic e	Unanimous
20 : 1999-12_14_CASE OF SERIF v. ...	Man	Second Section	Individual	Greece	Not Applicable	Violation	Muslim	Unanimous
21 : 1999-12_14_GLUCHOWSKI ET ...	Unassigned	Unassigned	Collective	France	Victim status	Not Applicable	Jehova	Not Applicable
22 : 1999-12_14_VIEL contre la FRA...	Unassigned	Chamber	Individual	France	Manifestly ill-founded	Not Applicable	Other	Not Applicable
23 : 1999-12_16_ALNASHIF AND OT...	Parent(s) and child	Fourth Section	Individual	Bulgaria	Manifestly ill-founded	Not Applicable	Muslim	Unanimous
24 : 2000-01-11_SAHINER v. TURKEY	Man	First section	Individual	Turkey	Manifestly ill-founded	Not Applicable	Thoughts (political, artistic e	Unanimous
25 : 2000--01-11-ARI v. TURKEY	Man	First section	Individual	Turkey	Procedure	Not Applicable	Thoughts (political, artistic e	Not Applicable
26 : 2000-03_09-KESKIN v. TURKEY	Man	Second Section	Individual	Turkey	Victim status	Not Applicable	Thoughts (political, artistic e	Unanimous
27 : 2000-03-07_K.S. v. THE UNITE...	Man	Third Section	Individual	UK	Manifestly ill-founded	Not Applicable	Other	Unanimous
28 : 2000-03-23-KOHN contre IALLE...	Man	Fourth Section	Individual	Germany	Manifestly ill-founded	Not Applicable	Jew	Unanimous
29 : 2000-04-06-ALTIN v. TURKEY	Man	Second Section	Individual	Turkey	Not Applicable	Alone under article (mostly	Thoughts (political, artistic e	Unanimous
30 : 2000-04-06-CASE OF THLIMME...	Man	Grand Chamber	Individual	Greece	Not Applicable	Art 9 not examined, but viol	Jehova	Unanimous
31 : 2000-04-06-I.S. v. BULGARIA	Man	Chamber	Not relevant	Bulgaria	Admissible	Not Applicable	Not relevant	Not Applicable

The classification of the cases had one main benefit for my research in that it allowed me to keep information which is not available in Hudoc in a structured form. Important and interesting information not available in Hudoc about freedom of religion cases is, for example, which religion is at stake in a particular case. I used the information from this classification sheet for the quantitative analysis in Chapter I.[262]

A second motivation for my classifying the cases was that I hoped to be able to use it in the process of analysis. I wanted to be able to use the features of the program where results of the case-law analysis could be examined from the perspective of the classification criteria. For example, I wanted to explore whether procedural fairness shortcomings could be linked to particular religions involved in the cases. I realized, however, that because of the diversity and large number of

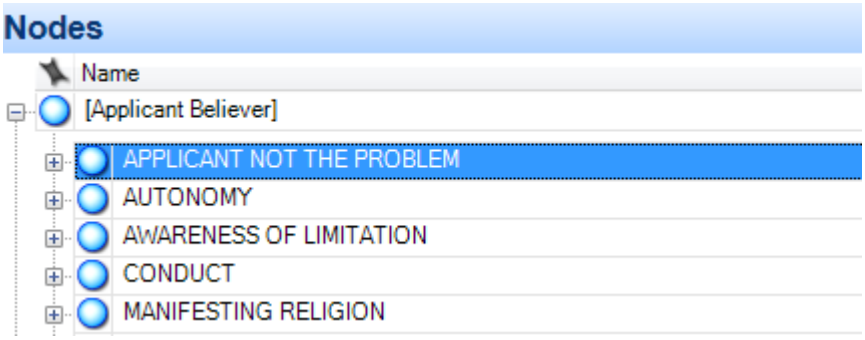
[262] See infra 1.4.

cases, this feature of the program was not useful for my research.[263]

B. Data analysis

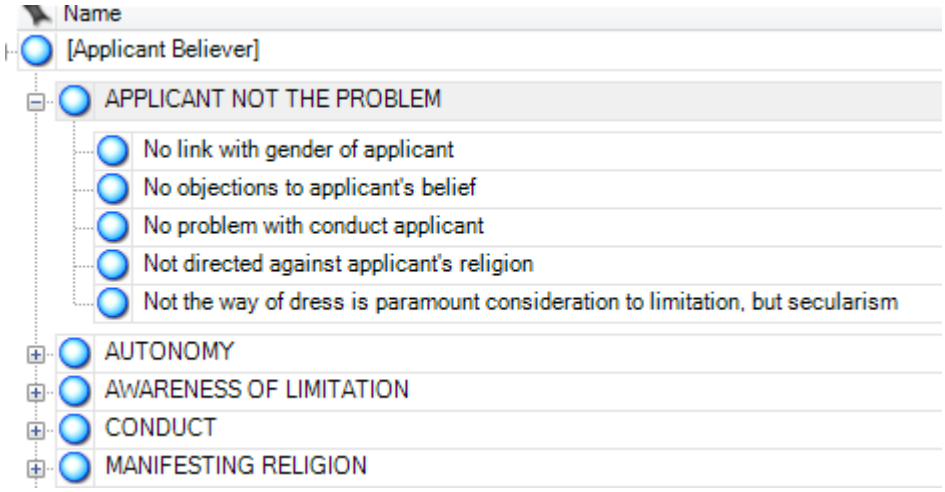
Nvivo is a qualitative data-analysis tool, but it is still the researcher who decides how she wants to analyse the case law. The case-law analysis I conducted through this program for chapter III is inspired by the grounded theory method, which consists of an in-depth bottom-up (inductive) approach, as will be explained in the methodological section of Chapter III. The main benefit I experienced from using the program is that it made my analysis more efficient and the results of my analysis were easily accessible. As will be explained in chapter III, the analysis was conducted in a multi-layered way. First, an open approach was applied to interrogate the case-law with general questions. In the very first stage, I analysed a selection of ten cases, both judgments and decision and concerning several aspects of the freedom of religion case-law, such as individual and group claims. At this stage I coded (highlighted) segments of the judgments which gave me information about the way the Court approaches the applicant, the way religion and religious practices were described, the way certain aspects of the proportionality analysis were undertaken, etc. This information was stored under categories, so-called 'codes'. The initial open coding of the selection of ten cases gave me a first list of codes, a structure, which I deepened and broadened while coding the entire body of case-law in a chronological order.

An example of the coding process is illustrated below. Under [applicant believer] for instance, I noticed several recurring themes:



Every theme contains sub-themes in which the segments of the case law can be found:

[263] Contrary of the traditional use of the program, where the amount of data is more limited and the selection of data more focussed.



In a second stage of the analysis, I analysed these observations from a procedural fairness perspective.

A major interesting aspect that I encountered about this process is the fact that it allows the case law to be looked at blind. At first sight, the categories do not reveal information (for example: which religion is at stake?) about the selection of segments of cases that can be found behind the folder. In the example illustrated above, in the category [applicant not the problem] and the subcategory [Not directed against applicant's religion], I have at first sight no idea from which cases this information comes.

I realized that this way of working makes the process of analysis more neutral to a certain extent. Nevertheless, for me personally it was interesting and confronting to see how when I was analysing the findings from a procedural fairness perspective and selecting the segments of case-law that could be used for illustrating the arguments in my article, ultimately three kinds of cases came back in many of these categories: the cases concerning prohibitions on religious signs (the headscarf in particular), the Turkish cases concerning the dismissal from the army and cases concerning religious accommodation in prison.[264]

1.8. Structure of the Dissertation

The dissertation is divided in three main parts comprising six chapters and a general conclusion.[265]

Part I consists of this introductory chapter, which lays the groundwork for the dissertation. The chapter aims at situating the research in a broader context. First, it situates the research in the broader societal context, describing the societal

[264] See for a full discussion of these cases Chapter III, with extensive references to the cases.
[265] I will refer to the several parts of the dissertation in terms of 'chapters' and not 'articles'.

debates surrounding (law and) religion in Western Europe. Second, it situates the research within the context of the article 9 case law of the European Court by first giving a quantitative insight into the case law and then by focusing on the principles the Court holds in the context of freedom of religion and diversity. The next part reveals how between principles and practice in the actual reasoning of the Court's freedom of religion adjudication, a gap can be found. This is illustrated with the criticism by legal scholars of problematic aspects of the Court's article 9 case law from a substantive point of view. Additionally, I make clear that my research aims at examining whether a gap can also be found between the inclusive principles of pluralism held by the Court and the procedural aspects of the reasoning. Finally, I reflect on my methodological approach in this dissertation. This reflection does not explain my methodology in detail, since every chapter contains more elaborate information on the methodology used. However, I explain how and why I build bridges in my dissertation between several disciplines, both at the theoretical level and at the level of methods of analysis and tools used for the analysis.

Part II starts in Chapter II with an exploration of social psychology research on procedural justice. This chapter aims at giving insight into the research field of procedural justice and reflects on how these findings might also normatively apply to the human rights adjudication of the Court, in particular in a context of diversity. Next, Chapter III explores at a normative level how the procedural justice criteria of participation, respect, neutrality and trustworthiness can be applied in the context of the right to freedom of religion. This normative reflection is followed by an in-depth analysis of the freedom of religion case law of the Strasbourg Court. This analysis is conducted through an inductive approach, inspired by grounded theory. It reveals several problematic trends in the article 9 case law from a procedural fairness perspective. General suggestions for improvement of the case law will therefore be made on the basis of the results of the analysis.

While part II gives a broad and deep analysis of the case law, **Part III** contains three specific case-studies covering several aspects of the Court's freedom of religion case law. At the same time the approach in these case-studies is very tangible, since it makes concrete suggestions for improving the case law. The three case-studies look at the Court's article 9 case law from a broad perspective. While chapter IV concerns a segment of the article 9 case law, chapter V covers one particular case in depth. Chapter VI, finally, uses an original perspective by anticipating a forthcoming case. In addition, the three case-studies employ comparative methods inside and outside the Court's case law and include empirical research additional to the legal-critical approach. The three case-studies highlight the importance of improving the procedural aspect of the reasoning in freedom of religion adjudication.

In contrast to chapters V and VI, **Chapter IV** is not conducted in a procedural justice framework. The research in this chapter, however, shows, through an examination

of cases concerning religious accommodation in the workplace, the importance of the procedural aspect in the Court's reasoning, additional to the substantive aspect. Although not formulated in procedural fairness terms, it uncovers serious procedural fairness shortcomings in the case law concerning the workplace. Being the first article written in the framework of this dissertation, the findings of this chapter confirmed the importance of a study focused on the procedural aspect of the reasoning in article 9 jurisprudence. This chapter also advances suggestions for improving the case law based on a comparative analysis with cases brought before the Court under other articles, but concerning similar issues.

While chapter IV started from a segment of the article 9 case law, **Chapter V** starts from one particular article 9 decision, namely the case of *Suku Phull v. France*, concerning the Court's reasoning in cases involving limitations on the right to manifest a religion due to safety measures. Drawing on procedural justice principles, this chapter argues that applicants and their religious claims should be taken more seriously. Besides making suggestions from a comfortable academic desk, this chapter also contains an attempt to redraft the judgment, which forces the writer to place herself in the shoes of the judge.

Chapter VI anticipates a (at the time of writing) pending case, namely *S.A.S. v. France*, concerning the ban on face veils in France. In the first part, it uncovers the serious procedural justice flaws at the domestic level in that the decision-making process on the face-veil ban in France was characterized by inaccuracy, prejudice and a lack of recognition of the perspective of the women concerned. In the first normative part, Eva Brems and I therefore argue that the Court should redress this situation by pointing out the procedural justice flaws which occurred at the domestic level. Subsequently, we argue that the Court should do a better job in its own reasoning from a procedural justice perspective when examining the *S.A.S.* claim. This chapter is followed by an addendum which discusses the Grand Chamber judgment issued in the case of *S.A.S. v. France* on 1 July 2014. The reflection on the case is conducted in light of the procedural justice arguments made in the chapter.

Finally, a general conclusion will be offered which recapitulates the main findings and suggestions made in the dissertation, followed by a reflection on potential questions for future research.

PART II – AN EXPLORATION OF THE RIGHT TO FREEDOM OF RELIGION CASE-LAW IN LIGHT OF THE CONCEPT OF PROCEDURAL FAIRNESS

Procedural fairness, also called procedural justice, concerns the degree of fairness displayed at the procedural level of the decision making process. As seen in the introductory chapter in Part I, the article 9 case-law of the Strasbourg Court has been widely criticized by legal scholars. This critique mostly refers to the lack of protection the Court offers under article 9, especially in cases concerning individual minority claims. Chapter I also highlights the religiously diverse societal context and the challenges it faces when it comes to debates on law and religion. In the past years, debates on the place of religion in society and restrictive measures towards believers have been on the rise. Unfortunately they are often conducted in polarizing and confrontational terms outside the realm of human rights law. It is also argued that the voice of the people concerned by certain measures is often neglected, as the recent face-veil controversy clearly shows. Chapter I further uncovers how the Court values pluralism as a principle and how this notion implies that society should not only offer a space that enables all people to participate at a structural level and express their identity, but that it should also create a space for dialogue to take place and where people's concerns are treated in an unbiased way in search of balance and compromises.

These three observations together all lead to one destination: procedural fairness. The study of the level of procedural fairness in the Court's article 9 adjudication and the normative model suggested for the improvement of procedural justice flaws is complementary to the existing literature on the substantive aspect of the Court's freedom of religion jurisprudence. Additionally, the focus on procedural fairness is intended to highlight the importance of the procedural aspects of debates on religion in society and to show how this aspect, in addition to the substantive aspect of decision-making, is also important from a perspective of inclusion, as the Court has also repeated many times in its own general principles accompanying its article 9 case-law.

This part will start in chapter II with an introduction to the research concerning procedural fairness. It will give an overview of how this notion was developed during the past decades and to what strong findings it led. It will further reflect on the importance this concept might have for the Strasbourg Court. Finally, I will explain how I consider procedural fairness to be particularly relevant in a context of religious diversity, specifically in cases concerning minority claims. In Chapter III, I first normatively explore how the four procedural justice criteria can be interpreted in the field of religious claims. I then submit the article 9 case-law of the Strasbourg

Court to in-depth analysis from a perspective of procedural fairness while making general suggestions for improvement.

CHAPTER II The Potential of Procedural Justice for Freedom of Religion Jurisprudence: The Inclusive Dimension of Belief in Justice

> One prediction that can be advanced with sure confidence is that human life on this planet faces steady increase in the potential for interpersonal and intergroup conflict. … It seems clear that the quality of future human life is likely to be importantly determined by the effectiveness with which disputes can be managed, moderated, or resolved.[1]

This quote formed the starting point of Thibaut and Walker's research[2] in the 1970s where they were searching for the forms of procedures[3] that could be considered the most effective and just.[4] In their search, they decided not only to focus on objective justice (is justice effectively done?), but also on subjective justice (is justice perceived to be done?). They considered that focusing on the latter 'is crucial because one of the major aims of the legal process is to resolve conflicts in such a way as to bind up the social fabric and encourage the continuation of productive exchange between individuals'.[5]

The prediction forming the starting point of Thibaut and Walker's research in the 1970s is certainly applicable in today's diverse context of Western Europe almost four decades later. Moreover, their aim of finding ways in which the 'social fabric' can be bound up coincides with the major aim of the study conducted in this dissertation. Thibaut and Walker's research formed the beginning of a major field of study in the domain of social psychology called 'procedural justice' or 'procedural fairness'.[6] **Research on procedural fairness focuses on the fairness of the process of doing justice, rather than the fairness of the outcome.** Although Thibaut and Walker — respectively a lawyer and a psychologist — initially studied procedural fairness in the field of legal procedures, procedural justice research encompasses a broader

[1] John Thibaut and Laurens Walker, *Procedural justice. A psychological analysis*, (L. Erlbaum Associates, 1975), at 1.
[2] Idem and John Thibaut and Laurens Walker, 'A theory of procedure', *66 Calif. Law Rev*. 541–566 (1978).
[3] Thibaut and Walker focused on procedures in the legal process. See John Thibaut and Laurens Walker, *Procedural justice. A psychological analysis*, (L. Erlbaum Associates, 1975), at 1.
[4] Idem.
[5] Idem, at 67.
[6] Both terms are often used interchangeably. The more 'formal' term 'procedural justice' will mostly be used to describe the research area, while the term 'procedural fairness' will be used more to describe the subjective experience of people about fairness. See also Robert J. MacCoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness', 1 *Annu. Rev. Law Soc. Sci.* (2005), at 8.

range of contexts, such as the workplace, policing and the family.[7] Evidently, in light of the aim of this dissertation, the research on the legal context will be at the centre of the study.

In this chapter I will first give an insight into the research on procedural fairness, starting with a short overview of its history and evolution and situating its main research findings. I will then turn to an exploration of the potential of this concept for the European Court of Human Rights in the context of religious diversity.

2.1. Situating the Findings of Procedural Justice Research

The findings of procedural justice research inspired an important part of the analytical and normative framework in which the research of this dissertation took place. This section will therefore highlight, in a short historical overview, the main findings of procedural justice research and explain how these findings were developed in social psychology research and how they have been interpreted later by Brems and Lavrysen in the context of human rights adjudication.

2.1.1. Thibaut and Walker: Process Control v. Decision Control

The most important finding of Thibaut and Walker, which laid the cornerstone of future procedural justice research, was that people, in their perception of procedures, focus not only on the outcome of their case but also on the way this outcome is reached. In their research, they differentiated between process control (do people have control over the process leading to a decision? e.g. through presenting evidence) and decision control (do people have a direct impact on the decision?).[8] They were the first to prove empirically[9] that process control is important independently of decision control.[10] Their research showed that procedures with higher process control were judged fairest and produced greater satisfaction, regardless of the favourability of the outcome in a case.[11]

Coming from a distributive justice tradition (where the emphasis lies on the

[7] See for an overview of the different fields in which procedural justice findings have been tested: Rebecca Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts', 63 *Hastings Law J.* 127–178 (2011), at 133-134 (with references).

[8] John Thibaut and Laurens Walker, *Procedural justice. A psychological analysis*, (L. Erlbaum Associates, 1975), at 76.

[9] Thibaut and Walker conducted their research through a controlled laboratory study of American students. See John Thibaut and Laurens Walker, at 69.

[10] Robert J. MacCoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness', 1 *Annu. Rev. Law Soc. Sci*. (2005) and John Thibaut and Laurens Walker, 'A theory of procedure', 66 *Calif. Law Rev*. 541–566 (1978), 542-543

[11] John Thibaut and Laurens Walker, *Procedural justice. A psychological analysis*, (L. Erlbaum Associates, 1975), at 80 and 118 and John Thibaut and Laurens Walker, 'A theory of procedure', 66 *Calif. Law Rev.* 541–566 (1978), at 551.

fairness of the outcome),[12] Thibaut and Walker explained these results from an instrumental perspective. They argued that people value process control out of self-interest, believing that process control would lead to better decisions.[13] Their hypothesis was that procedures with more process control, namely adversarial procedures, were preferred because of their potential to secure accuracy and to avoid decision makers (judges) being led by bias when making a decision.[14] Thus, process control was only considered as a means to an end, not the end itself.[15]

2.1.2. Leventhal: Six Rules of Procedural Justice

Another important cornerstone for procedural justice research is the study conducted by Leventhal.[16] Similar to Thibaut and Walker, Leventhal considered that both distributive (outcome fairness) and procedural justice (procedural fairness) shape people's fairness perceptions of procedures. However, Leventhal opened up Thibaut and Walker's research to a broader context than courts and he also expanded the criteria determining procedural justice perceptions.[17] Leventhal advanced six procedural justice rules that in his opinion influence procedural justice assessments.[18] The first criterion was 'representation', which refers to the need that procedures 'must reflect the basic concerns, values and outlook of important subgroups in the population of individuals affected by the allocation process'.[19] Other criteria were 'consistency' (procedures must be applied consistently across persons and across time), 'bias suppression' (the decision maker must be independent and neutral), 'accuracy of information' (decisions must be based on accurate information), 'correctability' (opportunities to correct bad decisions) and 'ethicality' (the general decision making process must respect moral standards).[20]

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[12] John Thibaut and Laurens Walker, 'A theory of procedure', 66 *Calif. Law Rev.* 541–566 (1978), at 542.

[13] John Thibaut and Laurens Walker, *Procedural justice. A psychological analys*is, (L. Erlbaum Associates, 1975), at 119 and John Thibaut and Laurens Walker, 'A theory of procedure', 66 *Calif. Law Rev.* 541–566 (1978), at 566.

[14] John Thibaut and Laurens Walker, *Procedural justice. A psychological analysis*, (L. Erlbaum Associates, 1975), at 77.

[15] Robert J. MacCoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness', 1 *Annu. Rev. Law Soc. Sci*. (2005)..

[16] Gerald S. Leventhal, 'What should be done with equity theory? New approaches in to the study of fairness in social relationships', in Kenneth Gergen, Martin S. Greenberg and Richard H. Willis (eds.), *Social exchange: Advances in theory and research* (Springer, 1977).

[17] Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 129.

[18] Gerald S. Leventhal, 'What should be done with equity theory? New approaches in to the study of fairness in social relationships', in Kenneth Gergen, Martin S. Greenberg and Richard H. Willis (eds.), *Social exchange: Advances in theory and research* (Springer, 1977), at 25-34.

[19] Gerald S. Leventhal, 'What should be done with equity theory?' (1980), at 44, cited in Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 132.

[20] Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 131-132 and Tom Tyler, 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', 22 *Law and Society Review*, (1988), at 104-105.

Like Thibaut and Walker, Leventhal also had an instrumental view of the value of procedural justice, linking the importance of procedural justice perceptions to the quality of the decision.[21] [22] Leventhal's six rules formed an important basis for future empirical research, determining which elements would form procedural justice perceptions.[23]

2.1.3. Tyler: Legitimacy of Authorities

The most well-known and important empirical research conducted in the field is the Chicago study of Tyler,[24] which built further on Leventhal's research. Tyler is one of the most eminent researchers in the still-growing field of procedural justice research. In 1984 he conducted wide-ranging empirical research, the famous Chicago study, in which he interviewed 1575 people on their perception of courts and the police.[25] The results of this study were published in his book 'Why people obey the law'.[26] As the title of the book indicates, the aim of the study was to understand what determines people's compliance behaviour towards authorities and rules, since the good functioning of authorities, and thus also of societies, depends of the willingness of people to follow their decisions.[27] Tyler wanted to propose an alternative non-instrumental model for maintaining social order, in contrast to the traditional model based on the assumption that compliance depends on deterrence.[28] Deterrence assumes that people will comply with rules and decisions depending of the rewards and punishments they receive,[29] while a non-instrumental model implies that people comply with the law on a self-regulatory basis.[30]

Tyler's main assumption was that compliance is influenced by people's perception of authorities' legitimacy. Legitimacy implies that people's behaviour can be based on 'the belief that some decision made or rule created by these authorities is "valid" in the sense that it is "entitled to be obeyed" by virtue of who made the

[21] Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 134-135.
[22] It is noteworthy, however, that, contrary to Thibaut and Walker, Leventhal did not base his theory on empirical research; rather, his six rules were 'largely the result of his intuition and speculation about what makes a procedure fair' Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 131.
[23] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006), at 118-119; Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 134-135.
[24] Tom Tyler, 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', 22 *Law and Society Review*, (1988) and Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006).
[25] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006), at 8. The study was conducted in two rounds. In the first round all respondents were interviewed by telephone. In the second round a random group of 804 people were interviewed a second time
[26] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006).
[27] Tom R. Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007), 26-27.
[28] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006), 269.
[29] Idem, 20-22.
[30] Idem, 271.

decision or how it is made'.[31] The Chicago study confirmed this assumption; it found that '[p]eople who regard legal authorities as legitimate are found to comply with the law more frequently'.[32]

Additionally, Tyler examined what shapes people's legitimacy views of authorities and he found that the level of procedural fairness was the key to people's legitimacy perceptions of authorities. [33] When people were treated in a procedurally fair way, meaning in a respectful, unbiased and caring way, they evaluated authorities to be more legitimate. Thus, procedural fairness was found to indirectly influence people's law-related behaviour as follows:

Procedural fairness was even found to be a more important determinant than the outcome of the case in people's perception of authorities.[34] In fact, when the procedure was perceived to be fair, the outcome was more easily accepted, even when the outcome in a case was unfavourable for the applicant.[35]

Tyler also examined what determined people's procedural fairness perception. He discerned four criteria that were found to be particularly relevant in the context of courts:[36]

1. Neutrality (are people treated in an unbiased and equal way?)
2. Trustworthiness (are authorities benevolent, can they be trusted?)
3. Respect (are people treated with dignity and respect?)

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[31] Idem, 277.
[32] Idem, 64.
[33] Idem, 103.
[34] On process being more important than outcome: Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 223. Also Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq.* 983–1019 (2000), at 999.
[35] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006), 107. To be clear, this does not mean that procedural fairness makes applicants happy about unfavourable outcomes. See also Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', White paper for the American Judges Association (2007), at 6 and Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc.* (2007), at 26 and 28.
[36] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007). See also other authors who examine the meaning of these criteria in a courts context: Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', *White paper for the American Judges Association* (2007); John M. Greacen, 'Social Science Research on "Procedural Justice": What Are the Implications for Judges and Courts?', 47 *Judges. J.* (2008); Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013).

4. Voice/participation/representation (do people have the opportunity to express their side of the story?).

These criteria will be fully discussed in the following chapters of this dissertation.[37]

Now that the relevance of procedural fairness for courts was established, and the criteria underpinning procedural justice assessments determined, Tyler and Lind turned to the question why exactly people value being treated in a procedurally fair manner.[38]

2.1.4. Lind and Tyler: The group-Value Model: Why Does Procedural Justice Matter to People?

Why is it that people care so much about procedural fairness? Initially, in the research of Thibaut and Walker, it was assumed that people care about the fairness of the process for instrumental reasons, namely the belief that a fair process would lead to a fair outcome.[39] Lind and Tyler, however, developed the so-called group-value model, in which they advanced relational reasons to explain the psychological underpinnings of procedural fairness.[40] According to this model, people value being treated in a respectful, neutral and caring way and having their voice considered in the process, because all these elements communicate to them that they are valued and respected members of the group.[41] In other words, this treatment recognizes people's inclusion within society.[42] This in its turn has an impact on people's feelings of self-worth.[43] By contrast, when people are treated unfairly, authorities and Courts communicate that they are considered marginal members of society.[44] The principle

[37] In this dissertation, these four criteria will be interpreted in light of the right to freedom of religion protected by article 9 ECHR. In Chapter 3, an in-depth analysis of the freedom of religion case law of the Strasbourg Court is conducted with these criteria in mind. In part III of this dissertation, two case-studies (chapters 5 and 6) employ the criteria to argue normatively how the Court's reasoning could be more inclusive. In each of these chapters the criteria are discussed into more detail.

[38] Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988). See also Tom R. Tyler, Peter Degoey and Heather Smith, 'Understanding why the justice of group procedures matters: A test of the psychological dynamics of the group-value model', 70 *J. Pers. Soc. Psychol.* 913–930 (1996).

[39] Zie supra 2.1.1.

[40] Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), chapter 10.

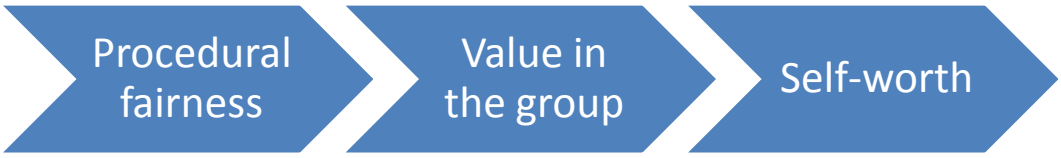
[41] Ibid. See also Tom R. Tyler, 'The Psychology of Procedural Justice: A Test of the Group Value Model', 57 *J. Pers. Soc. Psychol*. 830–838 (1989).

[42] Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq.* 983–1019 (2000), at 990-991.

[43] A.o. Tom R. Tyler, Peter Degoey and Heather Smith, 'Understanding why the justice of group procedures matters: A test of the psychological dynamics of the group-value model', 70 J. Pers. Soc. Psychol. 913–930 (1996), at 927.

[44] See amongst others: Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006), at 176; Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq.* 983–1019 (2000), at 1001; Tom R. Tyler, Peter Degoey and Heather Smith, 'Understanding why the justice of group procedures matters: A test of the psychological

underlying the group-value model can therefore be represented as follows:



In a further step in the procedural justice research, this model was tested in diverse (multicultural) contexts where several groups existed next to each other in society.[45] Several research studies showed that in this context people belonging to minority groups and majority groups both care about procedural fairness equally and that they use the same criteria for their procedural fairness evaluation.[46] Deeper research showed that this finding applies as soon as people identify with the superordinate group, e.g. the broader society.[47]

These findings are particularly relevant in a context of diversity and in the context of the freedom of religion case law of the Strasbourg Court, as will be argued below.[48]

In what follows, I will first summarize how Brems and Lavrysen apply this procedural justice framework to human rights adjudication, in particular in the context of the case law of the Strasbourg Court.

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dynamics of the group-value model', 70 *J. Pers. Soc. Psychol.* 913–930 (1996), at 914; Heather J. Smith et al., 'The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality', 34 *J. Exp. Soc. Psychol.* (1998), at 471.

[45] See amongst others: Yuen J. Huo, 'Procedural justice and social regulation across group boundaries: does subgroup identity undermine relationship-based governance?', 29 *Pers. Soc. Psychol. Bull.* 336–48 (2003); Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 217; Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq.* 983–1019 (2000), 1001.

[46] Tom Tyler and Yuen Huo, *Trust in the Law*, (Russel Sage Foundation, 2002), at 152; Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', *White paper for the American Judges Association* (2007), at 18; Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 217.

[47] This is the case for both 'assimilationist' (identifies only with the superordinate group) and 'biculturalists' (identifies with both the superordinate group and the subgroup). So-called separatists, however, who only identify with their subgroup, will pay more attention to the outcome that to the fairness of the process. See: Yuen J. Huo, Procedural justice and social regulation across group boundaries: does subgroup identity undermine relationship-based governance?, 29 Pers. Soc. Psychol. Bull. 336–48 (2003); Heather J. Smith et al., 'The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality', 34 J. *Exp. Soc. Psychol.* (1998); Yuen J. Huo, 'Is Pluralism a Viable Model of Diversity? The Benefits and Limits of Subgroup Respect', 9 *Gr. Process. Intergr. Relations* 359–376 (2006).

[48] Infra 2.2.

2.1.5. Brems and Lavrysen: Procedural Justice and the European Court of Human Rights

Brems and Lavrysen explore the potential of procedural justice research in the context of human rights adjudicating bodies with a focus on the European Court of Human Rights.[49] They start from the observation that 'strengthening these bodies' capacity to deliver justice in a way that strengthens their legitimacy as well as overall "customer satisfaction" is important'.[50] Through procedural justice, the Court can strengthen its legitimacy and compliance with its decisions, which is essential for ensuring its adequacy in protecting human rights.[51] Procedural justice could, according to the authors, contribute by creating a 'reservoir of good will', which is especially needed in cases concerning 'controversial and divisive issues', with which the Court is regularly confronted.[52] Brems and Lavrysen additionally accord particular importance to the finding that 'delivering procedural justice might be critical in preventing the alienation of minorities'.[53] They also stress the importance of procedural justice for victims of human rights violations, where strengthening feelings of self-worth through procedural fairness might help in the psychological recovery process.[54] The authors advance substantive reasons for stressing the particular value of procedural justice for a human rights court, since it comes close to the 'core business' of the substantive work they do.[55] Finally, they argue that '[r]egardless of its impact on legitimacy', procedural justice should matter 'simply because it is part of the value system they represent'.[56]

Brems and Lavrysen propose a two-level model of procedural justice for human rights adjudicating bodies such as the Strasbourg Court. First, they argue that the Court should deliver procedural justice in its own proceedings. The Court should make sure to rule in a neutral, accurate, respectful and trustworthy way and to represent the voice of the applicant in its judgments. At a second level, the authors argue that the Court 'could be a watchdog of procedural justice in human rights

[49] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013).
[50] Idem, at 177.
[51] Idem, 182.
[52] Idem, 183. The authors rely on research conducted by Tyler and Mitchell which confirmed the importance of procedural fairness in the context of the right to abortion in the well-known US Supreme Court case of Roe v. Wade. See Tom R. Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights', 43 *Duke Law J.* (1993),703–815.
[53] Idem, at 184.
[54] Idem, at 182.
[55] Idem, at 184.
[56] Idem, at 184-185.

matters at the domestic level' and should therefore also assess whether procedural justice has been done in their examination of human rights claims.[57]

In what follows, I will further explore the potential of procedural justice for the Strasbourg Court in the particular context of religious diversity.

2.2. Potential of the Concept of Procedural Justice for the Freedom of Religion Case Law of the Strasbourg Court

Differences in viewpoints and values are inherent to every society and so are the debates and conflicts accompanying them. This is certainly the case in a religiously diverse context, such as in Western Europe, where different views and needs regularly lead to heated debates on whether or not to accommodate (or 'de-accommodate'[58]) religious practices.[59] These developments pose challenges for courts,[60] including the European Court of Human Rights, which is also increasingly confronted with individual religious claims.

In this section, I will first reflect on how procedural fairness can play an important role in maintaining social cohesion in a religiously diverse context and the role it can play for the Strasbourg Court. Next, I will focus on the particular importance of procedural fairness in cases concerning people belonging to religious minority groups.

2.2.1. Procedural Fairness: A Universal Bridge-Building Concept in a Diversity Context

The diversification of society surely poses challenges for courts,[61] including the European Court of Human Rights. In general, it is not always possible for authorities to reconcile the different viewpoints or to accommodate the particular needs of all. In this context, the findings on procedural justice are particularly relevant. If people were to question the Court's legitimacy every time unfavourable decisions were taken, the good functioning of the Court would be constantly at risk. Also, it would be problematic if people refrained from turning to the Court with their human rights claims as soon as they evaluate previous decisions as unfavourable. Hence, the procedural justice model, stressing that people care not only about outcomes, but also, significantly, about the fairness of the process, advances a way

[57] Idem, 185.
[58] I borrowed this term from Markha Valenta, 'Pluralist Democracy or Scientist monocracy? Debating Ritual Slaughter', 5 *Erasmus Law Review* (2012), 27–41. By this term I mean debates that concern the prohibition of certain religious practices that were accepted before, such as the debate on religious slaughter or the prohibition on the wearing of religious symbols.
[59] See for a discussion on the societal debates Chapter I Introduction at 1.3.
[60] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc.* (2007).
[61] Idem, at 26.

of dealing with conflicts which ensures that the legitimacy of the Court is not threatened and which avoids aliening people from the protection of the Court.[62] The fact that people, when treated fairly, accord legitimacy to authorities independently of the outcomes received, creates a 'reservoir of support'.[63] This does not mean, however, that people need to agree with decisions; instead, it involves their keep their belief in the Court, despite the disagreement.

In a diversity context, this is relevant from the perspective of people belonging to both majority and minority groups. On the one hand, authorities will not always be able to accommodate minority needs. It is, however, important that people understand why this is the case and that it is clear to them that the authority genuinely examined the claim and concerns. On the other hand, sometimes authorities will take decisions aimed at including people belonging to minority groups, such as affirmative action, which might not be well received by members belonging to majority groups.[64] It is therefore important that authorities also make sure that these measures are well explained and that people belonging to the majority have an opportunity to voice their concerns.[65] Hence, Tyler's procedural justice model can be advanced as a 'strategy [that] could potentially be very effective in reconciling individual differences in beliefs and values'.[66]

Fortunately, as noted earlier procedural justice research shows that people belonging to minority and majority groups both value procedural fairness in the same way.[67] This shows that the concept of procedural fairness is a universally

[62] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013), at 184. See also Jason Sunshine and Tom R. Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing', 37 *Law Soc. Rev.* 513–548 (2003), at 514.

[63] Tom R. Tyler, 'Psychological perspectives on legitimacy and legitimation', 57 *Annu. Rev. Psychol.* (2006), at 381. See also Tom R. Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights', 43 *Duke Law J.* (1993),, who argue at 782 that '[i]f there is a reservoir of good will toward authorities, it will facilitate all their actions. If, however, that reservoir of legitimacy is diminished, then people feel less strongly obligated to accept government decisions.' '. See also: Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013).

[64] Margaret Levi, 'A State of Trust', in Valerie Braithwaite and Margaret Levi, *Trust and Governance* 77–101 (Russel Sage Foundation, 2003) and Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq*. 983–1019 (2000), at 993.

[65] Smith and Tyler found that procedural justice matters to both 'advantaged' and 'disadvantaged' groups and that people belonging to advantaged groups are willing to support measures such as affirmative action when they perceive the process as fair. See Heather J. Smith & Tom R. Tyler, 'Justice and power: When will justice concerns encourage the advantaged to support policies which redistribute economic resources and the disadvantaged to willingly obey the law?', 26 *Eur. J. Soc. Psychol.* 171–200 (1996).

[66] Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq.* 983–1019 (2000), at 992. See also Yuen J. Huo, Yuen J. Huo, 'Procedural justice and social regulation across group boundaries: does subgroup identity undermine relationship-based governance?', 29 *Pers. Soc. Psychol. Bull*. 336–48 (2003), at 336-337.

[67] Tom Tyler and Yuen Huo, *Trust in the Law*, (Russel Sage Foundation, 2002), at 152; Kevin Burke and

shared value. It is something people have in common, no matter what background they have. People in general expect or wish to be treated with respect and dignity, to have their voice considered by a neutral decision maker and to have their concerns taken seriously by courts. Procedural fairness is a concept that binds people, instead of exacerbating differences. While at a substantive level claims for structural inclusion (for example through accommodation) mostly revolve around the inclusion of one group by the other,[68] this procedural aspect of the case is shared across group boundaries. As such, as Tyler argues, 'procedural justice may be a better bridge across social and ideological groups than distributive justice'.[69] [70]

2.2.2. Procedural Fairness: A Concept Particularly Relevant for Religious Minorities

Procedural justice matters for everyone and should thus be applied in all cases. Yet, several reasons can be adduced why a good procedural justice approach is particularly relevant when minorities are involved. These arguments are twofold. First, when minorities are involved, the Court should be even more attentive so as not to alienate them. Second, the underpinning factor of inclusion makes the relevance of procedural fairness in cases concerning religious minorities self-evident.

2.2.2.1. To Avoid the Alienation of Religious Minorities

'We believe that we cannot trust the justice of the Court.' With these words in a letter addressed to the Court, Fazilet Partisi withdrew its case from the Court's jurisdiction, hoping that the Court would be 'more respectful' in the future and more 'careful and just in its examination of applications of all individuals living in Europe'.[71]

Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', *White paper for the American Judges Association* (2007), at 18; Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 217.

[68] See in this sense the critique of the concept of reasonable accommodation by Lori G. Beaman, '"It was all slightly unreal": What ' s Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?', 23 *Can. J. Women Law* 442–463 (2011).

[69] Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000), at 123; see also Tom R. Tyler, 'Governing and Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government', 28 *Law Soc. Rev*., at 813.

[70] It might even be argued that the universal character of the concept should in fact facilitate its implementation in practice. While substantive claims, such as religious accommodation claims, will not always be understood from an outsider's point of view, procedural fairness expectations should be able to be met more easily way since it is easier to understand. Cf Lynne Henderson, 'Legality and Empathy', 85 *Mich. Law Rev.* 1574–1653 (1987), at 1652.

[71] ECtHR, *Fazilet Partisi et Kutan v. Turkey*, 27 April 2006. Fazilet Partisi was a political party inspired by an Islamist ideology and for this reason dissolved by the Turkish authorities. The case was similar to the previous (well-known and highly criticized) case of *Refah Partisi v. Turkey*. The judgment in this

In their letter of withdrawal, Fazilet Partisi argues that these judgments show that the Court 'has prejudices towards Muslim communities'. Hence, rather than referring to the outcomes in the cases, Fazilet Partisi refers to shortcomings in the reasoning. They refer to 'arbitrary interpretations' in the case of *Leyla Sahin*[72] and they accuse the Court of being prejudiced, hostile and biased towards Muslims.[73] Hence, they motivate their distrust in the Court mainly by referring to procedural fairness elements.

As argued earlier, this kind of situation should absolutely be avoided by the Court.[74] This is not only for the benefit of the Court, in that it needs to keep a strong reputation as a prominent and trustworthy human rights institution and as the representative, or at least as the guardian, of European human rights norms, but it is also in the interest of the rights holder, who should be able to trust the Court in order to complain about human rights violations.

This is of general importance, no matter which right is at stake or who the applicant is, but it is particularly relevant for disadvantaged groups such as religious minorities.

The first reason why extra attention should be paid to procedural fairness in cases concerning people belonging to minority groups is that they are in general less trustful towards authorities than members of majority groups.[75]

A second reason that can be advanced is that it is particularly important that the Court does not alienate minorities from its protection, since the Court can be of particular importance for them. As posited earlier,[76] the Court has an important counter-majoritarian role to play in correcting the inherent inegalitarian effects of a democratic system where people belonging to minority groups by definition have less weight in the scale and a voice less heard.[77] The importance of avoiding

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case is one of the reasons why Fazilet Partisi withdrew its claim.

[72] ECtHR, *Leyla Sahin v. Turkey*, 10 November 2005.

[73] ECtHR, *Fazilet Partisi et Kutan v. Turkey*, 27 April 2006.

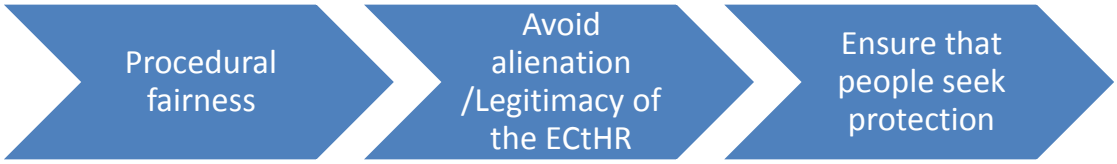
[74] See also Chapter 1.

[75] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006), at 270, Tom Tyler and Yuen Huo, *Trust in the Law*, (Russel Sage Foundation, 2002), at 142-146; Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 217; Levi, Sacks and Tyler, 'Conceptualizing Legitimacy, Measuring Legitimating Beliefs', 53 *American Behavioral Scientist* (2009) at 369.

[76] See Chapter 1, 1.2.3.

[77] John Heart Ely, *Democracy and Distrust*, (harvard University Press, 1980), at 103. Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *Eur. Const. Law Rev.* (2010), at 20-25. Patti Tamara Lenard, *Trust, Democracy, and Multicultural Challenges*, (Pennsylvania State University Press, 2012), at 2-3, who argues that '[h]uman rights law should find its inspiration from the Other, the marginalized person who, in most cases, has no other place to turn. This premise should be self-apparent. After all, the raison d'être of human rights law should be the protection and empowerment of those who have been most marginalized, "to give voice to human suffering, to make it visible, and to ameliorate it"'. (with reference to Upendra Baxi, "The future of Human Rights", 2002, 4). And Group of Eminent Persons of the Council of Europe, 'Living Together: Combining Diversity and Freedom in 21st-century Europe',

alienation can be illustrated as follows:



2.2.2.2. To Avoid Feelings of Exclusion

As procedural justice research shows, people value being treated in a procedurally fair way because it has a positive effect on their feelings of self-worth.[78] Indeed, when courts treat people in a respectful, neutral and caring way and when people are given a voice in the proceedings, courts communicate that they are valued and respected members of the group[79] and thus enhance the feeling of inclusion.[80] Conversely, when people are treated with disrespect, this communicates that they are marginal members of the group.[81]

Hence, when applying procedurally fair standards, the Court has an opportunity to contribute to the inclusion of minorities in society:

(Council of Europe, 2011), at 35: 'All human beings are entitled to the protection of the law, and the most vulnerable, or those most frequently exposed to illegal abuse or exploitation, are entitled to expect the authorities to make a special effort on their behalf. It should be clear from the examples given in part one that this applies particularly to members of minorities – especially the Roma – and to immigrants and those of recent immigrant descent.' See also Marie-Claire Foblets and Katayoun Alidadi, 'The RELIGARE Report: Religion in the context of the European Union: Engaging the Interplay between Religious Diversity and Secular Models' in Marie Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds.), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate, 2014), at 50, where the authors argue that '[f]reedom of religion and belief is also and should remain, if not primarily, a fundamental right of minorities'. See also Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013), at 184.

[78] A.o. Heather J. Smith et al., 'The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality', 34 J. *Exp. Soc. Psychol*. (1998).

[79] Allan Lind and Tom Tyler, The Social Psychology of Procedural Justice (Springer, 1988); Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq*. 983–1019 (2000); Heather J. Smith et al., 'The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality', 34 J. *Exp. Soc. Psychol*. (1998).

[80] E. Allan Lind, Tom R. Tyler & Yuen J. Huo, 'Procedural Context and Culture : Variation in the Antecedents of Procedural Justice Judgments', 73 *J. Pers. Soc. Psychol.* (1997), 769. See also Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 236- 237 and Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq*. 983–1019 (2000), at 990-991.

[81] Heather J. Smith et al., 'The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality', 34 J. *Exp. Soc. Psychol*. (1998), at 471.

This is particularly relevant in the context of religious minorities, not only because minorities are more prone to marginalization in society, but also because claims made by religious minorities in the context of freedom of religion will often concern claims for inclusion. Indeed, when an applicant complains about an absence of adapted diets in prison,[82] or a prohibition against manifesting religion through clothing at school or at work,[83] or a refusal by employers to adapt work schedules,[84] these claims essentially ask for the ability to participate in public life without having to sacrifice personal religious identity. In other words, these claims can be interpreted as being motivated by the need to be included.[85]

Evidently, as mentioned earlier, inclusion through the substantive accommodation of religious needs is not always possible. By contrast, taking an inclusive stance through procedural fairness is. And in cases where claims for substantial inclusion cannot be met, it can be argued that it is even more important to pay attention to the procedural fairness aspect in order to avoid people belonging to religious minorities feeling excluded all the way. Procedural fairness gives an opportunity to make clear to people that despite the fact that they cannot be accommodated in a particular context, they are considered to be valued members of society.[86]

The Court also needs to take into account that although its judgments are applicable only to one case, the impact it can have is much broader. Applying a procedurally fair approach is not only directly relevant to one applicant in one particular case, but indirectly the Court can also reach a broader group of people who identify with the applicant or his or her claim.[87] Thus, when the Court makes generalizing or biased statements in one case, this will resonate with other people

[82] ECtHR, *Jakobski v. Poland*, 7 December 2010.
[83] E.g. ECtHR, *Kurtulmus v. Turkey*, 24 January 2006 and ECtHR, *Dogru v. France*, 4 December 2008.
[84] ECtHR, *Sessa v. Italy*, 3 April 2012.
[85] Kristin Henrard, *The Ambiguous Relationship Between Religious Minorities and Fundamental (Minority) Rights,* (Eleven International Publishing, 2011), at 87.
[86] Of course, as will be explained later, the procedural fairness aspect is by no means a substitute to the substantive work of the Court. See infra 2.3.3.
[87] Cf Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq*. 983–1019 (2000), at 1004 and also Julie Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, 2006), at 433.

who identify with the applicant in that particular case.[88] The Court therefore has an opportunity to send a message of inclusion to a broader group through the application of procedural fairness in one case. Also, from an institutional point of view, the Court should fulfil an exemplary role for other authorities, for example at the domestic level. When therefore the Court acts against procedural fairness standards, other instances could feel entitled to do the same. The opposite can be true as well. When the Court treats applicants in a particular context in a respectful way, courts at the domestic level may follow suit as well.[89]

At the same time, as proposed in the model advanced by Brems and Lavrysen, the Court can also be a watchdog of procedural fairness at the domestic level, by examining the level of procedural fairness applied by domestic authorities in cases that reach the Court.[90] As such, the Court can play a corrective function for the disadvantage minorities a priori have in society where their voice is by definition less powerful.

