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Is Religion a Threat to Human Rights? Or is It the Other Way Around? Defending Individual Autonomy in the ECtHR's Jurisprudence on Freedom of Religion

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Defending individual autonomy in the ECtHR's jurisprudence on freedom of religion

Paulo Pinto de Albuquerque and Andrea Scoseria Katz[1]

1 Introduction

A foundational value under the European Convention on Human Rights, freedom of religion is itself both a positive right enshrined in Article 9 of the Convention and an important guarantor of democratic values in pluralist societies.[2] Article 9 para 1 ECHR protects the right of all individuals to freedom of thought, conscience, and religion, and to free religious exercise, which includes the freedom to change religion or beliefs and to manifest religion or belief, whether in public or private, individually or collectively, and through worship, teaching, practice and observance. Article 9 para 2 ECHR provides that limitations upon religious rights must be both prescribed by law and '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.'

Article 9 ECHR protects both beliefs and practices. Beliefs, to warrant Article 9 protection, require a certain level of cogency, seriousness, cohesion and importance. At the same time, protected beliefs include a wide range of opinions and convictions.[3] These include: Alevism[4], Buddhism[5], Christian denominations[6]; various forms of Hinduism[7]; Islam[8]; Judaism[9];

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[1] As appearing in RELIGION AND INTERNATIONAL LAW: LIVING TOGETHER 277-293 (Robert Uerpmann-Wittzack, Evelyne Lagrange, and Stefan Oeter eds. 2018).

[2] M Todd Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and ECHR' (2007) 17 Duke Journal of Comparative and International Law 91 (describing the freedom of religion as part of the "core" of most conceptions of human rights).

[3] Not all opinions or convictions necessarily fall within the scope of the provision, and the term "practice" as employed in Article 9, 1 does not cover each act which is motivated or influenced by a religion or belief (*Pretty v UK* App no 2346/02 ECHR 2002-III 155, para 82).

[4] *Sinan Isik v Turkey* App no 21924/05 ECHR 2010-I 317; *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfi v Turkey* App no 32093/10 (ECtHR, judgment of 2 December 2014).

[5] *Jakóbski v Poland* App no 18429/06 (ECtHR, judgment of 7 December 2010).

[6] *Sviato-Mykhailivska Parafiya v Ukraine* App no 77703/01 (ECtHR, judgment of 14 June 2007); *Savez crkava "Rijec zivota" and others v Croatia* App no 7798/08 (ECtHR, judgment of 9 December 2010).

[7] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, decision of 31 January 2012).

[8] *Hasan and Chaouch v Bulgaria* (GC) App no 30985/96 ECHR 2000-XI 117; *Leyla Şahin v Turkey* (GC) App no 44774/98 ECHR 2005-XI 115.

[9] *Cha'are Shalom Ve Tsedek v France* (GC) App no 27417/95 ECHR 2000-VII 231; *Francesco Sessa v Italy* App no 28790/08 (ECtHR, judgment of 3 April 2012).

Sikhism[10]; Taoism[11]; and many new or relatively new religions[12] as well as some non-religious philosophies.[13] Protected practices, meanwhile, fall under one of two categories: *forum internum*, concerning matters of the individual conscience or individual action, such as the freedom to hold or not to hold a belief, or to practise or not practise a religion.[14] *Forum externum* refers to institutional or collective dimensions of religious exercise; under its auspices fall claims of religious adherents related to the space, time, and institutional facilities required to practice a religion, as well as activities related to dissemination of that religion.

The right to free exercise of religion stands in a complex relationship with the panoply of human rights protected under the Convention more generally. Religious exercise can be beneficial to human rights, an important source of rights-enhancing norms as well as a powerful vehicle for educating and mobilizing people in the name of rights. Consider, for instance, the Christian roots of the concept of human dignity[15], the imprint of the Christian philosopher Jacques Maritain upon the Universal Declaration of Human Rights, or the role of African American churches in the American civil rights movement[16], respectively.