2.3. Procedural Fairness: Not a Substitute for Substantive Fairness

The benefits of procedural fairness, both for courts and for society and individuals, are clear. Sceptics might, however, object that procedural fairness could be used to cover for a lack of substantive fairness. In fact, the risk exists that procedural justice findings may be abused so as to make a lack of substantive

[88] E.g. when the Court makes a general statement about the headscarf, such as in the case of *Dahlab v. Switzerland*, this statement might not only affect Dahlab, but also the broader group of Muslim women.

[89] In a recent judgment of the Belgian Council of State concerning the prohibition in schools against wearing religious symbols, reference is made to para. 119 of the Court's judgment in *S.A.S. v. France* concerning a woman wearing a face veil, its interpretation being that 'it does not suffice that according to a majority opinion the principle of equality between men and women is affected to justify that a freely chosen religious practice is limited'. Similarly to the Court's judgment *in S.A.S. v. France*, the Belgian Council of State brings the perspective of the women to the fore, while generally in public debates this aspect of their autonomy is neglected. See also an in-depth analysis of the procedural fairness aspect of *S.A.S. v. France* in the addendum to chapter 6 and a discussion of the Belgian case, with reference to the judgment, in: Yousra Benfquih and Saïla Ouald Chaib, 'Religious signs in public schools: Belgian Council of State shows judicial bravery', *Strasbourg Observers*, 4 November 2014, at http://strasbourgobservers.com/2014/11/04/religious-signs-in-public-schools-belgian-council-of-state-shows-judicial-bravery/ (Last accessed on 30 April 2015)

[90] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013).

fairness acceptable. Tyler and other authors regularly warn against this (ab)use of procedural justice research:[91]

> focusing on the fairness of procedures can obscure the fact that nothing has changed in terms of structural inequality, even though people have received "symbolic" recognition of their status or rights.[92]

The purpose of advancing a procedural fairness approach in this dissertation should therefore be made very clear. Procedural fairness is not a substitute for substantive fairness and it is not a tool for legitimizing substantive shortcomings. The role of courts such as the European Court of Human Rights is still in the first place to make sure that justice is done and that people receive the protection they are entitled to. Procedural justice is an additional tool which requires the Court also to pay particular attention to the way this substantive work is done. As Brems and Lavrysen perfectly illustrate, 'the procedural justice principles are the procedural mirror of the substantive work [the Court is] trying to accomplish'.[93] Thus, procedural fairness and substantive fairness can be examined separately from an academic point of view, but they should always be applied jointly for justice to be both done and seen to be done.

In addition, it could even be argued that procedural fairness not only mirrors but can also potentially reinforce the substantive work of the Court. When applicants' voices are taken into account, when their concerns are taken seriously and are approached in a neutral way, there is an increased likelihood of reaching better decisions based on accurate information and of a better understanding of the issue at stake. In contrast, when applicants' perspectives are not taken into account, when they are not treated in a neutral way and when their claims and rights are not taken seriously, this will most likely also affect the quality of the decision taken.

In the following chapter, the remainder of part II, the freedom of religion case law of the Strasbourg Court will be submitted to an in-depth analysis through the lens of procedural fairness. This analysis is inspired by the four procedural fairness criteria advanced by Tyler and builds on the work of Brems and Lavrysen. I will reflect on how these criteria can be shaped in the context of freedom of religion claims and subsequently analyse the case law from that perspective. Additionally, on a normative level I will also advance ways in which the Court could improve its case

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[91] See: Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006),, at 111 and 148; Tom R. Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights', 43 *Duke Law J*. (1993), at 790-792; Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988), at 76 and Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq*. 983–1019 (2000), at 997-998.

[92] Tom R. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law Soc. Inq*. 983–1019 (2000), at 997-998.

[93] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013), at 184.

law from a procedural fairness perspective.

In part III of the dissertation, several case studies will be discussed from the perspective of inclusion. Chapter 4 will demonstrate how exclusionary aspects of the Court's reasoning are not only found at the substantive level, but also at the procedural level. Chapters 5 and 6 will *in concreto* examine the potential of and apply the normative suggestions made from a procedural fairness perspective in the specific case-studies of *Phull v. France*[94] and *S.A.S. v. France.*[95]

[94] ECtHR, *Phull v. France, 11 January,* 2005.
[95] ECtHR (GC), *S.A.S. v. France* , 1 July 2014.

CHAPTER III - Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court

> "Justice means making sure that this never happens again. Making sure that Muslims are respected, are protected, are cared for and are not left to live in fear."
>
> Dr. Suzanne Barakat[1]

The religious landscape in Western Europe is becoming increasingly diverse. Meanwhile, secularism gains more and more importance[2] and anti-Muslim sentiments are on the rise.[3] In this context, debates on the right to freedom of religion are never far away. These debates sometimes tend to be animated, polarizing, and ill-informed.[4] As the supranational human rights body in Europe, the European Court of Human Rights (hereafter "the (Strasbourg) Court") is inevitably confronted with these societal debates, the most recent example being the question of the French face veil ban.[5] In diverse societies with differing views and interests, conflicts are generally unavoidable, including conflicts related to religion. The question is, however, how to approach such conflicts in a way that preserves social cohesion and inclusion for all. This paper looks at the role of the European Court of Human Rights in this respect.

The first perspective from which conflicts involving religious issues can and should be approached is a substantive one, focused on reconciling conflict through provisions of the European Convention on Human Rights, such as article 9 (religious freedom).[6] Yet inclusion through the finding of substantive solutions will in practice

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[1] Suzanne Barakat is the sister of one of three Muslim students shot and killed near the University of North Carolina campus in Chapel Hill in February 2015. The two other victims were her sister in law and the sister of her sister in law. Questioned live on air on the question of a news host of what justice would entail for her following the killing of her family members, this was the first reply of Suzanne Barakat. (see http://english.alarabiya.net/en/media/digital/2015/02/14/Chapel-Hill-victim-sister-American-Sniper-dehumanizes-Muslims-.html. Last accessed on 20 April 2015) This quote struck me because of the reference to both substantive and procedural justice.

[2] Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Peter Cumper & Tom Lewis (eds.), Religion, rights And Secular Society (Edward Elgar Publishing 2012), 267.

[3] Thomas Hammarberg, Human Rights in Europe: no ground for complacency, Council of Europe 2011, p 36. Available at http://www.coe.int/t/commissioner/source/prems/HR-Europe-no-grounds-complacency_ en.pdf. (last accessed: 11 March 2015)

[4] Grace Davie, 'Understanding religion in Europe: a continually evolving mosaic', in Cumper and Lewis (eds), *Religion, rights And Secular Society,* (2012) at 267.

[5] ECtHR, Grand Chamber, *S.A.S. v. France*, 1 July 2014.

[6] For example, through the application of the concept of reasonable accommodation. See e.g. Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities : A Promising Concept for European Antidiscrimination Law?' 17 *Maastrich. J. Eur. Comp. Law* (2010), 137–161.

not always be possible. What is always possible, though, is to approach those who turn to the Court in search of protection in an egalitarian and inclusive way, acknowledging their membership and their equal status in society and avoiding their alienation and marginalization. This procedural perspective on inclusion is not intended to substitute for a substantive perspective on inclusion; it is instead complementary and it is always applicable, regardless of whether favorable or non-favorable outcomes are reached.

This article aims at an in-depth examination of the European Court of Human Rights' article 9 case law[7] from a procedural inclusion perspective, rather than from the more common substantive perspective. It starts from the assumption that treating people in a respectful and unbiased way, regardless of their background and the religion they profess, is inherently inclusive. In fact, as will be explained, this is confirmed by social psychology research on 'procedural fairness', which shows that in their contact with legal authorities, people not only care about the outcome they receive in their case, but also accord significant importance to the way this outcome is reached.[8]

This article will in a first – theoretical – part list the main findings of social psychology research on procedural fairness and will explain how these findings are particularly relevant in the context of religious diversity and freedom of religion adjudication. In a second – normative – part, it will set out how the factors that determine procedural fairness perceptions, namely neutrality, respect, trustworthiness, and participation, can be applied to the freedom of religion case law of the Court. In the third − both analytical and normative − part, it will examine the Court's case law from a procedural fairness perspective, uncovering procedural fairness flaws and making suggestions for improvement. This part will also explain the interdisciplinary methodological approach used for the analysis of the case law.

3.1. Towards more inclusion through freedom of religion case law: a procedural fairness perspective

3.1.1. Procedural fairness: a short introduction

The Court's case law under article 9 has been widely examined, debated, and criticized as regards its substance. The Court has been criticized for not according sufficient importance to article 9 in its adjudication and for having too restrictive an

[7] See infra III.A for an overview of the methodology used.

[8] See for example one of the most influential works in the field of procedural justice research Tom R. Tyler, *Why People Obey the Law* (Princeton Univeristy Press, 2006).

approach to the application of the right to freedom of religion in individual claims.[9] The Court has also been accused of holding anti-Muslim bias.[10] As a result, many authors plead for wider protection and more inclusiveness in the Court's freedom of religion case law.

While in general I join this plea for inclusion, in this article I explore how the Court can also play an inclusive role through procedural fairness. Rather than offering a critique of the substantive aspects of the Court's reasoning relating to the level of protection the Court offers under article 9, I look at how the Court through its judgments approaches religious applicants and religious claims irrespective of the level of protection offered. For example, when the Court questions whether an interference takes place with the freedom of religion of a practicing lawyer who complains about the fact that the hearing of case is scheduled on a religious holiday, the Court is not only limiting the protection of the applicant's freedom of religion, but it also shows a lack of genuine consideration of the applicant's concern. In this study I will argue that that in itself is problematic from the point of view of inclusion.

This article is inspired by the social psychology findings concerning procedural fairness.[11] The research in this field shows that people care significantly about the way they and their cases are treated by courts. This concern is shown to be even more important than their concern with the outcome of their case.[12] In the context of courts, Tom Tyler, a leading scholar in the field of procedural fairness research, discerns four main criteria determining people's perceptions of procedural fairness.[13] A first criterion being 'participation', also frequently called 'voice' referring to the ability of individuals to express their side of the story and having their views considered. A second element is 'neutrality', meaning that individuals expect to be treated in an unbiased and neutral way. A third criterion is 'respect' which refers to the need of respecting people's dignity and having respect for their rights. Finally,

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[9] Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford J. Law Relig*. (2012), 6 and Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative' in Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff Publishers, 2012) at 23.

[10] Peter G. Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 *Michigan Journal of International Law* (2011) at 741.

[11] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007).

[12] Ibid at 26; Tyler, Tom R., 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', 22 *Law and Society Review*, (1988), at 121; Amy Gangl, 'Procedural Justice Theory
and Evaluations of the Lawmaking Process', 25 *Political Behavior*, (2003), at 120 (with reference
to John R. Hibbing and Elizabeth Theiss-Morse, 'Process Preferences and American Politics:
What the People Want Government to Be', 95 *The American Political Science Review* (2001) at 145-153.

[13] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007), 26-31 and Tom R. Tyler, 'Social Justice: Outcome and Procedure', *35 Int. J. Psychol*., (2000) at 117–125.

the fourth element concerns 'trustworthiness' , meaning that authorities are expected to care about people's concerns and to strive to be just.[14]

A central finding of procedural fairness research is that people's perception of procedural fairness shapes their views about the legitimacy of the courts[15] and influences acceptance of and compliance with decisions.[16] Also important is the reason why people value procedural fairness. Initially it was assumed that people were concerned about procedural fairness for reasons related to the outcome of the case.[17] However, Tyler and Lind show that relational rather than instrumental reasons underlie people's procedural fairness concerns. People value procedural fairness because of the message of inclusion it communicates. Research also shows that the procedural fairness findings are universally applicable, irrespective of ethnic background.[18] Treating people in a respectful, equal, and caring way communicates that they are valued members of the group and this message influences people's feelings of self-worth.[19] Therefore, applying procedural fairness is particularly important in a religiously diverse context in order to foster the inclusion for all and to strive for social cohesion despite possible conflicting views.

3.1.2. Procedural fairness in a religiously diverse context

Applying high procedural fairness standards in all cases and to all applicants the Court is confronted with is important, not least because procedural fairness standards are part of the value system the Court represents.[20]

However, there are several additional reasons why in cases concerning freedom of religion these findings are particularly relevant. First of all, freedom of religion claims often concern applicants belonging to minority groups. Since minorities are generally less trusting in authorities than people belonging to majority groups,[21] applying high procedural fairness standards can help to avoid the

[14] These criteria will be discussed into more detail in the next section.

[15] Tom R. Tyler, *Why People Obey The Law* (Princeton University Press, 2006), at 270.

[16] Idem.

[17] Steven L. Blader and Tom Tyler,' A Four-Component Model of Procedural Justice : Defining the Meaning of a " Fair " Process', 29 *Pers Soc Psychol Bull* (2003), at 748.

[18] Tom R. Tyler and Yuen Huo, *Trust in the Law*, (Russel Sage Foundation, 2002), at 152; Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', White paper for the American Judges Association (2007), at 18; Tom R. Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 217.

[19] Allan E. Lind and Tom R. Tyler*, The Social Psychology of Procedural Justice* (Springer, 1988).

[20] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013) at 185.

[21] Tom R. Tyler, *Why People Obey The Law* (Princeton University Press, 2006) at 270; Tom R. Tyler and Yuen Huo, *Trust in the Law*, (Russel Sage Foundation, 2002), at 142-146; Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law

alienation of minorities from the Court.[22] Securing the Court's legitimacy and avoiding alienation is all the more important when it comes to more vulnerable groups such as religious minorities, because of the corrective function the Court should have in protecting "the rights of minority members against abuses of majority rule by the dominant group."[23]

Moreover, in the context of sensitive and polarizing debates on religion in Western Europe, the Court can act as a beacon of justice and peace, bringing back neutrality and accuracy to the debate.[24] An example of this can be found in the recent case of *SAS v. France*.[25] Although the judgment has been (rightly) criticized on a substantive level, among other things for not finding a violation, the Court should receive credit for the respectful way it dealt with the (controversial) subject of the face veil.[26]

Additionally, by applying good procedural fairness standards in its own case law, the Court communicates that people are considered valued members of society. This is particularly important in article 9 cases since a segment of the claims made under this article concerns claims of inclusion. Religious accommodation claims, for example, express a need for full inclusion in society, through work and education, while at the same time being able to express one's religious identity. Although religious accommodation is not always possible for practical reasons, the least the Court can do is to seriously examine the possibilities and to do so in a respectful and neutral way.

These arguments are particularly important because of the broader impact of the Court's decisions. They not only impact on the individual applicants in a case, but also affect other people or groups of people who identify with the applicant and/or his or her claim. A striking illustration can be found in the letter of Fasilet Partisi[27] to

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and Legal Institutions?', 19 *Behavioral Sciences and the Law* (2001) at 217; Margaret Levi, Audrey Sacks, and Tom Tyler, 'Conceptualizing Legitimacy, Measuring Legitimating Beliefs', 53 *American Behavioral Scientist* (2009) at 369.

[22] See also Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013) at 184.

[23] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013) at 184 with references to *Young, James and Webster v. The United Kingdom*, 13 August 1981 at para 63 and *Koky v Slovakia*, 12 June 2012.

[24] For a discussion on the debate on the face veil bans in France and Belgium: Eva Brems, Jogchum Vrielink and Saïla Ouald Chaib, 'Uncovering French and Belgian Face Covering Bans' (2014) 2 *Journal of Law, Religion and State* at 69-99.

[25] ECtHR (GC), *S.A.S. v. France*, 1 July 2014.

[26] See Saïla Ouald Chaib and Lourdes Peroni, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil', *Strasbourg Observers*, Blog commenting in developments in the case law of the European Court of Human Rights, 3 July 2014, available at http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/ (last accessed on 11 March 2015).

[27] ECtHR, *Fazilet Partisi and Kutan v. Turkey*, 27 April 2006.

the Court, in which they announce the withdrawal of their case because they had lost confidence in the Court after its decisions in *Leyla Sahin* and *Refah Partisi*. Fazilet Partisi argued, among other things, that the Court was biased against Muslims and did not show respect towards them.

In sum, these elements show that procedural fairness is an important aspect to take into account in the Court's adjudication, especially when people belonging to minority groups are involved. In what follows, I will elaborate further on the specific components of procedural fairness criteria, and how they can be translated to freedom of religion case law.

3.2. Normative application of procedural fairness criteria in freedom of religion case law

Tom Tyler developed a procedural fairness framework specifically for the context of courts based on four procedural fairness criteria.[28] This model is applied to the case law of the Strasbourg Court in the work of Brems and Lavrysen.[29] In this section I will further develop this framework specifically in the context of the Court's freedom of religion case law.

1. Voice[30]

Voice refers to the importance applicants accord to being able to participate in a case through the expression of their views and arguments,[31] irrespective of whether or not their voice will impact the outcome of their case.[32] However, expressing one's voice is not sufficient in itself; it needs to go hand in hand with genuine consideration by the courts.[33]

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[28] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 26–31.

[29] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013).

[30] Also called "representation" or "participation". See respectively, Tom Tyler, 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', 22 *Law and Society Review*, (1988), at 104-105 and Tom Tyler, Social Justice: Outcome and Procedure, 35 *Int. J. Psychol.* (2000), at 121.

[31] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 30 and Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', White paper for the American Judges Association (2007), at 6 and Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006).

[32] However, this element will matter even more when people feel they have an impact on the outcome. See Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000) at 121 and Rebecca Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts', 63 *Hastings Law Journal* (2011) at 136 with references to Debra (note 38).

[33] Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', White paper for the American Judges Association (2007), at 11-12 and Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 30 and Tom Tyler, *Why People Obey The Law*

Although applicants' personal contact with the Strasbourg Court is limited,[34] the Court can ensure this procedural fairness aspect by representing the facts of the case and the applicant's arguments in an accurate way in its decisions.[35] In the context of freedom of religion case law, this includes an accurate representation of the applicant's religious background and of his or her religious claim.

Since it is also important that the Court genuinely considers the arguments made by the applicants, the Court should be transparent in its judgments about its reasoning and the way the arguments are taken into account.[36] In this regard, mere standard formulations such as "having regard to all the evidence in its possession, and in so far as it has jurisdiction to examine the allegations, has not found any appearance of a breach of the rights and freedoms guaranteed by the Convention or its Protocols"[37] are clearly insufficient if the Court is to take the applicant and his or her rights seriously.

2. Neutrality

Judges are also expected to be honest, impartial, independent and objective[38] and to "make decisions based upon rules and not personal opinions."[39] In the freedom of religion case law, neutrality involves a representation of the religious aspects of the case without expressing value judgments, prejudices or generalizations about the applicant's convictions. This also means that the Court should stay away from theological assessments.[40] As criticized by many authors, the Court clearly fails to do so in cases such as *Leyla Sahin*[41] and *Refah Partizi*,[42] where it makes problematic and biased statements about Islam.[43] A more recent example can be found in *Jehovah's Witnesses*, where the Court observes "on a general note" that

(Princeton University Press, 2006) at 149 and 276.

[34] For an application of procedural justice criteria to a court's context where applicants have direct contact with the judges, see: John M. Greacen, 'Social Science Research on "Procedural Justice": What Are the Implications for Judges and Courts?', 47 *Judges. J.* (2008).

[35] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013) at 186.

[36] Ibid.

[37] E.g. ECtHR, *Glinski v. Poland*, 11 February 2014 and ECHR, *Kin v. Ukraine*, 17 November 2009, §2.

[38] I.a. Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000), at 122; Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006) at 164.

[39] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 30, see also Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000), at 122.

[40] I.a. David Harris et al *Law of the European Convention on Human Rights*, (Oxford University Press, 2009) at 433. See also Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013) at 186-187.

[41] ECtHR (GC), *Leyla Sahin v. Turkey*, 10 November 2005.

[42] ECtHR (GC), *Refah Partisi and Others v. Turkey*, 13 February 2003.

[43] See e.g. Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 Michigan J. Int. Law (2011).

"the rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practiced on Jewish or Muslim male babies."[44] Comparisons of this kind should obviously be avoided. Not only is this comparison redundant, but it also stigmatizes other religious practices which are not even at issue in the case.

An additional element of neutrality is consistency. This includes consistency across people and cases[45] and consistency across time.[46] When the Court breaks away from a consistent line of case law, it should at least be transparent and motivate that decision.[47] Comparing the cases of *Lautsi* and *Dahlab*, some problematic aspects of inconsistency come to the surface. In *Lautsi* for example, the Court states that "it cannot be asserted" that a crucifix on a classroom wall "does or does not have **an effect** on young persons" because there is no evidence that it "may have **an influence** on pupils." In this case the Court refers to the crucifix as a "passive symbol."[48] Compare this with *Dahlab*, where the Court, referring to the headscarf as a "powerful external symbol," states that "**it cannot be denied outright** that the wearing of a headscarf might have some kind of **proselytising effect**, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality."[49] In the case of *Lautsi* the Court requires evidence that the crucifix has an impact on children, while in *Dahlab* a theological interpretation suffices for it to make strong statements on the wearing of the headscarf. Also, in the first case the Court speaks about possible *influence* or *effect* on pupils, while in *Dahlab* the Court immediately speaks of a *proselytizing effect* of the headscarf. The distinction made between a 'passive' versus a 'powerful external symbol' certainly does not suffice to explain these different nuances in the reasoning.

Finally, another aspect of neutrality is the equal treatment of the parties. This applies not only across cases, as argued above, but also within a case. This is particularly important in the Court's adjudication since the defendant party is a State. The Court should therefore be attentive that the claimant's arguments are sufficiently weighed against the State's arguments.

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[44] ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, 10 June 2010, § 144.

[45] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 30.

[46] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' 35 *Human Rights Quarterly* (2013) at 181.

[47] Ibid at 186-187, where the authors note that even though the Court is not "strictly bound by its own precedents, it has adopted the practice of providing a detailed justification for an explicit change of direction compared to previous case law." See for an excellent example in the context of article 9: ECtHR, *Bayatyan v. Armenia*, 7 July 2011.

[48] ECtHR (GC), *Lautsi And Others v. Italy*, 18 March 2011 at §66. (Emphasis added)

[49] ECtHR, *Dahlab v. Switzerland*, 15 February 2001. (Emphasis added)

3. Respect

While both voice and neutrality are linked to the quality of decision making, respect is related to the interpersonal aspect of the decision-making process.[50] People want to feel that their concerns and rights are taken seriously and they want to be treated with dignity and respect as individuals and as members of society.[51] A minimum of respect would be to acknowledge an applicant's religious concerns. This does not mean that the Court should necessarily agree with the applicants' religious views or practices, but, following Heiner Bielefeld, the current Special Rapporteur on freedom of religion a starting point would be to have "respect for human beings as potential holders of deep, existential convictions."[52] This is particularly important for unfamiliar religious needs or claims that might seem 'frivolous' from an outsider's perspective. The Court should in any event treat claims with respect, realizing that, as Tyler observes, "people come to court about issues that are important to them, irrespective of the strength of their legal case."[53] Additionally to showing respect for the applicant believer, it is also important that the Court takes the applicant's rights seriously. Yet, as Carolyn Evans argues, in practice, the applicants' individual right to freedom of religion tend to easily be compromised when a conflict with other interests arise.[54] Like any other human right protected by the Convention, freedom of religion should receive appropriate consideration in every individual case. [55]

4. Trustworthiness

The question whether or not an authority can be considered trustworthy is the central element influencing people's perception of procedural fairness.[56] People want to feel that judges care about their concerns, that they are "trying to do what is

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[50] Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006) at 164 and Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000), at 122.

[51] Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000), at 122; Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 30 and Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006) at 149.

[52] Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', 35 *Hum. Rights Q.* (2013), at 47.

[53] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007) at 31.

[54] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' , 26 *Journal of Law and Religion* (2010-2011), at 341.

[55] In the context of freedom of religion in the workplace, for example, it is clear that the Court treats cases under article 9 differently from cases under other articles such as article 10, while the issues at stake appear to be very similar. See Saïla Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights,' in: Katayoun Alidadi, Marie Claire Foblets and Jogchum Vrielink (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, (Ashgate, 2012), 33.

[56] Tom Tyler, 'Procedural Justice and the Courts', 44 *Court Rev. J. Am. Judges Assoc*. (2007)at 30-31 and Tom Tyler, 'Social Justice: Outcome and Procedure', 35 *Int. J. Psychol*., (2000), at 122.

right for everyone involved"[57] and that they are making an effort to be fair.[58] The element of trustworthiness is clearly intertwined with the other criteria. Voice in itself is not enough; authorities must also show that the voice is generally considered. An authority that is manifestly biased and non-neutral will have a hard time showing its trustworthiness.[59] Moreover, when authorities do not show respect for people's rights and concerns, this is hard to square with characteristics such as sincerely caring.

This criterion requires the capacity of empathy from judges[60] through an ability to act in the interests of the parties, taking their concerns at heart. Even when judges are not able to give a favorable outcome to one of the parties, they can still communicate that the concerns have been viewed, listened to and taken into account. An example of such an approach can be found in the case of *Pretty v. the UK*. Although the Court concludes that the applicant's claim concerning assisted suicide does not fall within the protection of article 9, it observes at the same time that it "does not doubt the firmness of the applicant's views",[61] which clearly shows respect towards the applicant's concerns.

In the next part, I extensively explore the article 9 case law of the Court from a procedural fairness angle, using the previous four criteria as a guideline. Before going to the results of my analysis, I will first explain the methodology followed.

3.3. An In-Depth Interdisciplinary Analysis of Freedom of Religion Jurisprudence

3.3.1. Methodology

In this article an interdisciplinary approach is not only included at the level of the theoretical framework which, as seen above, is influenced by social psychology research, but interdisciplinarity also plays an important role at the level of the analytical methods used. This section will explain how the case-law analysis for this article was undertaken, first by showing how the case law was selected and then by uncovering the main principles and techniques employed in the case law analysis.

[57] Ibid.

[58] Tom Tyler, 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', 22 *Law and Society Review*, (1988), at 129.

[59] Rebecca Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts', 63 *Hastings Law J.* (2011), at 136.

[60] Lucia Corso, 'Should Empathy Play any Role in the Interpretation of Constitutional Rights?', 27 *Ratio Juris* (2014), 94-115. See also Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism', 30 *Cardozo Law Rev*. (2009), 30.

[61] ECtHR, *Pretty v. The United Kingdom*, 29 April 2002, §82.

3.3.1.1. Selection of cases

The corpus of case law that has been analyzed for this article includes those cases brought before the European Court of Human Rights under article 9 ECHR from November 1998 to July 2014.[62] Both judgments and inadmissibility decisions[63] are included. In a first selection round, the cases declared inadmissible on procedural grounds such as non-exhaustion of domestic remedies or inadmissibility *ratione temporis,* were eliminated. Also the cases struck out of the list are left out. After the first elimination round, 442 cases were retained for a deeper analysis.[64]

3.1.1.2. Method of analysis

The analysis of the case law took place in two stages. In the first stage the case law was explored in an inductive way, inspired by 'grounded theory', a common method of qualitative analysis in the social sciences. In a second stage the results were analyzed specifically from a procedural fairness angle.

Central to grounded theory is the inductive approach, involving a bottom-up mindset where the theory emerges from the data[65] instead of starting from a hypothesis and then deductively turning to the data in search of illustrations or confirmations of the hypothesis.[66] The analysis is shaped through the process of coding.[67] This is a deconstructing process[68] in which segments of the data (in my case the Court's judgments and decisions) are categorized under several themes and

[62] As the starting point I chose 1 November 1998, the date on which the Court was permanently installed and where the dual system with the European Commission of Human Rights and the Court came to an end. See more elaborate for a short description of the history of the Court: http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf. As an end point I chose 1 July 2014, the day on which the judgment in the case of *SAS v France* came out. (*S.A.S. v France*, 1 July 2014)

[63] This also includes the decisions of partial admissibility-inadmissibility, when the inadmissibility refers to the article 9 claim.

[64] The selection of cases is based on the Hudoc database. Hudoc gives, for article 9, 428 results in English and 425 results in French. Although a lot of cases appear in both languages, this is not the case for all of them. Therefore, both languages are taken into consideration.

[65] Initial theory developed by Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research,* (Transaction Publishers, 2009). Refined by other authors such as Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis*, (Sage Publications, 2006) and Matthew B. Miles, A. Michael Huberman and Johnny Saldaña, *Qualitative Data Analysis: A Methods Sourcebook* (Sage publications, 2013) .

[66] Harvey Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (AltaMira Press, 2006) at 493.

[67] For this I used the qualitative analysis software program 'Nvivo'.

[68] Dimitri Mortelmans, *Kwalitatieve analyse met Nvivo,* (Acco, 2011) at 27.

subthemes that are formed and refined during the analysis.[69] For example, under the general theme of 'reasoning', one of the codes is '*Alternative'* and this code comprises several sub-codes such as '*Applicant had an alternative*' and '*Applicant could have found an alternative*'. These codes were not defined before the start of the analysis, but were created during the coding process where it was observed how the Court used the concept of 'alternative' in diverse ways in its reasoning.[70] The categorization of the case law already consists of analysis in itself, but the analysis also requires constant reflection and comparison during the process of coding.[71]

The case law was approached with the following questions:[72] how is the Court approaching the applicant believer? How is the Court approaching the religious aspects of the case? And how is the Court interpreting freedom of religion? Only in a second phase of the analysis an explicit examination of the material was undertaken from the perspective of the procedural fairness criteria, on the basis of the codes and the reflections written down during the coding process.[73] In this stage it was explored where procedural flaws could be found and accordingly, how the judgments might have been improved.

The combination of both the extensive selection of cases, which were examined in chronological order, and the openness of the method used, allowed the researcher to have a broader overview and gain a deeper understanding of the Court's article 9 case law, as opposed to the approach of a selective reading of case law as a function of certain arguments. It was also helpful to detect procedural fairness flaws that are less obviously noticeable with a selective reading of the cases. With an examination of the case law limited by a procedural fairness focus, for example looking for signs of bias or disrespect, some of the observations made in the analysis below would probably not have seen the light.

Moreover, as the following analysis of the article 9 case law will show, the procedural fairness criteria often appear in combination when procedural fairness

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[69] E.g. Jonny Saldana, *The Coding Manual for Qualitative Researchers,* (Sage Publications, 2012) at 8; Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage Publications, 2006).

[70] See infra 3.3.2.3. where these codes were used.

[71] Researchers are encouraged to write these reflections down; this process in called 'memoing'. See e.g. Patricia Bazeley, *Qualitative Data Analysis: Practical Strategies* (Sage Publications, 2013), at 36.

[72] Some grounded theory experts submit that grounded theory requires that the researcher should approach the data with a 'pure' start. However, several researchers accept that grounded theory can also be conducted with a general framework or research question in mind. Charmaz formulates it as follows: "There is a difference between an open mind and an empty head." In my methodology I follow the latter approach. See e.g. Matthew B. Miles, A. Michael Huberman and Johnny Saldaña, *Qualitative Data Analysis: A Methods Sourcebook* (Sage publications, 2013), at 26-27 and Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage Publications, 2006).

[73] However, when during the first stage analysis I came across obvious procedural justice flaws in the case law, I had already marked them in a separate category called [procedural justice].

flaws occur. Therefore, in what follows I choose to present my analysis on three levels. First, I explore the Court's decisions to not examine article 9 claims (B.1.); second, at the surface of the reasoning I look at how the Court approaches the applicant believer and his or practice (B.2); and third, I look more deeply into the reasoning of cases where the Court does proceed to the examination of article 9 claims (B.3).

3.3.2. Freedom of religion jurisprudence viewed through a procedural fairness lens

3.3.2.1. Non-examination of article 9 claims

The perception of procedural fairness depends, amongst other considerations, on people's expectation that they will be respected, meaning that their rights and claims will be taken seriously. An interesting question that then arises is how this relates to the situation in which the Court does not examine an applicant's article 9 claim. In this part I will explore the different situations in which the Court does not examine article 9 claims from a procedural fairness perspective.

Two main types of situation can be discerned in which the Court decides not to examine an applicant's article 9 claim on its merits. The first occurs at the start of the examination of a case (examination under another article alone) and the second after one part of the case has already been examined (no separate examination needed).

To start with, often the Court decides to examine a case only under another Convention article, even though article 9 was also invoked. Mostly this has to do with the fact that the issue at stake does not fall under the scope of article 9, but rather under that of another article such as article 10 or article 11. This is a purely technical matter which is not necessarily problematic in itself.

However, it becomes more complicated when the claim made by the applicant also contains an aspect related to religion. In the case of *Yildirim v. Turkey*, for example, the applicant, the parent of a stillborn child, claimed that the refusal of the hospital to hand over the corpse of the baby for burial according to his religious rites violated both articles 8 and 9. The Court decided to "examine these complaints solely from the standpoint of Article 8 of the Convention."[74] Putting aside the fact that the Court did not motivate why it would only examine the case in light of article 8, it cannot be denied that burial rites are an important aspect of religious experience.[75] This can also be deduced from the case, in which the applicant not only

[74] ECtHR, *Yildirim v. Turkey*, 11 September 2007.

[75] See for example the case ECtHR, *Pannulo et Forte v. France*, 23 November 1999, where the Court recognizes the religious aspect of burial rites.

asked to be united with his daughter, but also stressed that he wanted to bury her according to religious rites. Simply not examining the article 9 claim neither acknowledged nor showed respect for this aspect of the applicant's concerns. The Court did the opposite, though, in *Hasan and Chaush v. Bulgaria*, concerning the interference of the state in the appointment of a religious organization's leader. The Court stated that it "does not consider that the case is better dealt with solely under Article 11 of the Convention, as suggested by the Government. Such an approach would take the applicants' complaints out of their context and disregard their substance."[76]

In other cases the Court decides that no separate examination is needed when other articles have already been examined. Often it is concluded that the examination under article 9 would lead to similar reasoning.[77] However, in some cases the article 9 claim is different from the claims under other articles and still the Court does not examine it separately. In *Riera Blume v. Spain*,[78] for example, a case concerning the deprivation of liberty and 'deprogramming' of members of a sect, the Court decided not to examine the case separately, observing that "the applicants' detention is at the core of the complaints under consideration. Having held that it was arbitrary and hence unlawful for the purposes of Article 5 § 1 of the Convention (…), the Court does not consider it necessary to undertake a separate examination of the case under Article 9."[79]

Another striking illustration is the case of *Kavakci v. Turkey.*[80] This case contained several complaints, among which were an article 9 complaint about not being allowed to wear a headscarf in parliament while having been democratically elected, and a complaint under article 3, Prot. 1 about the limitation of the applicant's political rights. Finding a violation under the second complaint, the Court decided not to examine the article 9 complaint, even though this was a major issue for the applicant.[81]

Not examining complaints for the sole reason that a violation has been found under another (unrelated) article can be considered problematic from a procedural fairness perspective, since it leaves the applicants' concerns unanswered and communicates that this part of the complaint is less important. Although in the end

[76] ECtHR, *Hasan And Chaush v. Bulgaria*, 26 October 2000, §65.

[77] E.g. ECtHR, *Ulke v. Turkey*, 24 January 2006, §68 and ECtHR, Jedlickova v. Czec Republic, 3 June 2008, §3.

[78] ECtHR, *Riera Blume And Others v. Spain*, 14 October 1999.

[79] Ibid, §38.

[80] ECtHR, *Kavakci v. Turkey*, 5 April 2007.

[81] See a detailed analysis of this case in Saïla Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights,' in: Katayoun Alidadi, Marie Claire Foblets and Jogchum Vrielink (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, (Ashgate, 2012), 33.

the applicants won their case, it is not unthinkable, in light of the procedural fairness finding that outcome is not the only element that matters, that the unwillingness to examine some important aspects of the claim leaves the applicant with an unfulfilling victory.

3.3.2.2. The Court's approach towards the religious believer

One of the first things people notice when reading a case is who the applicant is and what he is complaining about. In freedom of religion cases this includes the applicant's religious background and practice. As the Court's description of these elements will shape the reader's first impression of the case, it is therefore important commendable that the Court keeps procedural fairness in mind when describing these aspects of the case. In this section I will argue that from a procedural fairness perspective the Court should remain as neutral as possible and should take the applicant's voice into account when describing the applicant and his or her religious practice.

A. Naming the religious applicant

A detailed analysis of the case law reveals that the Court describes the applicant's religious background or affiliation in multiple ways.

A first prominent distinction can be observed in the perspective from which the Court describes this religious background. Often, the Court announces it as a simple fact in an abstract informative way, from an outsider's perspective, for example that the applicants "are Christian."[82] Sometimes, however, the Court incorporates an applicant's perspective. Examples are "the applicant submits that he is a Christian"[83] and "[t]he applicant, who considers himself a member of the Muslim Turkish minority."[84] In principle, these different approaches are not problematic in themselves. However, when distinct formulations are used in different cases, this may raise an issue of neutrality across cases. Consider, for example, the three following sentences:

A. the applicant is a Buddhist

B. the applicant considers himself a Buddhist

C. the applicant submits that he is a Buddhist

Read on their own, all three formulations seem convenient and neutral. But when read together, they can come across differently. Sentence A (outsider perspective) confirms the applicant's religious affiliation confidently, while B and C (applicant's

[82] ECtHR, *Z. And T. v. The United Kingdom*, 28 February 2006.

[83] ECtHR, *Patrikeyev v. Russia*, 21 Septembre 2004.

[84] E.g. ECtHR, *Ouzoun v. Greece*, 6 February 2003.

perspective) reflect more reluctance, as if there is doubt about the applicant's religious conviction.

This perception can be avoided if one of the formulas is consistently used. Although both approaches are adequate and neutral when used consistently, in my view, literally including the applicant's self-identification through his or her own voice, as in C, brings additional benefits. The approach of sentence C guarantees that the formulation used by the Court is an exact reflection of the applicant's voice, which guarantees the Court's neutrality in the matter.

A second interesting finding concerns the way the applicant is positioned in relation to his or her religious group or community. The applicant believer is sometimes described with reference to his or her community, for example as a "member of the Jehovah's Witnesses in Austria,"[85] while at other times, the applicant is represented as an individual believer, for example "[t]he applicants are Jehovah's Witnesses."[86] Here also, both formulations can be considered acceptable as long as they reflect the applicant's voice accurately in how he described him in relation to the religious community. In fact, some people consider themselves to be believers without necessarily identifying themselves with a community, or what Grace Davie calls "believing without belonging."[87] Besides ensuring an accurate representation of the applicant's voice, the use of an insider formulation is also a helpful tool for ensuring the Court's neutrality in personal religious conviction matters. Examples of this approach can be found in the case of *Sinan Isik v. Turkey*, where the Court notes that the applicant "stated that he was a member of the Alevi religious community."[88]

A third noteworthy observation concerns the use of particular adjectives, such as *practicing* and *active* when describing the applicant believer, or the use of expressions such as *deeply* or *strong* to describe the way he believes. For example:

"Mr Harry Hammond, …, was an evangelical Christian … His religious beliefs were deeply held and he had a desire to convert others to his way of thinking."[89]

And:

"The first applicant, …, is a practising Coptic Christian."[90]

It is not clear whether these expressions were used by the applicants in their

[85] ECtHR, *Bayatyan v. Armenia*, 7 July 2011, §111.

[86] ECtHR, *Kuznetsov And Others v. Russia*, 9 September 2004, §7.

[87] Grace Davie, 'From Believing without Belonging to Vicarious Religion. Understanding the patterns of religion in Modern Europe' in Detlef Pollack and Daniel V. A. Olson (eds.), *The Role of Religion in Modern Societies,* (Routledge, 2008).

[88] ECtHR, *Sinan Isik v. Turkey*, 2 February 2010, § 39.

[89] ECtHR, *Fairfield Others v. The United Kingdom*, 8 March 2005.

[90] ECtHR, *Eweida And Others v. The United Kingdom*, 15 January 2013, § 9.

submissions or whether they were added by the Court.[91]

Obviously, when these are not the applicants' words the Court cannot, just by deduction, add its interpretation to the case, since the level of practice or whether someone holds strong beliefs is a subjective matter which is difficult to objectively assess. Some may, for example, practice regularly and others only occasionally.[92]

Even if the presentation of the facts is based on the submission, the additional question arises whether the Court consistently mentions the reference to, for example, 'practicing' in all cases where the applicant defines himself as such in his application. If the Court only selectively refers to whether or not an applicant is practicing (when mentioned by the applicant) the Court risks creating a perception of bias.[93] It cannot be denied that information about a (positive) level of practice or the fact that the applicant's beliefs are deeply held impacts the impression about the applicant in a positive way, which can be problematic where practice is inconsistent. If, however, the Court consistently reproduces this kind of description when mentioned by applicants, there is less of a problem. Nonetheless, to avoid any doubt about the neutrality of the Court and to ensure an accurate representation of the applicant's voice, it should preferably be clear from the judgment that these descriptions come from the applicant. The easiest way to achieve this is through a phrase such as 'the applicant states that he is a practicing Christian'.

B. Naming the applicant's religious practice

The Court has repeated time and again that article 9 "does not protect every act motivated or inspired by a religion or belief."[94] Nevertheless, the criteria it uses to determine what it considers a manifestation of religion are not very clear.[95] For a

[91] In the first case mentioned above, the Court introduced the applicant by mentioning that "[t]he facts of the case, as submitted by the applicants, may be summarised as follows." In this sense it suggests that the applicant formulated the facts in this way, although one cannot be certain since it is the Court which "summarises". In the second example, nothing about who formulated the facts is mentioned.

[92] Roberto Cipriani, 'What can the Social Sciences Teach us About the Relationships Between Cultural Identity, Religious Identity, and Religious Freedom?' in Glendon and Hans (eds.), *Universal Rights in a World of Diversity The Case of Religious Freedom*, (The Pontifical Academy of Social Sciences. Vatican City, 2011) 477 at 479 with reference to Grace Davie, *Religion in Britain since 1945: believing without belonging*, (1994).

[93] Remarkably, the majority of cases where a reference is made to "practicing" concern Christians. (I conducted a search with the terms practicing and its equivalent in French, *pratiquant*. The results showed one case concerning a Muslim, 2 cases concerning Sikhs, 1 Buddhist and 8 cases concerning Christians (1 Catholic, the 4 applicants in Eweida, 2 Jehovah's Witnesses, 2 Orthodox Christians, 1 belonging to another Church, and 1 identified in general as a Christian))

[94] See e.g. ECtHR (GC), *S.A.S. v. France*, 1 July 2014, §125.

[95] Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer', 30 *Cardozo Law Rev.* (2009),at 2674.

long time the criterion seemed to be that an applicant should prove that a certain practice was required by his religion,[96] but in other cases the Court applied a subjective approach in which the applicant's experience was centrally placed.[97] In more recent cases the Court has broadened its viewpoint by only requiring an intimate link to the religion or belief.[98]

In this part I will identify how the Court defines religious practices, in particular focusing on the perspective from which it does that, and I will analyze from a procedural fairness angle what are the benefits and pitfalls of the different approaches.

In its representation of the manifestation of religion, the Court distinctively uses an insider and an outsider perspective.

With the insider or subjective approach, the Court puts the applicant's voice at the forefront. It is the applicant's view that determines whether a certain behavior is a manifestation of religion. In *Ahmet Arslan v. Turkey*,[99] for example, a case concerning people wearing religious apparel in the public space, the Court stated that "the applicants were members of a religious group named Aczimendi and they considered that their religion required them to dress in this way."[100] As such, the Court showed respect for the applicants' agency in defining their own religious practice and through this formulation reflected the applicant's voice in the judgment. Moreover, this approach takes away the risk of not being neutral since by repeating how a certain practice is considered by an applicant, the Court does not venture into theological issues and avoids expressing value judgments on the particular practice.

Although this approach at first sight seems procedurally fair, an important qualification needs to be expressed. An insider approach will only truly guarantee neutrality when used consistently across cases. When we look, for example, at cases concerning the wearing of religious apparel, it is interesting to see that all cases involving Muslims use the insider approach when defining the religious practice.[101] In

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[96] Ibid and Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), 115.

[97] Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer', 30 *Cardozo Law Rev.* (2009),at 2674.

[98] ECtHR (GC), *S.A.S. v. France*, 1 July 2014, § 55 and ECtHR, *Eweida And Others v. The United Kingdom*, 15 January 2013, § 81.

[99] ECtHR, *Arslan v. Turkey*, 8 July 1999.

[100] Ibid, §35 (translated from French by the author)

[101] ECtHR , *Dahlab v. Switzerland*, 15 February 2001; ECtHR *,* Sahin v. Turkey, 10 November 2005; ECtHR *, Tig v. Turkey*, 24 May 2005; ECtHR *, Kose And 93 Others v. Turkey*, 24 January 2006; ECtHR *, Kurtulmus v. Turkey*, 24 January 2006; ECtHR *, Arac v. Turkey*, 19 September 2006; ECtHR, *Karaduman v. Turkey*, 3 April 2007; ECtHR *, Yilmaz v. Turkey*, 3 April 2007; ECtHR *,* Kavakci v. Turkey, 5 April 2007; ECtHR *, El Morsli v. France*, 4 March 2008; ECtHR *, Dogru v. France*, 4 December 2008; ECtHR *, Kervanci v. France*, 14 December 2008; ECtHR *, Aktas v. France*, 30 June 2009; ECtHR *, Bayrak v.*

Kurtulmus v. Turkey, for example, the Court stated that it "will proceed on the basis that the rules … constituted interference with her right to manifest her religion, as she considered that Muslim women have a religious duty to wear the Islamic headscarf."[102] This reasoning was inspired by the judgment *Leyla Sahin v. Turkey*, in which the Court found that the applicant's "decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief" because she "said that, by wearing the headscarf, she was obeying a religious precept" and the Court did not want to make statements about "whether such decisions are in every case taken to fulfill a religious duty."[103] Although the applicants' agency is given a prominent place in these judgments, the formulation used communicates, as Evans argues, a certain reluctance to acknowledge "the value and religious importance" of the wearing of a headscarf,[104] as if the Court is not entirely convinced it is required by Islam.[105] This finding is even more apparent when compared to cases concerning the Sikh turban, in which the Court considers wearing a turban to be a manifestation of religion since "the Sikh religion indeed imposes on [male Sikhs] the wearing of a turban in all circumstances."[106] Seen in this light, the insider approach used in some cases does not necessarily guarantee neutrality, especially because of the inconsistent approach of the Court. Nor, however, is the outsider approach unproblematic.

When an outsider approach is used, the applicant's voice is not included when describing a manifestation of religion. The most obvious example is the one concerning the Sikh turban already mentioned above.[107] Another illustration can be found in *Kuznetsov a.o. v. Russia* where the Court stated: "**It is undeniable** that the collective study and discussion of religious texts by the members of the religious group of Jehovah's Witnesses was a recognised form of manifestation of their religion in worship and teaching."[108]

Although the claims made by the applicants in these cases are individual ones, the Court makes general statements about what a religion requires or recognizes as a manifestation. Not only is the lack of participation problematic from a procedural fairness perspective, but also the fact that by making this kind of generalizing

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France, 30 June 2009; ECtHR *, Gamaleddyn v. France*, 30 June 2009; ECtHR *, Ghazal v. France*, 30 June 2009; ECtHR *, Arslan v. Turkey*, 8 July 1999.

[102] ECtHR *, Kurtulmus v. Turkey*, 24 January 2006.

[103] ECtHR *, Leyla Sahin v. Turkey*, 10 November 2005.

[104] Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights', 7 *Melb. J. Int'l L*. (2006), 55-56.

[105] Ekaterina Yahyaoui Krivenko, 'The Islamic Veil and its Discontents: How Do They Undermine Gender Equality', 7 *Relig. Hum. Rights,* (2012), at 18-19 where the author notes that 'the ECtHR takes part in the debate on the veil instead of adopting a neutral and objective attitude'.

[106] ECtHR, *Ranjit Singh v. France*, 30 June 2009.

[107] The same approach can be found in ECtHR, *Jasvir Singh v. France*, 30 June 2009 and ECtHR, *Phull v. France*, 11 January 2005. Yet, in ECtHR, *Mann Singh v. France*, 13 November 2008,the Court used an insider approach.

[108] ECtHR, *Kuznetsov And Others v. Russia*, 9 September 2004, §57.

statement the Court enters into the theological field.[109] This approach inherently contains a risk of excluding practices that are less well known, whether from less familiar religions or from minority or dissident voices within religions, and it neglects the diversity of interpretation that is present within them.[110] Potential future applicants who represent minority voices within a religion might feel less inclined to go to a Court that interprets their religion in terms of the majority interpretation.

The problematic nature of this approach becomes clearer in cases in which the Court, from an outsider perspective, decides that a certain practice is *not* required by a religion. In *Jones v. The UK*,[111] for example, a father complained about the fact that he was not allowed to incorporate a photograph in the stone on his child's grave. The Court rejected the claim "*ratione materiae,*" stating:

> [I]t is irrelevant for this purpose that the church of which the applicant is a member permitted such photographs, for *it cannot be argued* that the applicant's beliefs *required a photograph* on the memorial or that *he could not properly pursue his religion* and worship without permission for such a photograph being given.[112]

Here, the Court not only made a statement about what the applicant's belief required, it also decided for the applicant whether or not he could "properly pursue" his religion without that particular practice. Hence, in this case the Court clearly failed the representation and neutrality test and did not show respect for the applicant's claim.

Another illustration can be found in *Kovalkovs v. Latvia*,[113] a case concerning a prisoner following the Hare Krishna movement, where the Court considered "that restricting the list of items permitted for storage in prison cells by excluding items (such as incense sticks) *which are not essential for manifesting a prisoner's religion* is a proportionate response to the necessity to protect the rights and freedoms of others."[114] Here also it was decided for the applicant what elements were essential for manifesting his religion. However, the Court's conclusion was based on an expert opinion gained from a religious authority within the Hare Krishna movement.[115]

Expert evidence might make the Court's reasoning more objective, since it is not the Court that makes the theological assessments. However, basing the assessment solely on the advice of a religious organization might not solve the problem of

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[109] David Harris et al *Law of the European Convention on Human Rights*, (Oxford University Press, 2009) at 433.

[110] Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 125 and Peter Edge, 'The European Court of Human Rights and Religious Rights' *International and Comparative law Quarterly,* (1998), at 687.

[111] ECtHR, *Jones v. The United Kingdom*, 13 September 2005.

[112] Idem. Emphasis added.

[113] ECtHR, *Kovalkovs v. Latvia*, 31 January 2012.

[114] ECtHR, *Kovalkovs v. Latvia*, 31 January 2012, § 68.

[115] In particular the Directorate of Religious Affairs by members of the Rīga Vaishnavist congregation.

possible exclusion of minority voices.[116] There might be divergent interpretations within one religion and the authorities' interpretation would logically be the dominant one. Hence, the choice of one particular authority might inherently contain bias.

From this analysis it follows that, from a procedural fairness perspective, an insider approach, if used consistently, should be favored. As argued by Evans, this approach is to be favored over the Court determining what is or is not required by a religion, especially so as to guarantee neutrality towards minority voices.[117] In its recent *S.A.S.* judgment, the Court applied this to the wearing of the face veil in stating, referring to the principles set in *Eweida*: "It cannot therefore be required of the applicant either to prove that she is a practising Muslim or to show that it is her faith which obliges her to wear the full-face veil. Her statements suffice in this connection."[118]

3.3.2.3. Religious applicant weighing less in the Court's scale

While the previous section focused on the approach of the Court towards the religious background and practices of the applicant, this section will go more deeply into the Court's reasoning and aims at uncovering more structural problematic aspects from a procedural fairness perspective. Firstly, it will show how the Court sometimes fails to recognize the issue at stake and secondly, it will examine procedural fairness flaws at the level of balancing.

A. Non-acknowledgment of applicant's religious concerns

People want to be taken seriously. Therefore, they expect judges to show care for their personal concerns[119] and to genuinely consider their arguments. This involves in the first place a full recognition of the issue at stake. However, the Court regularly fails to do so, as I will reveal in this part.

a) "It does not concern the applicant's religion or religious practice"

In multiple cases the Court states that it is not the applicant's religion or religious belief that forms the basis of certain restrictive measures, but broader principles such as secularism, the protection of public order, and the rights of others, or even

[116] ECtHR (GC), *Cha'are Shalom Ve Tsedek v. France*, 27 June 2000.

[117] Carolyn Evans, *Freedom of religion under the European Convention on Human Rights* (Oxford University Press, 2001), at 125.

[118] *S.A.S. v. France*, 1 July 2014, §56.

[119] Tom R. Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights', 43 *Duke Law J. (1993)*, at 786.

the conduct of the applicant him/herself. For example, in *Dahlab v. Switzerland*,[120] a case concerning a prohibition on teachers on wearing a headscarf, the Court stated that "the decision in issue was based on [the requirements of protecting the rights and freedoms of others and preserving public order and safety] and not on any objections to the applicant's religious beliefs."[121]

Similarly, in *Kurtulmus v. Turkey*,[122] this time concerning a veiled university professor who was prohibited from teaching, the Court found that secularism was "the paramount consideration underpinning the rules"[123] and not "objections to the way a person dresses as a result of his or her religious beliefs."[124]

The Court seems to be missing the point here, since the question at stake is not whether the state has objections to the applicants' religion or religious practice, but the limitation the regulations place upon the applicants' right. Hence, by focusing on the motives of the authorities, the Court is shifting attention away from the applicants' concerns. At the same time, the Court is also denying or at least minimizing the issue at stake, since the applicants are in fact undeniably limited because of their religious clothing. This could be compared to saying that someone is not fired because of her political conviction, but because of the neutrality rules of her employer. Both concern the same issue, and only the perspective from which the issue is described is different. This kind of reasoning contains a lack of recognition of the applicant's concern and does not give the impression that the Court is considering all the interests at stake equally.

A striking illustration can also be found in a case concerning the discharge of a military officer. The Court similarly reasoned that the decision "was based not on the applicant's religious beliefs and opinions, nor on the fact that his wife or relatives wore an Islamic scarf, nor on the manner in which he performed his religious duties, but on his conduct and activities in breach of military discipline and the principle of secularism,"[125] while the State implicitly acknowledged that these elements were in fact part of the reasons leading to the applicant's discharge.[126] This raises questions about the seriousness with which the Court approached this (and other similar)

[120] ECtHR, *Dahlab v. Switzerland*, 15 February 2001, p13.

[121] ECtHR, *Dogru v. France*, 4 December 2008; ECtHR, *Kervanci v. France*, 14 December 2008, at para §76; ECtHR, *Bayrak v. France*, 30 June 2009; ECtHR, *Aktas v. France*, 30 June 2009; ECtHR, *Gamaleddyn v. France*, 30 June 2009; ECtHR, *Jasvir Singh v. France*, 30 June 2009 and ECtHR, *Ranjit Singh v. France*, 30 June 2009. See also ECtHR, *Dahlab v. Switzerland*, 15 February 2001, at p 13 where same reasoning was first applied.

[122] ECtHR*, Kurtulmus v. Turkey*, 24 January 2006.

[123] Idem.

[124] Idem.

[125] ECtHR, *Acarca v. Turkey*, 3 October 2002.

[126] The State literally argued that "that these elements" had not been taken as the sole basis for his discharge from the army"

cases.[127]

In other cases the Court even puts the responsibility of the rights-restrictive measures on the applicant. In *Dogru v. France*,[128] for example, the Court accepted that the expulsion of girls from school for wearing a headscarf "is merely the consequence of the applicant's refusal to comply with the rules applicable on the school premises – of which she had been properly informed – and not of her religious convictions, as she alleged."[129] Here also the Court did not acknowledge what the real issue at stake was and even worse, blamed the applicant for the limitations on her own rights, while it was exactly about this limitation that she had complained.[130]

This kind of reasoning can hardly be perceived as procedurally fair; it shows a lack of acknowledgement and understanding of the applicants' concerns and interests and does not give the impression that their rights are taken seriously. Moreover, the main perspective adopted here is that of the authorities implementing the rules rather than that of the applicant whose rights are limited because of the rules.

b) "The applicant can practice his religion in an alternative way"

The Court sometimes refers in its reasoning to the existence of alternative ways of manifesting one's religion. I will argue, however, that the proposed alternatives cannot always be considered real and will show how the reasoning concerning alternatives sometimes contains procedural fairness shortcomings.

i. Fake alternatives to manifesting religion

- ***Non-comparable alternative***

When applicants have at their disposal alternatives for manifesting their religion, it is reasonable that the Court takes them into account in its analysis. However, the Court should be careful that the suggested alternatives are at least comparable to the way the applicant has to or wants to manifest his religion.

Take, for example, the case of *Astrianu v. Romania*,[131] in which the applicant

[127] See infra for a more detailed analysis the cases against Turkey concerning discharges from the army.

[128] ECtHR, *Dogru v. France*, 4 December 2008 and ECtHR, *Kervanci v. France*, 14 December 2008.

[129] Idem. This reasoning is comparable with cases concerning religious accommodation claims in the workplace where the Commission reasoned that employees who were not hired or fired because they asked for work schedules adapted to their religious needs were not fired because of their religion, but because of breach of contract. E.g. *X v. United Kingdom*, 12 March 1981.

[130] See an opposite example in *Pitkevitch v. Russia*, where the Court noted "that the applicant was dismissed for her specific activities while performing her judicial functions, whereby she expressed her religious views. In this regard there has been an interference with the applicant's freedom of religion". ECtHR, *Pitkevich v. Russia*, 8 February 2001, §2.

[131] ECtHR, *Austrianu v. Romania*, 12 February 2013.

complained about the confiscation of religious cassettes and a cassette player in prison. The prison authorities admitted only to confiscating the player and claimed to have offered Astrianu the opportunity to listen to his cassettes on a player provided by the prison. Because of this proposed solution, the Court found no appearance of a violation and also noted that the applicant "had been allowed to attend religious seminars, and … could read religious books."[132] It is perfectly understandable that the Court referred to the available alternative cassette player; the second part of the reasoning is, however, problematic.[133] The Court seems to have suggested that these religious practices can be considered substitutes for listening to the cassettes, especially since the applicant did not complain about not being able to attend religious seminars or read religious books.[134] The Court was deciding for the applicant how he could practice his religion and was, moreover, comparing non-comparable alternatives.

Another illustration of the reference to non-comparable alternatives can be found in *Indelicato v. Italy*,[135] in which a detainee falling under a strict detention regime complained about not being allowed to attend mass. The Court reasoned that since the applicant could follow the mass from his prison cell (by hearing it), "he was not deprived of the possibility to practice his religion."[136] It is perfectly defensible that prisoners' rights can be limited for security reasons; the problematic aspect of this reasoning is, however, that the Court gave the impression that listening to the mass from a cell was a fully comparable alternative to attending the mass in person, which is an embellished representation of reality. The fact that the Court considered this non-comparable alternative as proof that the applicant was not prevented from practicing his religion showed very little sensitivity towards his concerns and in fact denied the real issue at stake.

- ***Free inside and outside limits imposed***

In some cases the Court suggests that the applicant turn to an alternative way of manifesting his or her religion, either by adapting to the restrictive context or by moving the manifestation to another context.

A first illustration can be found in the reasoning that people are free within some limits to practice their religion. This reasoning can be found in numerous cases[137] against Turkey concerning the discharge of military officers[138] and also in

[132] Idem, § 105.

[133] See also Peroni, 'Deconstructing "Legal" Religion in Strasbourg', *Oxford Journal of Law and Religion,* (2013), at 9.

[134] ECtHR, *Austrianu v. Romania*, 12 February 2013, § 98.

[135] ECtHR, *Indelicato v. Italy*, 6 July 2000.

[136] Idem. (Translated by the author).

[137] See infra for a more elaborate discussion of these cases.

Leyla Sahin, where the Court stated that "it is common ground that practicing Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organisation, to manifest their religion in accordance with habitual forms of Muslim observance."[139]

This approach did not show a genuine understanding of the applicant, especially because the limits imposed were exactly what she was complaining of as they infringed her rights. It is needless also to explain that "being free within the limits imposed" contains a contradiction. Moreover, by stating that Sahin could manifest her religion "in accordance with habitual forms of Muslim observance," the Court was crossing the neutrality line. The Court was not only saying what the applicant could do as a practice (habitual forms of observance), it indirectly also said that wearing a headscarf did not constitute a habitual form of Muslim observance, which brought the Court into the theological domain.

In a case against France, *Pichon and Sajous*,[140] concerning religious pharmacists who refused to sell anti-contraceptive medicines, the Court applied similar reasoning: "the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere."[141] Here also the Court limited the context in which the applicants could exercise their religion, only this time the Court said that they were free 'outside' the limits imposed on their work context to practice their religion.

Although the conclusion of the Court is perfectly defendable, it could have reached it in a more procedurally fair way, in the first place with more respect towards the applicant's conviction and at least acknowledging their concerns. The way the Court formulated its argument seems as if it did not perceive the interference with the applicants' freedom of religion.[142] The Court's statement that they could "manifest those beliefs in many ways outside the professional sphere" is painfully ignorant, first, because this would imply that freedom of religion does not apply to the professional sphere, which is not correct if the applicant's right was to be taken seriously, and second, because the alternative suggested here by the Court did not show understanding of the applicants' religious praxis or that their arguments had been truly listened to.

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[138] In these cases the Court consistently states that "it is not disputed that members of the armed forces (army officers and non-commissioned officers) can perform their religious duties within the limits imposed by the requirements of military life". See e.g. ECtHR, *Aksoy v. Turkey*, 3 October 2002.

[139] ECtHR *, Leyla Sahin v. Turkey*, 10 November 2005.

[140] ECtHR, *Pichon And Sajous v. France*, 2 October 2001.

[141] Idem.

[142] Kristin Henrard, 'A critical appraisal of the margin of appreciation left to states pertaining to 'church-state relations' under the jurisprudence of the European Court of Human Rights' in Katayoun Alidadi, Marie Claire Foblets and Jogchum Vrielink (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, (Ashgate, 2012), 59.

Both cases deal with religion as a set of independent rules from which one can easily cherry-pick the rules one wants to follow and not as a way of life applicable in and outside the private sphere.[143] If the claims of the applicants had been listened to carefully, the Court should have been able to take in the following inescapable message: when removing her headscarf at the university entrance, Sahin would also have had to put aside her religious principles, while Pichon and Sajou would have struggled with leaving their principles aside whenever they put their lab coats on. Acknowledgment of these concerns is however missing in the Court's decisions.

ii. A fake alternative to securing the freedom of religion

Religious accommodation claims in daily life settings such as work or school often uncover a dilemma where people are compelled to choose between exercising their religion and being able to participate fully in daily life activity.[144]

This dilemma, if truly understood, is not always fully recognized by the Court, such as in *Sessa v. Italy.*[145] This case concerned a Jewish practicing lawyer requesting an adjournment of the hearing of his client, which was scheduled on a Jewish religious holiday. After the domestic court declined his request, he chose to celebrate his religious holiday and to not attend the hearing. This choice led to the Court's argument that "first, it is not contested that the applicant was able to fulfill his religious duties",[146] insinuating that no interference with his right took place. Next, the Court stated that the applicant could have fulfilled his professional duties by finding a replacement for the hearing. There are two things going on in this reasoning. First, the Court represented the fact that the applicant celebrated his holiday as a fully free choice, while the applicant was complaining precisely about being compelled to make professional sacrifices if he wanted to fully practice his religion. Second, the Court referred to finding a replacement as a logical alternative, while having to look for alternatives was precisely part of the applicant's complaint. Hence, the Court denied or at least did not show insight into the underlying issue at stake.

The same denial can be found in French cases concerning bans on the wearing of religious signs in schools, in which the Court found that "the applicants' religious convictions were fully taken into account" since they were able to continue their

[143] Peter Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', 32 Michigan J. Int. Law (2011), at13 and Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* (2003), at 114.

[144] See also Jonathan Seglow, 'Theories of Religious Exemptions' in Gideon Calder and Emanuela Ceva (eds.) *Diversity in Europe. Dilemmas of Differential Treatment in Theory and Practice* (Routledge 2011), at 55.

[145] ECtHR, *Sessa Francesco v. Italy*, 3 April 2012.

[146] Idem. (Translated from French by the author)

schooling through distance learning education.[147] Here also the Court overlooked the fact that the applicants followed distance education because they were compelled to do so if they wanted to practice their religion. This is exactly the issue they brought under the Court's scrutiny. The fact that the applicants proposed an alternative through the wearing of an adapted form of head covering was, however, not taken into account and left to the appreciation of the state.

Homeschooling and finding someone to replace you at work seems to be the alternative the Court favors, while, because of the sacrifices they involve, they cannot really be considered alternatives for the enjoyment of the applicants' rights. A procedurally fair assessment should at least involve a genuine and deep balancing between all parties' interests instead of *a priori* undermining the claim by denying the issue at stake. This is a matter of the four procedural fairness criteria. It involves a genuine consideration of the applicants' voices, equal treatment of all parties and respect and care for the applicants' claims and rights. As will be disclosed in the next part, however, the Court regularly falls short with respect to this balancing principle.

B. No balancing

At the center of people's perception of fairness lies the question whether authorities are trustworthy.[148] People assess whether judges make a genuine effort to be fair in their case and to what extent they take the several interests into account. Balancing can therefore be considered an important determinant of perceptions of the trustworthiness of the Court. In fact, balancing is inherently contained in the proportionality analysis prescribed by article 9.

In this section I will explore from a procedural fairness perspective three examples of how the Court fails in this balancing exercise.

a) No motivation/non-reasoning

In several cases the Court finds no appearance of a violation and concludes that the claim is manifestly ill-founded. This occurred, for example, in *E.M. and Others v. Romania*,[149] where the relatives of a deceased man complained that because doctors had concealed his medical problems, he had been prevented from seeing a priest before his death and from obtaining a blessing of his civil marriage with his wife. The Court declared this article 9 claim inadmissible, stating that "in the light of all the material in its possession, and in so far as the matters complained of are within its competence, it finds that they do not disclose any appearance of a violation of the

[147] E.g. ECtHR, *Jasvir Singh v. France*, 30 June 2009 and ECtHR, *Ranjit Singh v. France*, 30 June 2009.
[148] Supra 3.2.4.
[149] ECtHR, *E.M. And Others v. Romania*, 12 June 2012.

rights and freedoms set out in the Convention or its Protocols."[150] No additional motivation was provided, even though, on first sight, this claim contained an article 9 aspect. The fact that the Court did not even explain why it considered the claim manifestly ill-founded did not show much respect for the applicants. Did the Court even examine the claim? The standard formulation used here suggests the opposite. Or did it consider it sufficient to examine the case under their main article 2 complaint concerning the death of their relative as such? Or did the Court have legitimate reasons to come to this conclusion? If so, what were these reasons? Transparent motivation would give a better procedural fairness impression, namely that the claim was genuinely taken into account.

The same line of reasoning can also be found in cases concerning religious claims by prisoners, especially in cases where prisoners ask to see a priest or to attend a religious service in prison.[151] This kind of claim is clearly taken less seriously than other prisoner's accommodation claims, such as those concerning dietary requirements,[152] where the Court undertakes a thorough balancing exercise of the several interests at stake which is in strong contrast with the unmotivated (non-)reasoning that "no appearance of a violation can be found."[153] Although the prison context may legitimately require a limitation of people's rights, the Court should at least examine whether these limitations are legitimate in a particular case, or at the very least explain why in the Court's view there is no appearance of a violation. The opposite does not give the impression that the Court cares about these claims.

b) Reproducing the perspective of the state

No balancing takes place either in cases where the Court in its reasoning mainly relies on the perspective and argumentation of one party, *in casu* the state. Between 2001 and 2004, the Court issued a series of decisions concerning Turkish military officers' discharge from the army because of their convictions.[154] They

[150] Ibid. The case is declared admissible under article 2 only.

[151] ECtHR, *Pylnev v. Russia*, 9 February 2010; ECtHR, *Sevastyanov v. Russia*, 14 October 2010; ECtHR, *Lawniczak v. Poland*, 23 October 2012; ECtHR, *Enache v. Romania*, 5 February 2013; ECtHR, *Glinski v. Poland*, 11 February 2014.

[152] ECtHR, *Vartic v. Romania No. 2*, 17 December 2013; ECtHR, *Jakóbski v Poland*, 7 December.

[153] ECtHR, *Vartic v. Romania No. 2*, 17 December 2013; ECtHR, *Jakóbski v Poland*, 7 December.

[153] E.g. in ECtHR, *Enache v. Romania*, 5 February 2013; ECtHR, *Glinski v. Poland*, 11 February 2014 and ECtHR, *Pylnev v. Russia*, 9 February 2010. See *a contrario Kuznetsov and others v Russia*, where the Court accepted an interference (nonetheless it was found not to be prescribed by law). *Kuznetsov And Others v. Russia*, Application No. 184/02, Merits, 9 September 2004.

[154] ECtHR, *Tepeli And Others v. Turkey*, 11 September 2001; ECtHR, *A.C. v. Turkey*, 9 October 2001; ECtHR, *Aras v. Turkey*, 9 October 2001; ECtHR, *Ates v. Turkey*, 9 October 2001; ECtHR, *Can v. Turkey*, 9 October 2001; ECtHR, *Corbaci v. Turkey*, October 2001; ECtHR, *Dalgic v. Turkey*, 9 October 2001; ECtHR, *Genel v. Turkey*, October 2001; ECtHR, *Demirhan v. Turkey*, 9 October 2001; ECtHR, *Gezer v. Turkey*, 9 October 2001; ECtHR, *H .K. v. Turkey*, 9 October 2001; ECtHR, *Inkaya And Others v. Turkey*, 9

allegedly held fundamentalist ideologies and some of their wives were wearing a headscarf, which was apparently a problem for the military authorities. It is striking to see how lightly the Court went over all these cases. In the more than 60 cases the Court used the same reasoning no matter what the facts or the applicants' arguments were. In its reasoning, the Court consistently referred to the decision taken by the "commission of nine military officials," to the restrictive context of the army, and to the fact that the applicants had by their own free will joined the military. The Court did not require proof of the allegations made by the authorities even though sometimes they were strongly refuted with proof by the applicants.[155] Neither did it make an effort to examine whether the reasons invoked for the discharge were compatible with the convention; instead, the Court blindly trusted the contested decisions made by the military bodies.

Another illustration of this one-sided approach can be found in the famous cases concerning the prohibition of religious signs in France, in which the Court borrowed the state's lens of secularism, through which it examined the cases. In my opinion, this can most problematically be observed in *Dogru* and *Kervanci*.[156] Although these cases concerned not general school bans on the wearing of religious signs, but bans on wearing them in sport classes, mainly because of safety reasons, as argued by the state, the Court extensively relied on the principle of secularism in order to legitimize those restrictions. The applicants' side was not considered and their arguments, among which were a willingness to find alternatives, were not taken into account, as if the decision had already been taken before the case had been really well considered.

October 2001; ECtHR, *Kose v. Turkey*, 9 October 2001; ECtHR, *Mogulkoc v. Turkey*, 9 October 2001; ECtHR, *Sen v. Turkey*, 9 October 2001; ECtHR, *Tanal v. Turkey*, 9 October 200; ECtHR, *Apuhan v. Turkey*, 5 March 2002; ECtHR, *Davuter v. Turkey*, 5 March 2002; ECtHR, *Demir v. Turkey*, 5 March 2002; ECtHR, *Fidan v. Turkey*, 5 March 2002; ECtHR, *Karaca v. Turkey*, 5 March 2002; ECtHR, *Kiratoglu v. Turkey*, 5 March 2002; ECtHR, *Tan v. Turkey*, 5 March 2002; ECtHR, *Uludag v. Turkey*, 5 March 2002; ECtHR, *Zulfikaroglu v. Turkey*, 5 March 2002; ECtHR, *Isik v. Turkey*, 4 May 2002; ECtHR, *Kahramanyol v. Turkey*, 4 June 2002; ECtHR, *Tahta v. Turkey*, 4 June 2002; ECtHR, *Usta v. Turkey*, 4 June 2002; ECtHR, *Cevik v. Turkey*, 9 July 2002; ECtHR, *Cinar v. Turkey*, 9 July 2002; ECtHR, *Dogruer v. Turkey*, 9 July 2002; ECtHR, *Gokdogan v. Turkey*, 9 July 2002; ECtHR, *Kati v. Turkey*, 9 July 2002; ECtHR, *Meral v. Turkey*, 9 July 2002; ECtHR, *Ozcan v. Turkey*, 9 July 2002; ECtHR, *Sengulec v. Turkey*, 9 July 2002; ECtHR, *Acarca v. Turkey*, 3 October 2002; ECtHR, *Aksoy v. Turkey*, 3 October 2002; ECtHR, *Balci v. Turkey*, 3 October 2002; ECtHR, *Baspinar v. Turkey*, 3 October 2002; ECtHR, *Dagli v. Turkey*, 3 October 2002; ECtHR, *Dal And Ozen v. Turkey*, 3 October 2002; ECtHR, *Duman v. Turkey*, 3 October 2002; ECtHR, *Gundogdu v. Turkey*, 3 October 2002; ECtHR, *Kayseri v. Turkey*, 3 October 2002; ECtHR, *O.O. v. Turkey*, 3 October 2002; ECtHR, *Once v. Turkey*, 3 October 2002; ECtHR, *Ozcan v. Turkey*, 3 October 2002; ECtHR, *Ozdas v. Turkey*, 3 October 2002; *Pektas v. Turkey*, 3 October 2002; *Soysever v. Turkey*, 3 October 2002; *Yuguruk v. Turkey*, 3 October 2002; *Akbulut v. Turkey*, 6 February 2003; *Sert v. Turkey*, 8 July 2004.

[155] See for example ECtHR, *H.K. v. Turkey*, 9 October 2001 and ECtHR, *Demir v. Turkey*, 5 March 2002.

[156] ECtHR, *Dogru v. France*, 4 December 2008; ECtHR, *Kervanci v. France*, 14 December 2008.

c) Referral to previous case law

In other cases a lack of balancing can be found in the fact that the Court limits its reasoning to a reference to previous case law. Consider, for example, the case of *Karaduman v. Turkey*,[157] in which a teacher from an Imam Hatip school was compelled to remove her headscarf during class. The Court's decision consisted of a reference to earlier cases, such as *Dahlab*[158] (concerning a primary school teacher in Switzerland) and *Kurtulmus*[159] (a University professor in Turkey), but did not take into account that Mrs. Karaduman was a teacher of religion in a school with a religious philosophy. As such, the factual differences should have led to different considerations in a proportionality analysis, namely the fact that the circumstances for a religious class teacher are different from those for a general teacher. Nevertheless, the Court did not take any of the arguments, concerns, and rights of the applicant into account.

The same can be argued concerning cases in which religious signs were seen as a security problem. In *Phull v. France*,[160] a case concerning the security check at airports, the Court only referred to *X. v. UK*,[161] a case involving a Sikh complaining about the obligation to wear a motor helmet. Yet, while the rule underpinning the restriction on wearing a helmet aimed at protecting the life and health of individual motorcyclists, the security check at airports had a broader aim of public safety. Also, Mr. Phull made very specific arguments, such as the proposal of alternatives to the removal of the turban at the security gate, which were not taken into account.[162]

A more recent example is the case of *Franklinbeentjes and Cefluluz da Floresta v. the Netherlands*. Here, the Court was confronted with a complaint about the confiscation of forbidden products containing drugs, which were used for religious rituals by members of a religious group. Instead of balancing the several interests at stake, the court mentioned the legislation which forbade keeping such products and referred to earlier case law where health was accepted as one of the legitimate aims able to limit the freedom of religion. Although it is very understandable that these products are forbidden and confiscated, the Court could at least have acknowledged the limitation of the applicants' rights, next to explaining why the confiscation did not violate the Convention. Instead, the court chose to ignore the applicants' side in the case and no balancing took place.

It is not uncommon that the Court refers to previous case law, for example to reiterate its general principles; even more, this is a sign of consistency across time.

[157] ECtHR, *Karaduman v. Turkey*, 3 April 2007.

[158] ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

[159] ECtHR *, Kurtulmus v. Turkey*, 24 January 2006.

[160] ECtHR, *Phull v. France*, 11 January 2005.

[161] *X v United Kingdom*, 12 March 1981.

[162] Saïla Ouald Chaib, 'Suku Phull v France rewritten from a Procedural Justice perspective' in Brems (ed.) *Diversity and European Human Rights* (Cambridge University Press, 2013) 218.

However, this reference should not be considered a substitute for reasoning in another case which has its own particularities. Every individual claim should be taken seriously, which also implies that it merits its own assessment by the Court.

Conclusion

This article aimed at exploring procedural fairness as a standard of inclusion in the freedom of religion case law of the Strasbourg Court. It did so by building a normative bridge between social psychology research and human rights law through the application of the concept of procedural fairness to article 9 case law of the Strasbourg Court. As the psychology research convincingly shows, doing justice is not only about reaching good and fair decisions at a substantive level, it is also about doing so in a way that treats people fairly.

In my extensive study of the article 9 case law, I uncovered procedural fairness flaws and made suggestions for improvement at three levels. First, I argued that the decision to not examine article 9 claims can sometimes in itself be problematic from a procedural fairness perspective when it does not show sufficient care and respect for the applicants' rights and concerns. Secondly, at the surface of the case law I showed how some aspects of the Court's approach towards religious applicants and their practices can fall short in accurately representing applicants' convictions. I also showed how the Court is taking risks at the level of neutrality when using generalizing statements or when approaching these elements in an inconsistent way. Thirdly, I explained how a lack of balancing and a lack of recognition of the issue at stake, and of the interests and concerns of the applicant, create an impression of untrustworthiness.

Based on the procedural fairness framework, I advocated for including the applicant's perspective more often in the jurisprudence. In the first place, in order to be considered trustworthy the Court should refrain from approaching cases 'one-sidedly' from the perspective of the State and instead also recognize the applicants' claims and concerns and genuinely balance them accordingly with the States' interests. I further argued that the Court should avoid describing applicants and their practices from an outsider perspective. I also suggested that when the Court literally reflects the applicant's voice in its judgment, the Court should remove doubt about possible bias and avoid the risk of making theological assessments. However, in order to guarantee neutrality I strongly recommended consistency in the first place, whether an outsider or an applicant's perspective is chosen. Finally, I stressed the importance of motivation and transparency. It is only through transparency in the judgment that applicants can evaluate whether their voice has been heard accurately, that their arguments have been taken into account and that the Court has genuinely made an effort to be fair in the case. Also, when the Court decides not

to examine a certain claim, it is essential to explain the motivation for so doing in order to show that the Court has taken applicants' rights and concerns seriously. Only then will applicants feel respected not only as applicants but also as human beings.

In sum, this article argues in favor of more inclusion of applicant believers' perspectives in order to improve the level of procedural fairness in the Strasbourg Court's freedom of religion adjudication. This would not only impact the applicant in the particular case, but might potentially have a broader societal impact, as social psychology research also shows. Through the use of a more inclusive approach in its article 9 judgments on a procedural fairness level, the Court has an opportunity to contribute to inclusion and social cohesion. In today's diverse Europe with its sensitive debates about religion, the Court, as a supranational human rights body, can take up the exemplary role of a beacon of justice, neutrality and respect. This is an opportunity the Court should not miss.

PART III – IMPROVING THE LEGAL REASONING UNDER ARTICLE 9 OF THE ECHR. THREE CASE-STUDIES

PREFACE

In part II, a broad and comprehensive analysis of the freedom of religion case-law of the Strasbourg Court was conducted. It uncovered, through an in-depth bottom-up methodological approach, that the Court's article 9 case-law contains flaws at the procedural level, and discussed the exclusionary aspects of that case-law. Additionally, part II explored in general how procedural fairness can be understood in the field of freedom of religion claims and argued, on the basis of the analytical findings, how the Court's case-law could accordingly be improved.

This part, part III of the dissertation, contains three distinct case-studies in the domain of freedom of religion, which are complementary to the study conducted in part II.

The first case-study, in chapter IV, concerns religious accommodation claims in the workplace. This chapter contains an in-depth analysis of cases concerning work-time related and dress code related requests for accommodation in the workplace. Contrary to the other chapters, this chapter does not start from the procedural fairness framework, but employs an open approach from the perspective of inclusion. It uncovers in detail how exclusionary patterns occur both at the substantive and at the procedural level. It also uncovers how both levels are closely intertwined. This chapter also makes suggestions for improvement of the case law using an 'in-house' comparative analysis with cases brought under other articles of the Convention. This chapter will be followed by an addendum, discussing important developments in the case law of the Court concerning accommodation claims in the workplace which took place after the initial publication of the chapter.

Chapter five concerns the particular case of *Suku Phull v. France,* in which the Court issued an inadmissibility decision finding the complaint of a Sikh man who had to remove his turban at the airport security check manifestly ill-founded. Using a top-down approach, this decision is analysed in depth from a procedural fairness perspective; the analysis uncovers serious procedural fairness flaws. In the second part of this chapter, suggestions for improvement are made based on the procedural justice framework. The case is compared to a similar case of the Canadian Supreme Court from which inspiration is gained. In a third part, the decision of *Suku Phull v. France* is re-written from a procedural fairness perspective and, in so doing, it is transformed into a judgment in which the lack of procedural fairness at the domestic level is criticized.

The third and last case-study, in chapter six, concerns the debate over the face-veil bans and anticipates the (at the time of writing) pending case of *S.A.S. v. France*. The

study in this chapter is conducted from the perspective of procedural justice. Drawing on empirical knowledge, it first uncovers the serious procedural justice flaws at the domestic level in that the decision-making process on the face-veil ban in France was characterized by inaccuracy, prejudices and a lack of recognition of the perspective of the women concerned. Therefore, in a first normative part, Eva Brems and I argue for the Court to redress this situation by pointing out the procedural justice flaws which occurred at the domestic level. Subsequently, we argue how the Court should do a better job in its own reasoning from a procedural justice perspective when examining the claim of S.A.S. This chapter is followed by an addendum which discusses the Grand Chamber judgment issued in the case of S.A.S on the 1 July 2014. The reflection on the case will be conducted in light of the procedural justice arguments made in the chapter.

The three case-studies aim to look at the Court's article 9 case-law from a broad perspective. While chapter IV concerns a segment of the article 9 case-law, chapter V covers one particular case in-depth. Chapter VI, finally, uses an original perspective by anticipating a forthcoming case. Moreover, the three case-studies employ comparative methods inside and outside the Court's case-law and include empirical research in addition to the legal critical approach. The three case-studies moreover expose the importance of improving the procedural aspect of the reasoning in freedom of religion adjudication. This aspect is important in itself, but it is also closely intertwined with the substantive aspect of the reasoning.

CHAPTER IV Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights[1]

Introduction

Society becomes increasingly religiously diverse and this diversity inevitably will and should be reflected in the workplace. Employers are as a consequence more and more faced with requests of employees to be able to manifest their religion in the workplace[2], since for many employee believers religion constitutes an important part of their life, which they also want to manifest during their time at work. Examples of these religious accommodation claims concern requests for being allowed to wear religious signs at work, for having the possibility to pray during working hours or to have one's work-schedules adapted to religious requirements in order to be able to respect religious rules concerning, for example, the Sabbath.

Under the right to freedom of religion, religious accommodation in the workplace is one of the domains with which the Strasbourg institutions have been confronted during the past decades. The aim of this chapter is to give a comprehensive insight in how the Strasbourg institutions (encompassing both the former European Commission of Human Rights 'the Commission' and the European Court of Human Rights 'the Court') have been dealing with claims concerning religious accommodation in the workplace.

Two major kind of claims were discerned after a first analysis of the case-law. The first group of claims concern issues revolving around work time, such as requests for adaptations of work-schedules along individual's religious needs or requests for leave on religious holidays. A second segment of the examined cases concern claims involving prohibitions on the wearing of religious attire in the workplace.

The methodology employed for the selection of case-law is two-fold. The Commission cases were selected on the basis of literature study. Several authors have extensively researched the case-law of the European Commission of human

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[1] **This chapter is published in *A test of Faith? Religious Diversity and Accommodation in the European Workplace*, Katayoun Alidade, Marie-Claire Foblets and Jogchum Vrielink (eds.), (Ashgate, 2012), pp. 33-58. The introduction and the conclusion of this version are more elaborate than the initial version and an addendum has been added. The body of the chapter however is left unchanged.**

[2] This follows from the conception of religion as a "way of life" which makes it difficult to draw a clear boundary between a public and private dimension of religious manifestation. See e.g. Jeremy Gunn, The Complexity of Religion and the Definition of "Religion" in International Law, 16 Harv. Hum. Rts. J. (2003), 213 and Julie Ringelheim, Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?, in A European Dilemma: Religion and the Public Sphere (2012), 293.

Rights concerning the workplace.[3] As to the cases of the Court; an extensive manual selection of article 9 cases concerning the workplace was conducted for the period between 2000 and 2010.[4] Of these cases, only the ones concerning accommodation issues with regard to work time and religious signs were retained.[5]

This chapter can be divided in two major parts. The first part consists of a critical analysis of the selected cases from the perspective. The second part searches for good practices that could inspire the Court to improve its reasoning in cases concerning religious accommodation claims.

First, the cases concerning work-schedules will be discussed, the majority of which are decisions issued by the former Commission of Human Rights. Yet, these cases in general played an important role in the future case law of the Court.[6] Secondly, the cases concerning the wearing of religious attire in the workplace will be critically analyzed. All of these cases concern prohibitions on the wearing of headscarves in the workplace.[7] The third part will explore how the Court can improve its reasoning in cases concerning religious accommodation in the workplace. In doing so, a comparative approach will be undertaken in search of good practices in other cases within the Court's case law. A first comparison will be drawn with non-religious but comparable accommodation claims in the field of employment brought under other articles of the European Convention on Human Rights such as under the right to freedom of expression. A second comparison will be drawn with the Court's jurisprudence in a recent landmark case, *Jakobski v. Poland*,[8] under article 9 ECHR concerning religious accommodation in a prison context. This comparative approach will be followed by concluding remarks.

In an addendum to this chapter two recent cases concerning religious accommodation in the workplace issued after 2010 will be discussed. These cases are *Sessa v. Italy*[9] and *Eweida and Chaplin v. The UK*.[10] Both cases were judged after

[3] E.g. L. Vickers, *Religious Freedom, Religious Discrimination at the Workplace* (Hart Publishing 2008) and Carolyn Evans, Freedom of religion under the European Convention on Human Rights (2001).

[4] The time of writing of the initial publication of this chapter. An update is written however with two major judgments which were issued after the publication of this chapter. See the addendum to this chapter.

[5] From selected cases concerning the workplace, only those concerning accommodation claims have been retained. Consequently, cases concerning conflicts due to the religious conviction as such of an employee, such as EComHR 1 July 1997, *Kalaç¸* v. *Turkey*, App. No. 20704/92, ECtHR 3 February 2011, *Siebenhaar* v. *Germany*, App. No. 18136/02, ECtHR and ECtHR 12 April 2007, *Ivanova* v. *Bulgaria*, App. No. 52435/99, will not be discussed since they fall outside the scope of this study.

[6] See discussion on the case of *Sessa v. Italy* in the addendum attached to this chapter.

[7] As will be discussed in the addendum, in 2013 an important case concerning the wearing of a cross in the workplace was issued, namely *Eweida and Chaplin v. The UK*.

[8] ECHR, *Jakobski v. Poland*, 7 December 2010.

[9] ECHR, *Sessa v. Italy*, 3 April, 2012.

[10] ECH*R, Eweida and Chaplin v. The UK, 15 January 2013.*

the initial publication of this chapter and contain some interesting elements and developments. *Sessa v. Italy*, shows that even two decades after the initial (un)famous cases of the European Commission concerning work-schedules, the Court still employed the same restrictive reasoning. *Eweida and Chaplin v. The UK*, however, shows an important shift in the Court's case law in the field of religious accommodation in the workplace, towards a more inclusive approach.

4.1 Religion and work schedules in the workplace: no interference with the freedom of religion

Out of the—relatively rare—cases where the Court has been confronted with religious accommodation claims in the workplace, one category relates to employees requesting a work schedule be adapted to their religious needs. Interestingly, these claims have been presented by members of minority religions as well as by individuals belonging to majority religions. For example, in *Stedman*[11] a Christian employee objected to working on Sundays, and the case of *X* v. *UK*[12] concerned a Muslim teacher asking for a readjustment of his work schedule so that he would be able to attend the Friday prayer in a mosque. Similarly, in *Konttinen*[13] a member of the Seventh Day Adventist church wanted to respect the Sabbath on Friday afternoons, which made it impossible for him to work after sunset on those days. Also, in *Kosteski* v. *the Former Republic of Yugoslavia*,[14] the applicant complained about the refusal of his employer to grant him leave of absence to celebrate religious holidays.

In all these cases, the employees were dismissed or sanctioned by the employer, were forced to resign, or to opt for a part-time contract.

4.1.1. No interference with the freedom of religion

Except for *Kosteski*, none of the above-mentioned cases made it beyond the admissibility stage and the Strasbourg organs never found a clear interference with the right to freedom of religion. Two elements were important in this regard: the dubious position towards the question of whether or not a manifestation of religion was at stake (a), and the focus on the responsibility of the employee with the *freedom to resign doctrine* as well as the *contractual freedom* (b).

[11] EComHR 9 April 1997, *Stedman* v. *United Kingdom*, App. No. 29107/95.
[12] EComHR 12 March 1981, *X* v. *United Kingdom*, App. No. 8160/78 (also known as *Ahmad* v. *United Kingdom*).
[13] EComHR 3 December 1996, *Konttinen* v. *Finland*, App. No. 2494/94.
[14] ECtHR 13 April 2006, *Kosteski* v. *The Former Yugoslav Republic of Macedonia*, App. No. 55170/00.

4.1.1.1. (No) manifestation of religious belief

Claims of religious accommodation in the workplace will mostly be dictated by the wish to *manifest* one's religious conviction or belief in the work sphere. Contrary to the cases concerning religious dress in the workplace,[15] the Strasbourg organs do not have a clear stance towards the question whether claims concerning work schedules could be considered as a manifestation of religion. In *X* v. *UK*, the now-defunct European Commission of Human Rights ("Commission") questioned whether the applicant "was required by Islam to disregard his continuing contractual obligations vis-à-vis the ILEA" following his transfer to a school nearby a mosque, and whether his religion requires from him "to attend the mosque during school time."[16]

The way the Commission narrows the question with regard to the manifestation of religion is problematic. The question should not be whether Islam requires *disregarding contractual obligations* or attending a mosque *during school time*, but whether attending collective prayers in a mosque on Friday could be seen as a manifestation of religion and, subsequently, whether this should be protected under Article 9 of the Convention. Moreover, by questioning whether Islam requires adherents to disregard contractual obligations, the Commission also seems to assume that if the applicant attends the Friday prayer, he would breach his contract and is thus in a preliminary stage of excluding the possibility that he can exercise his religion within the framework of his employment contract.

Also, in the case of *Kosteski*, the Court was "not persuaded" that the celebration of religious holidays was a manifestation of the applicant's belief. It considered the fact that:

> "while it may be that this absence from work was motivated by the applicant's intention of celebrating a Muslim festival it is not persuaded that this was a manifestation of his beliefs in the sense protected by Article 9 of the Convention or that the penalty imposed on him for breach of contract in absenting himself without permission was an interference with those rights."[17]

Although *Kosteski* differs from the other cases discussed in this section,[18] with this statement the Court appears reluctant to find that a certain claim consists of a manifestation of religion.[19]

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[15] Cf. *infra*.

[16] EComHR 12 March 1981, *X* v. *United Kingdom*, App. No. 8160/78, par. 9.

[17] ECtHR 13 April 2006, *Kosteski* v. *The Former Yugoslav Republic of Macedonia*, App. No. 55170/00, par. 38.