At the same time, unconstrained religious exercise may threaten or impinge upon human rights, as for instance, when religious norms are opposed to the values of the State or the

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[10] *Phull v France* (decision) App no 35735/03 ECHR 2005-I 409; *Jasvir Singh v France* App no 25463/08 (ECtHR, decision of 30 June 2009).

[11] *X v UK* App no 6886/75 (Commission Decision, 18 Mai 1976).

[12] These include Aumism (*Association des Chevaliers du Lotus d'Or v France* App no 50615/07 (ECtHR, judgment of 31 Janurary 2013)), the Bhagwan Shree Rajneesh movement, also known as Osho (*Leela Förderkreis e.V. and others v Germany* App no 58911/00 (ECtHR, judgment of 6 November 2008)), Mormonism (*The Church of Jesus Christ of Latter-Day Saints v UK* App no7552/09 (ECtHR, judgment of 4 March 2014)), Raelianism (*F L v France* App no 61162/00 (ECtHR, decision of 3 November 2005)), Neo-Paganism (Ásatrúarfélagið *v Iceland* App no 22897/08 (ECtHR, decision of 18 September 2012)); Sainto Daime *(Franklin-Beentjes and CEFLU-Luz da Floresta v the Netherlands* App no 28167/07 (ECtHR, decision of 6 May 2014)), and Jehovah's Witnesses (*Religionsgemeinschaft der Zeugen Jehovas and others v Austria* App no 40825/98 (ECtHR, judgment of 31 July 2008); *Jehovah's Witnesses of Moscow and others v Russia* App no 302/02 (ECtHR, judgment of 10 June 2010)).

[13] These include pacifism (*Arrowsmith v UK* App no 7050/75 (1977) 8 DR 123); principled objection to military service (*Bayatyan v Armenia* (GC) App no 23459/03 ECHR 2011-IV 1); veganism (*W v UK* App no 18187/91 (Commission Decision, 10 February 1993); opposition to abortion (*Knudsen v Norway* App no 11045/84 (Commission Decision, 8 March 1985)); and the conviction that marriage is a lifelong union between a man and a woman and rejection of homosexual unions (*Eweida and others v UK* App nos 48420/10, 36516/10, 51671/10, 59842/10 (ECtHR, judgment of 15 January 2013)). It is not clear that the protections of Article 9 include activities of an entirely profit-making nature, however (*Company X v Switzerland* App no 7865/77 (1979) 16 DR 86; *Kustannus OY Vapaa Ajattelija AB and Others v Finland* App no 20471/92 (Commission Decision, 15 April 1996); *Church of Scientology and Others v Sweden* App no 8282/78 (1980) 21 DR 109. To the contrary, see *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı* (n 4).

[14] *Kokkinakis v Greece* App no 14307/88 (ECtHR, judgment of 25 May 1993), para 31; *Buscarini and others v San Marino* (GC) App no 24645/94 ECHR 1999-I 605, para 34.

[15] Samuel Moyn, *Christian Human Rights* (University of Pennsylvenia Press 2015).

[16] Sarah Azaransky, *This Worldwide Struggle: Religion and the International Roots of the Civil Rights Movement* (OUP 2017).

Convention,[17] or where beliefs are imposed upon others by coercion.[18] Conversely, the exercise of other freedoms may threaten religion, as, say, when the free expression of ideas strikes believers as blasphemous and offensive.[19]

Accordingly, Article 9 ECHR contemplates a number of permissible limitations upon religious freedom, and in principle, member States are granted a margin of appreciation in deciding whether and to what extent a restriction on the right to manifest one's religion and beliefs is 'necessary'.[20]

Where religion and human rights stand in an oppositional relationship, the Court, in its review, will seek to ensure that the two competing rights are protected as far as is possible by the governing organs of a member State; that an appropriate legal framework to ensure these rights is established and applied in practice; and that a fair balance is struck among the competing rights.[21] When a right such as the freedom of religion comes into conflict with another Convention right, these must be balanced against each other.[22]

In such cases, the member State and, if necessary, the European Court of Human Rights (ECtHR) must balance the two opposing rights in such a way as to respect the importance of both. This is far from a simple task. In addition to maintaining an eye to the particularities of the individual case and differences in member States' traditions and values, the Court must avoid the pitfalls of casuistic, situation-specific "balancing" of rights, which has been criticized as an unprincipled mode of decision-making.[23] It is true that balancing can leave large questions

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[17] *Khan v UK* App no 11579/85 (Commission Decision, 7 July 1986); *S.A.S. v France* (GC) App no 43835/11 ECHR 2014-III 341, para 153.