[18] The issue in *Kosteski* is not whether or not an employee is allowed to take leave of absence on religious holidays, since the Former Republic of Macedonia has a "Public Holidays Act" which not only recognizes Christmas and Easter as public holidays for all its citizens, but also recognizes the two Islamic holidays for citizens of Muslim faith. The underlying issue in this case is the fact that the applicant was not granted leave on these Holidays because—according to the employer—he did not prove he was of the Muslim faith. (The fact that the applicant never absented himself before on

The questioning position of the Court as to whether or not some claim relates to a manifestation of religion might be a dangerous exercise which places the Strasbourg judges in the role of theological scholars interpreting religious prescriptions.[20] Moreover, this would entail the risk that only one interpretation of a certain religious provision would be taken into account.[21] Therefore, an insider approach should be preferred.[22] This approach would take the motivation of the employee-believer into account when assessing whether a manifestation of religion was at stake in the particular case. Since the famous case of *Leyla Sahin*,[23] the Court has been inclined towards this insider approach.[24] In the case of *X* v. *UK*, for example, this insider approach would mean that the Court should have taken into account that the applicant himself considered it as his religious obligation to perform Friday prayer collectively.[25]

In *Konttinen* and *Stedman* the Commission avoided the question about the existence of a manifestation of religion by removing the case from the religious context. In *Konttinen*, the Commission found that the employee "as a civil servant of the State railways, had a duty to accept certain obligations towards his employer"[26] and that the dismissal of the applicant was not due to his religious convictions, but due to the fact that he refused to respect his work hours.[27] It further proceeds that:

"This refusal, even if motivated by his religious convictions, cannot as such be considered protected by Article 9 para. 1. Also, the applicant has not shown any pressure put on him to change religion or that he was prevented to manifest his religion."[28]

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religious holidays, that he had also celebrated Christian holidays, that his parents were Christian and that his way of life and diet showed that he was of Christian faith made the national jurisdiction conclude that the applicant was "a self-proclaimed Muslim in order to justify his unjustified absence from work." See ECtHR 13 April 2006, *Kosteski* v. *The Former Yugoslav Republic of Macedonia*, App. No. 55170/00, par. 19.)

[19] E. Bribosia, J. Ringelheim and I. Rorive, "Reasonable Accommodation for Religious Minorities: a Promising Concept for European Antidiscrimination Law?" 17 *Maastricht Journal of European and Comparative Law* 137 (2010), 154.

[20] See also L. Vickers, *Religious Freedom, Religious Discrimination at the Workplace* (Hart Publishing 2008), 99–100.

[21] P. Cumper, "The Accommodation of 'Uncontroversial' Religious Practices" in *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (T. Loenen and J. E. Goldschmidt, eds, Intersentia 2007), 207.

[22] E. Brems, "The Approach of the European Court of Human Rights to Religion" in *Die Rechtstellung des Menschen im Völkerrecht* (J.C.B. Mohr 2003), 8 (with reference in footnote 23).

[23] ECtHR 10 November 2005, *Leyla Şahin* v. *Turkey*, App. No. 47774/98.

[24] See, for example, ECtHR 7 December 2010, *Jakóbski* v. *Poland*, App. No. 18429/06 and ECtHR 4 March 2008, *El Morsli* v. *France*, App. No. 15585/06.

[25] In a mosque or in the school if there were other Muslims with whom he could pray. EComHR 12 March 1981, *X* v. *United Kingdom*, App. No. 8160/78, par. 19.

[26] EComHR 3 December 1996, *Konttinen* v. *Finland*, App. No. 2494/94, par. 6.

[27] *Id*. at par. 7.

[28] *Id*. at par.7.

The latter statement of the Commission that "the applicant has not shown … that he was prevented to manifest his religion" is a bit surprising. The cause of the conflict between the employee's religion and his contractual obligations lies precisely in the fact that he wanted to respect the Sabbath and thus wanted to manifest his religion. The Commission's reasoning might consequently be interpreted in such a way that it does not seem to recognize the Sabbath as a manifestation of religion. Likewise, the Commission observed in *Stedman* that "the applicant was dismissed for failing to agree to work certain hours rather than her religious belief as such."[29] Ignoring the element of religion in these cases seems like ignoring an elephant in a small room. Of course the applicants resigned or were dismissed because they did not agree with their work schedule, but the only reason they failed to agree with these conditions was because of their religious convictions.

If this reasoning were applied in other circumstances, claims of reasonable accommodation would virtually never be recognized by the Court. Imagine that a person with a disability is dismissed because he does not arrive on time at work, as the building is not easily accessible despite his multiple requests to adapt the building to his needs. Would it be logical if a judge accepts that the disabled employee was dismissed because of not respecting his contractual obligations to arrive on time at work and that the dismissal had nothing to do with the lack of accommodation? Or imagine the situation where an employee asks for a readjustment of her work schedule so that she might breastfeed her child at specific times during the workday. If she were dismissed or put in a situation where—for her—resignation is inevitable, could the Strasbourg judge hold that she is dismissed only because of not being able to respect her contractual obligations and not because of her private life, with which no interference is consequently found?

In sum, it can be argued that in order to provide better reasoning in cases where an employee-believer is confronted with resignation or dismissal in the workplace because of a conflict related to a religious claim such as adapted work schedules, the religious motivation behind the employee's actions should be taken sufficiently into account. Moreover, when assessing whether a manifestation of religion is at stake, the insider approach of the applicant should be considered.

4.1.1.2. Freedom to resign

The reluctance of the Strasbourg organs towards finding that a certain claim concerns a manifestation of religion was not the only element that led to not finding an interference. A second important element is the so-called *freedom to resign doctrine*. According to the Commission, in *X* v. *UK* the Inner London Education Authority (ILEA) was in principle entitled to rely on the terms of the employment

[29] EComHR 9 April 1997, *Stedman* v. *United Kingdom*, App. No. 29107/95, par. 3.

contract with the employee, but "the question arises whether, under Article 9 of the Convention, the ILEA had to give due consideration to his religious position."[30] According to the Commission, "the applicant remained free to resign if and when he found that his teaching obligations conflicted with his religious duties."[31] Paradoxically, this position, where an employee has to make a choice between his full-time job and the manifestation of his religion, is the situation the applicant is complaining about:

> "[It] would mean that a Muslim, who took his religious duty seriously, could never accept employment as a full-time teacher, but must be content with the lesser emoluments of part-time service, and would thus also be excluded from opportunities for promotion."[32]

In *Konttinen* the Commission went even further by stating that the freedom to resign is "the ultimate guarantee of his [the applicant's] right to freedom of religion."[33] This principle was also repeated in *Stedman*.[34]

In the three cases discussed above[35] it is clear that the "freedom to resign" doctrine could not really be perceived as a genuine *freedom* of choice by the employees. For the employee in *X* v. *UK*, for instance, stepping over to a part-time contract meant a lot of disadvantages concerning pay and career opportunities.[36] Resigning would, for him, also carry heavy consequences. The argument of the Commission that resigning is the ultimate guarantee to the freedom of religion can therefore be highly criticized since it places before the applicant-employees a difficult dilemma between job and religion. Because of his or her religion and the manifestation of it, an individual will not be able to exercise the profession he or she wants, or will have to make extra efforts to find a job that suits his or her religious needs. It is clear that what the Commission considers to be a freedom will not be experienced by every employee in the same way, especially when an employee belongs to a minority religion and lives in a country where the state system—including official holidays and days of rest—is largely organized along the precepts of a majority religion. In this case, the employee is, under the case law of the Commission, more burdened than employees belonging to the majority religion.[37]

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[30] EComHR 12 March 1981, *X* v. *United Kingdom*, App. No. 8160/78, par. 13.
[31] *Id*. at par. 15.
[32] *Id*. at par. 32.
[33] EComHR 3 December 1996, *Konttinen* v. *Finland*, App. No. 2494/94, par. 7.
[34] EComHR 9 April 1997, *Stedman* v. *United Kingdom*, App. No. 29107/95, par. 3.
[35] *X* v. *United Kingdom*, *Konttinen* v. *Finland* and *Stedman* v. *the United Kingdom*.
[36] EComHR 12 March 1981, *X* v. *United Kingdom*, App. No. 8160/78, par. 16.
[37] See also R. Gavison and N. Perez, "Days of Rest in Multicultural Societies: Private, Public, Separate?" in *Law and Religion in Theoretical and Historical Context* (P. Cane, C. Evans and Z. Robinson, eds, Cambridge University Press 2008), 186–213 and M. Nussbaum, *Liberty of Conscience* (Basic Books, 2008), 119. See also *infra*.

A second element that is closely linked to the freedom to resign of the employee is the idea of his or her own free will when entering into a contractual relationship with an employer. Here, the question arises whether an employee distances himself from his rights by signing a contract with his employer. This is not the case, since the ECtHR still keeps the right to assess whether a contractual restriction of a fundamental right is proportional.[38] A different position would lead to an undermining of the fundamental rights guaranteed by the Convention. In other words, the fact that an applicant by his or her own free will places him or herself in this particular situation by signing a contract should not be a reason to deny *a priori* that an interference with his or her freedom of religion took place. This approach "casts the applicant … as the author of their own misfortune, and sees the remedy as lying in their own hands."[39]

Furthermore, putting all the responsibility on the side of the employee by stating that he or she should bear the consequences of the contract he signed by his own free will, starts from the assumption that he had a full choice about all the aspects of the contract. In *X* v. *UK*, for instance, the Commission observed that the applicant "of his own free will, accepted teaching obligations under his contract." One could then argue that the applicant should bear the consequences of the contract he signed and should thus follow the regular work schedule like the other employees, or quit his job. This argument, however, ignores the fact that an individual who voluntarily signs a contract does not always have a say in its terms. Caroline Evans argues that "[i]n these types of situations, the Commission talks about people having a choice or making a 'voluntary' decision in a context where they may only have a range of unpalatable choices."[40] The Court ignores completely the fact that the applicant belongs to a minority religion and thus does not always freely make choices as we would like him to do.[41] Or to put it in the words of Seglow:

> "matters are not so simple because, while we can hold Mr Ahmad[42] responsible for his beliefs, we cannot hold him responsible for the fact that in the UK Friday is a work day."[43]

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[38] L. Vickers, *Religious Freedom, Religious Discrimination at the Workplace* (Hart Publishing 2008) 93–94. See *mutatis mutandis* ECtHR 23 September 2010, *Obst* v. *Germany*, App. No. 425/03 and ECtHR 23 September 2010, *Schüth* v. *Germany*, App. No. 1620/03.

[39] M. Evans, "Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions" in *Law and Religion in Theoretical and Historical Context* (P. Cane, C. Evans and Z. Robinson, eds, Cambridge University Press 2008) 296.

[40] C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, 2001) 131.

[41] See also J. Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant 2006) 162.

[42] Ahmad is the name of the applicant in the case *X* v. *UK* (1981).

[43] J. Seglow, "Theories of Religious Exemptions" in *Diversity in Europe. Dilemmas of Differential Treatment in Theory and Practice* (Gideon Calder and Emanuela Ceva, eds, Routledge 2011), 55.

Certainly, the freedom to resign doctrine and the argument of the applicant's free will to sign a contract should not be referred to in the light way of the Commission. If the Court would like to use this argument, that an employee remains free to resign and take into account that he entered into a contractual relationship by his own free will, this could at most be used during a proportionality analysis, but should certainly not lead to not finding an interference.[44] This way of reasoning at the level of interference creates a disequilibrium disadvantaging the employee-believer.

It is strongly suggested that as the Court proceeds to a proportionality analysis in cases concerning claims of religious accommodation in the workplace, all the interests of both the employee and employer could and should be taken into account. On the side of the employee, the real-life consequences of a dismissal and subsequent search for an alternative position should be taken into account.[45] On the side of the employer, the feasibility of the accommodation claim should be examined. The existence of an alternative which is less restrictive on the employee's rights is also one of the elements that could be examined.[46] Vickers has proposed several other elements such as the nature of the job, the content of the religious claim and the nature of the restriction.[47] An additional element which can play a role in the proportionality analysis is whether the employee belongs to a minority religion.

Such an approach would give more attention to the situation of the employee. To date, the Strasbourg judges have placed the contractual obligations central in their reasoning. In the cases cited above, the interpretation of Article 9 of the ECHR was governed by these contractual obligations rather than by the religious duties of the employee.[48] A proportionality analysis would offer a more genuine balance between the several interests at stake.

[44] See also S. Knights, "Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights," in *Legal Practice and Cultural Diversity* (R. Grillo et al., eds, Ashgate 2010) 291.

[45] See *mutatis mutandis* ECtHR 26 September 1995, *Vögt* v. *Germany*, App. No. 17851/91, *infra*.

[46] E. Brems, "Human Rights: Minimum and Maximum Perspectives," 9 *Human Rights Law Review* 349 (2009), 360. See also E. Bribosia, J. Ringelheim and I. Rorive, "Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?" 17 *Maastricht Journal of European and Comparative Law* 137 (2010), 151.

[47] See also L. Vickers, *Religious Freedom, Religious Discrimination at the Workplace* (Hart Publishing 2008), 102–107. Vickers adds two categories: nature of employer, relationship between the religious expression and applicant's job.

[48] P. Cumper, "The Accommodation of 'Uncontroversial' Religious Practices" in *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (T. Loenen & J. E. Goldschmidt, eds, Intersentia 2007) 198.

4.1.2. No discrimination on the ground of religion[49]

All the applicants in the above-mentioned cases alleged discrimination on the ground of their religion. However, in *X* v. *UK*, *Konttinen*, *Stedman* as well as in *Kosteski*, the Strasbourg organs did not find that the measures taken (or not taken) were violating Article 14 in conjunction with Article 9 of the ECHR.

In *X* v. *UK* the Commission observed that the applicant did not show that he was treated differently than, for instance, Jewish teachers, and declared the claim manifestly ill-founded. The Commission apparently found no need to compare the applicant's situation with teachers belonging to a majority religion or with teachers not having a religion. It made a very interesting statement concerning this issue:

"in respect of the general question of religious and public holidays, … that, in most countries, only the religious holidays of the majority of the population are celebrated as public holidays. Thus Protestant holidays are not always public holidays in Catholic countries and vice versa."[50]

The Commission thus not only recognized but also normalized the fact that in most countries only the religious holidays of the majority are celebrated as public holidays.[51] In *Konttinen* the Commission unsuccessfully tried to soften this stance somewhat by on the one hand acknowledging the fact "that the Finnish legislation on work hours provides that the weekly day of rest is usually Sunday," but on the other hand it observed that this legislation does not contain any provision "which would guarantee to members of a certain religious community an absolute right to have a particular day regarded as a holy day."[52] In other words, in this case, the Commission rejected the discrimination argument by referring to the formally non-discriminatory character of the Finnish legislation. However, the effect of this legislation is that religions which do not have Sunday as a holy day, which is the case for most of the minority religions, are less accommodated in the workplace.[53] It is exactly because the applicants have to undergo the same employment system organized along the (religious) needs of the majority that they are restricted in the exercise of their freedom of religion. When a certain measure is general in application and in principle neutral, but causes particular hardship for certain

[49] This part is only discussed briefly, since the focus of this chapter is on the Article 9 case law. However, the element of discrimination could not be omitted from the chapter.

[50] EComHR 12 March 1981, *X* v. *United Kingdom*, App. No. 8160/78, par. 28.

[51] See also E. Bribosia, J. Ringelheim and I. Rorive, "Reasonable Accommodation for Religious Minorities: a Promising Concept for European Antidiscrimination Law?" 17 *Maastricht Journal of European and Comparative Law* 137 (2010), 153.

[52] EComHR 3 December 1996, *Konttinen* v. *Finland*, App. No. 2494/94, par. 7.

[53] See also L. Vickers, *Religious Freedom, Religious Discrimination at the Workplace* (Hart Publishing, 2008), 92 and J. Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant 2006), 325–326.

people, the question of "indirect discrimination" may arise.[54] Thus, applied to the cases discussed above it can be concluded that the applicants in *X* v. *UK* and *Konttinen* v. *Finland* are indirectly discriminated against on the basis of their (minority) religion.

Hence, in the landmark case *Thlimmenos* v. *Greece*, the Court also recognized 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."[55]

According to this reasoning, minorities could claim exceptions to general rules unless the state has a reasonable and objective justification for not allowing this exception. In the case of *X* v. *UK* this would mean that the Court would have to examine whether the refusal to adapt the applicant's work schedule was proportionate to the legitimate aim.[56] To date, in the field of religious claims in the workplace this principle has not been applied. However, the Court recently applied religious accommodation in a prison context.[57]

Although these principles of indirect discrimination and differential treatment could be seen as "principal tools that may be used to guarantee respect for minority cultures,"[58] they still remain unrealized in the field of employment.

4.2. Religious attire in the workplace: interference with but no violation of the freedom of religion

Until now, the issue of religious attire in the workplace was only raised before the ECtHR by Muslim women wearing an Islamic headscarf.[59] However, it seems that the

[54] P. Bosset and M.-Cl. Foblets, "Accomodating Diversity in Quebec and Europe: Different Legal Concepts, Similar Result?" in *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Council of Europe Publishing 2009), 37, 61.
[55] ECtHR 6 April 2000, *Thlimmenos* v. *Greece*, App. No. 34369/97, par. 44.
[56] J. Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant 2006), 332.
[57] See *infra*, ECtHR 7 December 2010, *Jakóbski* v. *Poland*, App. No. 18429/06.
[58] E. Brems, "Human Rights as a Framework for Negotiating/Protecting Cultural Differences: an Exploration in the Case-law of the European Court of Human Rights" in *Cultural Diversity and the Law. State Responses from Around the World* (M.-Cl. Foblets et al., eds, Bruylant 2010), 667–668.
[59] However, at the domestic level other religious groups issued claims concerning this topic. See, for example: S. Ouald Chaib, "About Crucifixes and Headscarves in Dutch Jurisprudence. Is There a Difference Between Both?" *Strasbourgobserves.com* 2010. See also K. Alidadi, "Muslim Women Made Redundant: Unintended Signals in Belgian and Dutch Case Law on Religious Dress in Private Sector Employment and Unemployment" in A Test of Faith? Religious Diversity and Accommodation in the European Workplace (Ashgate 2012), 245-282 and R-S. Alouane, "The Practice of Religion in the French Public and Private Workplace: in Search of an Elusive Balance" in A Test of Faith? Religious Diversity and Accommodation in the European Workplace (Ashgate 2012), 205-244.

Court will be confronted with other religious claims in the near future, since a case has recently been communicated concerning a British Christian woman wanting to wear a cross on the work floor.[60] Under this section three cases will be discussed. *Dahlab* v. *Switzerland* involved a Swiss primary school teacher, while *Kurtulmus* v. *Turkey* and *Kavakçi* v. *Turkey* concerned, respectively, a university professor and a parliamentarian in Turkey.

4.2.1. Interference with the freedom of religion

Contrary to the adjudication concerning work hours, the Court did find that an interference with the right to the freedom of religion occurred in the cases of *Dahlab*, a primary school teacher, and in *Kurtulmus*, a university professor, both being prohibited from wearing a headscarf in their workplace.[61] Moreover, the Court seems to have adopted a more insider approach when assessing whether a manifestation of religion is at stake. Although the Court in the case of *Dahlab* did not explicitly acknowledge that the headscarf is a manifestation of religion,[62] the Court proceeds in *Kurtulmus* that

> "on the basis that the rules on dress for public servants constituted interference with her right to manifest her religion, *as she considered that Muslim women have a religious duty to wear the Islamic headscarf*."[63]

This very personal approach of the Court contrasts with the position of the Commission in, for instance, *X* v. *UK* where the necessity of performing the Friday prayer during work hours was questioned. Here the Court attaches particular importance to the question whether in the specific case the motivation to wear the headscarf is driven by the religious belief of the applicant. By applying this insider approach in this case and thus accepting that the underlying issue concerned a manifestation of religion, the Court accepts that a headscarf ban in the workplace entails an interference with the freedom to manifest one's religion.

The cases discussed under this section clearly show the importance of recognizing that a manifestation of religion was at stake, since the Court proceeds to a proportionality analysis. However, the fact that the case has reached this phase

[60] ECtHR 12 April 2011, *Nadia Eweida and Shirley Chaplin* v. *UK*, App. No. 48420/10 and 59842/10.
[61] The third case discussed in this section, *Kavakçi* v. *Turkey*, was not examined under Article 9 of the Convention. See *infra*.
[62] In *Dahlab* v. *Switzerland* the Court did not explicitly state that the headscarf was a manifestation of a religious belief, but it can indirectly be assumed to be the case, since it examined the case under Article 9. Moreover, the Court mentioned the following principle: "The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion. Bearing witness in words and deeds is bound up with the existence of religious convictions."
[63] ECtHR 24 January 2006, *Kurtulmus* v. *Turkey*, App. No. 65500/01, at par. 5 (own emphasis).

does not guarantee that the reasoning under this proportionality analysis will be satisfactory, whatever the outcome of the case will be.

In the next part a closer look will be taken at the Court's reasoning in the cases of *Dahlab* and *Kurtulmus* where the Court did not find a violation, and *Kavakçi* where a violation was found, but not concerning the applicant's freedom of religion.

4.2.2. Dahlab and Kurtulmus: manifestly ill-founded

Lucia Dahlab was a Swiss woman who converted to Islam after working for almost two years in a public primary school in Switzerland. After her conversion she started wearing the headscarf, and wore it while working in the school for approximately four years, and this without any objections from the school management, the parents or the pupils. It was only after these four years that the education board prohibited her from wearing a headscarf at school.

Dahlab's claim that the prohibition imposed on her against wearing a headscarf during her school activities consisted of a violation of her freedom of religion guaranteed by Article 9 of the ECHR was declared manifestly ill-founded and thus inadmissible.[64] Referring to the margin of appreciation in this field,[65] the Court concluded that the prohibition of wearing the headscarf was not unreasonable. It observed that the national authorities took the personal conviction of the applicant sufficiently into account and that they amply balanced the applicant's freedom of religion against the principle of state neutrality. The Court attaches particular importance to the protection of the rights of others, in this case the young pupils, by stressing that the headscarf could have a proselytizing effect on children:

"It cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, 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."[66]

This part of the Court's reasoning can be contrasted with its observation that for several years the applicant has been teaching with a headscarf

[64] For an excellent analysis of this case see also C. Evans, "The 'Islamic scarf' in the European Court of Human Rights," 7 *Melbourne Journal of International Law* 52 (2006), 52–73.
[65] See also K. Henrard, "A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to "Church-State Relations" under the Jurisprudence of the European Court of Human Rights" in A Test of Faith? Religious Diversity and Accommodation in the European Workplace (Ashgate 2012), 59-86.
[66] ECtHR 15 February 2001, *Dahlab* v. *Switzerland*, App. No. 42393/98, par. 14.

"without any action being taken by the head teacher or the district schools inspector or any comments being made by parents. That implies that during the period in question there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs."[67]

In other words, Mrs Dahlab had been teaching for approximately four years with her headscarf and no complaints about pressure towards the pupils were formulated, nor was it reported that pupils were being indirectly influenced. The reasoning applied by the Court is thus confusing and contradictory. On the one hand it recognizes that the applicant performed a good job as a teacher but on the other hand it depersonalizes the issue by first stating that the headscarf as such could have a proselytizing influence on the children—which is factually proven to be untrue—and secondly by stating that the wearing of the headscarf is difficult to reconcile 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"—which is also proven to be untrue by the above-mentioned observation. Consequently, a more pragmatic approach would be more appropriate in this case, especially since the Court claims to balance the right of the teacher to manifest her religion against the need to protect pupils by preserving religious harmony. The balancing exercise the Court is trying to make in its reasoning is incomplete. A more complete and fair proportionality analysis would have included the uncontested conduct of the applicant and the consequences a headscarf ban might have for her.[68] Instead, the case was declared manifestly ill-founded and inadmissible, which is a paradoxical conclusion considering the complexity of the case.

The same "manifestly ill-founded" conclusion was reached in *Kurtulmus* v. *Turkey*. Contrary to *Dahlab*, where the argument of state neutrality plays only a marginal role in the Court's reasoning, the central line of reasoning used by the Court in *Kurtulmus* is that of secularism.

Mrs *Kurtulmus*, a Turkish university professor who wore a headscarf, was suspended from her duties and eventually dismissed on the ground that she had failed to comply with the dress code applicable to state officials. As in *Dahlab*, the applicant had already been wearing the headscarf for some time on the job before she received her first "warning."

In this case also, the Court granted a wide margin of appreciation to Turkey and accorded particular attention to the principle of state neutrality. Instead, the Court put forward the Turkish Kemalistic principle of secularism. The Court states that it is

[67] *Id*. at par. 13.
[68] See *mutatis mutandis* ECtHR 26 September 1995, *Vögt* v. *Germany*, App. No. 17851/91, discussed below.

"that principle, and not objections to the way a person dresses as a result of his or her religious beliefs, that is the paramount consideration that is underpinning the rules."[69]

This part of the Court's reasoning shows similarities with the reasoning in *Konttinen* and *Stedman*,[70] where the Commission did not find that the employee was dismissed because of his religion and the manifestation of it, but because of the failure to respect his contractual duties.[71] Moreover, similarly to the work schedule cases discussed in the previous section, the Court emphasized that Mrs Kurtulmus had "assumed the status of a public servant of her own free will" and that

"as a university lecturer, and thus a person in authority at the university and a representative of the State, she could not have been unaware of the rules requiring her not to express her religious beliefs in public in an ostentatious manner."[72]

The emphasis on free will and on facing the consequences of the "choice" made indirectly places the employee before a dilemma. Mrs Kurtulmus can indeed make the choice between being a professor and not being a professor. But since the dress code is a general rule applicable in all the public universities, this "choice" hides the dilemma between manifesting one's religion on the one hand and pursuing a career as an academic and public servant on the other. In other words, wearing a headscarf *a priori* restricts freedom of choice of profession and career opportunities in Turkey,[73] which is exactly the issue that the applicant is contesting in front of the Court. It cannot be denied that the principle of secularism is fundamental in Turkish society.[74] The question should be whether the measure taken is proportionate in attaining this aim. Taking into account that the applicant teaches adult students, that she was allowed to obtain her PhD degree with a headscarf and that she has been teaching for two years with a headscarf without getting any complaint, the proportionality of the ban is highly debatable. However, in cases against Turkey in the field of religious freedom the principle of secularism plays a major role.[75]

The Court concluded that the claim is manifestly ill-founded, referring to the arguments in the case of *Dahlab*, namely neutrality *and* the tender age of the children. Interestingly, the second element, namely the profile of the persons taught by the applicant, was not taken into account in this case. If the Court had been consistent in its case law, it would at least have touched upon this issue. As a

[69] ECtHR 24 January 2006, *Kurtulmus* v. *Turkey*, App. No. 65500/01, par. 6.
[70] See *supra*.
[71] See *supra*.
[72] ECtHR 24 January 2006, *Kurtulmus* v. *Turkey*, App. No. 65500/01, par. 6.
[73] J. Maclure and C. Taylor, *Laïcité é liberté de conscience* (La Découverte 2010), 58.
[74] See the chapter by Mine Yilderim in this volume.
[75] See also, for example, ECtHR 10 November 2005, *Leyla Şahin* v. *Turkey*, App. No. 47774/98.

university professor, the applicant teaches adult students who cannot be considered as vulnerable as primary school children. Moreover, contrary to *Dahlab*, the Court did not mention the fact that Mrs Kurtulmus had been teaching for two years with a headscarf before any issue arose. Consequently, in *Kurtulmus*, the Court has taken the perspective of the applicant even less, according the principle of secularism an almighty weight in the balance.

4.2.3. Kavakçi: Headscarf at the parliament

In *Kavakçi* v. *Turkey*,[76] the Court was again confronted with the headscarf in a workplace setting. Mrs Kavakçi was elected as a member of parliament.[77] When she wanted to take the oath, she was forced to leave the parliament following protests about her Islamic headscarf. She was a member of the party *Fazilet Partisi* which openly advocated for the right to wear the headscarf. The party was subsequently dissolved by the Turkish Constitutional Court on the basis that it was a "centre of activities contrary to the principle of secularism."[78] The conduct of certain leaders and members of the party, including the applicant's conduct, were taken into account in reaching this conclusion. The Turkish Constitutional Court stripped two parliamentarians, including the applicant,[79] of their status of Member of Parliament and prohibited five members of the party, including the applicant, from becoming founding members, ordinary members, leaders or auditors of any other political party for five years.[80]

Mrs Kavakçi claimed under Article 9 and Article 3 of Protocol 1 to the Convention that she was sanctioned because of her religious convictions and because of the fact that she manifested her religion by wearing the headscarf.

The Court opted for examining the case solely under Article 3 of Protocol 1 which guarantees the right to free elections. It noted that the temporary political sanctions following the dissolution of the party aimed to preserve the secular character of the Turkish political regime. Subsequently, it found the aim pursued to be legitimate. In its proportionality analysis, the Court observed that the legislation concerning the dissolution of political parties had a very wide scope since all the actions and statements made by party members could be taken into consideration to conclude that a party had to be dissolved, irrespective of the level of involvement of that member. In this case, the Court observed that the president and the vice-

[76] ECtHR 5 April 2007, *Kavakçi* v. *Turkey*, App. No. 71907/01. See also the chapter by Mine Yilderim in this volume.
[77] For a detailed description of the facts and the context see K. Shively, "Religious Bodies and the Secular State: The Merve Kavakçi Affair," 1 *Journal of Middle East Women's Studies* 46 (2005), 46–72.
[78] ECtHR 5 April 2007, *Kavakçi* v. *Turkey*, App. No. 71907/01, par. 42.
[79] It is unclear whether the political activities of the applicant formed the basis of this sanction or whether this was due to another discussion concerning the applicant's nationality.
[80] ECtHR 5 April 2007, *Kavakçi* v. *Turkey*, App. No. 71907/01, par. 23.

president of the party did not suffer the same sanctions as the applicant, despite the fact that they were in a comparable situation to the applicant. Subsequently, the Court concluded that the measures taken towards the applicant were not proportionate to the aim pursued and thus that they had been violating the applicant's freedom to participate in free elections; the Court did not find it necessary to examine her dismissal as a parliamentarian as such.

Although the outcome in this case was favorable for the applicant, some remarks can be made with regard to the line of reasoning followed by the Court. The most striking element in the reasoning is the absence of an assessment of a possible violation of the freedom of religion of the applicant. Although there was a strong link between the applicant's religious freedom and the political sanctions imposed on her, which is also implicitly recognized by the Court through the acceptance of the Turkish principle of secularism as a legitimate aim, the Court clearly avoided entering into this discussion.[81] The question whether a parliamentarian who is democratically elected can be prevented from taking up her function because of her headscarf remains unanswered.[82] It is not clear whether the Court refrained from answering this question because it knew beforehand that it was a lost battle or because it did not come to a consensus on this issue.

A first conclusion that can be drawn from the cases discussed above is the inconsistency in the reasoning of the Court. While in the first case much weight is given to the rights of others—*in casu* the children—this element is not mentioned in *Kurtulmus* where the principle of secularism is the main and only argument. Subsequently, in the third case, the Court neglects the argument linked to the headscarf, while this was the main argument of the applicant. A second, related observation is the lack of a pragmatic and "employee/applicant friendly" approach of the Court. Similar to the work schedule cases discussed in the previous section where it has been argued that more attention is paid to the contractual obligations and the responsibility of the applicant, the Court is also giving less weight to the interests of the applicant in the cases concerning religious attire in the workplace.

4.3. Improving the Court's legal reasoning: "good practices" in the case law of the ECtHR

The title of this chapter reveals an ambitious and audacious aim: improving the legal reasoning of the Court in cases concerning religious accommodation in the workplace. The cases discussed above revealed several opportunities for improvement in the Court's reasoning.

[81] The Court did not even mention the word "headscarf" once in its reasoning.

[82] See also A. Barras, "A Rights-based Discourse to Contest the Boundaries of State Secularism? The Case of the Headscarf Bans in France and Turkey," 16 *Democratization* 1237 (2009), 1249.

It is first observed that the Court shows a reluctance to find an interference in cases concerning religious claims in the workplace. Insofar as it found that the claims concerning work scheduling are related to a manifestation of a religious conviction, the Court does not find an interference with the freedom of religion and holds the opinion that the employee remains free to leave his job. Consequently, the case does not reach the proportionality test and the several interests at stake are not balanced. Secondly, in the cases concerning religious attire in the workplace, the Court accepts that the headscarf is a manifestation of a religious conviction and finds an interference with the freedom of religion. Nevertheless, at the level of the proportionality assessment it does not sufficiently weigh the several interests at stake.

In this section, a closer look will be taken at the legal reasoning of the Court in other fields than the freedom of religion in search of "good practices" within the case law of the Court itself. The cases have been selected on the ground of factual similarities that can be found with the cases discussed in the previous section. The first kind of cases concern employees who have been dismissed or have resigned because of reasons related to their political ideas or facts related to their private or family life. Next, a comparison will be drawn with cases where religious accommodation claims were raised in context other than a workplace setting.

4.3.1. Looking over the fence of Article 9

4.3.1.1. Freedom of expression in the workplace

The landmark case *Vögt* v. *Germany*[83] shows several factual similarities with the cases discussed in the previous sections, but at the level of reasoning the different approaches taken with these cases is remarkable. Mrs Vögt was a teacher in a German public school, where she taught French and German courses. She was also a member of the DKP, a communist political party. When she became actively involved in this party, she was dismissed from her job as a teacher. The authorities argued that she failed to comply "with the duty to uphold the free democratic system of the country."[84]

The Court found that the dismissal interfered with the applicant's freedom of expression but agreed that a duty of loyalty could be expected from a civil servant, so as to protect national security, prevent disorder and protect the rights of others. Subsequently, the Court examined whether the measure was necessary in a democratic society, meaning relevant and sufficient. The way in which the Court proceeds in this necessity test is very interesting. The Court notes that

[83] ECtHR 26 September 1995, *Vögt* v. *Germany*, App. No. 17851/91.
[84] *Id*. at par. 44.

"there are several reasons for considering dismissal of a secondary-school teacher by way of disciplinary sanction for breach of duty to be a very severe measure. This is firstly because of the effect that such a measure has on the reputation of the person concerned and secondly because secondary-school teachers dismissed in this way lose their livelihood, at least in principle, as the disciplinary court may allow them to keep part of their salary. Finally, secondary-school teachers in this situation may find it well nigh impossible to find another job as a teacher, since in Germany teaching posts outside the civil service are scarce."[85]

Thus in this case the Court adopts a very inclusive and sensitive approach towards the personal situation of the employee. The Court even goes a step further by stating that "[c]onsequently, they will almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience.[86]

> "This approach can first be contrasted to the cases where the Court states that the freedom to resign is the ultimate guarantee of one's freedom of religion. In fact, despite the factual similarities between the cases discussed above, the Court at no point mentions the possibility of the applicant resigning, nor does the Court refer to the fact that the applicant entered in this contract by her own free will. On the contrary, the Court notes the consequences the termination of the contract would have on her. Why the Court applies the freedom to resign doctrine in Article 9 cases and not in Article 10 cases is not clear, but the reasoning in *Vögt* shows that leaving out this doctrine gives room for a proper proportionality analysis, while its application in the freedom of religion cases means claims are blocked at the interference level.[87] Secondly, in this proportionality analysis the Court puts the applicant in a central position by taking due regard of the consequences of a dismissal and the particularities of the profession."[88]

A more specific comparison can be drawn between *Vögt* and *Dahlab* v. *Switzerland*. In *Dahlab* the Court acknowledges on the one hand that no critique can be leveled on the conduct of the applicant, but still uses the argument of indoctrination of the children as a red thread in its reasoning. In *Vögt*, we clearly see that the ECtHR is adopting a more pragmatic approach. Here the Court acknowledges, on the one hand, that there could be a risk of indoctrination of the pupils, but it notes, on the other hand, that "no criticism was leveled on [the

[85] *Id*. at par. 60.
[86] *Id*. at par. 60.
[87] *X* v. *United Kingdom*, *Konttinen* v. *Finland* and *Stedman* v. *the United Kingdom*.
[88] For example, the fact that she was a teacher would make it more difficult to find a workplace where she would be accepted with her political ideas.

applicant] on this point."[89] "On the contrary, the applicant's work at school had been considered wholly satisfactory by her superiors and she was held in high regard by her pupils, their parents, and her colleagues."[90] The Court also observes that a teacher is a figure of authority to pupils which implies a responsibility outside the school building. But in this case, no evidence was brought before the Court of such conduct. Finally, since the political party to which the applicant belongs was not banned, her activities were not illegal as such. The Court concluded that the arguments put forward by the government were relevant to the aim pursued, but not sufficient. Consequently, the dismissal of the applicant was found to be disproportionate. Balancing all the elements, the Court found that it was not sufficiently shown that the applicant in practice was causing any harm while exercising her rights guaranteed by Article 10 of the Convention.

In sum, from *Vögt* several "good practices" can be deduced for cases concerning religious accommodation in the workplace. Instead of focusing on the contractual obligations and integrating a "freedom to resign" argument in its reasoning, thereby placing all the responsibility on the shoulders of the employee, the Court should also take the situation of the applicant into account. This leads to a more balanced reasoning of the several interests at stake, of both the employer and the employee. With this approach the cases concerning the accommodation of work schedules would at least have been examined under a proportionality analysis. A second good practice in *Vögt* is the pragmatic approach of the Court. While in *Dahlab* and *Kurtulmus* the Court is following a principled approach—based on secularism and a possible proselytizing effect of the headscarf—in *Vögt* the Court is looking at the de facto conduct of the employee, even though it also recognizes the potential indoctrinating effect of her political ideas. A more pragmatic approach would also lead to a more genuine balancing of the interests of the parties involved.

4.3.1.2. The right to a family life and the workplace

A. The church as employer

All the cases discussed above concerned private employers or the State as employer. A special situation occurs when a church is the employer of an individual. Here the religious freedom of the Church-employer could enter into conflict with the fundamental rights of their employees, such as their freedom of religion or their right to private life.[91] The Court and the Commission have on a number of occasions had the opportunity to review such cases. In *X* v. *Denmark*[92] a clergyman was faced

[89] ECtHR 26 September 1995, *Vögt* v. *Germany*, App. No. 17851/91, par. 60.
[90] *Id*. at par. 60.
[91] See the chapter by Yves Stox on religious-ethos employers in this volume.
[92] EComHR 8 March 1976, *X* v. *Denmark*, App. No. 7374/75.

with resignation from the church when he would not abandon his practice whereby he obliged parents to follow five religious lessons before being able to christen their child. In *Karlsson* v. *Sweden*[93] the applicant was found not to be qualified for the job as vicar since he did not want to work together with clergywomen. Similarly, in *Williamson* v. *UK*[94] a priest complained that he was faced with dismissal since he did not agree with the new policy of the church allowing women to enter the priesthood. In all these cases, the Commission declared the cases inadmissible and referred to the freedom to leave the office. In fact, the arguments which the Commission later used in the cases concerning work hours were used for the first time in cases where the church was the employer:

"Their 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 church guarantees their freedom of religion in case they oppose its teachings."[95]

However, it seems that the Court is embarking on a new line of reasoning when it comes to cases involving Church-employers. Recently, the Court issued two judgments, *Obst* v. *Germany*[96] and *Shüth* v. *Germany*,[97] involving respectively the Mormon Church and the Catholic Church as employers.[98] The two cases show a number of similarities but are distinct nonetheless, both in the facts and in the ruling of the Court. Mr Obst, a member of the Mormon Church and director of the public relations department of the Church for Europe, was dismissed after admitting to an extra-marital sexual relationship. Mr Shüth, organist and chief of the choir, was dismissed when the Church that employed him discovered that he was expecting a child with a woman other than his wife, from whom he was separated. Both employees complained before the ECtHR about a lack of protection accorded by the State in their relationship with their employers. Both cases were dealt with under Article 8 of the ECHR.

In *Obst* v. *Germany* the Court found that the decisions of the national jurisdictions which confirmed the dismissal of the applicant were not unreasonable since it balanced the several interests at stake. This balancing exercise required that the seriousness of the facts (sexual relationship with another woman while still living together with his wife), the important position of the applicant (director of a public relations department at a European level) and the enhanced duty of loyalty linked to his post were taken into account.

Contrary to *Obst*, in *Shüth* v. *Germany* the Court did find a violation of Article 8 of the ECHR. It observed that the several interests at stake were not sufficiently

[93] EComHR 12 April 1989, *Karlsson* v. *Sweden*, App. No. 12356/86.
[94] EComHR 17 May 1995, *Williamson* v. *United Kingdom*, App. No. 27008/95.
[95] EComHR 8 March 1976, *X* v. *Denmark*, App. No. 7374/75.
[96] ECtHR 23 September 2010, *Obst* v. *Germany*, App. No. 425/03.
[97] ECtHR 23 September 2010, *Schüth* v. *Germany*, App. No. 1620/03.
[98] See also the chapters by Lucy Vickers and Yves Stox in this volume.

balanced by the national judicial body and that a more thorough examination was needed. The Court also acknowledges that a Church may impose a duty of loyalty upon its employees, but the several interests at stake must be taken into account, such as the nature of the post. This balancing exercise was not undertaken by the national jurisdictions. Moreover, the Court refers to the limited possibilities of finding a new job,[99] taking into account the specific training of Mr Shüth. According to the Court, it would be difficult, if not impossible, for him to find a new job outside the Church. The Court concludes that the national jurisdictions "did not balance the rights of the applicant and those of the church-employer as is required by the Convention."[100]

Although the different outcomes in the cases can lead to discussions,[101] several "good practices" can be observed with regard to the reasoning. First, the Court does not drop the case at the interference level, but allows room to examine the issues more profoundly at the proportionality level. The argument that employees working for a Church remain free to leave the church is not used here. Moreover, as in *Vögt*, the Court also takes the situation of the applicant into consideration, although the reasoning in *Shüth* is more elaborate than in *Obst* in this regard. In my opinion, the Court does not convincingly show that the several interests are well balanced in *Obst*. The arguments raised in this case concern mainly the interests of the employer, namely the work ethics and the importance of the job. However, in this case the consequences of the dismissal, such as the likelihood of the applicant finding another job, were not taken into account. Whether or not this might lead to another outcome, it is at least inconsistent with the reasoning in *Shüth* where the Court firmly argues that the national jurisdictions did not balance the rights of the applicant and those of the Church-employer as is required by the Convention. This leads us to a second particularly interesting point in these cases. Even though not consistently applied, the way the Court stresses the importance of balancing the several interests of the employer and the employee at stake is, taking into account the previous case law involving the church as employer, striking.

This line of reasoning is continued in a later case involving the Protestant church as employer, *Siebenhaar* v. *Germany*. Mrs Siebenhaar was dismissed from her job in a day care centre ran by the protestant church after the church found out that she was an active member of another religious group, the Universal Church. Thus a

[99] ECtHR 23 September 2010, *Schüth* v. *Germany*, App. No. 1620/03, par. 73: "Or, aux yeux de la Cour, le fait qu'un employé licencié par un employeur ecclésial ait des possibilités limitées de trouver un nouvel emploi revêt une importance particulière." [However, in the eyes of the Court, the fact that an employee who is dismissed by a church-employer has limited possibilities of finding a new job should be accorded particular importance].

[100] ECtHR 23 September 2010, *Schüth* v. *Germany*, App. No. 1620/03, par. 74. Own translation.

[101] See, for example, G. De Beco, "Le droit au respect de la vie privée dans les relations de travail au sein des societiés religieuses—L'approche Européenne des droits de l'homme," 86 *Revue trimestrielle des droits de l'homme* 375 (2011), 390. [The right to family life and private life in work relations in religious societies—The approach of the European Court of Human Rights].

conflict arose between the freedom of religion of the church-employer and the believer-employee, respectively. In its reasoning the Court took, similarly to *Vögt*, several aspects of the applicant's life into account such as her age, the nature of the job and the possibility of finding another job.[102]

In sum, a positive evolution can be found in the Court's case law where a Church is the employer. The focus lies in balancing the interests of the employer and the employee respectively, whereby special attention is paid to the consequences of a possible dismissal for the employee.

B. The "freedom to resign" in 2010

In a recent case, *Konstantin Markin* v. *Russia*,[103] the applicant, an army serviceman, claimed discrimination in the workplace on the ground of gender because he was not awarded parental leave on the same terms as his female colleagues. The applicant had lost his case at the national level. The Russian Constitutional Court *inter alia* argued that "[if] the serviceman decides to take care of his child himself, he is entitled to early termination of his service for family reasons."[104] Although formulated in a more subtle manner than, for instance, *Konttinen* v. *Finland*, this statement of the Russian Court is similar to the freedom to resign argument used by the ECtHR in the freedom of religion cases discussed in this chapter. However, the Strasbourg Court surprisingly reacted as follows:

"The Court is particularly struck by the Constitutional Court's intimation that a serviceman wishing to take personal care of his children was free to resign from the armed forces. Servicemen are thereby forced to make a difficult choice between nursing their new-born children and pursuing their military career, no such choice being faced by servicewomen."[105]

The Court criticizes in this case the same kind of reasoning which it adopted itself, namely the argument that one remains free to resign when one's job conflicts with one's freedoms guaranteed by the Convention. Here the Court also acknowledges that this argument puts a "difficult choice" in front of the applicant-employee. Moreover, referring to the unique nature of the armed forces, the Court also takes the consequences of a possible resignation into account:

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[102] However, in light of the arguments that were raised in the case of Vögt, some critique can also be uttered. The Court namely refers to the possible influence the applicant can have on the children she is educating. However, no proof of proselytizing behavior is put forward in this case, making the fear of "of influence on the children by an educator who is a member of a belief that is contradictory with the principles of the Protestant church" ungrounded. See ECtHR 3 February 2011, *Siebenhaar* v. *Germany*, App. No. 18136/02, par. 44 (translation by the author).

[103] ECtHR 7 October 2010, *Konstantin Markin* v. *Russia*, App. No. 30078/06.

[104] *Id*. at par. 19.

[105] *Id*. at par. 58.

"It is therefore clear that, if they choose to resign from military service to be able to take care of their new-born children, servicemen would encounter difficulties in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status that they had achieved in the armed forces."[106]

Consequently, this case is also an example of a "good practice." Not only does the Court criticize the freedom to resign approach, but it also takes the particular situation of the applicant into account in a well-weighted proportionality analysis. The question arises whether, after taking this firm stance against a freedom to resign approach, the Court would still apply the freedom to resign doctrine in future cases in the field of the freedom of religion.

4.3.2. Looking over the fence of the workplace: religious accommodation in prison

Claims of prisoners who wish to exercise their religion during their detention have come before the ECtHR on a number of occasions.[107] These claims mostly concern visits by a minister, dietary rules and the observance of prayer in prison.

In *Jakóbski* v. *Poland*[108] the Court dealt with a very interesting example of religious accommodation. Mr Jakóbski, detained in a Polish prison, asked on several occasions to be served meat-free meals in order to follow the religious dietary rules required by his Mahayana Buddhist religion. For a few months he was provided a "PK diet"—a diet that contains no pork—upon doctor's orders, but thereafter he was put back on the general prison non-meat-free diet to which he objected on religious grounds.