[18] *Jehovah's Witnesses of Moscow* (n 12) para 119; *Larissis and others v Greece* App no 23372/94 (ECtHR, judgment of 24 February 1998), para 45.

[19] See, among many authorities, *Otto-Preminger-Institut v Austria* App no 13470/87 (1994) Series A no 295-A, para 47; *Wingrove v UK* App no 17419/90 ECHR 1996-V; *İ.A. v Turkey* App no 42571/98 ECHR 2005-VIII 235; *Giniewski v France* App no 64016/00 ECHR 2006-I 277; *Klein v Slovakia* App no 72208/01 (ECtHR, judgment of 31 October 2006); see also *X. Ltd. and Y. v the UK* App no 8710/79 (1982) 28 DR 77. At the same time, the right to religious freedom without interference does not guarantee a right to bring legal proceedings against those who offend the sensitivities of an individual or group (*Dubowska and Skup v Poland* App nos 33490/96, 34055/96 (Commission Decision, 18 April 1997); *Choudhury v UK* App no 17439/90 (Commission Decision, 5 March 1991); *Ben El Mahi and others v Denmark* (decision) App no 5853/06 ECHR 2006-XV 365).

[20] Several limitations upon permissible manifestations of religious belief are possible under the Convention. First, not every act motivated, inspired, or influenced by religious belief constitutes a manifestation of religion or belief entitled to Article 9's protections. To count as such, the act in question must be intimately linked to the religion or belief and must be sincere (*X v UK* App no 7291/75 (1977) 11 DR 55). Secondly, interference with such a manifestation may be justified if the religious act is incompatible with the key principles underlying the Convention, as in the case of polygamous or underage marriage or a flagrant breach of gender equality (*Khan* (n 17)), or where religious beliefs are imposed upon believers by force or coercion (*Larissis* (n 18) para 45). Thirdly, the State may limit speech and expression in pursuit of the legitimate aims provided in Article 9 para 2.

[21] *Karaahmend v Bulgaria* App no 30587/13 (ECtHR, judgment of 24 February 2015), paras 91-96.

[22] Nicholas Bratza, 'The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights' (2012) 14 Ecclestiastical Law Journal, 256; Françoise Tulkens, 'Freedom of Religion under the European Convention on Human Rights: A Precious Asset' (2015) 2014 BYU Law Review 509, 522.

[23] Jürgen Habermas, *Between Facts and Norms* (William Rehg tr, 2nd edn, Polity 1996) 256-259.

unanswered, and may be opaque in its reasoning. Insofar as it leaves behind little in the way of a precedential trail, it is difficult for lower courts to apply and leaves these with little incentives toward self-discipline and consistency. This chapter explores these theoretical concerns by examining the case-law of the ECtHR in cases where human rights and religion stand in conflict.

Our analysis suggests a certain asymmetry. Where religious intolerance is a threat to human rights – as found in cases concerning political extremism and extradition, in particular – we find that the Court has offered broad protection for the values of democracy and individual freedom. Where, on the other hand, religious freedom comes under threat as a result of the exercise of other rights – as typified in cases on freedom of assembly of religious groups, and freedom of religious expression through the wearing of symbols or clothing – the Court has charted a path of judicial minimalism that, to some, has proven unsatisfactory.[24] This chapter argues that a more robust understanding of religious claims as constitutive of individual autonomy on the part of the religious believer might yield a jurisprudence at once more regular, principled, and just.

2 Religion as a threat to human rights: extremist political parties and extradition

Article 9 ECHR protects religious freedom against threats from individuals, as well as from politics and society. Yet as we recall, that freedom can be limited in the pursuit of one of the following ends: the protection of public safety, public order, health or morals, or the protection of the rights and freedoms of others.[25] An important, and increasingly common, site of such limitations is in States' responses to perceived threats to the societal and political order in the form of extremist religious parties.