The Court first examined whether a manifestation of a religious belief is involved. Contrary to the government, the Court did not enter into the discussion of whether or not vegetarianism is really a religious dietary prescription. The Court held that the case fell within the scope of Article 9:

"without deciding whether such decisions are taken in every case to fulfil a religious duty … in the present case the Court considers that the applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable."[109]

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[106] *Id*. at par. 58.
[107] See, for example, ECtHR 9 November 2010, *Ali* v. *Romania*, App. No. 20307/02 (2010); ECtHR 13 November 2007, *Schiavone* v. *Italy*, App. No. 65039/01; ECtHR 30 November 2006, *Igors Dmitijevs* v. *Latvia*, App. No. 61638/00; ECtHR 24 October 2006, *Vincent* v. *France*, App. No. 6253/03 and ECtHR 23 September 2004, *Enea* v. *Italy*, App. No. 74912/01.
[108] ECtHR 7 December 2010, *Jakóbski* v. *Poland*, App. No. 18429/06.
[109] *Id*. at par. 45.

This part of the reasoning is in line with the case of Leyla Sahin.[110] Thus the Court does not judge in general whether a certain claim is related to a manifestation of a religious conviction, but makes the experience of the applicant central. As already argued, this insider approach should also be favored in cases where religious accommodation claims occur in the workplace.

In this case the Court concluded that the refusal of the authorities to accommodate the applicant's religious claim interfered with the applicant's freedom of religion. The Court was not convinced by the argument of the Polish government that providing each detainee with special food would entail too many technical and financial difficulties:

"Unlike in the latter case, he was not offered any alternative diet, nor was the Buddhist Mission consulted on the issue of the appropriate diet. The Court is not persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners."[111]

Jakóbski v. *Poland* has the potential to become a landmark case in the field of freedom of religion. It is the first time the Court actually accepted reasonable accommodation of a religious claim. The context of a prison is of course different to the context of employment, since in the situation of a prison, a detainee completely relies on the authorities. Yet the balancing exercise the Court handled in this case could be applied to cases in the field of the workplace as well, especially for complaints concerning work schedules. Both the interests of the authorities and the prisoner were taken into account. The Court admitted that special arrangements for one prisoner may have financial implications for the custodial institution, but the nature of the claim was not as such that this is an insurmountable problem as the prisoner "merely asked to be granted a vegetarian diet excluding meat products." This reasoning can be compared with the "undue hardship" test used by the US Supreme Court[112] or the Canadian Supreme Court. If the Court followed the same line of reasoning in workplace cases, the feasibility of accommodating a particular religious claim would have to be taken seriously during the proportionality assessment, which would also lead to a more genuine balancing of the several interests at stake in that context.

[110] *Supra*.

[111] ECtHR 7 December 2010, *Jakóbski* v. *Poland*, App. No. 18429/06, par. 52.

[112] See also G. Caceres, "Reasonable Accomodation as a Tool to Manage Religious Diveristy in the Workplace: What about the "Transposability" of an American Concept into the French Secular Context?" in A Test of Faith? Religious Diversity and Accommodation in the European Workplace (Ashgate 2012), 283-316.

Conclusion

The analysis outlined in this chapter makes clear that, until recently,[113] the Strasbourg institutions offered little protection for religious accommodation claims in the workplace with regard to adapted work-schedules and to the wearing of religious attire. Their interpretation and application of the right to freedom of religion is in these cases manifestly restrictive and non-inclusive.

Regarding the cases concerning work-schedules and religious holidays, it is remarkable that none of the article 9 claims pass beyond the interference stage. One underlying reason for this observation is the reluctance of the former European Commission of Human Rights to find that a manifestation of religion is at stake. This occurs when a narrow definition is applied to what consists of a manifestation of religion, or when the Commission frames the claim in non-religious terms. An example of the latter is the reasoning that a dismissal of an applicant-employee is not due to the applicant's religion, but instead, to the applicant's non-respect of the employment contract.

A second cause for not finding an interference in these cases, is the so-called freedom to resign doctrine. Here the Commission argues that no interference with an employee's right to freedom of religion takes place, as the employee remains free to resign. The latter is considered by the Commission as an ultimate guarantee of the freedom of religion. In the same line of this doctrine the Commission also refers to the idea that one enters by his or her own free will into the contractual relationship and must therefore have been aware of the accompanying consequences of this choice. The reluctance to find that an interference takes place undeniably leads to a limited protection of religious accommodation claims under article 9.

In the cases concerning the prohibitions on wearing religious attire in the workplace, the Court at least finds an interference with the applicants' right to freedom of religion. In so doing, a broader and more insider approach is handled when defining whether a certain practice can be considered a manifestation of religion. However, due to the application of a wide margin of appreciation in favor of the State, the protection of the applicants' individual right is also limited.

Hence, the (un)protective[114] reasoning of the Strasbourg institutions in these cases reveals a non-inclusive approach towards a *de facto* religious diversity in the workplace. With this approach, the possibility of religious employees to successfully ask to be included in the workplace through a full participation with respect for their religious identity is seriously limited.

[113] Until the recent cases of Eweida and Chaplin v. the UK, that is.

[114] I borrow this term from Javier Martínez-Torrón, *The (Un) protection of Individual Religious Identity in the Strasbourg Case Law*, 1 OXFORD J. LAW RELIG. 1–25 (2012).

Additionally, irrespective of whether or not accommodation should have been granted in the cases discussed in this chapter, the reasoning in these cases display several exclusionary patterns on a more procedural level in the reasoning. The analysis of the case-law reveals in the approach of the Strasbourg institutions a lack of empathy and understanding towards the applicants in that their concerns and their arguments are often disregarded and not taken seriously.
First, as argued in this chapter, the reluctance to find an interference with the employees' religious freedom when a conflict occurs between professional rules and religious dictates, mostly ignores the applicants' concerns. When the Commission for example finds that the right to manifest one's religion is not interfered with because a certain measure — such as a dismissal— is not due to the religious conviction but to the non-respect of a contractual obligation, the Commission blatantly ignores that the essence of the applicant's claim and argument is exactly the fact that he or she is confronted with a dilemma between religious dictates and professional obligations.

Closing the eyes for this situation is not a serious, respectful, nor inclusive approach towards the applicant and his or her rights. This point of view is also neglecting the disadvantage people belonging to religious minorities have towards the issue of religious accommodation in a workplace where the underlying rules are dominated by the Christian tradition. Indeed, religious dictates concerning the Sabbath or the Friday prayer are not *a priori* accommodated while Sunday is generally considered a day of rest. In the cases concerning work-schedules, the central issue around which the reasoning is built are the contractual obligations rather than the fundamental rights of the individual who is seeking a judicial solution before the Strasbourg institutions.

Similarly, by granting a wide margin of appreciation in the cases concerning the prohibition to wear religious signs at work, the Court bans the concerns and arguments of the applicants to the back, all the while putting the principle of secularism at the fore. The applicants' perspectives and arguments are consequently not truly taken into account. In one case, *Kavakci v. Turkey*, the article 9 claim is not even examined while it was at the heart of the applicant's complaint.

Evidently, accommodation of religious needs will in practice not always be possible in the workplace. Nevertheless, concluding that accommodation is not possible in a particular situation is one thing. Not recognizing that an interference with one's right to manifest his or her religion occurs in a context of conflict between professional duties and religious dictates, is another. By not finding an interference in these cases, the Court does not even recognize the validity of the applicants' claims.[115] Similarly, concluding that a ban on religious attire in the workplace is

[115] Megan Pearson, *Article 9 at a Crossroads: Interference Before and After Eweida*, 13 HUM. RIGHTS LAW REV. 1–23 (2013), 4.

justified while on a procedural level the applicant's perspective and arguments in the case are not even truly taken into account is also problematic. It does not only make the right to freedom of religion void in the workplace context by the lack of protection and thus as a consequence the lack of accommodation of religious diversity, but it is also problematic because of the absence of a genuine examination of the claim and of the lack of empathy towards the applicants' concerns.

The comparative examination within the Court's case law reveals however that good practices, which can serve as inspiration for improvement of these problematic lines of reasoning, are not far away since they can be found within the Court's broader case-law. Applying them is a matter of consistency. Several comparable cases concerning the workplace brought under other articles and the case of *Jakobski v. Poland* concerning religious accommodation in prison, show a more constructive, inclusive and sensitive approach towards the concerns and argumentation of the applicants. As a result also, a more genuine balancing of the several interests at stake takes place.

It is in the workplace that "[i]n the course of their working lives … the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world", as the Court stated in *Niemitz v. Germany*.[116] In an ideal world the workplace should also be a space where the personal (religious) identity of employees are allowed to be expressed and manifested. However, structural inclusion of one's religious identity through accommodation will as a matter of fact not always be possible; the Court will not always be able to conclude in favor of religious employees. Yet, this does not dismiss authorities' and courts from treating people in a way that shows respect for people's religious identity and their particular claims and thus also to show that despite the absence of an inclusive solution at a structural level, people should not feel marginalized in the workplace and in the broader "outside world".

[116] ECtHR 16 December 1992, *Niemetiez* v. *Germany*, App. No. 13710/88, par. 29.

ADDENDUM to Chapter III: A discussion of *Sessa v. Italy* and *Eweida and Chaplin v. the UK*

The case law concerning religious accommodation in the workplace took an important turn in 2013 with the case of *Eweida and others v. the UK*,[1] in which the Court moved towards a more open and inclusive approach *vis-à-vis* religious accommodation in the workplace. Until 2013, the Court's approach towards workplace-related accommodation claims remained the same: non-inclusive. Indeed, this was confirmed in the recent case of *Sessa v. Italy*,[2] concluded in 2012, concerning a conflict between professional duties and a religious holiday.

Both cases, important in the field, will be discussed below. In this addendum, a critical analysis of *Sessa v. Italy* will be followed by an extended and critical appraisal of the cases of *Eweida and Chaplin v. The UK* concerning the visible wearing of a cross by Christian employees in the workplace.

1. *Sessa v. Italy*: a confirmation of the Commission's approach towards religious accommodation claims in the workplace

The restrictive and non-inclusive reasoning in the context of cases concerning religious accommodation in the workplace remained unchanged for a long time. In a relatively recent case from 2012, *Sessa v. Italy*,[3] the Court referred, in the general principles section, to the line of reasoning followed in the old Commission cases of *Konttinen v. Finland*[4] and *Stedman v. the UK* [5] This reasoning included the idea that when a conflict between religious dictates and professional duties occur, it is a breach of contractual obligations rather than the religious beliefs of the applicant that leads to, for example, the employee's dismissal. The former Commission several times found that for this reason, no interference with the applicant's right to freedom of religion took place.

Sessa v. Italy is a case concerning a Jewish practising lawyer who complained about the unwillingness of the Italian court authorities to reschedule a public hearing in the case of his client. The two proposed dates for the hearing coincided respectively with *Yom Kippur* and *Souccot*, which are two important Jewish religious holidays. Noteworthy is the fact that these dates were proposed after the investigating judge excused himself during a previous hearing, leading to an

[1] ECtHR, *Eweida and others v. the UK*, 15 January 2013.
[2] ECtHR, *Sessa v. Italy*, 3 April, 2012.
[3] Ibid, § 35.
[4] EComHR, *Konttinen* v. *Finland,* 3 December 1996.
[5] EComHR, *Stedman* v. *United Kingdom,* 9 April 1997.

adjournment of the hearing of the applicant's client's case.[6]

The applicant complained that the Italian court's refusal to schedule the hearing on another day prevented him from participating in the hearing as the representative of his client and as such constituted a limitation on his right to manifest his religion.[7]

In a short, five-paragraph reasoning,[8] the Court found no violation of his right. On the contrary, the Court even questioned, similarly to the reasoning of the Commission in the cases analysed in this chapter, whether an interference with Sessa's right to freedom of religion really took place. The Court

> is not convinced that setting the case down for hearing on a date which coincided with a Jewish holiday and refusing to adjourn it to a later date amounted to a restriction on the applicant's right to practise his religion freely.[9]

Multiple reasons are advanced for this observation. The first argument put forward by the Court was that '[i]t is not disputed between the parties that the applicant was able to perform his religious duties'.[10] Moreover, said the Court, the applicant 'could have expected that his request for an adjournment would be refused on the basis of the statutory provisions in force and could have arranged to be replaced at the hearing in question to ensure that he complied with his professional obligations'.[11] Finally, the Court, with reference to the Commission case of *Konttinen v. Finland*,[12] stated that the applicant 'did not demonstrate that pressure had been exerted on him to make him change his religious beliefs or to prevent him from manifesting his religion or beliefs'.[13]

This reasoning is problematic from several perspectives. First, the Court limits the protection of the applicant's right to freedom of religion by its restrictive interpretation of what consists of an interference with this right. The criterion of not being pressured to change religions is, to say the least, a very narrow understanding of how the right to freedom of religion can be interfered with. Furthermore, the Court refers to the applicant's ability to foresee the need for a replacement at the hearing. The dissenting judges in the case rightly note that this appraisal can only be made by the applicant himself; it is not up to the Court to decide whether in this

[6] *Sessa v. Italy*, § 6.
[7] *Sessa v. Italy*, § 21.
[8] Of which two paragraphs contain the general principles applicable in this case.
[9] *Sessa v. Italy*, § 37.
[10] Ibid.
[11] Ibid.
[12] EComHR, *Konttinen* v. *Finland,* 3 December 1996.
[13] *Sessa v. Italy*, § 37.

particular case a replacement was a possible option.[14] Moreover this reasoning starts *a priori* from the assumption that the responsibility to find a solution lies with the applicant and disregards whether it is possible for employers to accommodate their employees.

Moreover, positing that the applicant was able to practise his religion — apparently because in the end he chose to celebrate his religious holiday — is an almost incredible denial of the issue at stake. While it is surely true that the applicant in the end chose to celebrate his religious holiday, his complaint related to the fact that in order to be able to do that, he had to make sacrifices in his professional life.

Hence, next to the fact that the Court's approach offers very limited protection to the freedom of religion through this reasoning — which leads to the absence of an inclusive structural approach in the field of religious diversity in the workplace — the way the Court ignores the arguments and concerns of the applicant in this case is highly problematic.

Stating that interference was not obvious, since the applicant was able to celebrate his religious holiday, is a partial representation of the facts which does not acknowledge the fact that this choice came with a price, namely that he was not able to fulfill his professional duties. Moreover, this approach also ignores the central argument made by the applicant, which is precisely the fact that he was confronted with a dilemma between his religious duties and his professional obligations for which he was searching for a solution that made it possible to respect both.

The perspective of the applicant is clearly missing in the reasoning. Neither his arguments and concerns nor his rights are taken seriously.

Irrespective of whether or not accommodation should have been accorded in this particular case[15] and whether a *de facto* inclusion was possible through a readjustment of the hearing calendar, the way the Court approached the case at the procedural level and its failure to acknowledge the applicant's concerns and arguments was therefore in itself exclusionary. The applicant was not truly heard and his concerns were not really put into the balance. This approach failed to communicate to the applicant that he was being taken seriously and that his religious claim was valued.

The Court also disregarded the fact that the practices of religious minorities

[14] See dissent by Judge Tulkens, Judge Popovic and Judge Keller attached to the case.

[15] Like the dissenters, I agree that in this case accommodation was in fact a possible option, one of the reasons being the following: 'First of all, as soon as the date of the hearing was set, the applicant drew attention to the difficulty it presented for him, and requested an adjournment. He therefore notified the judicial authorities four months in advance, giving them a reasonable opportunity to organise the timetable of hearings in order to ensure that the various rights at stake were respected.'[Dissent by Judge Tulkens, Judge Popovic and Judge Keller, at § 11]

have a *de facto* disadvantage *vis-à-vis* majority religious practices in a society that is organized along the lines of a Christian majority tradition. Indeed, the dilemma Sessa was faced with as a practising lawyer would never be faced by a Christian practising lawyer since hearings would never be scheduled on Christian holidays such as Easter or Christmas.

It is not argued here that all religious holidays should *a priori* be incorporated into official calendars; however, when a conflict arises between the religious holiday of an employee and a professional duty, at least an effort to search for a possible accommodation should be undertaken, instead of bluntly blocking the claim at the interference level and not even recognising that a conflict occurs.

This would not only be a more inclusive interpretation of article 9, but no matter whether accommodation is *de facto* possible, it would also communicate to people that they as well as their rights and concerns are valued.

2. *Eweida and Chaplin v. the UK*: towards a more inclusive approach in cases concerning religious accommodation in the workplace

In January 2013, the Court issued an important judgment in the field of religious accommodation in the workplace. The judgment in *Eweida a.o. v. the United Kingdom*[16] grouped four cases together. The analysis in this section will focus on two of them — *Eweida and Chaplin v. the UK* — concerning the wearing of religious symbols in the workplace.[17]

The first applicant, Nadia Eweida, was a Coptic Christian who worked as a member of the check-in staff for British Airways. When she decided to wear a cross visibly above her uniform, she was (after several warnings) sent home without pay.

The second applicant, Shirley Chaplin, also a Christian, worked in a geriatric ward, where she used to wear a cross under her uniform. When a new uniform that included a V-neck was introduced, the cross she was wearing around her neck became visible, which was against the internal rule that members of staff could not wear jewellery for safety reasons.

Both applicants complained that the prohibition against wearing their cross in the workplace infringed their right to manifest their religion.

In this judgment the Court made several interesting observations at the level of general principles which clearly announced a shift in its reasoning in cases

[16] ECH*R, Eweida and others v. the UK*, 15 January 2013.

[17] The two other cases of Ladele and Mc Farlane, concern the conscientious objection of two employees who refused to serve same-sex couples. These cases will not be discussed, since they do not fall within the scope of this chapter.

concerning religious accommodation in the workplace. First, the Court stated that in order to find that a manifestation of religion was at stake, 'the act in question must be intimately linked to the religion or belief'[18] but 'there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question'.[19] This principle, although already applied in previous case law,[20] has now been made explicit as a general principle in the Court's freedom of religion case law.[21]

But the most groundbreaking part of the reasoning in this case is the fact that the Court distanced itself from its previous line of reasoning, in which it considered that having the 'freedom to resign' and having the opportunity to find another job was an ultimate guarantee of the enjoyment of one's right, leading to the conclusion that no interference was at stake. Interestingly, similarly to the argument made in this chapter, the Court referred to the inconsistency in its own case law with regard to this reasoning, stating that

> the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under Article 8; the right to freedom of expression under Article 10; or the negative right, not to join a trade union, under Article 11.[22]

As a result, the Court decided that

> [g]iven the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.[23]

As was also argued in the preceding chapter, the argument that people can find another job can only be considered in the proportionality analysis, where the several interests are balanced, instead of *a priori* leading to a finding of non-interference with the right to manifest a religion. This approach at least recognizes the limitations put on the religious freedom of the applicants. The Court here clearly chose a more open and balanced approach that took into account both the

[18] *Eweida a.o.*, § 82.
[19] *Eweida a.o.*, §82.
[20] See for example the cases on religious attire discussed supra in this chapter, where the Court did not question the religious motivation of the wearing of religious attire.
[21] See for example the later case of *SAS v. France* discussed infra in the addendum to chapter VI, in which this principle is referred to.
[22] *Eweida a.o.*, §83.
[23] *Eweida a.o.*, §83.

employer's and employee's concerns. This, however, does not entirely change the Court's reasoning, since the proportionality analysis remains, as the Court said, 'subject to the margin of appreciation enjoyed by the State'.[24]

Nevertheless, now that an important threshold at the interference level has been taken away, the approach has become more inclusive and protective than the previous cases concerning religious accommodation discussed in the preceding chapter. Indeed, religious employees are at least given a chance to advance arguments that can be taken into account during the proportionality analysis. The right to freedom of religion has been, according to some authors, 'revitalized' in the workplace context since 'while previously Article 9 played at most a subsidiary role, now it could come much more prominently to the fore in analyses'.[25]

The importance of balancing the several interests at stake was made central in the cases of both Eweida and Chaplin. Interestingly, both cases were, however, decided differently. While the Court found a violation in the case of Eweida, in the case of Chaplin no violation was found of her right to manifest her religion. The Court concluded in the case of Eweida that

> a fair balance was not struck. On one side of the scales was Ms Eweida's desire to manifest her religious belief. **As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life** to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. **Ms Eweida's cross was discreet** and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.[26]

There are several interesting elements in this reasoning, at both the

[24] *Eweida a.o*., §84. See also Nicolas Hervieu, Un nouvel équilibre européen dans l'appréhension des convictions religieuses au travail, in *Lettre « Actualités Droits-Libertés » du CREDOF*, 24 January 2013 at http://wp.me/p1Xrup-1wU.

[25] Veit Bader, Katayoun Alidadi and Floris Vermeulen, 'Religious diversity and reasonable accommodation in the workplace in six European countries: an introduction', 13 *Int. J. Discrim. Law* (2013), at 70-71.

[26] *Eweida* a.o., § 94, emphasis added.

substantive and procedural levels. A first remarkable element is that the Court did not accept the interests of the employer, in this case the preservation of its corporate image, as trumping the individual's right to manifest her religion, all the while accepting that this aim is 'undoubtedly legitimate'.[27][28]

The classification of the cross as 'discreet' can, however, be considered problematic since this notion is rather vague. Where is the line to be drawn between 'discreet' and 'ostentatious', as was previously noted in other cases?[29] Does the Court not leave a window open for the limitation of more visible religious signs in the workplace, such as the headscarf or the turban? Of paramount importance, however, seems to be the fact that no evidence was advanced that the rights of others had been interfered with and thus it concluded that Eweida's right had been violated.

In Chaplin's case, however, the Court did not find a violation of her right to manifest her religion, stating that

> as in Ms Eweida's case, the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance. However, the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.[30]

This reasoning stands in contrast with the reasoning in the case of Eweida, where the Court assumed that the cross was not a problem in the context of the corporate image, especially since no evidence was advanced that could prove the opposite. In Chaplin's case, however, the Court did not require evidence from the hospital authorities and awarded them a broad margin of appreciation, which indirectly gives the impression that the Court supposes that a safety problem arises with religious signs in a hospital context. It might indeed be possible that jewellery

[27] See also Veit Bader, Katayoun Alidadi and Floris Vermeulen, 'Religious diversity and reasonable accommodation in the workplace in six European countries: an introduction', 13 *Int. J. Discrim. Law* (2013), at 73.

[28] It can be argued, however, that the acceptance of the corporate image as undoubtedly legitimate is problematic in light of the enumerated aims in article 9.

[29] See for example ECtHR, *Kurtulmus* v. *Turkey*, 24 January 2006, where the Court noted, concerning the wearing of an Islamic headscarf by a university professor, that '[a]s a university lecturer, and thus a person in authority at the university and a representative of the State, she could not have been unaware of the rules requiring her not to express her religious beliefs in public in an **ostentatious** manner' (emphasis added). See also the detailed analysis of this case supra in chapter IV.

[30] *Eweida a.o.*, §99.

can be dangerous in the context of a hospital; however, why did the Court not apply the same reasoning as in Eweida, requiring the hospital authorities to advance proof of this danger and as such truly balance the several interests at stake?

Despite these small elements of critique, it is clear that the Court's approach in these cases has been, from a substantive point of view, far more protective and inclusive than its previous case law in the field of the workplace.

Additionally, from the perspective of procedural fairness the cases were clearly more inclusive and respectful of religious employees' concerns, their arguments and their right to freedom of religion. This can be seen not only in the strong emphasis the Court placed on the need to balance the several interests at stake, but also in its acknowledgment of the importance that religious manifestation played in the lives of the applicants. In *Chaplin*, although an unfavourable decision was reached, the Court at the same time recognised 'the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly', a consideration that therefore 'must weigh heavily in the balance'.[31] And in *Eweida* the Court firmly stated that the right to manifest a religion 'is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others'.[32] As such, the Court recognized the central importance of the right to freedom of religion for an individual, and also for society, and made clear that it should be taken seriously.[33]

These cases, although not without flaws, reflect inclusivity, especially at the procedural level. They not only confirm the importance of the right to freedom of religion, but also convey the message that the applicant's concerns will be taken seriously, more so than the Court has previously done in cases concerning religious accommodation in the workplace.

Is this case a turning point in the Court's approach towards religious diversity under article 9? That answer is not clear-cut. It might be argued that the Court's case law under article 9 is at the moment still too unpredictable. While, for example, the case of *Jakobski v. Poland*[34] in 2010 seemed very promising from the perspective of inclusion,[35] the case of *Sessa v. Italy*[36] in 2012 showed that an inclusive approach in

[31] Ibid.
[32] Ibid.
[33] See also Lourdes Peroni, 'Eweida and Others v. the United Kingdom (Part I): Taking Freedom of Religion More Seriously', 17 January 2013 at http://strasbourgobservers.com/2013/01/17/eweida-and-others-v-the-united-kingdom-part-i-taking-freedom-of-religion-more-seriously/ (last accessed on 16 March 2015).
[34] *Jakobski v. Poland*, 7 October 2010.
[35] See the discussion of the case in the chapter preceding this addendum and Saïla Ouald-Chaib and

the Court's article 9 adjudication should not yet be taken for granted. However, the cases of *Eweida* and *Chaplin* certainly marked a U-turn in the case law concerning the workplace, in that claims will now more easily pass beyond the interference level. However, there is still room at the substantive level to adopt a non-inclusive approach by applying a wide margin of appreciation. The real test will be when the Court is confronted with a case concerning the accommodation of a minority religious practice in the workplace, such as the wearing of a headscarf, in order to have more clarity on the vague concept of 'discreet' sign that the Court has used. In the increasing diversity of western European society, it is probably just a matter of time before the Court is faced with such a case.

Lourdes Peroni, 'Jakóbski v. Poland: is the Court opening the door to reasonable accommodation?', 8 December 2010 at http://strasbourgobservers.com/2010/12/08/jak%CF%8Cbski-v-poland-is-the-court-opening-the-door-to-reasonable-accommodation/ (last accessed 15 March 2015).

[36] ECtHR, *Sessa v. Italy*, 3 April 2012.

CHAPTER V S*uku Phull v. France* Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously*

Introduction

Religious manifestations have always been a complicated issue. Over the past decade uncountable pages have been written about the headscarf and about the case-law of the European Court of Human Rights[1] concerning this topic. [2] More recently, a world-wide debate was held about the crucifix case *Lautsi v. Italy*[3]. The world press[4], researchers from universities in Europe and across the Atlantic[5], bloggers[6], the Vatican[7]… everybody wished to have a say in the discussion. In many of these famous cases I would probably also judge differently and yet, this is not the kind of case I have chosen to rewrite.

My choice went to *Suku Phull v. France*[8], a case about a Sikh who was compelled to remove his turban at a security check in the airport and who complains that this single fact violates his freedom of religion. Many people might not understand why Mr. Phull was so much affected by having had to remove his turban, that he hired a lawyer and contested this situation before the domestic courts up until the Court in Strasbourg. Even the Court, which declared the case inadmissible, seems to consider this situation as an *a priori* clear-cut issue. It considers the claim as manifestly ill-

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[1] Hereafter the 'Court' or the 'Strasbourg Court'.

[2] See *i.a.* P. Cumper and T. Lewis, 'Taking religion seriously"? Human rights and hijab in Europe—some problems of adjudication', *24 J.L. & Religion 599* 2008-2009; C. Evans, 'The Islamic scarf and the European Court of Human Rights', 7 *MELB. J. INT'L. L.* 52 (2006); J. Marshall, 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate', *Human Rights Quarterly* 30 (2008) 631–654; I. Rorive, 'Religious Symbols in the Public Space: In search of a European Answer', *Cardozo L. Rev.* 2008-2009, 2669-2698.

[3] ECtHR, *Lautsi v. Italy*, 3 November 2009 and ECtHR (GC), *Lautsi v. Italy,* 18 March 2011.

[4] See for example: 'School crucifixes 'do not breach human rights'', at http://www.bbc.co.uk/news/world-europe-12791082 ; 'European Court of Human Rights rules crucifixes are allowed in state schools', 18 March 2011 at http://www.guardian.co.uk/law/2011/mar/18/european-court-human-rights-crucifixes-allowed?INTCMP=SRCH and S. Fish, 'Crucifixes and Diversity: The Odd Couple', 28 March 2011, http://opinionator.blogs.nytimes.com/2011/03/28/crucifixes-and-diversity-the-odd-couple/. (Last consulted 29 January 2012)

[5] See for example *Religion and Human Rights*, Volume 6, Number 3, 2011. Almost the entire volume is dedicated to the Lautsi case.

[6] See for example A. Buysse, 'Grand Chamber Judgment in Lautsi: No Violation', 18 March 2011 at http://echrblog.blogspot.com/2011/03/grand-chamber-judgment-in-lautsi-no.html; L. Peroni, 'Lautsi v. Italy: Possible Implications for Minority Religious Symbols', 31 March 2011 at http://echrblog.blogspot.com/2011/03/grand-chamber-judgment-in-lautsi-no.html; L. Zucca, 'A Comment on Lautsi', 19 March 2011 at http://www.ejiltalk.org/a-comment-on-lautsi/#more-3161. (Last consulted 29 January 2012)

[7] http://www.uscatholic.org/news/2011/03/vatican-welcomes-european-court-decision-classroom-crucifixes

[8] ECtHR, *Phull v. France*, 11 January 2005.

founded, since security checks in airports are 'without any doubt' necessary to safeguard public safety. Of course the Court is right about that; who could disagree with this safety concern? In fact, I am convinced that even Mr. Phull cares about the safety in airports as much as I do, as much as France does and as much as the Strasbourg Court does.

This is however not the question that is at stake in Mr. Phull's case. The issue at stake is whether the concern of public safety required the removal of Mr. Phull's turban. This question however is not addressed by the Court, even though Mr. Phull's argumentation had pointed at alternative measures for safeguarding public safety, such as the use of a manual detector or a walk-through scanner.

The main concern in this chapter is not to criticize the outcome of the case, but rather to assess the way the case was dealt with. In a first part I will present the idea of procedural justice. Building on empirical findings concerning the link between the legitimacy of courts and the acceptance of their rulings on the one hand, and the way they deal with applicants and their arguments on the other, some normative guidelines have been developed. After outlining the *Suku Phull* decision more extensively in the second section, the ruling will be checked against these procedural justice guidelines in the third section. In the fourth section, I will propose remedies for the problems that will have been identified. These include reframing the decision into a judgment, asking the right necessity question and proposing an alternative. This will be followed by some concluding remarks and by the presentation of the redrafted judgment of *Suku Phull v. France.*

5.1. Procedural justice

Social psychology research has revealed that in their evaluation of their experience with the law, people do not only care about the outcome in their case, but also, and even more, about the way their case is dealt with.[9] Taking these findings seriously implies that judges should care not only about outcome fairness, but should pay particular attention as well to the fairness of the process as such. This means that the parties' views should be taken into account, that the judge should act in a neutral and unbiased way, that the parties should be treated with respect and that the Court's actors should show genuine care about the parties' concerns.[10] This idea forms the starting point of the rewriting exercise I undertake in this chapter.

[9] T. Tyler, 'Procedural Justice and the Courts', *Court Review* 2007-2008, vol. 44, 26-31; T. Tyler, 'What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures', *Law and Society Review* 1988, 22:1, 121.

[10] See infra.

5.1.1. Benefits of a procedural justice approach

Since the Court system is in the first place concerned with delivering fair decisions and not with pleasing the parties in a case, judges might ask why they should care about procedural justice.[11] Here are some arguments in favor of procedural justice in judicial procedures.[12]

The findings of Tyler and his associates indicate that procedural justice "encourages decision acceptance and leads to positive views about the legal system".[13] Treating individuals fairly thus enhances the legitimacy of courts and of the law in general. Moreover "once the perception that legal authorities are legitimate has been shaped, compliance with the law is enhanced, even when it conflicts with one's immediate self-interest".[14] Hence, the integration of a procedural justice approach in its adjudication can strengthen the Court's position and enhance compliance with its judgments. Moreover, as Brems and Lavrysen argue, regardless of its impact on legitimacy, procedural justice should matter for human rights adjudicating bodies "simply because it is part of the value system they represent".[15]

The way courts treat individuals also directly impacts on the individuals themselves. Research in economics has revealed that trust in the legal system is an important non-economical factor contributing to individuals' sense of well-being.[16] Moreover, in search of the reasons why individuals care about fair treatment by the authorities, Tyler and Lind developed the group-value model that is premised "on notions of respect and trust between authorities and group members".[17] According to this model, fair treatment communicates regard for the individual whereas unfair treatment signals marginality and exclusion.[18] Consequently, treating individuals in a fair manner is beneficial for social cohesion in society. People who feel respected consequently feel part of the society the authority is representing.[19] Although this model applies to the relationship between a particular individual and an authority and despite the finding that members of both minority and majority groups care

[11] K. Burke and S. Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', White paper for the American Judges Association, 2007, 15; T. Tyler, 'Procedural Justice and the Courts', 26.

[12] See for a specific analysis of the importance of procedural justice for the Strasbourg Court: E. Brems and L. Lavrysen, 'Procedural justice in human rights adjudication: The European Court of Human Rights', *Human Rights Quarterly,* 2-5. (Forthcoming, manuscript on file with authors)

[13] Tyler, 'Procedural Justice and the Courts', 27; T. Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', *Behavioral Sciences and the Law* 2001, 234.

[14] R. Paternoster, R. Brame, R. Bachman and L. Sherman, 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault', *Law and Society Review* 1997, 169.

[15] Brems and Lavrysen. 'Procedural justice in human rights adjudication', 10.

[16] A. Aslam and L. Corrado, 'The geography of well-being', *Journal of Economic Geography*, 2011, pp. 18-19.

[17] Y. Huo, 'Procedural Justice and Social Regulation Across Group Boundaries: Does Subgroup Identity Undermine Relationship-Based Governance?', *Personality and Social Psychology Bulletin* 2003, 345.

[18] Ibid., 337.

[19] Y. Huo et al., 'Testing an Integrative Model of Respect: Implications for Social Engagement and Well-Being' *Pers Soc Psychol Bull February* 2010 vol. 36 no. 2, 200-212.

about procedural justice[20], it can be argued that in a multicultural context procedural justice deserves extra attention.

To start with, research has proven that minority members are more than average distrustful toward authorities such as the police and Courts.[21] Overcoming this distrust may require a particular focus on fairness in cases dealing with applicants belonging to a minority group such as in the present case. Moreover, treating a member of a minority in an unfair manner does not only communicate information about the position of this applicant as suggested by the group-value model, but it can also have an impact on the whole minority group. In this context it is noteworthy to refer to the letter of Fazilet Partisi[22] with which this applicant – a political party that had been banned in Turkey- withdrew its case from the Court. It argued *inter alia* that the Court is "not a fair tribunal" since "it rejects constantly cases introduced by Muslims". Fazilet Partisi also argued that the Court "has prejudices against Islam" since the Court "has formulated critique towards a universal religion about which she has no knowledge". Fazilet Partisi concludes that in light of the judgments held in the cases of *Refah Partisi v. Turkey*[23] and *Leyla Şahin v. Turkey*[24], "the Court has demonstrated to have prejudices against the Muslim community" and that therefore they have the conviction that they "can have no trust in the justice of this Court".[25]

When dealing with a case concerning a member of a particular group, it is useful to be aware of the impact the case may have on the Court's perception within that group. For example, the Court's case law concerning Sikhs has been widely debated in the Sikh community.[26]

In conclusion, procedural justice is important for the legitimacy of the Court, for compliance with human rights, for social cohesion and for the well-being of individuals. This is applicable to both minorities and majorities. However, there are good reasons to pay extra attention to procedural justice in a diversity context.

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[20] Tyler, 'Public Trust and Confidence in Legal Authorities', 217 (with references); Burke and Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', 18.

[21] Tyler, 'Public Trust and Confidence in Legal Authorities', 217 (with references).

[22] ECtHR, *Fazilet Partisi v Turkey,* 27 April 2006.

[23] ECtHR, *Refah Partisi v Turkey,* 31 July 2001, where the Court i.a. stated at para. 72 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".*

[24] ECtHR, *Leyla Şahin v. Turkey*, 10 November 2005.

[25] ECtHR, *Fazilet Partisi v Turkey,* 27 April 2006. [Author's translation]

[26] See for example "European Court rules against the Sikh turban in French schools", where the author starts with "Sikhs feel let down once again in history, now by the European Court of Human Rights (ECHR), the apex European judicial body supposed to be the guarantor of human rights and human dignity.". (at http://www.examiner.com/europe-policy-in-national/european-court-rules-against-the-sikh-turban-french-schools)

5.1.2. The four procedural justice criteria

In the judicial context, procedural justice or procedural fairness concerns the perception people have of the way they are treated by courts and by the courts' actors. Empirical research has consistently shown that individuals evaluate this treatment according to four criteria: representation, neutrality, respect and trustworthiness.[27]

The first criterion, *representation*, refers to the need of applicants to express their views to the Court, before a decision is taken in their case.[28] This criterion is important irrespective of whether or not their views will influence the outcome.[29] Yet this should not be a *pro forma* act; the applicants' views should be taken seriously and the judge should genuinely listen to them.[30]

As Brems and Lavrysen argue, this criterion can be met by the Strasbourg Court by accurately representing the arguments of the parties in the judgment and by carefully examining the merits of each of the arguments.[31] This is particularly essential when it concerns an admissibility decision as in the present case. In the situation where an applicant is told that his case will not be examined on the merits, the Court should sufficiently clarify, based on the arguments of the parties, that the application has been fully and sincerely considered.[32]

The second criterion, *neutrality*, might be seen as the most obvious one for court actors. This criterion requires judges to be impartial, independent and unbiased. The decisions they take should be based on an objective assessment of facts and upon the rules instead of their personal opinion.[33] The parties in the case should be treated equally, which might not always be obvious if the opposite party is a State. Furthermore, the equality of parties does not only matter in the framework of a particular case, but also in the context of the broader case-law of the Court. The Court should be consistent across people, over time and across cases.[34] Equality across people requires the Court to treat all applicants in a similar respectful way, irrespective of their country of origin, their economical status, their ethnicity, etcetera. This requirement of equal treatment is especially important for members of minority groups.[35] Equality over time and cases implies that when the Court

[27] For literature specifically concerning Legal authorities see: Burke and Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction'; Tyler, 'Procedural Justice and the Courts', 26-31; J. Greacen, Social Science Research on "procedural justice": What are the implications for Judges and courts?, *Judge's journal*, 2008; Brems and Lavrysen. 'Procedural justice in human rights adjudication'.

[28] Tyler, 'Procedural Justice and the Courts', 30.

[29] Burke and Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction', 11-12; Tyler, 'Procedural Justice and the Courts', 30.

[30] Ibid and Tom Tyler, *Why People Obey the Law*, Princeton University Press, 2006, 149.

[31] Brems and Lavrysen. 'Procedural justice in human rights adjudication', 12.

[32] Ibid, 6.

[33] Tyler, 'Procedural Justice and the Courts', 30.

[34] Tyler, 'What Is Procedural Justice?', 105; Tyler, 'Procedural Justice and the Courts', 30.

[35] See Tyler, 'Public Trust and Confidence in Legal Authorities, 231-232;

overrules a certain line in its case law, this is sufficiently explained.[36] Another aspect of equality over cases is the consistency in the reasoning between the cases that are dealt with under different fundamental rights. The Court should avoid creating the impression that some rights are more important than others.[37] Finally, in order to ascertain neutrality, transparency in adjudication is crucial.[38]

Also important is the third criterion of *respect*. A good basis for a respectful treatment is the understanding that "people come to court about issues that are important to them, irrespective of the strength of their legal case".[39] Not only the case, but also the persons claiming a violation of their rights should be taken seriously, meaning that they must be respected in their dignity and always be treated well and politely.[40] Respect can also indirectly be shown through the text of the judgment. In several freedom of religion cases the Court clearly fell short from this criterion. Stating for example that the headscarf "is hard to square with the principle of gender equality" and that "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"[41] surely did not only affect the applicants who were respectively a school teacher and a university student in medicines, but at the same time stigmatized many women.

Finally, the last element consists of the *trustworthiness* of the judge. This criterion involves an appraisal of the judges' motivation; whether they are sincere and caring and whether they are "honest and open about the basis of their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices".[42] This might be reflected in a judgment when for example the Court does not agree with the applicant, but shows understanding towards the applicant's concerns. In *Lautsi* for example the Court stated that "it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective

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Brems and Lavrysen. 'Procedural justice in human rights adjudication', 12-13.

[37] See in this sense S. Ouald Chaib, 'Religious accommodation in the workplace: improving the legal reasoning of the European Court of Human Rights' in K. Alidadi, M-C. Foblets and J. Vrielink (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace, Ashgate*. (Forthcoming 2012); T. Lewis, 'What not to wear: Religious rights, the European Court, and the margin of appreciation', *ICLQ* vol 56, 2007, 395-414; L. Vickers, *Religious Freedom, Religious Discrimination at the Workplace* 101 (Hart Publishing, 2008)..

[38] Brems and Lavrysen. 'Procedural justice in human rights adjudication', 6.

[39] Tyler, 'Procedural Justice and the Courts', 31.

[40] Ibid, 30.

[41] ECtHR, *Dahlab v. Switzerland*, 15 February 2001 and repeated in ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005, Para 111.

[42] Idem. See also E. Brems and L. Lavrysen. 'Procedural justice in human rights adjudication', 6-7.

perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1".[43]

No empirical research has yet been done on the importance of these procedural justice criteria for the legitimacy and broader image of the European Court of Human Rights. Yet there can be little doubt about the relevance of procedural justice for the Court. Following Brems and Lavrysen, two levels can be discerned at which it could and should take procedural justice into account.[44]

First, the Court should be careful to act fairly during its own proceedings. And secondly, the Court could also incorporate in its reasoning a procedural justice assessment of the way the case was dealt with at the domestic level. As Brems and Lavrysen argue, where small shortcomings of procedural justice are concerned, these should be taken into account in the proportionality analysis, whereas more serious shortcomings of procedural justice should lead to the finding of a violation of the Convention.[45]

Hence the Court can set a good example by being neutral, trustworthy and respectful and at the same time act as a kind of watchdog over the national authorities' conduct with respect to these criteria.

5.2. Suku Phull outlined

5.2.1. Factual background

Mr. Suku Phull, a UK national, was stopped by security guards at the Entzheim airport of Strasbourg when returning to the UK from a business trip. As a practicing Sikh, he was wearing a turban. For inspection reasons, Mr. Phull was compelled to remove his turban as he was making his way through the security checkpoint prior to entering the departure lounge.

Mr. Phull alleges that the obligation to remove his turban violated his right to freedom of religion. He argues that it was not necessary to make him remove his turban since he did not object to pass through the walk-through scanner, nor did he refuse to be checked with a hand-held detector.[46]

[43] ECtHR (GC), *Lautsi v. Italy,* 18 March 2011, para. 66.

[44] E. Brems and L. Lavrysen. 'Procedural justice in human rights adjudication', 11.

[45] Ibid, 29.

[46] The applicant also complained under Article 2 of Protocol No. 4 of a violation of his right to freedom of movement. According to the applicant, as a national of one of the member States of the European Union, he should be exempted from security procedures of this type on the territories of the member States. As the focus of this chapter lays on the freedom of religion, this part of the complaint will not be examined.

5.2.2. Decision

The Court declares the case inadmissible stating that the claim is manifestly ill-founded.

The reasoning consists of two parts. In the first part the Court acknowledges that an interference with the applicant's right to freedom of religion took place, accepts that this interference was prescribed by law and finally finds that the interference "pursued at least one of the legitimate aims listed in the second paragraph of Article 9 (guaranteeing public safety)". Subsequently, the Court examines whether "the interference was "necessary in a democratic society in the interests of public safety" within the meaning of the second paragraph of Article 9".

For this necessity test, the Court refers to an earlier case, *X v. the United Kingdom,*[47] in which a turban-wearing Sikh who failed to comply with security regulations concerning the compulsory wearing of a motor helmet, alleged a violation of his freedom of religion. The European Commission of Human Rights (Commission) declared the claim manifestly ill-founded following the reasoning that "the obligation to wear a helmet was a necessary safety measure and that any resulting interference with the applicant's freedom of religion was justified for the protection of health by virtue of Article 9 § 2".[48] The Court transposes this reasoning to the case of *Phull* where it concludes that Phull's claim is manifestly ill-founded as "security checks in airports are *undoubtedly* necessary in the interests of public safety" and since "the arrangements for implementing them in the present case fell within the respondent State's margin of appreciation, particularly as the measure was only resorted to occasionally"[49].

5.2.3. *Suku Phull* submitted to a procedural justice test

5.2.3.1. Taking each case seriously: examination on a case by case level

The first eye-catcher when glancing at the decision of *Suku Phull* is the shortness of the text.[50] When a closer look is taken at the reasoning (or the absence thereof) one can only be puzzled by the brevity of the decision. This is problematic from the perspective of several procedural justice criteria.

Having a voice in the proceedings is, as explained above, essential for applicants in their relationship with courts. It must be clear from the decision that the applicant's concern has been taken seriously, and has been the subject of a genuine

[47] ECommHR, *X v. UK*, 12 July 1978, http://strasbourgconsortium.org/document.php?DocumentID=4845.
[48] Translation provided by the Court in the case of *Phull*.
[49] *Suku Phull v. France*, own emphasis
[50] See also Rorive, 'Religious Symbols in the Public Space', 2687-88.

examination. In this case however, the reasoning is minimal and mainly based on the reasoning in a previous case that is factually speaking not entirely comparable to the case of *Suku Phull*. Besides the fact that the applicants are both Sikhs, UK nationals and turban wearers, no similarities between the cases can be discerned. In fact, the case of *Phull* concerned an occasional security check, while the applicant in the case of *X* v. *The UK* was prevented in general to ride a motorbike due to safety regulations. Moreover, the safety concern in *Phull* affects a broad audience, whereas in the case of *X* his own health is the main concern. Such factual differences may lead to different outcomes in a proportionality analysis.[51] The Court repeated the same 'technique' in the later case of *El Morsli v. France*[52] in which a Muslim woman refused to remove her veil in a French consulate during an identity check.[53] Declaring this case inadmissible, the Court said it saw "no raison why it would deviate"[54] from the reasoning in *Suku Phull*. Reference to previous similar cases is important from a consistency perspective, yet this cannot be done blindly. The Court should always treat a case on its own merits, taking into account the particular situation of the applicant.

5.2.3.2. Taking the applicant's arguments seriously

The most troublesome observation from a procedural justice perspective is the way the Court completely ignores the applicant's argumentation. He argued that "there had been no need for the security staff to make him remove his turban, especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector."[55] The relevance or adequacy of these possible alternatives is not addressed by the Court. The absence of an examination on this point is disrespectful towards the applicant and goes against the requirement of representation. The possible existence of less restrictive alternatives is in my opinion the key issue in this case, necessitating a thorough proportionality analysis in an examination on the merits. The question is whether public safety could be guaranteed without interfering with the applicant's rights or with a less intrusive interference than occurred in the present case.[56]

Hence, the first major adaptation in my redraft is declaring the case admissible and examining it on the merits. An examination on the merits and a decent proportionality analysis would further equality between the parties in this case, as

[51] In fact, other —maybe even stricter— considerations should be taken into account when assessing whether the interference is justified in the case *Phull*.
[52] ECtHR, *El Morsli v. France*, 4 March 2008.
[53] El Morsli argued that she was not opposed to an identity control, but only if it took place in front of a woman.
[54] ECtHR, *El Morsli v. France*, 4 March 2008, p. 4, author's translation.
[55] *Suku Phull v. France*, own emphasis.
[56] See *infra*

the interests of both parties would be weighed against each other. Two other procedural justice criteria that would be furthered by an examination on the merits are respect and trustworthiness. No matter what the outcome in this case might be, by examining it on the merits, the Court shows understanding towards the applicant's position, shows that his claim is taken seriously and shows respect for his religious conviction.

5.2.3.3. Taking the applicant's religion seriously

Ultimately this case has to be framed in a broader debate concerning religion and the question of accommodating religious minorities in the mainstream society. The Court however does not show awareness of this broader issue in the decision. Although it starts with recognizing that an interference with the applicant's freedom of religion took place, it does not seem to acknowledge how important this interference could be for the applicant. In light of the procedural justice concerns mentioned above, it can be argued that this position does not give a caring impression towards the religious conviction of the applicant and at the same time of all Sikhs who could be in a similar situation. On the contrary, it can be argued that the Court is banalizing the religious concerns of the applicant, by brushing away his arguments rather lightly.

Regarding this point, the case of *Phull* can be contrasted to the Canadian *Multani*[57] case concerning a pupil who was prohibited to wear his kirpan[58] in school. After finding an infringement of the applicant's freedom of religion, the Canadian Supreme Court examines in *Multani* whether the infringement is reasonable and can be justified in a free and democratic society. According to the Supreme Court, "the issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified".[59] Obviously, this is the question that is lacking in the Strasbourg Court's decision of *Suku Phull*. In short, the Canadian Supreme Court concluded that the authorities failed to demonstrate that the absolute prohibition minimally impairs the applicant's rights.[60] According to the Supreme Court "[an] absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others"[61] and it concludes that a

> "total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand,

[57] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.
[58] "A kirpan is a religious object that resembles a dagger and must be made of metal". Description given by the Supreme Court of Canada in *Multani* case, para. 3.
[59] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6
[60] Ibid. Para 77
[61] Ibid. Para 78

accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects"[62].

This case is a wonderful example of how a jurisdiction can acknowledge and respect the religious conviction of an applicant belonging to a religious minority and frame the issue in a broader societal context of multiculturalism.

With this goal in mind I start the redraft with reiterating the settled principles in the Court's case law concerning the importance of religious freedom in the Convention. In addition to the well known principles cited in paragraphs 1-5, I introduce a new principle stressing the importance of accommodating religious minorities in the broader context of a diverse society. This is important not only "for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community"[63] . (redraft para. 6)

Having examined the decision of *Suku Phull v. France* through a procedural justice lens, I will now examine the case on the merits in the next section. Hereby, I will propose an alternative reasoning that takes the particular situation of the applicant into account and that balances the interests at stake in the proportionality analysis.

5.2.3.4. Suku Phull v. France examined on the merits

A. Avoiding theological assessments

The Court does not dispute that an interference with the applicant's freedom to manifest his religion was at stake.

While the finding of an interference is undeniable in this case, the Court's representation of the manifestation of religion at stake is not unproblematic. By stating that "the Sikh religion requires its male followers to wear a turban", the Court goes one step too far. Irrespective of whether or not the turban is a strong obligation in Sikhism, it is not for the Court to make conclusions about this. Just like it would be wrong for the Court to interpret what a religion does not require from its followers, it is also wrong for the Court to interpret what a religion does require from them. The Court should refrain from walking on this theological path.[64] This would avoid excluding from Convention protection religious practices that are unfamiliar to the Court,[65] as well as marginalizing minority voices within religious communities.[66]

[62] Ibid. Para 79

[63] See *mutatis mutandis* ECtHR, *Muñoz Diaz v. Spain*, 8 December 2009, para. 60.

[64] C. Evans, *Freedom of Religion Under the European Convention on Human Rights,* Oxford University Press, 2001, 123-125, D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press, 2009, 433-434.

[65] C. Evans, *Freedom of Religion*, 125, P. Edge, 'The European Court of Human Rights and Religious Rights' *International and Comparative law Quarterly* 1998, 687.

Hence, when considering a manifestation of religion, the Court should not assess on a general level whether or not a religion requires its adherents to follow a certain rule, yet should look on a case by case level whether the applicant accords authority to a particular requirement of his or her religion.[67] This is supported moreover by the need for consistency in the Court's case-law. In the cases concerning the Islamic headscarf the Court never stated that "since Islam requires its female followers to wear a headscarf, it works from the premise that an interference of the freedom of religion is at stake". Instead the Court stated that since "[the applicant] considered that Muslim women have a religious duty to wear the Islamic headscarf"[68] or since "the applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith."[69], it would proceed on the basis that the measures interfered with their freedom to manifest their religion. Hence, in the headscarf cases, the Court developed a consistent subjective approach towards assessing whether a manifestation of religion is at stake[70].

In the turban cases, similar consistency is lacking. In *Mann Singh v. France*[71], about a turban on a driver's license , the Court seems to apply a subjective approach similar to that adopted in the headscarf case-law:

> "**According to the applicant**[72], the Sikh faith compels its members to wear a turban in all circumstances. It is not only considered at the heart of their religion, but also at the heart of their identity. Consequently, the Court notes that it consists of an act motivated or inspired by a religion or a conviction."[73] [Translation by the author]

However, in two later cases, *Jasvir Singh v. France*[74] and *Ranjit Singh v. France*[75], concerning Sikh pupils who wanted to wear a turban at school, the Court returns to the 'theological' position it also adopted in *Phull*:

> " The Court recalls that it already held that the wearing of the turban by men of the Sikh faith could be considered as an act "motivated or inspired by a religion or a religious conviction", **since the Sikh faith indeed imposes on**

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[66] Compare to G. Bouchard and Ch. Taylor, *Consultation Commission on Accommodation Practices Related to Cultural Differences "Building the Future: A Time for Reconciliation"*, Full Report, Quebec, 2008, 175-177.

[67] E. Brems, 'Human rights as a framework for negotiating/protecting cultural differences: an exploration of the case-law of the European Court of Human Rights', in *Cultural Diversity and the Law: State Responses from Around the World*, M-C Foblets, J-F Gaudreault-Desbiens and A. Dundes Renteln eds., Bruylant, Bruxelles, 2010, 677.

[68] ECtHR, *Kurtulmus v. Turkey*, 24 January 2006.

[69] ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005.

[70] Rorive, 'Religious Symbols in the Public Space', 44.

[71] ECtHR, *Mann Singh v. France*, 13 Novembre 2008.

[72] Own emphasis

[73] ECtHR, *Mann Singh v. France*, 13 Novembre 2008.

[74] ECtHR, *Jasvir Singh v. France*, 30 June 2009.

[75] ECtHR, *Ranjit Singh v. France*, 30 June 2009.

them the wearing of the turban in all circumstances"[76] [Translation by the author]

For the reasons mentioned above I have adopted in the redraft a subjective approach similar to that of *Mann Singh* and the headscarf jurisprudence. (Redraft para. 1)

B. To accommodate or not to accommodate?

As argued above on grounds of procedural justice, the Court is required to undertake a decent proportionality analysis with a sincere consideration of the arguments raised by the applicant about possible less restrictive alternatives. This requires two corrections. First the right necessity question will be asked and then a necessity assessment will be undertaken.

a) Asking the right necessity question

By affirming that a security check at the airport is without any doubt necessary in a democratic society, the Court repeats the le To accommodate or not to accommodate? gitimate aim, namely the protection of the public safety, but does not question whether the measure taken — obliging a Sikh passenger to remove his turban — is proportionate to this undisputed legitimate aim. Consequently the Court is asking the wrong question; the question should not be whether a security check is necessary, but whether in this case the public safety necessitates the applicant to remove his turban at the security check. (redraft para. 10)

b) Applying the necessity test

The necessity test implies that an interference should be relevant, sufficient and proportionate to the legitimate aim pursued.[77] (Redraft para. 10)

There is no doubt that removing the turban for inspection reasons can be relevant to the aim pursued, which is the protection of the public safety. As a general rule, travellers have to remove pieces of clothing such as their jackets or shoes to facilitate security checks in airports. However, from a procedural justice perspective, it is important to acknowledge that religious headgear such as the turban cannot be seen as a simple piece of clothing; that might be experienced by the applicant as disrespectful and careless. Giving due account to this religious aspect in the judgement shows understanding towards the applicant. (Redraft para. 11)

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[76] *Jasvir singh*, own emphasis

[77] J. Schokkenbroek, *Toetsing Aan De Vrijheidsrechten Van Het Europees Verdrag Tot Bescherming Van De Rechten Van De Mens* (Zwolle 1996), 200. P. Van Dijk & G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (2006), 193. See for example ECtHR, *Church of Scientology Moscow v. Russia*, 5 April 2007, para. 87; ECtHR, *Dahlab v. Switzerland*, 15 February 2001; ECtHR, *Moscow Branch of The Salvation Army v. Russia*, 5 October 2006, para. 77.

An element that should be taken into account in the proportionality analysis is the margin of appreciation the Court accords to states. In this case, the Court decides that the way states implement their security policies falls within the margin of appreciation, especially since these measures occur only occasionally. Indeed, it is not for the Court to judge about the effectiveness of a public safety measure. I therefore agree with the Court that the national authorities are best placed to assess the situation. (redraft para. 8) Yet this does not altogether do away with the supervision of the Court. Hence the Court can still check whether the national authorities were sufficiently respecting the applicant's religious freedom. (Redraft para. 8)

As outlined above, the main issue in this case concerns the argument raised by the applicant about possible less restrictive alternatives.

Several authors favour including a least restrictive alternative criterion in the proportionality assessment.[78] The Court repeatedly applied such a test in its case-law. In a case on solitary confinement, the Court stated that "a rigorous examination is called for …to determine … whether the measures taken were necessary and proportionate compared to the available alternatives".[79] In case on preventive detention of protesters the Court argued that "the commission of that offence could not justify an interference with the right to liberty, especially as less intrusive measures could have been taken"[80]. Another interesting example concerns a Swiss citizen suffering from diabetes. The applicant was acquitted from military duty and from civil service, but instead had to pay a tax. In this case the Court literally states that a measure can only be considered proportionate and necessary in a democratic society, when no other measure exists that is less invasive to the fundamental right while permitting to achieve the same aim.[81] This position is less nuanced compared to earlier case law where the Court finds that

> "[t]he availability of alternative solutions does not in itself render the … legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way"[82].

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[78] See J. Gunn, 'Deconstructing proportionality in limitations analysis', *Emory International Law Review* Volume 19, Issue 2 (2005), p. 467 and 474; Van Dijk and Van Hoof, *Theory and Practice*, 340 ; S. Vandrooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'Homme. Prendre l'idée simple au sérieux,* Bruxelles, FUSL/Bruylant, 2001. Compare also to dissent of Tulkens to ECtHR (GC), *Leyla Sahin v. Turkey,* 10 Novermber 2005.

[79] ECtHR, *Ramirez Sanchez v. France*, 4 July 2006, para. 136.

[80] ECtHR, *Schwabe and M.G. v. Germany*, 1 December 2011, para. 85.

[81] ECtHR, *Glor v. Switzerland*, 30 April 2009, para 94.

[82] James and others, para. 51.

Likewise, several authors argue that the existence of a less restrictive alternative cannot be considered sufficient in itself to conclude that a measure is disproportionate[83], although such a finding can be seen as an indication that there might be a problem with the proportionate character of that measure.[84] During the proportionality analysis due weight must also be accorded to the interests of the State, for which the less restrictive alternative may constitute a burden. In the case of *Phull*, France might for example have argued that accommodating Phull's claim would place a too heavy burden on the authorities with regard to costs or time constraints.

Similar approach is found in Canadian case-law applying the principle of reasonable accommodation[85]. The Canadian courts have repeatedly been confronted with Sikhs claiming accommodation of their religious practices.[86] It is worth mentioning that the way the Canadian jurisdictions apply reasonable accommodation, is very similar to the necessity test applied by the Strasbourg Court.[87] When an infringement with an individual's rights is established, any attempt to "disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant". It must be showed that the application of a certain rule is a "rational means" of achieving the objective and "that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test)". This minimal impairment test also implies an assessment of possible undue hardship for the supposed accommodator. Finally, as seen above, it must be demonstrated that "there is proportionality between the measure's salutary and limiting effects".[88]

Similarly, when applying a least restrictive alternative test, the Strasbourg Court could take the criterion of 'undue hardship' into account. In fact, in a recent freedom of religion case, *Jakóbski v. Poland*[89], the Court appears to apply this principle, albeit without using the same wording. In this case, a Buddhist prisoner claimed a violation of his religious freedom after his request for a diet adapted to his religious needs had

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[83] Vandrooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'Homme.* 219 ; E. Brems. 'Human Rights: Minimum and Maximum Perspectives,' Human Rights Law Review 9:3 (2009), 364.

[84] J. Schokkenbroek, *Toetsing Aan De Vrijheidsrechten Van Het Europees Verdrag Tot Bescherming Van De Rechten Van De Mens* (Zwolle 1996), 200.

[85] See also chapter by Pierre Bosset in the same Volume.

[86] See for example *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC and Nijjar v. Canada 3000 Airlines Limited, Can. Trib., T497/1498 (1999) (http://www.chrt-tcdp.gc.ca/search/files/t497_1498de_07_09.pdf)

[87] P. Bosset and M-C Foblets, 'Accommodating Diversity in Quebec and Europe: Different Legal Concepts, Similar Results?', in: *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society*, Strasbourg, Council of Europe (Trends in Social Cohesion No. 21) , p. 37, at pp. 61.

[88] J. Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse' (1998), 43 *McGill L.J.* 325, at p. 360. [translation].

[89] ECtHR, *Jakóbski v. Poland*, 7 December 2010.

been refused by the authorities. The Court was not convinced that providing the applicant with an adapted diet would lead to a "disruption of the management of the prison" and consequently found a violation of article 9 ECHR.

In *Phull*, the least restrictive alternative criterion cannot be applied without restraint, since the State enjoys a wide margin of appreciation and it is consequently not for the Court to decide whether the proposed alternatives are appropriate in this case. However, the Court can still apply a marginal check. Similar to the Canadian model used in reasonable accommodation cases, it can be argued that since the applicant suggested possible less restrictive alternatives, the State can only justify the non adoption of the alternatives by proving in a satisfactory manner that applying these alternatives would not be effective for the legitimate aim pursued or would entail an excessive burden. In this sense I concur with the dissenting Judge Hedigan in the case of *Jasper v. the United Kingdom* who is of the opinion that "where the applicant can establish on a *prima facie* basis that such an alternative way exists, the onus shifts to the respondent to show why it cannot use or adapt such a way".[90] [91] (Redraft para. 13)

However, in the present case, it seems that the domestic authorities did not even consider the alternatives proposed by the applicant. In that case, the Court can even go a step further in its assessment by applying a strictly procedural approach to the least restrictive alternative criterion, requiring "not *per se* that the least restrictive option be chosen but that evidence is provided that the national authorities have included a consideration of less restrictive alternatives in their decision-making process".[92] This approach was repeatedly used in the Strasbourg Court's jurisprudence.[93] (Redraft para 14.)

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[90] ECtHR (GC), *Jasper v. the United Kingdom*, 16 February 2000, dissenting opinion judge Hedigan.

[91] A comparison can also be drawn with the *Multani* case where the Canadian Supreme Court observed that the prohibition on the wearing of the kirpan was absolute, while the applicant "has never claimed a right to wear his kirpan to school without restrictions". "Thus", the Supreme Court continues, "the issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified". (*Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256, 2006 SCC 6, para. 54) The formulation by the Supreme Court could be interpreted in a way that when the applicant is open to other alternatives than an absolute ban, it is for to the authorities to prove whether the absoluteness of the ban is justified.

[92] E. Brems. 'Human Rights: Minimum and Maximum Perspectives,' *Human Rights Law Review* 9:3 (2009), 362.

[93] See for example : ECtHR, *Bartik v. Russia*, 21 December 2006, para. 48, where the Court finds that the authorities "did not consider whether the restriction on the applicant's right to travel abroad for private purposes was still necessary for achieving the legitimate aim it had been intended to serve and whether a less restrictive measure could be applied" and in ECtHR, *Khudoyorov v. Russia*, 8 November 2005, para. 184 "Given that the applicant's trial would not be able to begin for a considerable time owing to events wholly unrelated to his conduct (see paragraph 188 below), the authorities should either have considered having recourse to such alternative measures or at minimum explained in their decisions why such alternatives would not have ensured that the trial would follow its proper course". Other examples include ECtHR, *Smith and Grady v. The United Kingdom*, 27 September 1999, para. 102; ECtHR, Supreme Holy Council of the Muslim Community v. Bulgaria, 16 December 2004, para 97.

Consequently, in *Phull*, instead of assessing *in concreto* whether less restrictive alternatives are available I only examine whether the authorities sufficiently took alternatives into account, especially since the applicant proposed several. In procedural justice terms, with this way of reasoning I assess whether the domestic authorities took the applicant seriously. (Redraft paras. 12-14)

In this case, it is not sufficiently proven that these alternatives were seriously considered by the State. Consequently, the State did not sufficiently show that the measure is necessary in a democratic society. Therefore, I cannot but conclude that France violated the applicant's right to freedom of religion by compelling him to remove his turban. (Redraft para. 15)

Conclusion

The man who was obliged to remove his turban at a security check, the Sikh who could not drive without a motor helmet, and the woman who had to remove her Muslim headscarf while queuing for a passport in a consulate, have something in common: they all returned from Strasbourg with an inadmissibility decision in their hands and at the same time —if you allow me a guess— they possibly all went home with a bit less trust in the justice system or at least with a feeling of not having been understood.

In this chapter I tried to demonstrate in the light of the findings of procedural justice research that the outcome of a case that might be seen by a majority of people as an *a priori* lost case, is not always that clear-cut if one genuinely takes the claim seriously and assesses the case on its own merits. But more importantly, what I tried to show in this chapter is that this outcome, although important, is not always the main concern of applicants. In fact research has consistently shown that people accord even more importance to the way they are treated by courts than to the outcome in their case. Obviously with the case of *Suku Phull* the Court has failed at this level. Not only did it dismiss Phull's claim in an ultra short inadmissibility decision, but – adding insult to injury- it completely ignored the applicant's claim about alternative solutions that that would not infringe his freedom.

In my redraft I have tried to redress this situation by issuing a judgment instead of a decision, because if the argument of the applicant is taken seriously it becomes clear that the ill-foundedness of the claim is not as manifest as the Court concludes. Instead the proportionality analysis necessitates a thorough balancing exercise where possible less restrictive alternatives are taken into account.

That public safety is an important legitimate aim is not contested. However a general interest should not serve as a blindfold obscuring individual freedoms. I argued that the Court should keep in mind that the stakes of procedural justice include its own

legitimacy. Finally, I argued that procedural fairness towards applicants and their claims is especially important in cases dealing with minorities, since it conveys a message to the minority group the applicant belongs to. This message involves understanding, respect and the place the Court accords to minorities in the mainstream society.

Rewriting Phull v. France

(...)

ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

The applicant complained of a violation of his right to freedom of religion by the airport authorities. He argued that there had been no need for the security staff to make him remove his turban, especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector. He relied on Article 9 of the Convention.

(...)

I. **Whether there was an interference**

1. [Fragment deleted] **Since the applicant considered himself to be under a religious duty to wear the turban,** the Court is prepared to work on the premise that the disputed measure constituted interference with the applicant's freedom to manifest his religion or beliefs.

II. **Whether the interference was prescribed by law and pursued a legitimate aim**

2. [Fragment deleted] **The Court** further notes that the applicant did not allege that the measure was not "prescribed by law" and finds that it pursued at least one of the legitimate aims listed in the second paragraph of Article 9 (guaranteeing public safety).

The Court must therefore determine whether the interference was "necessary in a democratic society in the interests of public safety" within the meaning of the second paragraph of Article 9.

[Paragraphs deleted]

III. **Whether the interference was necessary in a democratic society**

(i) General principles

3. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among other authorities, Kokkinakis v. Greece, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and Buscarini and Others v. San Marino [GC], no. 24645/94, § 34, ECHR 1999-I).

4. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, mutatis mutandis, Cha'are Shalom Ve Tsedek v. France [GC], no. 27417/95, § 73, ECHR 2000-VII). However, article 9 does not protect every act motivated or inspired by a religion or belief (see, among many other authorities, Kalaç v. Turkey, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV, p. 1209, § 27; Arrowsmith v. the United Kingdom, no. 7050/75, Commission's report of 12 October 1978, Decisions and Reports (DR) 19, p. 5; C. v. the United Kingdom, no. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142; and Tepeli and Others v. Turkey (dec.), no. 31876/96, 11 September 2001).

6. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see, mutatis mutandis, Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, Series A no. 44, p. 25, § 63, and Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III). Indeed, in today's pluralist society the presence of religious minorities becomes more visible. This is a trend that should not lead to suppression, but instead the individual concerns of members of these minority groups should be respectfully considered, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the

whole community. (see mutatis mutandis Smith and Grady v. The United Kingdom, para.60 and Chapman v. the United Kingdom [GC], no. 27238/95, § 93, ECHR 2001-I)

7. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (see, mutatis mutandis, the United Communist Party of Turkey and Others, cited above, pp. 21-22, § 45, and Refah Partisi (the Welfare Party) and Others, cited above § 99).

8. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. (See mutates mutandis Jakobski v. Poland, §47) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 9 (art. 9) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to 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" (see mutatis mutandis Vögt v. Germany) Particular care is called for when examining whether the reasons adduced by the national authorities to justify the interference with the applicants' freedom to manifest their religion under Article 9 (Art. 9) of the Convention were relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued. (See Larissis v. Greece para. 70)

9. The object of Article 9 is essentially that of protecting the individual against unjustified interference by the State, but that there may also be positive obligations inherent in an effective "respect" for the individual's freedom of religion (cf. mutatis mutandis the judgment of the European Court of Human Rights in the Marckx case, p . 15, para . 31) .

ii. Application to the present case

10. The Court must determine whether the interference with the applicant's freedom of religion was "necessary in a democratic society in the interests of public safety" within the meaning of the second paragraph of Article 9. The applicant argued that there had been no need for the security staff to make him remove his turban, especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector. Consequently, the Court must examine whether the removal of the turban was necessary in the

interest of public safety. Therefore it must determine whether the measure taken was appropriate for achieving this legitimate aim, whether less restrictive alternatives were available and whether the measure taken was proportionate to the aim pursued.

11. Security checks in airports are undoubtedly necessary in the interests of public safety within the meaning of that provision. **The Court acknowledges that the removal of certain clothing such as jackets, shoes or in this case headgear during security checks might in certain situations be relevant in the interest of public safety. However, the Sikh turban cannot be regarded as a simple headgear, since for the applicant the turban carries a religious meaning. Therefore, the authorities should be careful to respect the sensitivities of the situation. The mandatory removal of his turban constituted an interference with the applicant's religious freedom.**

12. This interference must be necessary to achieve the legitimate aim pursued and should not be more intrusive than necessary for that purpose. (See mutatis mutandis Bartik v. Russia) The Court reiterates that the choice as to the most appropriate means of achieving this aim is in principle a matter for the domestic authorities, who are better placed to assess the efficiency of the available security techniques. (See mutatis mutates El Majjaoui & Stichting Touba Moskee v. the Netherlands, no. 25525/03, § 32, 20 December 2007) The authorities must balance the interests at stake and should make serious efforts to find solutions to attain the legitimate aim pursued with a minimal infringement of the individual's fundamental rights. The applicant suggested two alternative measures to the removal of his turban, namely the manual metal detector and the walk-through scanner. He argued that these measures would allow a full-fledged security check of his turban without the need to take it off and hence without touching upon his religious freedom.

13. Since the applicant proposed measures, the walk-through scanner and the manual metal detector, that prima facie seem to be valuable alternatives, the burden of proof shifts to the State who must prove that these measures are insufficient for guaranteeing the legitimate aim pursued or that the accommodation through these measures would lead to an excessive burden for the State. (See mutatis mutandis Jakobski v. Poland and Supreme Court of Canada, Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6) Furthermore, even if the insufficiency of these measures would be established by the State, this does not exempt the State from its positive obligations inherent in an effective "respect" for the individual's freedom of religion (cf. mutatis mutandis the judgment of the European Court of Human Rights in the Marckx case, p. 15, para. 31) Consequently, it must be shown that enough efforts were undertaken by the State to accommodate the applicant's religious needs.

14. However, the Court observes that the French authorities did not even consider the alternatives proposed by the applicant and that it did not convincingly show why these proposals were not fully considered. (See mutatis mutandis Van Mechelen v. The Netherlands)

15. Having regard to the foregoing and despite the margin of appreciation left to the State, the Court concludes that the authorities failed to strike a fair balance between the right to freedom of religion of the applicant on the one hand and the general interest of the public safety on the other hand. Therefore, the obligation to remove the turban imposed on the applicant was not proven to be necessary for the achievement of the legitimate aim pursued.

The Court therefore concludes that there has been a breach of Article 9 of the Convention.

CHAPTER VI - Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe*

(Co-authored by Saïla Ouald Chaib and Eva Brems)

> We all move through our lives, a lot of the time, wrapped in a fog of our own selfish aims and desires, seeing other people as mere instruments of those desires. Kant thought, plausibly, that we need good principles to address this ubiquitous failing. But we need something else as well, the habitual cultivation of a displacement of mind, a curious, questioning, and receptive demeanor that says, in effect, "Here is another human being. I wonder what he (or she) is seeing and feeling right now." This curiosity needs to be fed by facts: for without correct historical and empirical information we can't possibly answer such a question. But it needs something more, a willingness to move out of the self and to enter another world.[1]

In the name of women's rights, public security and social cohesion, two European countries, France and Belgium, have enacted laws prohibiting face covering in the public space, generally known as 'burqa bans'.[2] These bans have been strongly criticized as violations of religious freedom and discriminations on grounds of religion and sex.[3] Complementing such substantive human rights critiques, this paper takes a different approach, examining the bans from the perspective of procedural fairness. Indeed, the French and Belgian bans are extreme examples of legislative processes taking place above the heads of the people concerned. Not only was the voice of the women concerned missing in the debates, even more striking was the fact that a discussion of the ban's human rights impact was nearly non-existent.

In a first section, we will refer to social psychology research to explain what procedural fairness encompasses and what it entails for both the judiciary and the legislator, particularly in a multicultural context. Next, we will demonstrate how the

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[1] Nussbaum, Martha, *The New Religious Intolerance*, (Harvard University Press, 2012), 140.

[2] The French law *prohibiting the conceilment of the face in the public space* (Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public) came into force on 11 April 2011. The Belgian law of 1 June 2011 instituting a *prohibition on wearing clothing tha covers the face, or a large part of it" (*Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage) came into force on 13 July 2011.

[3] See also Brems, Eva, Vrielink, Jogchum and Ouald Chaib, Saïla, "Uncovering French and Belgian Face Covering Bans", *Journal of Law, Religion and State*. (Forthcoming)

French and Belgian authorities have neglected procedural fairness at the domestic level. In the third section, we will argue how the European Court of Human Rights, if confronted with the subject matter, might restore procedural fairness.

6.1. Procedural Fairness and Minority Justice

Procedural fairness or procedural justice refers to the fairness of the procedures by which a decision is taken or by which an outcome is arrived at in a case. Social psychology research has shown that in their fairness assessment of authorities and the law, people tend to accord more importance to procedural fairness than to distributive justice.[4] In other words, the way people are treated by judges and authorities is more relevant to them than the particular outcome in their case or the policy decision taken. This does not mean however that the outcome is considered irrelevant.[5] Procedural fairness and distributive justice should be seen as mutually strengthening approaches rather than substitutes.[6]

6.1.1. Importance of Procedural Fairness

Initially, procedural justice research focused on the question of compliance with the law. Tyler and his associates found that the *legitimacy* of an authority shapes compliance and that legitimacy is rooted in procedural fairness judgments.[7] Hence, the first reason for authorities to accord particular importance to procedural fairness is maintaining their own legitimacy and that of the law. Central to the idea of legitimacy is the belief that "some decision made or rule created by [the] authorities is 'valid' in the sense that it is 'entitled to be obeyed' by virtue of who made the decision or how it is made".[8] As a consequence, procedural fairness also enhances *cooperation* with authorities.[9] It can also be argued that when a human rights body such as the European Court of Human Rights is involved, the importance

[4] Tyler, Tom R., "Procedural Justice and the Courts", *Court Review*, 44(1/2) (2008), p.26; Tyler, Tom R., "What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures", *Law and Society Review*, 22 (1988), p. 121; Gangl, Amy, "Procedural Justice Theory and Evaluations of the Lawmaking Process", *Political Behavior*, 25, 2 (2003), p. 120 (with reference to Hibbing, John R, and Theiss–Morse, Elizabeth, "Process Preferences and American Politics: What the People Want Government to Be", *The American Political Science Review* 95(1) (2001), pp. 145-153.

[5] Tyler, Tom R., "Governing amid diversity: Can fair decision-making procedures bridge competing public interests and values?", *Law and Society Review*, 28, (1994), p. 820-821.

[6] Brems, Eva and Lavrysen, Laurens, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", *Human Rights Quarterly*, 35 (2013), p. 182.

[7] Tyler, Tom R., *Why People Obey The Law* (Princeton University Press, 2006), 270.

[8] Idem, 277.

[9] Idem, 271.

of procedural justice is even more important 'because it is part of the value system they represent' and because the legitimacy of human rights law is at stake.[10]

Moreover, it promotes *social cohesion and individual well being*. Research has consistently shown that "[p]eople … value fair treatment by legal authorities because it communicates a message about their identities— that they are respected and valued members of society"[11] and that they can count on the authorities for protection, benevolence and consideration when needed.[12]

Although it follows from Tyler's research that procedural fairness is equally important to majority populations as to minorities[13], there are several reasons to believe that procedural fairness is particularly crucial for *minority justice*.

Firstly, overcoming minority members' above-average distrust of authorities[14] may require particular vigilance on procedural fairness.[15] Secondly, perceptions of social standing in the society gain a special significance for minority members. When certain people, e.g. youth, minorities or people with disabilities are treated unfairly, authorities might be sending the signal that these groups are marginal in society.[16] In contrast, by treating minority individuals fairly the authorities convey a message of inclusion among the valued members of society.

6.1.2. Components of Procedural Fairness

Tyler and others highlight four criteria, according to which people evaluate procedural fairness: participation, trustworthiness, neutrality and respect.[17]

Participation, frequently called 'voice', represents the need of people to be able to express their own perspective, regardless of whether or not their voice will have an impact.[18] Valuing participation requires moreover that people feel that their views

[10] Brems and Lavrysen "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", p. 185.

[11] Tom Tyler and Yuen Huo, *Trust in the Law*, (Russel Sage Foundation, 2002), at 167.

[12] Tyler, *Why People Obey The Law,* p. 175-176.

[13] Tyler, Huo, *Trust in the Law,* p. 152; Burke, Kevin and Leben, Steve, "Procedural Fairness: A Key Ingredient in Public Satisfaction", White paper for the American Judges Association (2007), 18; Tyler, Tom R, "Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?", *Behavioral Sciences and the Law* (2001), p. 217 (with references)

[14] Tyler, *Why People Obey The Law,* p. 270, Tyler, Huo, *Trust in the Law,* pp. 142-146; Tyler, "Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?", p. 217; Levi, Margaret, Sacks, Audrey and Tyler, Tom, "Conceptualizing Legitimacy, Measuring Legitimating Beliefs", *American Behavioral Scientist* 53(3) (2009), p. 369.

[15] See also Ouald Chaib, Saïla, "*Suku Phull v. France* Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously" in *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Eva Brems (ed.) (Cambridge, Cambridge University Press, 2012), p. 221.

[16] Tyler, *Why People Obey The Law,* p. 176.

[17] See for example Tyler, "Procedural Justice and the Courts", 30.

[18] *Ibid.* and Burke and Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction", p. 11-12.

are genuinely considered.[19] Judges can show this by referring to parties' arguments in the judgment and carefully examining the merits of the case.[20] When people are confronted with an authority with which they have less direct contact, such as a legislator, direct voice is less important.[21] Yet that does not make participation irrelevant. People still expect their interests to be taken into account.[22] For minorities this might be of additional relevance since the "underrepresentation of a group in the legislature (...) may reduce the group members' sense of ownership, increase their sense of injustice and partiality in the determination of policy, and dampen their obedience to authority".[23]

Trustworthiness refers to authorities' intentions. They must be sincere and caring.[24] The question at hand is whether authorities are making an effort to be fair[25] and people will evaluate whether they "are being honest and open about the basis for their actions; are trying to do what is right for everyone involved, and are acting […] not out of personal prejudices".[26]

Neutrality requires judges to be honest and unbiased about the applicant and the case and to base their decision upon rules and on objective information about the case and on the arguments of the parties instead of personal assumptions.[27] Neutrality requires also transparency about the way decisions are taken and how the rules are applied.[28] It also involves consistency across people, over time and across cases.[29] For lawmakers, neutrality requires that the interests of the whole population are taken into account. All views should be considered and no one view should be granted an obvious advantage in the policy debate.[30] It may be argued that particular caution should be paid to this when minorities are not represented in legislative bodies. Therefore, in our view, it is important that lawmakers be sufficiently informed on minorities' interests and needs when enacting legislation that affects them. In fact, neutrality also requires *accuracy*: informed decisions based on accurate information.[31]

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[19] Tyler, *Why People Obey The Law,* p. 149 and 276.

[20] Brems and Lavrysen "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", 186.

[21] Gangl, "Procedural Justice Theory and Evaluations of the Lawmaking Process", p. 136.

[22] Levi, Sacks and Tyler, "Conceptualizing Legitimacy, Measuring Legitimating Beliefs", p. 360.

[23] *Ibid.*

[24] Tyler, "Procedural Justice and the Courts", p. 31.

[25] Tyler, "What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures", p. 129 en Tyler, *Why People Obey The Law,* p. 164.

[26] Tyler, "Procedural Justice and the Courts", p. 30

[27] *Ibid.* and Tyler, *Why People Obey The Law,* p. 164.

[28] Tyler, "Procedural Justice and the Courts", p. 30 and Burke and Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction", p. 6.

[29] Tyler, "Procedural Justice and the Courts", p. 30 and Ouald Chaib, "*Suku Phull v. France* Rewritten from a Procedural Justice Perspective, p. 223.

[30] Gangl, "Procedural Justice Theory and Evaluations of the Lawmaking Process", p. 121.

[31] Tyler, Tom R., "Governing amid diversity: Can fair decision-making procedures bridge competing public interests and values?", *Law and Society Review*, 28, (1994), p. 824.

The final criterion, *respect* means that people's human dignity is not infringed and that authorities treat them in a polite and respectful way.[32] This criterion is particularly relevant for individuals' feeling of self-worth, as mentioned above.[33]

6.2. Denial of Procedural Fairness at the Domestic Level

The kick-off of the French 'burqa ban' process was a speech by President Nicolas Sarkozy on 22 June 2009, stating that face veils were not welcome in France, and that legislation was necessary "to protect women from being forced to cover their faces and to uphold France's secular values".[34] The French Parliament subsequently initiated an inquiry into the issue, led by MP André Gerin. The 32 member Gerin Commission represented all parliamentary groups. It heard witnesses and experts, and sent out questionnaires to several French Embassies. Its January 2010 report concluded that the face veil constituted an infringement of the three principles constitutive of the French Republic: liberty, equality and brotherhood. The majority of the commission therefore recommended that Parliament adopt a resolution proclaiming this, as well as a law banning the face veil in public spaces. On 11 May Parliament unanimously adopted said resolution.[35] This paved the way for the ban. In the summer of 2010,[36] the bill passed in both houses of Parliament with an overwhelming majority, despite negative advice of the Council of State, which estimated that "no incontestable legal basis" could be provided for a general ban.[37] The Constitutional Council however declared the ban to be constitutional in October 2010, with only a minor reservation for places of worship open to the public.[38]
In Belgium, the 'burqa ban' debate took place at a time of severe political crisis. Shortly after the near-unanimous approval[39] of a ban by the Chamber of Representatives, the government fell prematurely and Parliament was dissolved on 7 May 2010. As the Senate had 'evoked'[40] the bill, this meant that the newly elected

[32] Burke and Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction", p;7; Tyler, *Why People Obey The Law,* p. 152; see also Nussbaum, *The New Religious Intolerance*, (Harvard University Press, 2012), p. 65.
[33] Idem, p. 129.
[34] Gabizon, Cécilia, "Sarkozy : 'la burqa n'est pas la bienvenue'", *Le Figaro*, 26 June 2009, http://www.lefigaro.fr/politique/2009/06/23/01002-20090623ARTFIG00055-sarkozy-la-burqa-n-est-pas-la-bienvenue-.php (Last consulted on 31/10/2012, our translation).
[35] Résolution no. 2272 réaffirmant la prééminence des valeurs républicaines sur les pratiques communautaristes et condamnant le port du voile intégral comme contraire à ces valeurs, *Assemblée nationale*.
[36] In the lower house the bill received 335 ayes, only 1 nay, and 221 abstentions (13 July 2010). In the Senate there were 246 ayes, 1 nay, and 100 abstentions (14 September 2010).
[37] "Etude relative aux possibilités juridiques d'interdiction du port du voile integral", *Rapport Assemblée générale plénière du Conseil d'Etat,* 25 March 2010.
[38] French Constitutional Council, 7 October 2010, no. 2010-613 DC.
[39] More specifically it concerned 136 ayes, 0 nays and 2 abstentions.
[40] The majority of legislative proposals in Belgium are 'optionally bicameral'. Regarding such proposals, the governing principle is that the Chamber of Representatives has the authority to

Parliament had to start over. While political negotiations for a new coalition government were going on for more than a year, the ban was adopted fast, without referral to the Council of State for advice. This time the Senate did not evolke the bill, which was approved by the Chamber of Representatives with an overwhelming majority[41]. In Belgium too, the law was unsuccesfully challenged before the Constitutional Court, also with a minor reservation for places of worship.[42]
A closer look at the processes in both countries reveals serious shortcomings with respect to several procedural fairness requirements.

6.2.1. Accuracy

Accuracy is an aspect of the neutrality of the law.[43] This means simply that the law has to be based on information that is correct. In this respect, both the Belgian and French 'burqa ban' laws are seriously flawed. Several commentators have noted that in the legislative process, no evidence was adduced that would allow to identify the exact problem the law would remedy, nor to support the claim that the specific remedy – i.e. the ban- would be effective with respect to that problem.[44] The Belgian and French legislators were rather well tuned in with majority sentiments vis-à-vis the face veil, yet they were working on erroneous assumptions concerning the profiles and experiences of women wearing the face veil.[45] The central error is the assumption that all –or nearly all- women who wear the face veil are forced or pressured to do so. Since the adoption of the bans, empirical research based on interviews with face veil wearers in France[46] and

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approve a bill autonomously but the Senate has the right to 'evoke' the approved bill and discuss it. This so-called 'right of evocation' must be invoked within a certain term and it requires a minimum number of members.

[41] In the plenary Chamber, there were 129 ayes, 1 nay and 2 abstentions.

[42] Belgian Constitutional Court, 6 December 2012, no. 145/2012.

[43] T. Tyler, *Why People Obey the Law*, p.119, referring to the criteria developed by G.S. Leventhal, "What should be done with equity theory?" in *Social exchange: Advances in theory and research*, Gergen, Greenberg and Weiss (eds.) (New York: Plenum), 1980, 27-55.

[44] Leane, Geoffrey W.G., "Rights of ethnic Minorities in Liberal Democracies: Has France Gone too far in Banning Muslim Women from wearing the Burka?", *HRQ* 33 (2011), p.1053; Hunter-Henin, Myriam, "Why the French Don't Like the *Burqa*: *Laïcité*, national Identity and Religious Freedom", *International and Comparative Law Quarterly* 61(3) (2012), p. 613; Nanwani, Shaira, "The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?", *Emory International Law Review* 25 (2011), p. 1464. Cf. on the Netherlands: van Sasse van Ysselt, Paul, "Over het verbod op het dragen van een gezichtssluier en van andere gelaatsbedekkende kleding", *Tijdschrift voor Religie, Recht en Beleid* 2010 (1), p. 7.

[45] For an extensive discussion of the erroneous assumptions of the Belgian legislator as confronted with empirical reality, see Brems, Eva, Janssens, Yaiza, Lecoyer, Kim, Ouald Chaib, Saïla, Vandersteen, Victoria and Vrielink, Jogchum, "The Belgian 'Burqa Ban' Confronted with Insider Realities", in *The Face Veil in Europe Inside and Out*, Brems, Eva (ed.) (forthcoming).

[46] Open Society Foundations, "Unveiling the Truth; Why 32 Muslim Women Wear the Full-Face Veil in France", 2011, at http://www.soros.org/publications/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france.

Belgium[47] has shown that in fact the main profile is that of women choosing to wear the veil as a matter of an individual spiritual journey, generally against opposition of their family and in many cases of their partner as well. This is consistent with research in the Netherlands[48] and Denmark,[49] that was available at the time of lawmaking. Moreover, an expert testified before the Gerin commission that the wearing of the face veil in France was a matter of 'religious hyper-individualism' in which women choose to submit to a religious rule.[50] The finding that the assumption of coercion is wrong renders moot at least two of the arguments used by both legislators to justify the ban. The first is the argument based on women's rights. If women are not forced to wear the veil but instead freely choose to do so, the bans instead of liberating women, curtail their autonomy. Moreover they strengthen stereotypes about Muslim women's subordination. In both ways, the bans work against women's rights. The second is the argument about social integration. When donning the face veil is a well-considered choice, many women will not consider abandoning it as a first option when confronted with the ban. They prefer instead to continue wearing the veil yet avoid going out in public except by car.[51] For these women, the bans reduce social integration. Moreover, empirical research also questions the relevance of the third argument in the parliamentary debates, which is based on security concerns. It appears in fact that face veil wearers are generally willing to lift their veils for identity checks, in many cases even to male security personnel.[52]

The fact that the legislators literally had no idea what they were dealing with,[53] thus had important consequences for the impact of the ban. Disregarding essential evidence in the course of lawmaking is highly problematic; it is even more so when it concerns legislation restricting fundamental rights. In Belgium, the disregard seems deliberate, as Parliament insisted on moving fast, and in that spirit rejected both a request for the hearing of experts who could have advanced evidence, and requests

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[47] Brems, Eva, Janssens, Yaiza, Lecoyer, Kim, Ouald Chaib, Saïla, Vandersteen, Victoria, "Wearing the Face Veil in Belgium; Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering", 2012, at http://www.ugent.be/re/publiekrecht/en/research/human-rights/faceveil.pdf.

[48] Moors, Annelies, "Gezichtssluiers; Draagsters en Debatten", Amsterdam, 2009, at http://www.e-quality.nl/assets/e-quality/dossiers/Moslimas/Onderzoek%20Gezichtssluiers%20draagsters%20en%20debatten.pdf. (Consulted on 31/10/2012)

[49] "Rapport om brugen af niqab og burka", Institute of Cross-Cultural and Regional Studies, University of Copenhagen, 2009, at www.e-pages.dk/ku/322/. (Consulted on 31/10/2012).

[50] Gérin, André, "Rapport d'information fait en application de l'article 145 du règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national", 26 January 2010, p. 469. Cf. also Amghar, Samir, "Le 'niqâb' pour s'affirmer?", 2 January 2010, at http://www.ceras-projet.org/index.php?id=4196. (Consulted on 31/10/2012)

[51] Brems et al., "Wearing the Face Veil in Belgium; Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering".

[52] *Ibid.*

[53] About the Netherlands: Witteveen, Willem, "Montesquieu en het boerkaverbod", 20 May 2010, at http://njblog.nl/2010/05/20/montesquieu-en-het-boerkaverbod/. (Last accessed on 31/10/2012)

for an advice of the Council of State, who could have checked whether the proponents of the ban advanced sufficient evidence to support their arguments. In France however, the Gerin Commission auditioned 211 persons and produced a 658 page report. Yet the same flaws occurred. One of the auditioned experts suggests that an erroneous presentation of reality may have been brought in through the analyses of some of his colleagues, as they were set on an ideological reading of the face veil and on interpreting it as a sign of domination and alienation of Muslim women.[54]

Moreover neither the French Constitutional Council nor the Belgian Constitutional Court did anything to correct this flaw.[55] Both had the power and the opportunity to require the government to advance evidence as to its correct assessment of the problem the legislation sought to address, and of the ban's likelihood to remedy that problem. Yet, the French Council chose to only reiterate the legislator's assumptions that the face veil could endanger public security and the minimal requirements of living together and that women wearing a face veil, "whether voluntarily or not" are in a situation of exclusion and inferiority that is manifestly incompatible with the constitutional principles of liberty and equality.[56]

The Belgian Constitutional Court did a slightly better job with regard to accuracy, acknowledging both that no security problem involving face covering occurred yet in Belgium[57], and that the face veil can be a manifestation of a well-considered choice[58]. Nevertheless it accepted the ban as necessary for security reasons as well as for reasons of gender equality. With regard to the former, the Court argued that the State was allowed to "anticipate" potential risks.[59] As to the gender argument, the Court stated that regardless of free choice, the principle of gender equality justifies a ban on religious manifestations that are not reconcilable with the principle of equality between men and women.[60] Thus, although the Court does bring nuance to the legislator's general assumptions, these nuances do not affect the reasoning whatsoever. With regard to the social integration argument however, the Belgian Constitutional Court fully endorsed the role of speculator when stating that covering the face renders an essential element of a person's individuality invisible, making life in society impossible.[61]

[54] Amghar, Samir, "Niqab, quels sens pour celles qui le portent?", *Le Monde des Religions* 40 (2010).
[55] Davis, Britton, "Lifting the Veil: France's New Crusade", *B.C.Int'l & Comp.L.Rev*. 34(1) (2011), p.139-140.
[56] French Constitutional Council, 7 October 2010, no. 2010-613 DC, 4. ,
[57] Belgian Constitutional Council, 6 December 2012, no. 145/2012, B 20.2.
[58] Idem, B 23.
[59] Idem, B 20.3
[60] Idem, B 23.
[61] Idem, B 21.

6.2.2. Neutrality/Sincerity/Transparence

For lawmakers, the requirement of neutrality comes close to those of sincerity and transparence. It is about being clear on the purpose of the legislation, and seriously striving to best achieve that purpose. In the case of conflicting interests between different categories of people affected by the law, it is also about taking the interests of all categories equally seriously.

Both the French and Belgian laws ban face covering in general, even though the legal history and the accompanying discourse make clear that they target the Islamic face veil specifically. The neutral wording is intended chiefly to avoid legal challenges of discrimination on grounds of religion. Yet it goes at the expense of sincerity and transparence. Both the Belgian and French legislators have been accused of hypocrisy for disguising the real objective of the law.[62] The legislators 'desire to 'appear impartial and reasonable'[63] extended to the parliamentary debates, where parliamentarians avoided as much as possible mentioning Islam. Following French president Sarkozy's statement in his speech to parliament in 2009, that 'the burqa is not a sign of religion, it is a sign of subservience', politicians have gone out of their way to describe the face veil as a matter of culture, not religion.[64]

Furthermore, commentators of the French Gerin Commission and the ensuing legislative process have alleged bias in the selection of the persons to be auditioned[65] as well as in the interpretation of the information from the auditions by the Commission. It was noted that the final report erased the plurality of reasons explaining the practice of the face veil that were advanced at the Commission's hearings.[66] Moreover, it can be argued that parliamentarians interpreted the Gerin report in a selective and biased manner, as in addition to a ban, the report also proposed a number of positive measures related to sensitization, mediation, respect for diversity and the rejection of discrimination, none of which were taken up in the political work that followed the report.[67]

The French Council of State is not beyond criticism from the angle of neutrality. It was the Council that came up with the novel concept of 'non material public order',

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[62] Delgrange, Xavier, "Quand la burqa passé à l'Ouest, la Belgique per-elle le Nord?", in *Quand la burqa passé à l'Ouest. Enjeux éthiques, politiques et juridiques*, Roy, Olivier and Koussens, David (eds.) (Rennes: Presses universitaires de Rennes (Forthcoming, 2013), p. 35.; Hunter-Henin, "Why the French Don't Like the *Burqa*: *Laïcité*, national Identity and Religious Freedom", p. 617.

[63] Winet, Evan D., "Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face", *Hastings Int'l & Comp. L. Rev.* 35 (2012), p. 244.

[64] Cf. in the Netherlands, Moors, Annelies,
"Minister Donner as Mufti: New developments in the Dutch 'burqa debates'", September 2011, at http://religionresearch.org/martijn/2011/09/21/minister-donner-as-mufti-new-developments-in-the-dutch-%E2%80%98burqa-debates%E2%80%99/. (Last accessed 31/10/2012)

[65] Krivenko, Ekaterina Yahyaoui, "The Islamic Veil and its Discontents: How do they Undermine Gender Equality", *Religion and Human Rights* 7 (2012), p. 20-21.

[66] Mullally, Siobhan, "Civic Integration, Migrant Women and the Veil: at the Limits of Rights?", *The Modern Law Review* 74(1) (2011), p. 34.

[67] Delgrange, "Quand la burqa passé à l'Ouest, la Belgique per-elle le Nord?", p. 24

'a minimum base of reciprocal requirements and guarantees that are essential to life in society and that… are so fundamental as to precondition the exercise of other liberties'.[68] Even though the Council of State advised against the use of this concept, it became one of the main foundations of the ban. Critics have argued that this concept, also labeled 'social public order' is far from neutral, as it allows 'to sweep away human rights whenever their manifestation is offensive to the majority of citizens'.[69]

For courts, neutrality requires that judges act as "neutral, principled decision makers who make decisions based upon rules and not personal opinions."[70] This relates to perceptions of independence and impartiality of the judge, as well as to the equal treatment of all parties. In that respect, the French Constitutional Council, acting as a court in controlling the constitutionality of legal texts, has a problem. The Council is composed of political notables, including leading "conservative politicians who had taken vocal and often controversial stances on anti-Muslim and anti-immigrant campaigns and who were unlikely to obstruct a government close to their leanings".[71] By hardly motivating its approval of the face covering ban, the Council left itself "unprotected to the criticism that it is not much more than a semi-political organ".[72] Similar reasoning has been applied to the Belgian Constitutional Court, half the bench of which are former politicians, making it unlikely that it would dare criticize a law adopted with near unanimity.[73] Although the Belgian Constitutional judges motivated their decision more thoroughly, the reasoning remained one-sided giving quasi-absolute weight to the State's arguments instead of balancing the interests of all the parties. [74]

[68] French Council of State, "Etude relative aux possibilités juridiques d'interdiction du port du voile integral", p. 26.

[69] Hunter-Henin, "Why the French Don't Like the *Burqa*: *Laïcité*, national Identity and Religious Freedom", p. 621.

[70] Tyler, "Procedural Justice and the Courts, p. 30.

[71] Joppke, Christian, "Limits of Restricting Islam: The French Burqa Law of 2010", (conference paper) at http://rps.berkeley.edu/content/limits-restricting-islam-french-burqa-commission, p. 30.

[72] Van der Schyff, Gerhard and Overbeeke, Adriaan, "Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans", *E.C.I. Review* 7(3) (2011), p. 428.

[73] Delgrange, Xavier, "La loi "anti-burqa" comme symptom", *Politique-Revue des débats* 74 (2012), p. 47.

[74] See supra and see also Ouald Chaib, Saïla, Belgian Constitutional Court says Ban on Face Coverings does not violate Human Rights, 14 December 2012, at http://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/. (Last accessed 25 January 2013)

6.2.3. Participation

In the process of lawmaking, individuals cannot expect to be heard in person.[75] Yet individuals belonging to a group that is directly affected/targeted by a law have a legitimate expectation that their side of the story is somehow on the table. Moreover, substantive participation requires some evidence that these people's views have been considered by the decision maker.

This is yet another procedural fairness component that has been seriously neglected by the French and Belgian lawmakers who banned the face veil. Empirical research in Belgium has shown that women wearing the face veil experience intense frustration at the fact that this political intervention in their lives took place without consulting them or researching their situation.[76] Moreover, several suggested that if there had been a dialogue, a compromise could have been found, for example wearing a veil in a different colour than black to cause less offense, or taking alternative measures for easy identification.[77] It is indeed arguable that this is a matter in which dialogue might lead the way to the best solution for all; or that at least dialogue should have been tried before resorting to the criminal law.[78]

Yet as shown above, the lawmakers were not really interested in information from the perspective of the face veil wearers. During the massive information gathering effort that was the French Gerin Commission, the idea of talking to a woman who wears the face veil came as an afterthought. Kenza Drider, the only face veil wearer who was heard by the Commission, states that she had written several letters to Mr. Gerin asking to appear before the Commission, and that she had to mobilize her media contacts in order to succeed. During her hearing, summarized in ten lines in the 658 page report, she had to unveil her face.[79] Moreover, the Gerin report starts with an '*avant-propos*', in which a member of the commission relates the one encounter he had with a (French) woman wearing the face veil, which was on a professional trip to Syria. According to the text the woman approached him because she wanted to explain the meaning of her face veil. The melodramatic text describes the scene in much detail and concludes that "the eyes of Farah from Marseille" were

[75] Even though the small numbers, in particular in Belgium, would have made that possible. See (on the Netherlands), Witteveen, "Montesquieu en het boerkaverbod". On the local level, where bans had been enacted in Belgium before the nationwide ban, individual contact seems a logical approach, as the localities concerned usually counted only a handful of face veils.

[76] Brems et al., "Wearing the Face Veil in Belgium; Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering".

[77] *Ibid.*

[78] van Sasse van Ysselt, "Over het verbod op het dragen van een gezichtssluier en van andere gelaatsbedekkende kleding", p.7.

[79] Open Society Foundations, "Unveiling the Truth; Why 32 Muslim Women Wear the Full-Face Veil in France", 2011, p.20.

a source of motivation for the commissioners. Yet it remains mute on the content of her message. [80]

This is symptomatic of the whole report, and by extension of the entire lawmaking process that took place: the perspective of the women concerned was systematically shoved off the table.[81] This is all the more remarkable given the fact that both Belgium and France have a strong tradition of consulting with target groups in the run-up to lawmaking.[82] The derogation from democratic custom in this specific case cannot go unnoticed, neither by the women themselves, nor by the population at large.

6.2.4. Respect

Treating people with respect means taking them and their concerns seriously, and treating them as valued members of society.[83] Under this heading, at least three issues are cause of concern in the face veil banning process.

The first has been called "a neo-colonial form of paternalism".[84] The Belgian and French legislators claim to want to liberate women wearing a face veil, yet they are not interested in the viewpoints of these women. They pretend to know better than them why they wear what they wear.[85] Throughout their discourse, they picture these women as submitted, dependent creatures. The legislators thus deny these women autonomy. Moreover, the legislators dwell extensively on how the majority in society experience the encounter of a face veil or even the idea of a face veil, yet show no interest in knowing how women who wear it experience their encounters with others. They thus ignore the women behind the veil, denying them humanity.

In the second place, the legislators do not take seriously the infringement they are creating into a fundamental right, i.e. the freedom to express one's religion. They consistently downplay the religious factor, despite the fact that for most women who wear the face veil, the central reason for doing so is a deep religious commitment. Even more importantly, they go lightly about tampering with a fundamental right. This is evidenced most clearly in the blatant ignoring of the advice of the French Council of State, and in the refusal to consult the Belgian Council of State. In addition to the legislator, the French Constitutional Council did not appear

[80] Gérin, "Rapport d'information fait en application de l'article 145 du règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national", p. 15-16; See Krivenko, "The Islamic Veil and its Discontents: How do they Undermine Gender Equality", p. 21.

[81] Hennette-Vauchez, Stéphanie, "La burqa, la femme et l'Etat", *Raison Publique* (2010) at http://www.raison-publique.fr/article317.html. *(*Last accessed: 31/10/2012)

[82] Cf. (on the Netherlands) Witteveen, "Montesquieu en het boerkaverbod".

[83] Brems and Lavrysen "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", p. 181.

[84] Hennette-Vauchez, "La burqa, la femme et l'Etat",

[85] Leane, "Rights of ethnic Minorities in Liberal Democracies: Has France Gone too far in Banning Muslim Women from wearing the Burka?", p. 1054.

to take religious freedom seriously. It needed only one sentence to conclude that the face veil ban did not violate religious freedom:

> *Taking into account the objectives he stated for himself as well as the nature of the sanction in case of breach of the rule, the legislator adopted provisions that guarantee a conciliation of the protection of public order and the protection of constitutional rights that is not manifestly disproportionate.*[86]

Even with the finest legal scalpel, it is hard to detect any reasoning or justification in these lines. This is the more striking, given the fact that the Council of State had earlier come to the opposite conclusion in an extensively motivated advice. The Constitutional Council did not even bother to brush the Council of State's arguments aside. Moreover, it adds insult to injury when it stipulates an exception to the ban: in order not to violate religious freedom, the French ban should not apply in places of worship that are open to the public.[87] As this statement is likewise unmotivated, we cannot know whether the Council is deliberately reinterpreting a religious dress practice to make it into part of a mosque ritual, nor on what basis it claims the power to do so. The same holds for the Belgian Constitutional Court, which stipulated the same reservation in its judgment. Thirdly, the discourse surrounding the introduction of the bans shows a strong tendency of 'othering'[88]. Women who wear a face veil are not portrayed as members of the same society as those who encounter them on the street, and those who decide to ban the veil. Nicolas Sarkozy set the tone when he announced that "the burqa will not be welcome on the French territory" (cf. supra). This speech has been analysed as an example of ethnonationalism: by labeling the face veil as foreign to French identity, there is no acknowledgement of the possibilities of a hybrid or multilayered identity, that would at the same time be profoundly French and profoundly Islamic.[89] Moreover, Sarkozy's 'colonial gaze' at the face veil mobilizes the French around self-proclaimed French values while excluding the face veil wearers from both those values and the idea of Frenchness.[90] Mullally noted that the Gerin Commission's presentation of its proposals as '*un accord républicain'* clearly reflects "the desire to reinforce and bolster a collective sense of national identity, designed to define the terms of belonging."[91] It deliberately targets those who symbolize otherness. Stigmatization, if not intentional, is at best accepted as collateral damage.[92] The main purpose of the

[86] French Constitutional Council, 7 October 2010, no. 2010-613 DC ,para 5. Our translation.
[87] *Ibid.*
[88] On the 'otherization' of the face veil, see Chakraborti, Neil and Zempi, Irene "The veil under attack: Gendered dimensions of Islamophobic victimization", *International Review of Victimology* 18(3) (2012), 8.
[89] Binte Ismail, Nur Syahidah, "Ban of the Burqa in France", *Ignite* 3(1) (2011), p. 20.
[90] Idem. p.21.
[91] Mullally, "Civic Integration, Migrant Women and the Veil: at the Limits of Rights?", p. 32
[92] Nanwani, "The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?", p.1447.

ban seems to be "to reassure public opinion that the political class is ready to stand up for 'our' values in the face of 'foreign' threats to 'our way of life'."[93]

6.2.5. Trust/caring

The criterion of trust relates to the feeling among those affected by the law, that those who are making the law sincerely strive for justice.[94] It is about the lawmakers showing to the people that they care. From this angle as well, the French and Belgian face veil bans are very problematic.

To the extent that the lawmakers in the face veil banning process show caring, it is caring about the majority population, for whom the face veil may engender feelings of insecurity, who dislike the sight of a face veil on the street, and who see the face veil as a symbol denying women's rights. The arguments advanced by both parliaments to ban the veil – women's rights, security, and social cohesion – make sense only from the (subjective) perspective of those who do not wear the face veil. As argued above, for the face veil wearers the bans have reduced women's rights, social integration and security. This lack of caring for the women concerned is most flagrant in the Belgian law, as – different from the French law – it does not include a stipulation against forcing a person to cover her face. While the authors of the ban were assuming that women wearing the face veil are coerced to do so, they apparently did not care enough about these women to punish the perpetrators. Manifestly the only problems the lawmakers cared about are those of the majority population.

An even more cynical interpretation is one that does not see any evidence of sincere caring by the lawmakers, except for their own electoral gain. Such is the suggestion among commentators who point at the fact that the bans enjoyed wide popular support, and that those supporting them politically would surf to similar popularity on waves of populism and islamophobia.[95]

At a more institutional level, the refusal of the Belgian lawmakers to hear experts or consult the Council of State, or the anti-discrimination watchdog,[96] or even to seriously engage with any arguments against the ban,[97] can be seen as evidence of

[93] Laborde, Cécile, "State Paternalism and Religious Dress", *International Journal of Constitutional Law* 10(2) (2012), p.13.

[94] Tyler, "What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures", p. 129.

[95] Hammarberg, Thomas, "Human Rights in Europe: no grounds for complacency", *Council of Europe Publishing* (2011), 41; Joppke, "Limits of Restricting Islam: The French Burqa Law of 2010", p. 28; Leane, "Rights of ethnic Minorities in Liberal Democracies: Has France Gone too far in Banning Muslim Women from wearing the Burka?", p. 1060; Van der Schyff and Overbeeke, "Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans", p. 15.

[96] The Centre for Equal Opportunities and Opposition to Racism; cf. Delgrange, "Quand la burqa passé à l'Ouest, la Belgique perd-elle le Nord?", p. 35.

[97] Delgrange, "Quand la burqa passé à l'Ouest, la Belgique perd-elle le Nord?", pp. 25 and 33.

lack of caring, in the sense that the focus on getting a ban voted, left no room for even the most common efforts aimed at doing things in a proper way. It was quite clear that the parliamentarians did not want to have to deal with criticism. One of the main proponents of the ban explicitly stated that the reason for avoiding the Council of State was the fear that it might find inconsistencies with fundamental rights. In other words, in their hurry to get the ban voted, politicians did not even care about fundamental rights.[98]

In France, the Council of State was consulted, yet the picture does not look any rosier. The Council crushed the proposed ban on grounds of incompatibility with fundamental rights. Similarly, the legal experts heard by the Gerin commission had warned that a general ban would be highly problematic.[99] In an 'unprecedented defiance of concerted legal opinion'[100] however, the French parliament ignored these objections, and several MPs engaged in public court-bashing against the Council of State,[101] signaling that if they cared about anything, it was not the rule of law or fundamental rights.

6.3. Doing Procedural Minority Justice in Strasbourg

As was to be expected, an application challenging the French face veil ban was brought before the European Court of Human rights.[102] This is an opportunity for the Court to set the standard on procedural justice as well as substantive justice. In the analysis below we will explore how the Court could potentially realize the former.

6.3.1. Assessing Domestic Procedural Fairness

Throughout its case-law, the European Court of Human Rights regularly acts as a watchdog of domestic procedural fairness. In this respect it has evaluated decision making processes by domestic courts, administrations and lawmakers. It is noteworthy that the Court has paid attention to this in cases involving the rights of members of ethnic or religious minorities, even when it exercised only light scrutiny.

In particular, in cases involving article 8 – the provision that protects a minority lifestyle,[103] as well as dealing with numerous issues of specific relevance for minorities, such as housing[104] and registration of ethnic identity[105]— the Court has

[98] Id., 5.
[99] Hennette-Vauchez, "La burqa, la femme et l'Etat".
[100] Joppke, "Limits of Restricting Islam: The French Burqa Law of 2010", p.1.
[101] Idem, 28.
[102] ECtHR, *S.A.S v. France*, application number (43835/11)
[103] ECtHR (GC), *Chapman v. UK*, 18 January 2001, para. 73.
[104] Ibid.
[105] ECtHR, *Ciubotaru v. Moldova*, 27 April 2010, para. 51.

regularly stated that "the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8."[106] Moreover, the Court emphasized the minority component in its famous dictum in *Chapman*, a case concerning a Gypsy's right to live in a caravan on her land: "the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases".[107] A fine example of this, is the case *of Noack v Germany,*[108] concerning the collective transfer of the —mostly minority – inhabitants of a village to allow for mining expansion. The Court found the complaint manifestly ill-founded, basing its decision mostly on the elaborate procedures at the domestic level. The Court noted in particular that the process "lasted several years and that the distinctive feature of that process was the wide debate that took place in the Parliament of the *Land* of Brandenburg and among the other leading figures in public life regarding the choice between three alternative lignite-mining projects."[109]
It also drew attention to the due consideration of minority concerns during the process: "As regards protection of the rights of the Sorbian minority, the Court notes that ... the Constitutional Court of the *Land* of Brandenburg carefully examined whether the legislature had understood the scope of Article 25 § 1 of the Constitution of the *Land* of Brandenburg, which protects the rights of the Sorbs, whether it had duly weighed the right it enshrined against other fundamental rights and whether the result was not disproportionate."[110]
Under article 9 – protecting religious freedom— the Court, in its famous Grand Chamber case of *Leyla Şahin v. Turkey,* examined the way in which the Turkish headscarf ban for university students was introduced. In particular, it noted that the university authorities explained the reasons behind the ban to the students,[111] and that "the process whereby the regulations ...were implemented took several years and was accompanied by a wide debate within Turkish society and the teaching profession ... It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned".[112] Hence, the broad margin the Court left to national authorities to decide whether or not to ban headscarves in school, was to some extent compensated by a control of the domestic process. However, this type

[106] Ibid.; ECtHR, *Buckley v. UK*, 25 September 1996, , para. 76.
[107] ECtHR, *Chapman v. UK*, para. 96; ECtHR, *Connors v. UK*, 27 May 2005, para. 84; ECtHR, *Muñoz Diaz v Spain*, 8 December 2009, para. 61.
[108] ECtHR (inadm.), *Noack v. Germany*, 25 May 2005.
[109] Id., p. 12.
[110] Id., p. 13.
[111] ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005, para. 119.
[112] Id., para. 120.

of procedural fairness assessment is far from systematic in the European Court's case-law.

Following Brems and Lavrysen,[113] it is submitted that the control by the European Court of Human Rights should always include an appreciation of the extent to which procedural fairness has been done at the domestic level. Serious shortcomings of procedural fairness in cases involving Convention rights should systematically lead to the finding of a violation. Smaller shortcomings should be put in the balance with the other elements in the overall assessment of whether an infringement constitutes a violation. Moreover, the degree of scrutiny exercised by the Court could be linked to procedural fairness criteria, in the sense that light scrutiny – granting a wide 'margin of appreciation' to domestic authorities – would not be applied in case of procedural fairness flaws. Moreover, in cases involving minority rights, the procedural fairness check should include due attention paid to minority concerns.

Dealing with the French and/or Belgian face veil banning processes, the European Court of Human Rights would therefore be expected to point out the numerous and very serious procedural fairness shortcomings, and remind the states parties of proper practice. Moreover, it would have to exercise strict scrutiny at the European level so as to compensate for the absence of domestic procedural fairness.

6.3.2. Doing it Right at the European Level

In addition to setting the standard on domestic procedural fairness, we submit that the Court in its own work should strive for best practice in this field. This would both strengthen its credibility when criticizing domestic shortcomings and offer states parties concrete examples of procedural fairness in legal reasoning. Moreover, from applicants' perspective, fair treatment by this highest body in the hierarchy of law can offer some compensation for procedural unfairness suffered in earlier stages.

6.3.2.1. Recognizing the Applicant

The issue of voice is crucial for the European Court's treatment of the face veil case. As it examines the case from the starting point of the fundamental right at stake, the right holder's perspective comes natural to the Court. Throughout its reasoning, the Court should take care to present sufficient and accurate information on her experiences and to accurately present her arguments. While the applicant's perspective is centerpiece, information on the experiences of other face veil wearers provides a relevant contextualization.

[113] Brems and Lavrysen "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", p. 189.

Assuming that the applicant in *SAS v. France* corresponds to the 'standard profile' of face veil wearers in France, it is to be expected that her religious conviction is a crucial aspect of the insider perspective.[114] The way a conviction is experienced and the importance accorded to it is subjective. Outsiders may not understand why a Sikh objects to removing his turban at a security check or why it might not be evident for a Muslim girl to remove her headscarf during sports classes. Similarly, outsiders may not understand why a woman decides to cover her face when appearing in public. In determining whether or not such behaviour falls under the European Convention, it is however the insider perspective that counts. It is not for the Court to determine what a religion prescribes or does not prescribe.[115] Only the applicant-believer can autonomously decide this for herself. In most of its case law, the Court has adopted a correct approach to this matter: the relevant question is whether the applicant finds a particular practice important in the context of her religion or belief.[116]

The ECtHR recently clarified in *Eweida e.o. v. the UK* that "the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question".[117] Accordingly, the autonomy of the believer implies also that it does not matter whether the religious dictate she wants to follow consists of a minority view within her religious group.[118]

Additionally, in light of the neutrality principle, the Court must refrain from making biased or generalizing statements about the applicant's religious conviction or practice. In the past, the Court has made a number of problematic statements such as **"**the rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practiced on Jewish or Muslim male babies"**[119]** or "wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils"[120]. Such statements in fact contradict the ruling that

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[114] This can be derived from the facts of the case communicated to the state. ECtHR, *S.A.S v. France*, application number (43835/11), p.1.

[115] Martinez-Torron, Javier, "The (Un)protection of Individual Religious Identity in the Strasbourg Case Law", *Ox. J Law Religion* (2012), pp. 13-14; Evans, Carolyn, *Freedom of Religion under the European Convention on Human Rights* (Oxford: 2001), pp. 120-124.)

[116] Rorive, Isabelle, "Religious Symbols in the Public Space: In search of a European Answer", *Cardozo L. Rev.* (2008-2009), p. 2674.

[117] ECtHR, *Eweida and others v. UK*, 15 January 2013, par. 82.

[118] Cf. Nussbaum, Martha, *The New Religious Intolerance*, p. 79.

[119] ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, 10 June 2010, para. 144.

[120] ECtHR, *Dahlab v. Switzerland*, 15 February 2001*;* reiterated in *Leyla Şahin v. Turkey*, 10 November 2005, para. 111

> "(T)the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."[121] [122]

In addition, such statements are stigmatizing[123] and disrespect the plurality of meanings a certain religious expression can have[124] as well as individual autonomy to choose what meaning to attach to a certain religious expression.[125] Instead of taking part in the political debate about the meaning society imposes on the face veil the Court has with *SAS v. France* the opportunity to break the circle of prejudice and return to the essence of the issue at stake, namely the rights of the women concerned and their right to freedom of religion in particular.[126]

6.3.2.2. Recognizing the Weight of the Applicant's Right

In the domestic debates surrounding the face veil bans the impact of the bans on freedom of religion was hardly put on the table. It is the Court's task to redress procedural justice by considering the voice of all parties and by genuinely weighing the arguments against each other as prescribed by the second paragraph of article 9 ECHR.[127] Procedural fairness requires moreover that this balancing exercise is done in a transparent manner, clarifying the weight given to each argument, as well as the underlying reason. Unfortunately the Court's adjudication in article 9 cases has often lacked clarity and consistency, in contrast with its case law under other provisions, such as freedom of expression.[128] From a procedural fairness perspective, the Court should be careful not to create the impression that some rights are more valued than others.[129] Although the Court describes in its case law the freedom of religion

[121] ECtHR, *Manoussakis v. Greece*, 26 September 1996, para. 47
[122] Martinez-Torron, "The (Un)protection of Individual Religious Identity in the Strasbourg Case Law", p. 25.
[123] Martinez-Torron, Javier, "Limitations on Religious Freedom in the Case Law of the European Court of Human Rights", *Emory Int'l L. Rev.* 19 (2005), p. 607.
[124] Grillo, Ralph and Shah, Prakash, "Reasons to Ban? The Anti-*Burqa* Movement in Western Europe", (2012) to be found at http://www.mmg.mpg.de/publications/working-papers/2012/wp-12-05/, p.31.
[125] Leane, "Rights of ethnic Minorities in Liberal Democracies: Has France Gone too far in Banning Muslim Women from wearing the Burka?", p. 1054; Krivenko, "The Islamic Veil and its Discontents: How do they Undermine Gender Equality", p. 19; Evans, Malcolm, *Manual on the Wearing of Religious Symbols in Public Areas*, (Strasbourg: Council of Europe Publishing, 2009), p. 44.
[126] Krivenko, "The Islamic Veil and its Discontents: How do they Undermine Gender Equality", p. 27.
[127] Lewis, Tom, "What not to wear: Religious rights, the European Court, and the margin of appreciation", *ICLQ,* vol 56 (2007), p.414.
[128] See for a comparative study on case law concerning religion in the workplace: Ouald Chaib, Saïla, "Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights" in *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Katayoun Alidade, Marie-Claire Foblets and Jogchum Vrielink (eds.)(Ashgate, 2012), pp33-58.
[129] Ouald Chaib, "*Suku Phull v. France* Rewritten from a Procedural Justice Perspective, p. 224; Lewis, "What not to wear: Religious rights, the European Court, and the margin of appreciation", p. 396.

as "one of the most vital elements that go to make up the identity of believers and their conception of life",[130] in practice, the reasoning adopted in freedom of religion cases often shows a less understanding approach, especially when the individual aspect of the right is concerned.[131] The Court's case law in the headscarf cases is well known for its one-sided approach, heavily relying on principles put forward by the State such as secularism and neutrality.[132] But also in other cases concerning religious accommodation claims the Court has often shown a lack of understanding of the importance of religious claims for applicants in a particular situation.[133] In *Francesco Sessa v. Italy*[134] for example, the Court stated that a lawyer complaining about the scheduling of a hearing on a Jewish holiday, should arrange for replacement by a colleague if his religious and professional duties enter into conflict.[135] It did not seriously consider the possibility that the organization of the judicial system might accommodate respect for his religious duties. In other cases, such as the cases concerning security measures in public buildings – requiring taking off religious dress —, the Court simply refers to the importance of security measures, omitting to examine the necessity of the measure for security.[136] This insensitive approach towards religious claims should be avoided by carefully considering the concerns of the applicant and by genuinely and thoroughly balancing the interests at stake. Good practices can be found in the cases, rare in their kind, of *Jakobski v. Poland*[137] and *Ahmet Arslan v. Turkey*[138] and the recent case of *Eweida and others v. the UK*[139].

6.3.2.3. Recognizing the Applicant's Minority Position

As argued above, procedural fairness is particularly important when a minority is involved. That authorities should make an extra effort to keep confidence of minorities, was acknowledged by the Strasbourg Court in a recent case concerning

[130] ECtHR, Kokkinakis v. Greece, 25 May 1993, para.31
[131] Martinez-Torron, Javier, "The (Un)protection of Individual Religious Identity in the Strasbourg Case Law", *Ox. J Law Religion* (2012), p.2.
[132] See for example Rorive, Isabelle, "Religious Symbols in the Public Space: In search of a European Answer", *Cardozo L. Rev.* (2008-2009) and Lewis, "What not to wear: Religious rights, the European Court, and the margin of appreciation".
[133] Cf. Ferrari, Silvio, "The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law" in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* Temperman, Jeroen (ed.) (Martinus Nijhoff: 2012) p. 23 and Martinez-Torron, "The (Un)protection of Individual Religious Identity in the Strasbourg Case Law", p.6.
[134] ECtHR, *Francesco Sessa v. Italy*, 3 April 2012.
[135] ECtHR, *Francesco Sessa v. Italy*, para 37.
[136] See e.g. ECtHR, *Phull v. France*, 11 January 2005 and ECtHR, *El Morsli v. France*, 4 March 2008.
[137] ECtHR, *Jakóbski v. Poland*, 7 December 2010
[138] ECtHR, *Ahmet Arslan and others v. Turkey*, 23 February, 2012
[139] ECtHR, *Eweida and others v. UK. (In particular in the case of the first applicant)*

racist violence towards Roma.[140] When the Court examines legislation interfering with minority rights, it has an important corrective function of "protecting the rights of minority members against abuses of the majority rule by the dominant group."[141] Indeed, there is always a risk that "law-making is done on the basis of dominant assumptions about minority cultures and their members' views, with the minority being treated as a silent interlocutor".[142] When it comes to the face veil ban, the Court cannot overlook the fact that the discussion concerned a minority that was silenced in the debates.[143] Moreover, face veiling women are in a particular vulnerable position since they consist of a small minority within the minority group of Muslims who are not necessarily supportive towards them.[144]

Some authors argue that the debates surrounding the face veil bans were so heated, because women wearing a face veil represent the Islam Europe does not want to see.[145] It cannot be denied that the face veil bans are rooted in an anti-Islamic climate in Europe, and that this legislation even risks reinforcing the existing tensions. This has been extensively documented amongst others by Amnesty International,[146] by the former Council of Europe Commissioner for human rights Thomas Hammarberg,[147] by the European monitoring Centre on racism and Xenophobia,[148] and by the Organization of the Islamic Conference.[149] Also, the Parliamentary Assembly of the Council of Europe issued a resolution on "Islam, Islamism and Islamophobia in Europe" in which the face veil bans were discussed as well.[150] In the recommendation with the same name, the Assembly called on member states *not* to establish a general ban of full veiling.[151] The Court should

[140] ECtHR, *Koky and Others v. Slovakia*, 12 June 2012, para. 239.
[141] Brems and Lavrysen "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", (forthcoming).
[142] Grillo and Shah, "Reasons to Ban? The Anti-*Burqa* Movement in Western Europe", p. 28. This can be illustrated with the name of the campaign issued after the enactment of the ban: "La République se vit à visage découvert" meaning "The Republic is lived with uncovered face": http://www.gouvernement.fr/gouvernement/la-republique-se-vit-a-visage-decouvert
[143] See *supra*.
[144] Some women reported that they experienced aggression also from Muslims: http://www.ugent.be/re/publiekrecht/en/research/human-rights/faceveil.pdf, p. 19.
[145] Grillo and Shah, "Reasons to Ban? The Anti-*Burqa* Movement in Western Europe", p. 23.
[146] *Choice and Prejudice; Discrimination against Muslims in Europe*, Amnesty International 2012, http://www.amnesty.org/en/library/asset/EUR01/001/2012/en/85bd6054-5273-4765-9385-59e58078678e/eur010012012en.pdf
[147] Hammarberg, Thomas, "Human Rights in Europe: no grounds for complacency",, *Council of Europe Publishing* (2011), p.36.
[148] "Muslims in the European Union: Discrimination and Islamophobia", *EUMC* 2006: http://fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf
[149] http://www.oic-un.org/document_report/Islamophobia_rep_May_23_25_2009.pdf
[150] Resolution 1743 (2010) Islam, Islamism and Islamophobia in Europe.
[151] Recommendation 1927 (2010) Islam, Islamism and Islamophobia in Europe, para. 3.13.

recognize this "sensitive nature of the situation"[152] in which hostility and discrimination towards Muslims is on the rise in many European countries.[153]
All these factors point at the particular vulnerable position of women wearing the face veil in France. In addition to close attention to neutrality and balancing in the Court's reasoning, they mandate specific care with respect to its discourse. Respect should characterize the way the Court talks about women wearing the face veil, and all forms of paternalism and 'othering' should be avoided.

Concluding Remarks

Procedural fairness is an important and useful concept for all types of situations in which individuals encounter the law. Its particular strength lies in its empirical basis in social psychology research, demonstrating the importance of procedural fairness for the legitimacy of legal authorities as well as for individual wellbeing. There are good reasons to state that procedural fairness merits particular attention in cases of minority justice. Moreover, it may be argued that best practice of procedural fairness is of particular importance when fundamental rights are at stake.
Our examination of the far-reaching procedural fairness flaws in the parliamentary and judicial treatment of the Belgian and French face veil bans has shown that disregard of procedural fairness makes for bad and harmful law. It is bad law, because it is not fit to address real problems: lack of attention to participation, accuracy and neutrality have led to crucial errors in the identification of problems as well as remedies. It is moreover harmful law, because it results in stigmatization and violations of the very rights it proclaims to protect.
The European Court of Human Rights is well placed to lead the way toward procedural fairness as a necessary twin of substantive fairness in human rights adjudication. While the Court's case-law shows a number of instances in which it has violated crucial procedural fairness principles, it also shows a potential to play a role in both reviewing domestic procedural justice and leading through example. The upcoming face veil case of *SAS v France* will be an excellent opportunity for the Court to show both its willingness and its capacity to do so.

[152] See mutatis mutandis ECtHR, Koky and Others v. Slovakia, 12 June 2012, para. 239.
[153] See also Tulkens, Françoise, "The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism", *Cardozo Law Review* 30(6) (2009), p. 2587.

ADDENDUM to Chapter VI- A Procedural Fairness Look at the Grand Chamber Judgment of *S.A.S. v. France*

In our article,[1] Eva Brems and I argue that in the case of *S.A.S. v. France*[2] concerning the French face-veil ban, the Court had an opportunity to 'break the circle of prejudice' about women wearing a face-veil. We argue that the Court should recognize the applicant, the weight of her right and her minority position. The first goal is almost fully achieved by the Court. The Court puts the applicant's perspective (and with hers, the perspective of women wearing a face-veil) to the fore whenever it has an opportunity to do so. The Court shows respect for her choice to wear a veil and examines her arguments, taking into account her concerns and even the concerns of the broader Muslim community. In contrast, when it comes to the applicant's rights, the Court fails to give them sufficient weight. By according the State a wide margin of appreciation in this case, despite all the arguments in the reasoning pointing to problematic aspects of the ban, the Court ultimately gives a *carte blanche* to the State, leaving the applicant's concerns and interests as they are. This aspect of the Court's reasoning is not only problematic from a substantive point of view, in that it leaves the applicant, who belongs to a minority group, unprotected, but it is also problematic from a procedural justice point of view. The main focus of this commentary will be on the second problematic aspect.

In this addendum, first a short summary of the judgment will be given, followed by a critical analysis in light of the arguments made in the chapter preceding the addendum. The analysis will first highlight the positive procedural fairness aspects of the judgment and will then uncover the main problematic aspect.

1. Summary of the judgment

The case of *S.A.S. v. France* was introduced on the day of the entry into force of the French law banning the face-veil[3] by a French citizen who wore a veil. The applicant stated that 'she wore the niqab in public and in private, but not systematically: she might not wear it, for example, when she visited the doctor, when meeting friends in a public place, or when she wanted to socialise in public'.[4] She also 'did not claim that she should be able to keep the niqab on when undergoing a security check, at the bank or in airports, and she agreed to show her face when requested to do so for necessary identity checks'.[5]

Before the Court, the applicant claimed a violation of articles 3, 8, 9, 10 and

[1] See Chapter 6, based on Saïla Ouald Chaib and Eva Brems, 'Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe', 2 *J. Muslims Eur.* (2013), 1–26.
[2] ECtHR (GC), *S.A.S. v. France*, 1 July 2014.
[3] Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.
[4] ECtHR (GC), *S.A.S. v. France*, 1 July 2014, §12.
[5] Idem, §13.

11 separately and in conjunction with article 14. The Court, however, found no violation of any of these articles. The main reasoning in the case revolved around article 8 (right to private life) and 9 (right to freedom of religion), which the Court examined together.

The Court started its judgment with an examination of the two legitimate aims invoked by France, the first being the protection of safety and the second referring to 'respect for the minimum set of values of an open and democratic society'.[6] This second aim encompasses three separate values: the protection of gender equality, of human dignity and of the so-called principle of 'living together'.

1.1. Gender equality and human dignity

From the outset, the Court made it clear that the arguments concerning gender equality and human dignity cannot be accepted as legitimate aims. The Court took the view that

> a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.[7]

With regard to the human dignity argument the Court noted that it

> is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy.[8]

In other words, the Court did not accept that feelings of discomfort or disagreement with the face-veil could lead to a 'blanket ban on the wearing of the full-face veil in public places'.[9] Instead, it highlighted the women's right to choose to wear a veil, which the Court even described as an expression of an identity that contributes to pluralism.

1.2. Public Safety

The second aim, the protection of public safety, was accepted by the Court as

[6] Idem, §16.
[7] Idem, §119.
[8] Idem, §120.
[9] Idem, §120.

a legitimate aim, but not uncritically, since it questioned whether safety reasons really motivated the drafters of the law. The Court noted that 'it may admittedly be wondered whether the Law's drafters attached much weight to such concerns' and observed that the safety argument was clearly considered to be of secondary importance.[10] In any event, the Court made it clear that 'a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety'.[11]

This context of a 'general threat' was, according to the Court, not present and the State had less restrictive means at its disposal which enabled it to ensure public safety, such as a contextual obligation to show the face in risky situations.[12] Meanwhile, as the Court noted, the women concerned were 'obliged to give up completely an element of their identity that they consider important, together with their chosen manner of manifesting their religion or beliefs'.[13] The Court therefore concluded that a blanket ban was manifestly disproportionate and could not be justified for reasons of safety.

1.3. Living together

The last aim, the concept of 'living together', is the one that received most attention from the Court. This does not come as a surprise since it is also the main aim that dominated the debates at the domestic level. The Court categorized this aim under the protection of the rights and freedoms of others, in particular 'the right of others to live in a space of socialisation which makes living together easier'.[14] Its recognition of living together as a legitimate aim did not come without scepticism about the 'flexibility' of this notion 'and the resulting risk of abuse'.[15] The Court

[10] Idem, §115.
[11] Idem, §139
[12] Idem, §139: in particular the Court argues that 'the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud'.
[13] ECtHR (GC), *S.A.S. v. France*, 1 July 2014, §139.
[14] Idem, §122.
[15] Idem, §122. The Court's critical stance, however, remains at the surface. Several authors rightly criticize the Court's acceptance of 'vivre ensemble' as a legitimate aim. See for example Stephanie Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?', 2 July 2014 on *EJIL:Talk*, (available at http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/), where she argues that by endorsing this notion, the Court endorses an assimilationist position. See also Eva Brems, 'S.A.S. v. France as a problematic precedent', 9 July 2014, *Strasbourg Observers*, available at http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/, where she criticizes the fact that the Court accepts this notion without requiring an objective basis and without questioning the reason behind 'the perceived negative impact on "living together"', which is 'discriminatory bias'. She also points out that in this case 'the "others" in the name of whose "right to live in a space of socialisation" the ban is upheld, are the very people who chose not to want to socialize with veiled women'. See also Erica Howard, 'S.A.S. v France: Living Together or Increased Social Division?', 7 July 2014 on *Ejil:Talk,* available at

therefore warned that it 'must engage in a careful examination of the necessity of the impugned limitation'.[16]

Although at first sight the Court indeed seems to have applied a 'careful examination', since it deeply scrutinized the several arguments of the applicant and even of the third party interveners,[17] ultimately it gave *carte blanche* to the State by uncritically according it a wide margin of appreciation. As a consequence, no violation was found of article 8 and 9 ECHR.

Not surprisingly, the Court received much criticism of its reasoning in this case.[18] [19] Most of this criticism mainly and rightly refers to the lack of protection offered by the Court, calling the endorsement of the principle of 'living together' a 'problematic precedent'[20] and asking what 'remain[s] of the right to manifest religion'.[21]

In the folowing sections, the Court's reasoning will be critically assessed mainly from a procedural fairness point of view in light of the arguments made in the article co-authored by Eva Brems and myself, on which the previous chapter (chapter 6) is based. It will analyse how the Court approached the applicant and her concerns and how the Court's reasoning can be interpreted from the perspective of respect for the applicant's right to freedom of religion.

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http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/, who argues that the Court insufficiently acknowledges the polarizing character of the ban instead of leading to 'living together'.

[16] ECtHR (GC), *S.A.S. v. France*, 1 July 2014, §122.

[17] See infra under 3.

[18] Susan S M Edwards, 'No Burqas We're French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling', *26 Denning Law J.* (2014), 246–260. See for example Stephanie Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?', 2 July 2014 on *EJIL:Talk*, (available at http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/); Eva Brems, 'S.A.S. v. France as a problematic precedent', 9 July 2014, *Strasbourg Observers*, available at http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/; Erica Howard, 'S.A.S. v France: Living Together or Increased Social Division?', 7 July 2014 on *Ejil:Talk,* available at http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/; and Saïla Ouald Chaib and Lourdes Peroni, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil', 3 July 2014, *Strasbourg Observers*, available at http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/; Lucy Vickers, 'Conform or be confined: S.A.S. v France', 8 July 2014, *OXHRH*, available at http://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/; Mark L. Movsesian, 'European Human Rights Court to France: Do Whatever You Want', 3 July 2014, available at http://clrforum.org/2014/07/03/european-human-rights-court-to-france-do-whatever-you-want/ (all articles were last accessed on 25 March 2015).

[19] On the blog Strasbourg Observers, a poll was organized in which readers could vote for the best and worst judgment issued in 2014. *S.AS. v. France* topped the list of worst judgments. See: http://strasbourgobservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014 (last accessed 26 March 2015).

[20] Eva Brems, 'S.A.S. v. France as a problematic precedent', 9 July 2014, *Strasbourg Observers*, available at http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/.

[21] Stephanie Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?', 2 July 2014 on *EJIL:Talk*, (available at http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/).

2. Voice of women wearing a face-veil finally heard

It cannot be denied that, despite the fact that the outcome in this case was an anticlimax, which will be discussed in the next section, the Court did some ground-breaking work in its approach to the applicant. Until now, cases concerning Muslim women have often lacked recognition of and respect for their concerns.[22] The Court's remark about the Islamic headscarf in *Dahlab v. Switzerland*,[23] for example, became (in)famous, the Court stated that

> it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, 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.

Although this position was only reiterated in the case of *Leyla Sahin v. Turkey*,[24] the Court has never implicitly or explicitly distanced itself from this position. What is more, in most cases concerning religious symbols the concerns of the applicant are not sufficiently recognized.[25] The analysis below will reveal a different approach by the Court, in that it stresses the autonomy of the applicant and shows respect for her choices and also clearly takes her arguments and concerns into account. From a procedural justice perspective, this indicates that the Court shows respect, gives the applicant a voice and cares about her concerns. However, as will be demonstrated in the next section, there is a gap between recognition and truly taking the voice and concerns into consideration.

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[22] A selection of the criticism of the Court's case law concerning Islamic veiling can be found here: Anastasia Vakulenko, '"Islamic headscarves" and the European Convention on Human Rights: an intersectional perspective', 16 *Soc. Leg. Stud.,* (2007), 183–199; Peter Cumper, '"Taking Religion Seriously?" Human Rights and Hijab in Europe - Some Problems of Adjudication', 24 *Journa of Law and Religion* (2008), 599; Nusrat Choudhury, 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls', 16 Columbia Journal of Gender and Law, (2007), 199–296; Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation', 56 *Int. Comp. Law Q.*, (2008), 395–414, 'The "Islamic Scarf" in the European Court of Human Rights', 7 *Melb. J. Int'l L.*, (2006), 52–73; Eva Brems, 'Above Children's Heads. The Headscarf Controversy in European Schools from the Perspective of Children's Rights', 14 *Int. J. Child. Rights* (2006), 119–136.

[23] ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

[24] ECtHR (GC), *Leyla Sahin v. Turkey*, 10 November 2005.

[25] Cf. supra Chapter 3.

2.1. Respect for the applicant's autonomy

Following the State's objection to recognizing that wearing the face-veil could be considered a manifestation of religion, the Court reiterated its principle that the State's duty of neutrality entails that no legitimacy assessment can be made of religious beliefs and the way they are expressed.[26] Similarly to its reasoning in the judgment of *Eweida and others v. the UK*,[27] the Court stated that

> [i]t cannot … be required of the applicant either to prove that she is a practising Muslim or to show that it is her faith which obliges her to wear the full-face veil. **Her statements suffice** in this connection, since there is no doubt that this is, for certain Muslim women, a form of practical observance of their religion and can be seen as a "practice" within the meaning of Article 9 § 1 of the Convention. The fact that it is a minority practice … is without effect on its legal characterisation.[28]

The Court clearly started from the autonomy of the applicant, with respect for her choices. This is not only the case in its assessment whether a manifestation of religion was at stake, but recurs in different parts of the judgment. In its assessment of gender equality as a legitimate aim, the Court referred to the wearing of the face-veil as 'a practice that **is defended** by women'.[29] In its proportionality assessments concerning the argument of the protection of safety, the Court referred to the 'impact on the rights of women **who wish to wear** the full-face veil for religious reasons' and the fact that 'they are thus obliged to give up completely an element of their identity that they consider important, together with **their chosen manner of manifesting their religion or beliefs**'.[30] Under its proportionality analysis concerning the aim of 'living together', the Court put the applicant's choice at the centre: 'the ban has a significant negative impact on the situation of women who, like the applicant, **have chosen to wear the full-face veil** for reasons related to their beliefs'.[31] Further, in its assessment of the fine imposed on the women, the Court's understanding was that 'the idea of being prosecuted for concealing one's face in a public place is traumatizing for **women who have chosen to wear the full-face veil** for reasons related to their beliefs'.[32] Finally, in its conclusion the Court once more noted the impact of the ban in preventing women 'from **expressing their personality and their beliefs** by wearing the full-face veil in public'.[33] As mentioned earlier, this approach is a clear departure from the Court's previous case law, in which it

[26] ECtHR, *SAS v. France*, 1 July 2014, §55.
[27] ECtHR, *Eweida and others v. UK*, 15 January 2013.
[28] ECtHR, *SAS v. France*, 1 July 2014, §56. (emphasis added.)
[29] Idem, §119. Emphasis added.
[30] Idem, §139. Emphasis added.
[31] Idem, §146. Emphasis added.
[32] Idem, §152. However, hereafter comes the observation that the level of the fine is only 'the lightest that could be envisaged', which somehow weakens the seriousness of this argument.
[33] Idem, §153. Emphasis added.

expresses in generalizing terms value-judgments on the wearing of the headscarf by Muslim women, disregarding their own autonomous choices.[34] In addition, by applying an approach which explicitly and regularly emphasises the autonomy of the women concerned, the Court took a clearly different position from the approach expressed in the domestic debates, which were held in stereotyping terms and the voices of the women concerned were insufficiently heard. Instead, the Court gave the women a voice and put respect back on the map in a debate where this was often lacking.

2.2. Recognition for the applicant's concerns

The Court not only showed respect for the autonomy of the applicant, but also acknowledged her concerns and the harm she suffered because of the ban. This was already clear in the Court's reasoning on the safety argument,[35] where the Court pointed to the effect of the ban on women who are 'obliged to give up **completely an element of their identity** that **they consider important**, together with their chosen manner of manifesting their religion or beliefs'.[36] The Court further found it 'understandable that the women concerned **may perceive the ban as a threat to their identity**'[37] and that it prevented them from '**expressing their personality** and belief'.[38] One of the main harmful consequences of the ban, as interpreted by the Court, was the threat to their identity. This not only showed recognition for the applicant's concerns in an empathic way (the Court understands), but also clearly assessed the issue from the applicant's point of view (it was not only an interference with her rights, but her identity and personality were at stake). The Court could instead have stated that the ban was interfering with her rights in that she was limited in expressing and manifesting her belief. However, it chose to bring her deep personal concern to the fore, namely the important impact the ban had on her and the way she perceived it. This deep understanding and acknowledgment of the applicant's concerns has not been seen in cases concerning Muslim women. It is as if the Court was saying, we hear you and understand you!

The Court additionally acknowledged the problematic way in which the debates had been held, as voiced by different third party interveners.[39] The Court noted that it 'is very concerned' by the indications that 'certain Islamophobic

[34] Lucia Dahlab was a school teacher and Leyla Sahin a medical student and yet the Court referred to the headscarf as a symbol that was 'imposed on women'.
[35] Cf supra 1.2.
[36] ECtHR, *SAS v. France*, 1 July 2014, §139.
[37] Idem, §146.
[38] Idem, §153.
[39] Idem, §149, reference to observations of the Human Rights Centre of Ghent University and of the non-governmental organisations Liberty and Open Society Justice Initiative.

remarks marked the debate which preceded the adoption of the Law'.[40] It pointed out the risk this entailed 'of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance'.[41] Thus, the Court expressed its concern not just for the applicant's interests, but also for the broader society. Indeed, one of the main critiques voiced about this ban concerns its polarizing effect.[42]

The Court also specifically addressed the broader Muslim community, mentioning that it 'is also aware that the Law of 11 October 2010, together with certain debates surrounding its drafting, **may have upset part of the Muslim community**, including some members who are not in favour of the full-face veil being worn'.[43]

It is interesting to see that the Court did not limit itself to a discussion of the law banning the face-veil, but also brought the debate preceding the ban into the picture. The Court clearly wanted to communicate a broader message in this case that was addressed not only to the particular applicant, but also to other women wearing a face-veil (we respect your autonomy and we understand your concerns), to the Muslim community (we realize the ban and the debate is upsetting for you) and to society (be careful not to stereotype and polarize).

It is noteworthy, moreover, that the Court acknowledged the concerns of the proponents of the ban too, which is also important from a procedural fairness point of view. For example, the Court stated that it:

> is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy.[44]

From a procedural justice point of view, it is important that the Court also recognized the concerns people have against full-facial veils.

The Court's deep recognition of the applicant's concern is, however, somehow weakened at the end of the judgment. When talking about the fine imposed by the ban, the Court stated that it should 'be taken into account that the sanctions provided for by the Law's drafters are among the lightest that could be envisaged, because they consist of a fine at the rate applying to second-class petty offences (currently 150 euros maximum), with the possibility for the court to impose,

[40] Idem, §149.
[41] Idem, §149.
[42] E.g. Erica Howard, 'S.A.S. v France: Living Together or Increased Social Division?', 7 July 2014 on *Ejil:Talk,* available at http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/
[43] ECtHR, *SAS v. France*, 1 July 2014, §148.
[44] Idem, §120.

in addition to or instead of the fine, an obligation to follow a citizenship course'.[45] Hence, while it first acknowledged that '[i]t is certainly understandable that the idea of being prosecuted for concealing one's face in a public place is traumatising for women who have chosen to wear the full-face veil for reasons related to their beliefs',[46] with this statement the Court minimized the consequences of the ban for the applicant.

Nevertheless, it is very clear from the text of the judgment that the Court offered a platform for the applicant by representing her side of the story and the personal harm that she suffered not only from the ban itself, but also from the debates surrounding it. This recognition is essential, especially in light of the lack of it in the domestic debates, but also in light of the Court's case law concerning the manifestation of religion through the wearing of religious signs.

2.3. Right to freedom of religion (still) not taken seriously

Besides a deep recognition of the concerns of the applicant, it is remarkable how the Court carefully examined the arguments made by the applicant (and some of the intervening non-governmental organisations). This should be self-evident, of course, but it is not always standard practice in article 9 case law, as illustrated in chapter 3 of this dissertation.[47] The most important arguments can shortly be listed as follows.

The Court first agreed that the number of women wearing a face veil was very small and as a consequence noted that '[i]t may thus seem excessive to respond to such a situation by imposing a blanket ban.'[48]

Secondly, the Court acknowledged, as noted earlier, the negative impact of the ban on the women concerned since the ban 'may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life'.[49]

Thirdly, the Court mentioned that a 'large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate'.[50]

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[45] Idem, §152. This statement is not convincing from a substantive point of view, since as Brems also argues, this line of reasoning ignores the fact that it is the criminalization of women and the imposition of a fine as such which makes the ban humiliating, harmful and problematic, rather than the amount of the fine itself. Eva Brems, 'S.A.S. v. France as a problematic precedent', 9 July 2014, Strasbourg Observers, available at http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/

[46] Idem, §152.

[47] See supra Chapter 3 of this dissertation.

[48] ECtHR, *SAS v. France*, 1 July 2014, §145.

[49] Idem, §146.

[50] Idem, §147.

As noted earlier, the Court acknowledged, in fourth and fifth points, the observations made by third party interveners in taking into account the impact of the ban on the broader Muslim community, as noted earlier,[51] and voiced its concern about the risk of stereotyping effects resulting from the debates surrounding the ban.[52]

The Court thus clearly examined the arguments in detail and agreed overall that the ban was disproportionate in relation to the small number of women wearing a veil and that it affected these women deeply. After these five convincing arguments, the 'inevitable conclusion' seems to be that a breach of article 9 would be found.[53] Yet, the Court decided otherwise.

The Court's approach to the applicant's arguments showed a willingness to recognize the issue at stake, but does it also show a willingness to fully examine the case? The Court ultimately decided that France should be granted a wide margin of appreciation in the matter, noting that 'the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society'[54] and concluding that '[i]t can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society'.[55] The Court added that '[i]n such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess **a balance that has been struck by means of a democratic process within the society in question'**,[56] and further that 'in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight'.[57]

This conclusion is in the first place problematic at a substantive level, especially from the perspective of people belonging to minority groups.[58]

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[51] Idem, §153. Cf supra 2.2.

[52] Idem, §149.

[53] See Lucy Vickers, 'Conform or be confined: S.A.S. v France', 8 July 2014, *OXHRH*, available at http://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/; and also Saïla Ouald Chaib and Lourdes Peroni, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil', 3 July 2014, *Strasbourg Observers*, available at http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/

[54] ECtHR, *SAS v. France*, 1 July 2014, §153.

[55] Idem, §153.

[56] Idem, §154. Emphasis added.

[57] Idem, §154.

[58] It makes the right to freedom of religion void for people in a minority position since ultimately their right is subjected to 'the choice of society'. The reasoning also starts from the assumption that measures taken through a democratic process should not be assessed and thus assumes that the result of a democratic process is by definition valid, which ignores that the minority position of people are de facto disadvantaged and that the Court should, especially in this kind of case, be more careful. For a more detailed analysis of the problematic aspects from a substantive point of view, see Saïla Ouald Chaib and Lourdes Peroni, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women

Additionally, from a procedural justice point of view this 'move' of the Court in the conclusion is disturbing.

Although the Court initially gave the applicant a voice, approached the issue at stake with respect and showed care and understanding *vis-à-vis* her concerns, the way in which the Court ultimately proceeded in the conclusion brushed away all the arguments it found valid against the ban and replaced them by a wide margin of appreciation for the State. It is as though the Court collected several weights on its way to the conclusion, on the side both of the applicant and of the State, but in the end forgot to put them in the scale in order to balance them. Instead, it assumed that the State put these weights in its own balance, while earlier in the judgment, the Court clearly pointed to important flaws in the ban and the debate surrounding it at the domestic level. It is indeed defensible that the Court should accord a margin to states to decide how they fulfil their national policies, including in religious matters. However, this does not take away the Court's right, even duty, to check whether the several interests have really been weighed in the scale at the domestic level, and whether the applicant's concerns have truly been taken into account. The fact that this did not happen in the matter of the face veil was blatantly clear, which should have led to a narrower margin of appreciation.

A true procedural justice stance and true respect for the applicant's right to freedom of religion requires not only recognition of her arguments and concerns, but also a true consideration of her voice. In this judgment the Court indeed listens to the applicant's voice and concerns and does so excellently. However, listening and acknowledging are not sufficient; the Court should also have been more consequent in its approach and should have truly taken these observations into consideration when deciding the case.

Wearing a Face Veil', 3 July 2014, *Strasbourg Observers*, available at http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/.

GENERAL CONCLUSION

This dissertation has sought to examine what role the European Court of Human Rights can play in the religiously diverse context of Western Europe through the way it deals with religious claims brought under the right to freedom of religion protected by article 9 ECHR. It advances the thesis that in terms of inclusion, attention should be paid not only to the substantive aspect of the reasoning, but also to the procedural aspect. In this general conclusion I will look back at the main findings of this dissertation and reflect on the suggestions I make for improvement in the case law. Finally, I will explore possible fields of study for future research.

Introduction

If your work schedule conflicts with your religious duty to respect the Sabbath, the possibility of resigning from your job is the ultimate guarantee of your right to freedom of religion. There is no appearance of a violation of your right when you are not able to see a priest in prison. And when you can listen to the Sunday mass through the walls of your prison cell, no limitation of your right can be discerned. If you are expelled from school because you wear a headscarf or a turban, you can still follow home schooling. In any event, you are expelled from school not because of your religious conviction, but because you infringed the school regulations. Moreover, it cannot be denied that the headscarf is a symbol which is not reconcilable with principles such as gender equality and respect.

These statements all represent certain lines of reasoning advanced by the Court in cases concerning religious claims, in particular with regard to claims for the accommodation of religious needs. Without any doubt these statements reflect a narrow, non-inclusive interpretation of the fundamental human right to freedom of religion. It does not therefore come as a surprise that, despite the important work it has generally done for human rights protection in Europe, the Court has been widely criticized for its approach in these cases. The Court has been criticized for not offering sufficient protection to the right to manifest a religion and for interpreting the right in a restrictive and non-inclusive way, especially in cases in which people belonging to minority groups are involved. This is also confirmed by the extensive research on the Court's case law in cases concerning religious accommodation claims in the workplace I conducted in chapter IV of this dissertation. In that chapter I uncovered how until recently the Court (and the former Commission of Human Rights) offered very little protection to people requesting accommodation of religious needs in the workplace. The analysis shows in particular how many claims do not make it beyond the interference level and how in other cases a wide margin of appreciation accorded to the State leads to a de facto absence of protection for the applicants, who in the majority of the cases belong to minority groups. However,

chapter IV also uncovered how the problematic aspects in the cases examined often occur at a procedural level. The reasoning in these cases, but also in the statements I mention in the previous paragraph, in essence show a lack of understanding and empathy for the applicants and a lack of recognition of the applicants' concerns. A comparison with the reasoning in other cases brought under other articles, for example under freedom of expression, revealed that the Court's approach can be different and more inclusive towards the applicants.

In this thesis, I started with a multi-layered view of inclusion, encompassing both inclusion at a structural or substantive level and inclusion at a more subjective level. Structural inclusion refers to actual inclusion, for example through the accommodation of particular religious needs. With the subjective level of inclusion I refer to peoples' feeling of inclusion – the feeling of belonging to the group or, more generally, to society. As social psychology research shows, these feelings can be encouraged when people receive the message that they are considered valued and respected members of society. Therefore, complementing the already existing critique of the Court's article 9 adjudication from a substantive view on inclusion, I advocate for more attention to be paid to the subjective aspect of inclusion as well.

In the religiously diverse context of Western-Europe this is particularly important. In chapter I, I sketched the societal context in which religious claims must be viewed. On the one hand, a growth in the diversity of the religious population can be observed in Western Europe. On the other, a decline in religiosity is also observed. Secularism, for example, is clearly on the rise. In this highly diverse context, conflicting views and needs are a logical consequence and it will never be possible to meet everyone's expectations. In particular, it is impossible to accommodate all the diverse religious needs in daily aspects of public life, such as in schools and workplaces. However, despite the fact that peoples' needs will structurally not always be included, it is still possible to communicate to them that despite this impossibility, they are still considered valued members of society. Therefore, this dissertation posits that in the context of the Court this means that even though it cannot always rule in favour of the accommodation of religious applicants, the Court can still try to communicate an inclusive message through the way it treats the applicants and their cases at the procedural level. In cases concerning religious accommodation claims, this is particularly important, since accommodation claims, as argued in this study, inherently concern claims for inclusion in daily aspects of public life with respect for the personal identity. These claims are, moreover, mostly made by applicants belonging to minority groups.

Additionally, chapter I also showed that debates on religious issues are often sensitive and held in a polarizing and confrontational way, creating divisions between 'us' v. 'them'. Not only do religious and non-religious views collide, but

several reports show also that anti-Muslim sentiments are on the rise. In this context particular attention to exclusionary patterns is therefore highly recommended. For the Court, this means that in religious freedom cases and especially in cases concerning religious minorities, who are in particular subjected to confrontational debates, the Court should make an extra effort to reflect on how it can communicate an inclusive message through its decisions and judgments.

The sensitivity surrounding debates about religious issues is a challenge for the Court, as could be witnessed in the much debated recent cases of *Lautsi v. Italy*, both by a Chamber and the Grand Chamber of the Court. I acknowledge therefore that the Court's position entails difficulty when it comes to religion-related claims. However, being a supranational human rights body, I consider the Court has a particular responsibility in cases concerning disadvantaged groups. Indeed, freedom of religion claims are often made by people belonging to minority groups, who are, by definition, more likely to be marginalized in society. I argue therefore that the Court should be particularly careful in this kind of cases, not only to protect them at a substantive level in accordance with the ECHR, but also to treat them in an inclusive way. Therefore, despite the difficult position, I consider that the Court is in a privileged position in which it has an opportunity to exercise a corrective function both towards structural exclusionary patterns at the domestic level and also towards the inherent power imbalances present in debates on religion at the domestic level. Indeed, the Court has an opportunity to offer a platform where everyone is heard and respected equally, in contrast to the way debates are held in society, and it can also function as a beacon of justice, neutrality and trust where people's rights and concerns are at the centre of attention.

Against this background, I decided to focus my attention in this dissertation mainly on the procedural aspect of the Court's reasoning in article 9 cases, rather than on the substantive aspect. This means that the central question concerns how the Court treats religious applicants, their claims and their rights in the article 9 case law. I found inspiration in social psychology research on procedural justice, which shaped the framework in which I undertook the critical case law analysis. Additionally, it also inspired me in my normative arguments made in favour of improvement of the Court's article 9 adjudication.

1. Procedural justice: towards a complementary inclusive approach in freedom of religion adjudication

In Part II of the dissertation, I offer a framework through which the procedural aspect of the Court's case law can be examined. I rely on the social psychology research on procedural justice or procedural fairness, which refers to the fairness of the process of decision making rather than the fairness of the outcome. In this

dissertation I built on the work of Tyler, an eminent scholar in the socio-psychological field of procedural justice research, and the work of Brems and Lavrysen, who have applied this research in the context of human rights adjudication, in particular in the context of the Strasbourg Court. In this dissertation I deepened their framework in the context of the Court's jurisprudence under article 9.

Through his empirical research, Tyler advances four procedural fairness criteria which are found to be particularly relevant in the context of courts: voice, neutrality, respect and trustworthiness. These criteria entail that people want to be heard by the Court and they want their voice to be taken seriously. Secondly, they also expect judges to be impartial and that their case is treated in an unbiased way. Thirdly, people want to be treated with dignity and respect. Finally, they value the trustworthiness of courts. They evaluate whether the court is treating them and their claim in a caring and genuine manner and is making a true effort to be fair in their case.

These criteria are found to be particularly relevant for people's perception of the legitimacy of courts. I argued therefore, concurring with Brems and Lavrysen, that taking procedural justice into account, meaning treating people in a fair, neutral and respectful manner, is particularly relevant for the Strasbourg Court in keeping and strengthening its position as the pivotal human rights institution in Europe. Additionally, I stressed the relevance of securing legitimacy in light of the fact that the Court can be considered a representative and the guardian of human rights norms and rights in Europe; perceptions of the European Court of Human Rights can therefore have an impact on peoples' perception of human rights.

A central finding of procedural justice research is that in their evaluation of authorities, among them the courts, people care more about procedural fairness than about outcome fairness. This means that the way the Court treats people and their cases is of crucial importance for the level of trust people will hold in the Court. Procedural fairness can thus play a role in avoiding the alienation of people from the protection of the Court. I argued that this finding is particularly important in a diversity context with regard to people belonging to minority groups in that in general they are considered to be less trustful than people belonging to majority groups. Additionally, especially in the context of human rights protection, it is important that people keep faith in the Court so that they take the step of bringing before the Court their claims in search of human rights protection. Since people belonging to religious minority groups are more likely to be confronted with limitations on their human right to freedom of religion, it is particularly important that they keep seeking protection from the Court and that the Court does not alienate them.

Moreover, a very important segment of procedural justice research is the examination of the motivations behind people's procedural justice assessments. Why do people care about procedural justice more than about outcome justice? And why does this aspect in particular shape their views on the legitimacy of authorities? The answer offered through the empirical findings of social psychology research is in essence the following: people care about being treated fairly, respectfully and in a caring and unbiased way because it makes them feel good. It increases their feelings of self-worth since they feel they are considered to be valued members of society. And as the research shows, this observation is universally applicable, no matter what background people have. It is essentially a human need to be recognized, to be listened to and to be respected. The importance of applying high procedural fairness standards is applicable to all claims and all applicants. However, I argue strongly that this finding should encourage the Court even more to pay particular attention to procedural fairness standards in cases concerning religious minorities. I argue from the perspective of inclusion that the Court should, especially in their cases, avoid acting in a procedurally unfair or disrespectful manner, since this communicates to them that they are marginal members of the group, and thus of society. Of course no one should receive this message, but since minorities are by definition more prone to marginalization from society, and are de facto often disadvantaged, it is of fundamental importance that the Court should avoid sending exclusionary messages to these people through procedurally unfair treatment.

I also highlighted the Court's exemplary function in applying high procedural fairness standards. As Brems and Lavrysen also argue, procedural fairness should, irrespective of the benefits it entails for the Court's legitimacy, matter to the Court because in essence, procedural fairness is part of the value system the Court represents. Respect, neutrality and trustworthiness are values that the Court, as a human rights institution, should by definition apply. Moreover, as Chapter I brought to light, in the principles accompanying its judgments and decisions in article 9 case law, the Court also refers to principles comparable to those that procedural justice research advances. Examples are the Court's reference to the State's duty of neutrality and impartiality, the importance of dialogue and the responsibility to make an effort in the search for a balance between competing interests. Expecting this behaviour from States, the Court should at least lead by example by applying high procedural fairness standards in its own case law.

As argued in chapter I, the Court should be aware of the important role it can play in Europe, since although it rules only in particular cases, the messages it sends and the principles it sets influence debates at the domestic level. Moreover, I also argue that through individual cases the Court reaches a broader group of people who identify with the case. The inclusive or exclusive messages it sends through its case law will as a consequence also have an impact on them. In short, this means that when the

Court makes biased statements, such as its (in)famous statements on the headscarf, this has an impact on the way the headscarf is discussed at the domestic level and it also has an impact on other people who identify with the applicant in the case, for example other women wearing a headscarf. In this sense, the case of *S.A.S. v. France*, concerning the debate on the face-veil, was an important test case in which, as Brems and I argued in the article included in chapter VI, the Court had an opportunity to break the circle of prejudice about women wearing a face-veil, which it did, as I discussed in the addendum to chapter VI.

Hence, the concept of procedural fairness offers a lot of potential for the Strasbourg Court, especially when it comes to the protection and inclusion of religious minorities. The procedural justice criteria formed the basis on which I built my normative framework, through which the procedural aspects of the Court's reasoning are examined. In the next section, I will discuss the main findings of my analysis.

2. A broad and deep analysis of the article 9 case law through a procedural justice lens: the results

In this dissertation, I submitted the Court's article 9 case law to a thorough analysis, using different methodologies. In Chapter III, all the cases since the reform of the Court in November 1998 up to the date of publication of the Grand Chamber judgment in the case of *S.A.S. v. France* in July 2014 were covered. The cases were analysed in an inductive way, inspired by the qualitative data analysis method of grounded theory. The analysis was conducted in different steps. First, the cases were approached in an open general manner, asking three questions: How does the Court approach the applicant? How does it deal with religious claims? And finally how does it deal with the applicant's right to freedom of religion? At a second level, the results that emerged from this first-level analysis were examined through a procedural justice lens. In contrast, Chapter V starts with one case in particular: *Suku Phull v. France*. The case is examined in depth from a procedural justice perspective, using a direct deductive approach. The procedural justice criteria are in this chapter immediately applied to the case. Chapter VI anticipates what was at the time of writing the forthcoming case of *S.A.S. v. France*. It starts with an analysis of procedural justice flaws at the domestic level and argues how the Court should deal with these flaws in its decision, but also how the Court could do a better job in its own reasoning. Chapter IV concerns a specific segment of the case law (of both the Strasbourg institutions), namely cases concerning religious accommodation claims in the workplace. These cases were analysed not directly from a procedural justice perspective but in a broader way, which also included an examination of the

substantive aspects of the reasoning. Nevertheless, this case study uncovered procedural fairness flaws similar to those analysed in the other chapters.

Several procedural justice flaws could be discerned at different levels across the case law. A first aspect of the article 9 case law which I considered problematic is the decision taken by the Court in some cases not to examine an article 9 claim. In some cases the Court decides not to examine article 9 separately since it has already examined the claim under another article. In other cases, the Court decides to examine the applicant's claim under one article alone. Mostly this happens in cases where the claim does not fall under the scope of article 9 or because examination under article 9 would be similar to examination under the other article. However, this is not always the case. In some cases the article 9 aspect was at the heart of the claim, such as in the case of *Kavakci v. Turkey*, discussed in depth in chapter IV. In such cases, the non-examination is problematic from a perspective of representation and consideration of the applicant's argument. I argued therefore that the Court should not lightly decide not to examine the article 9 claim.

At a second level I examined from a procedural justice angle how the Court names the applicant and the religious practice at stake. Both chapter III and chapter V uncover the inconsistency in the way the Court refers to the applicant's religious background and to the religious practice involved. With regard to the religious background of the applicant, the Court sometimes refers to it from the applicant's perspective, meaning in literal terms how the applicant identifies him or herself (e.g. the applicant considers himself a Sikh), while in other cases, the Court states from an outsider perspective which religion the applicant professes (e.g. the applicant is a Sikh). Also, sometimes the Court uses adjectives or mentions additional information about the religious background, while in other cases it does not (e.g. the applicant is a *practising* Sikh). With regard to the description of religious practice, the same inconsistency was observed. Whereas sometimes the Court describes the religious practice from an insider perspective, in other cases the Court uses general wording stating that a certain religion prescribes a certain practice. The inconsistency in its approach as to whether an insider or outsider angle is used leads to confusion about whether or not the applicant described him or herself in this particular way or whether the Court is adding its own view. Additionally, with regard to religious practice, when using generalizing terms instead of describing the practice from individual's perspective, the Court risks entering the theological realm, which is problematic from a neutrality point of view. In some cases the Court expresses value judgments on certain practices, which of course cannot be acceptable from the perspective of respect and neutrality. It is therefore suggested that the Court take an applicant approach, using an insider perspective, always referring to the applicant and to the religious practice in the applicant's own words. This ensures that the

applicant's voice is accurately represented and that the Court remains absolutely neutral.

At a third level, the level of the actual examination of the claims, I uncovered several procedural justice flaws. Firstly, I exposed a line of reasoning which contains a lack of acknowledgment of the issue at stake. This occurs when the Court reframes the issue at stake in the case by shifting the focus to the interests of the State (e.g. not the religion, but the principle of secularism is at stake), locating responsibility for the issue with the applicant (e.g. not the religion but the applicant's conduct is the problem), or by shifting the focus of attention to the applicant's choices (e.g. the applicant knows the rules, she should thus have known that she would not be able to manifest her religion). I argued that this approach fails to take the issue at stake, and thus also the applicant's concerns, seriously. A second line of reasoning problematic at the level of the actual examination of the claim refers to possible alternatives at the disposal of the applicant. I exposed in my analysis how these proposed alternatives are actually false, since they are either non-comparable (e.g. listening to mass through the prison walls instead of attending it or being free, within the limits imposed, to manifest a religion) or in reality a compromise of the freedom of religion (e.g. the applicant's religious conviction was fully taken into account since they followed home-schooling education). I argued that these lines of reasoning show a lack of representation of the applicant's voice, that the issue at stake is not recognized and the concerns of the applicant are not sufficiently taken into account. Finally, I uncovered how the Court fails in some cases to conduct a thorough and genuine examination of the case. In many cases it simply states that no appearance of a violation can be found and often does not motivate that decision. In some cases the Court limits its reasoning to a reproduction of the arguments of the State and in other cases by referring to previous case law, such as in the case of *Suku Phull v. France*, discussed in chapter V. I argue in favour of always motivating the decisions taken and of also properly putting the interests of the applicant in the balancing scale. This approach would be considered more respectful and caring towards the applicant.

In sum, the analysis of the case law displayed several serious and less serious procedural fairness flaws. The approach taken in this dissertation is, however, not only a critical-analytical one, but is also aimed to be normative-constructive in the sense that I also wanted to advance techniques to improve the Court's article 9 reasoning. I made general suggestions for improvement in chapter III and more specific suggestions in chapters V and VI (together with Eva Brems), applying them *in concreto* to particular cases. In the next section I group the main suggestions I made throughout the several chapters.

3. Towards more inclusivity IN the Court's article 9 adjudication

In essence, the procedural fairness flaws I discovered in the case law analysis reveal a failure to take the applicant's perspective into account. Whether at the level of representation of the arguments, at the level of description of religious practice and background, at the level of balancing or at the level of deciding whether a claim should or should not be examined, ultimately all these flaws expose a neglect of the applicant's perspective in the Court's reasoning.

I therefore advocate for a better inclusion of the applicant in the text of the judgment. The suggestions for improvement in the Court's article 9 case law, which are spread across chapters III, V and IV, can be grouped as follows.

First, I advocate for **a more inclusive approach in the way the applicant and the religious practice is described**. I argue that this would ensure that the applicant's religious background and practice are accurately represented in an unbiased way. This entails that the Court should absolutely abstain from expressing value judgments on applicant's religious practices. The Court should also avoid making generalizing statements about religious practices and should be consistent and neutral in the way it describes the applicant's religious background and practices. I therefore recommend taking an insider perspective when describing the applicant's background and the religious practice at stake. This would involve the Court reproducing the way the applicant refers to these elements and by preference literally also formulating it in a way which makes clear that the wording used comprises the literal words of the applicant.

Next, I argue in favour of taking the applicant more seriously, which involves **taking a more inclusive approach to the applicant's religious concerns**. This includes ensuring that minimization of their concerns are avoided, that their arguments are listened to and taken into account, that the real issue at stake is acknowledged and that the applicant's concerns are genuinely taken into account.

Finally, I argue in favour of **a more inclusive approach towards the applicant's rights.** I advocate for taking the applicant's right to freedom of religion more seriously, which involves ensuring that religious claims are examined when they belong to the core of the applicant's case, that the interests at stake are appropriately balanced, that every case is examined on its own instead of simply referring to previous case law and that every decision is motivated properly.

4. Some positive reflections

The entry point of my research for this dissertation was to examine the case law critically and to make constructive suggestions for improvement where needed. Additionally, I would like to highlight some positive observations that came to the surface during my research.

First, as I show in chapter IV some techniques which can lead to an improvement of the case law under article 9 need not be searched for far away, since they already occur within the Court's adjudication, mostly under other articles. Additionally, inspiration can also be drawn from the general principles the Court relies on in freedom of religion case law. This means that the implementation of a better approach at the procedural level does not in itself consist of a revolutionary new technique, since the Court already applies more inclusive techniques in other segments of its case law. Secondly, also from a practical perspective of incorporating a better procedurally fair approach into its reasoning, the fact that procedural fairness criteria are universally valued should make it easier to apply than techniques which are not universally valued or accepted or even understood (e.g. the technique of reasonable accommodation). A third important positive finding is that in the course of my research term, I observed some positive changes in the Court's article 9 adjudication. The cases of *Eweida v. the UK* and *S.A.S. v. France*, for example, which I discussed at length in the addendums to chapters III and VI respectively, although not free from shortcomings, demonstrate a procedurally fairer approach than in the case law preceding them. However, the case of *S.A.S. v. France* at the same time also makes clear that procedural justice involves not only recognition of the concerns of the applicant, but also a true consideration of the applicant's perspective in the reasoning. I also think that although these cases are signals of change in the Court's freedom of religion reasoning, it is still too early to draw general conclusions about new trends in the Court's article adjudication.

5. Towards more inclusivity THROUGH the Court's article 9 adjudication?

Chapter I referred to the letter of withdrawal of *Fazilet Partizi v. Turkey*, in which the applicants mentioned that they were withdrawing their application from the Court's jurisdiction since they no longer trusted the Court. I highlighted how in their arguments they referred to procedural fairness aspects, such as the lack of respect and bias the Court displayed, according to them, in previous cases. This position seems to confirm the findings of procedural justice research and also to point to procedural justice flaws I discerned in the Court's case law. However, I am aware that I cannot generalize this example.

I started the research for my dissertation partly from the motivation to examine the role the Court can play in the diverse context of Western Europe through its article 9 adjudication. I advanced the thesis that the Court should be more attentive to the procedural aspect of its reasoning, that is, to the way it approaches the applicants and their cases; by contrast, this means that the focus should not be only on the outcome. I found that enhancing the inclusion of the applicant in its reasoning would strengthen the level of procedural fairness in its article 9 case law. In my normative framework I also referred to procedural justice research which shows how procedural fairness influences peoples' perception of the legitimacy of courts and the fact that procedural justice is much valued because it communicates inclusion to people. I also argued, concurring with Brems and Lavrysen, that procedural fairness should be applied because it is part of the values inherent in the human rights framework. However, in the normative framework offered in chapter II, I also reflected on the potential of procedural justice in a religiously diverse context. Based on the widely confirmed findings of procedural justice research, I introduced the concept of procedural justice as a potential tool for furthering feelings of inclusion or at least avoiding feelings of exclusion by people in society, especially when they belong to a minority group. I argued that the Court can, through its case law, have a direct impact on the applicant, but also an indirect impact on a broader group of people who identify with the applicant, through the message the Court sends in its judgment. In other words, when the Court uses biased statements in its case law, this communicates exclusion and marginalisation not only to the applicant but also to a broader community identifying with the applicant. I also argue that the Court can potentially have an indirect impact on domestic authorities by leading by example, influencing through the level of procedural fairness in its own case law. In other words, when the Court uses biased statements in its own case law, such as that the headscarf is not reconcilable with the values of respect and equality, it gives the impression to authorities that they can do the same. On the other hand, when the Court applies a respectful approach towards the applicant, such as in the case of *S.A.S. v. France*, the Court can potentially encourage others to approach women wearing a face-veil in a different way.

However, although the general research on procedural justice is strong and the procedural justice findings have been confirmed many times, as I mentioned in chapter I, I unfortunately do not have empirical information on the effect of procedural justice at the level of the Court. This kind of information would be extremely interesting as I will argue in the next section.

6. Looking to the future

Through my work I hope to raise awareness of the exclusionary effect courts can have at a more subjective level of inclusion, meaning the impact they can have on people's *feelings* of inclusion (additional to a maximum effort to ensure structural inclusion). I hope to encourage more research on this aspect of reasoning in fields concerning diversity matters. Through the research methods I applied, I also hope to encourage researchers in law studies to build bridges between disciplines, not only at the theoretical and conceptual level, but also at the level of methodology. Finally, I hope that the concept of procedural fairness receives more prominent attention, not only in the academic world, but also in being taken up by practitioners, both (and preferably first) at the domestic level and also at the level of the Court.

Additionally, the research conducted for this dissertation confronted me with some reflections on issues that need further examination at the level of the European Court of Human Rights. I will mention three potential questions and/or issues that merit further research which could offer more insight into the process of decision making and the role of different actors involved in it.

1. What happens after the publication of the judgment?

First, following the observations in this dissertation on the procedural aspect of the Court's reasoning, it would be interesting to complement the analytical observations and normative arguments made with empirical analysis. Potential questions that could be asked to potential respondents are the following: How do applicants react to the judgment they receive in their case? How do they experience the decision making process of the Court? What were their views of the Court before and after they received the decision in their case? What are their expectations of the Court? What are the reactions of other people who are not a party in the case, but who identify with the applicants, when they are confronted with the judgments of the Court? And even, what impact does the level of fairness demonstrated by the Court have on the decision making process at the domestic level? Also, what are the lawyers' experiences of the Court system? How do they perceive procedural fairness at the Court? The last question brings me to a second field that deserves deeper examination.

2. What happens before the judgment is written?

This dissertation is written with the aim of giving an insight in the article 9 case law and to make constructive suggestions for its improvement. As is traditionally done in legal scholarship examining the Court's case law, the Court and thus also the Court's judges are the first addressees of our reflections and criticism. However, good reasoning and good judgments are not only dependent on good reasoning written by the judges and on a good application of the rights protected by the Convention.

Good judgments also depend of good cases. And with good cases I do not mean cases that should not reach the Court; instead, by 'good cases' I refer to the quality of the file submitted to the Court. When I argue for an accurate representation of the applicant and for taking the applicant's concerns into account, a question that arises is to what extent were these concerns well formulated in the application to the Court? And to what extent does the quality of the application also influence the quality of the Court's approach at the procedural level? Additionally, I also wonder how the files/applications are translated by the Court's lawyers and judges into the final decisions. Do procedural justice (and other) shortcomings in the judgments result from a lack of quality in the files or is to a certain extent some degree of quality lost in translation by the time they are incorporated into the judgment? Should consideration be given to drafting guides or manuals to make available to potential lawyers or applicants who want to submit a case to the Court, with very concrete suggestions about how an application could best be written and what information should be explained clearly?

3. Which judgments will never be written?

I saved the most important question I have for last. While conducting the research for my dissertation, focussing on procedural fairness in the reasoning of the Court's case law and on aspects of trust in the Court, I realized that one of the main limitations a critical-analytical appraisal of case law involves is the fact that I was limited by the fact that as a lawyer I could only analyse the cases which exist. I can only analyse judgments which are issued and published in cases brought before the Court. But what about the cases that are not brought before the Court? How many claims, issues and disputes do not reach the Court? How many limitations on the right to freedom of religion encountered by people belonging to minority groups do not reach the Court? When we look at the numbers mentioned in the quantitative part of chapter I and when we compare them to the widespread debates proceeding in society and the numerous reports of NGOs which contain devastating numbers concerning discrimination against religious minorities, I wonder how it is that the Court does not receive more claims from religious minorities. It would therefore be enriching to have widespread empirical research done across European countries to gain information about the level of trust people have in the Court and to what extent they are familiar with its existence and the work it does. In that research it would be particularly interesting to include people belonging to both minority and majority groups.

For now, I can only hypothesize about possible reasons. Is the small number of cases due to the fact that justice is already done at the domestic level? This, I can only hope! Or is it because the Court is still not well enough known amongst Europeans, especially when they belong to minority groups? In that case, what can be done to

facilitate access to the Court? Or is it because people do not believe in the justice delivered by the Court? I sincerely hope this is not a reason, but if it is, I hope my work might contribute to change in a positive direction.

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SUMMARY IN ENGLISH

The effect courts can have in a diversity context should not be underestimated. From a perspective of inclusion their primary task is evidently to examine whether structural inclusion can be achieved, but additionally courts can also play an inclusive role at a more subjective level, through the messages they communicate to people. When courts use disrespectful or biased language, or when they do not take the voice of people into account, this in itself can communicate exclusion, irrespective of the actual decision taken. The present work aimed at raising awareness for this procedural aspect of adjudication. In fact, social psychology research on procedural justice convincingly shows that people do not only care about outcomes in their cases, but also, and even more, about the way this outcome is reached. The level of fairness of treatment does not only significantly impact people's evaluation of the courts, but it also has an influence on people's feeling of inclusion in the group.

This procedural perspective on inclusion is particularly relevant in the context of Western Europe, where the religious landscape is undeniably becoming increasingly diverse. A diversity of views unavoidably contains a potential for conflicts or at least debates and discussions concerning religious, political or other views. In itself, these debates are signs of a healthy democracy. However, when it comes to religion, debates tend to be sensitive and polarizing and the voices of the people concerned are very often ignored. Courts, including the European Court of Human Rights, could therefore play an important role in ensuring social cohesion and the inclusion of all individuals in society. As a matter of fact, religious diversity in society will and does increasingly find its way to judicial bodies.

This dissertation examines which role the European Court of Human Rights could play in this religiously diverse context and how it can best deal with religious claims in its own case law, in particular in the field of the right to freedom of religion. The focus in this dissertation mainly lies with the procedural fairness aspect of the case-law and it accordingly tries to be complementary to the vast body of literature dealing with the substantive aspect of the freedom of religion case-law of the Strasbourg Court. At an analytical level, this work examined how the Court deals with religious applicants, with their religious claims and with their right to freedom of religion. At a normative level, this dissertation aimed at making constructive suggestions for improvement of the case-law. At a methodological level, it examined the case-law as broadly and deeply as possible, exploring different perspectives and innovative methodologies for the analytical process inspired by social science methods.

The analysis of the case-law reveals that the Court's article 9 jurisprudence contains several flaws from a procedural fairness angle; both in the way the Court approaches

the applicants, the applicants' religious claims and the right to freedom of religion. Often the perspective of the applicants is clearly missing in the Court's article 9 judgments, their arguments are not truly taken into account and sometimes the reasoning employed shows a lack of neutrality towards certain religious practices. At the same time, the research conducted in this dissertation also reveals that the solutions for improvement of the case-law are not far away. In fact, inspiration can be drawn from the Court's own case-law in fields other than freedom of religion, where the Court displays good practices of procedural fairness. Also, applying high procedural fairness standards would be a consistent application of the principle of pluralism for which the Court advocates in its general principles accompanying freedom of religion cases. This dissertation argues for more inclusivity in the article 9 case-law of the Court. This entails a more inclusive approach in the way the applicant and his or her religious practice is described in the text of the judgment, but it also includes a more inclusive approach towards the applicant's religious concerns and towards the right to freedom of religion. This can be achieved when taking the arguments and the applicants' perspectives more into account, when acknowledging the concerns at stake and when avoiding to make generalizing statements on certain religious practices. This dissertation also reflects on whether the Court could play an inclusive role through the way it deals with article 9 claims. It is suggested that treating applicants in a neutral, respectful and caring way does not only have an impact on one applicant in a particular case, but that through its case-law the Court could have a much broader impact by communicating that no matter which religious background one has and no matter whether it is possible to find inclusive structural solutions for people's religious needs, people should always be treated with respect and in an unbiased way and their claims and concerns should be taken seriously.

SAMENVATTING IN HET NEDERLANDS

De invloed die rechtbanken kunnen hebben in een context van diversiteit kan niet worden onderschat. Vanuit het oogpunt van inclusie is de eerste evidente taak van rechterlijke instanties om te onderzoeken of structurele inclusieve oplossingen mogelijk zijn. Daarbovenop, kunnen rechtbanken echter ook op een meer subjectieve niveau een inclusieve rol spelen door de manier waarop ze met bepaalde claims omgaan. Wanneer rechters weinig respectvol of bevooroordeelde taal gebruiken of wanneer ze de stem of het perspectief van verzoekers niet in aanmerking nemen, dan kan dit in zichzelf een uitsluitend effect hebben, ongeacht de uitkomst van de zaak. Dit proefschrift heeft als doel om dit procedureel aspect van het rechtsprekend proces onder de aandacht te brengen. Zoals sociaalpsychologisch onderzoek over procedurele rechtvaardigheid (*procedural justice*) breed heeft aangetoond, zijn mensen niet enkel bezig met de uitkomst in hun zaak wanneer ze naar het gerecht stappen, maar hechten ze ook veel belang aan de wijze waarop ze behandeld worden. Zoals dat onderzoek aantoont, heeft dat laatste niet enkel een impact op de wijze waarop mensen het rechtssysteem evalueren, maar het heeft ook een impact op de wijze waarop ze zichzelf in de groep zien, op hun gevoel van inclusie in de groep.

Dit procedurele perspectief t.o.v. inclusie is in het bijzonder relevant in de context van het religieus divers diverse landschap in West-Europa. Een diversiteit aan standpunten en wereldbeelden brengt inherent conflicten, discussies en debatten met zich mee; wat een normaal gegeven is in een democratie. Wanneer het echter gaat over religieuze diversiteit en debatten rond religie in de maatschappij, dan valt het op dat deze debatten meestal gevoelig liggen en polariserend werken en dat hierbij de stemmen van de mensen om wie het gaat wel eens genegeerd worden. Rechtbanken en hoven, waaronder het Europees Hof voor de Rechten van de Mens, zouden in deze context een belangrijke rol kunnen spelen in het nastreven van sociale samenhang en in het waarborgen van maatschappelijke inclusie t.o.v. iedereen in de maatschappij.

Dit proefschrift onderzoekt welke rol het Europees Hof voor de Rechten van de Mens zou kunnen spelen in deze religieus diverse context en hoe ze het best zou kunnen omgaan met religieuze claims in haar eigen rechtspraak betreffende het recht op vrijheid van religie. De focus ligt hierbij vooral op het procedureel aspect van de rechtspraak, dit is de wijze waarop het Hof omgaat met religieuze claims, eerder dan toe te spietsen op de uitkomsten in de zaken rond vrijheid van religie. In die zin tracht dit werk complementair te zijn aan de reeds bestaande uitgebreide literatuur rond vrijheid van religie in de context van het Europees Verdrag voor de Rechten van de Mens. Vanuit analytisch perspectief heeft dit proefschrift onderzocht hoe het Mensenrechtenhof omgaat met religieuze verzoekers, met hun religieuze claims en

met het recht op vrijheid van religie. Op een normatief niveau, maakt dit proefschrift concrete voorstellen ter verbetering van de rechtspraak van het Hof. Op methodologisch vlak, ten slotte, heeft het getracht om de rechtspraak zo breed en zo diep mogelijk te onderzoeken, hierbij werd inspiratie geput uit analytische methodologie gebruikt in de sociale wetenschappen.

De analyse van de vrijheid van religie jurisprudentie van het Hof brengt verschillende tekortkomingen vanuit het perspectief van procedurele rechtvaardigheid naar de oppervlakte. Zo ontbreekt onder meer het perspectief van de verzoeker heel vaak uit de redenering in vrijheid van religie zaken en zijn de argumenten niet altijd in aanmerking genomen. Bovendien tonen sommige arresten een gebrek aan neutraliteit t.o.v. sommige religieuze praktijken. Tegelijk toont het onderzoek ook aan dat technieken voor verbetering van de rechtspraak niet noodzakelijk ver moeten worden gezocht. Een comparatieve analyse toont bijvoorbeeld goede praktijken in de jurisprudentie van het Hof onder andere artikels van het EHRM. Bovendien vloeit een inclusieve houding uit de principes die het Hof zelf voorschrijft in haar vrijheid van religie rechtspraak.

Dit proefschrift roept op tot meer inclusie in de artikel 9 rechtspraak van het Europees Hof voor de rechten van de Mens. Dit houdt in dat het Hof een inclusievere houding zou moeten hebben tegenover verzoekers, hun religieuze claims en hun recht op vrijheid van religie, door onder andere meer rekening te houden met de argumenten en het perspectief van de verzoekers, door erkenning te tonen voor hun bezorgdheden en door te vermijden om generaliserende uitspraken te doen. Dit proefschrift reflecteert ook over de al dan niet inclusieve rol die het Hof zou kunnen spelen via haar rechtspraak rond vrijheid van religie. Het argumenteert dat wanneer verzoekers op een neutrale, respectvolle en oprechte manier behandeld worden, dit niet enkel een impact heeft op de verzoeker in de bepaalde zaak, maar het een veel bredere impact kan hebben op de samenleving. Door de wijze waarop het Hof verzoekers en hun religieuze claims behandelt, communiceert het immers dat ongeacht welke religieuze achtergrond iemand heeft, en ongeacht of er al dan niet structurele inclusieve oplossingen voorhanden zijn voor bepaalde religieuze noden, de religieuze claims steeds ernstig moeten worden genomen en met het nodige respect en neutraliteit behandeld moeten worden.