In the well-known case of *Refah Partisi v Turkey*,[26] the Court upheld the severest of limitations upon a religious political party's free exercise, made in the name of the Convention values of democratic pluralism and tolerance. In 1998, the Constitutional Court of Turkey had allowed the Turkish authorities to ban the Islamist Refah Partisi (Welfare Party), the largest in Parliament, on the grounds that its platform and activities violated the constitutional principles

[24] Ian Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 Res Publica 55 (arguing that embellishment and over-emphasis of freedom of religion; excessive use of the margin of appreciation; and the devaluing of some forms of offensive speech plague the Court's jurisprudence on religiously offensive expression).

[25] In contrast to Articles 8 para 2, 10 para 2 and 11 para 2 of the Convention and Article 2 para 3 of Protocol No. 4, 'national security' is not included among the aims listed in Article 9 para 2. This omission is not accidental, in consequence of which no national security interest can authorize a State to dictate what a person believes (*Nolan and K. v Russia* App no 2512/04 (ECtHR, judgment of 12 February 2009), para 73).

[26] (GC) App nos 41340/98, 41342/98, 41343/98, 41344/98 ECHR 2003-II 267.

of secularism and separation of church and state. The party's assets were confiscated, and many of its members were forced to leave Parliament and were banned from founding or joining any other political party for five years.

Upon review of the case, the ECtHR upheld the ban. It considered the interference upon party members' rights a lawful exercise of the State's power to pursue the legitimate aims of Article 9 ECHR, in this case protecting public safety, defending rights and freedoms, and preventing disorder or crime. Furthermore, reasoned the Court, the ban had responded to a 'pressing social need': preventing the enactment of policies violative of Convention rights and freedoms, a distinct possibility given Refah's numerical strength in Parliament at the time of its dissolution. Party leaders had espoused proposals to refound the Turkish state on sharia law, as well as to introduce different legal regimes for individuals of different religions. And although it was not clear that the party itself endorsed violence, the fact that party leaders had not distanced themselves from members who had publicly called for the use of force to bring about political change justified the Turkish authorities' uncompromising response to that perceived threat. Finally, the interference had been proportional, as not all Refah members had been forced out of office, and the prohibition on political activities imposed on party leaders had been temporary.

The judgment did not fail to earn its share of controversy and criticism,[27] but it contains the core principles grounding the Court's review of contested religious exercise by political parties: legal and religious pluralism and tolerance as foundational values of a democratic society. the importance of respect for constitutional principles, such as that of secularism; and an emphasis on context, namely the historical and cultural experience of a State – in this case, Turkey's history of struggles against Islamic fundamentalism – as important factors to be weighed in assessing the lawfulness of a limitation upon free exercise by a religious party.[28]

Under the Court's jurisprudence concerning threats to individuals as a result of religion, of particular importance has been the assertion of the extra-territorial protection of Convention rights in cases where individuals are faced with a risk of persecution as a result of deportation. In several emblematic cases, we find a coherent and uniform body of cases that articulates clear principles of review.

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[27] Christopher Moe, 'Refah Partisi (the Welfare Party) and Others v Turkey' (2003) 6 no 1 *The International Journal of Not-for-Profit Law.*

[28] The European Court of Human Rights has heard nine cases against Turkey concerning political party bans by Turkey's Constitutional Court; a violation was found in all but *Refah Partisi* (n **Error! Bookmark not defined.**). S ee, also, *Staatkundig Gereformeerde Partij v the Netherlands* App no 58369/10 (ECtHR, decision of 10 July 2012), para 71.

In *N.K. v France*[29] and *Singh and others v Belgium*,[30] the Court found a violation in the proposed deportation of applicants who faced the risk of ill-treatment in their native countries. In both instances, applicants' petitions for asylum had been dismissed on the basis of a cursory review of the provided materials. The Court found that authorities had failed to make an effort to verify the authenticity of the materials, and to assess the real risk of ill-treatment that the applicants faced.

The landmark case *F.G. v Sweden*[31] expanded upon these cases, reiterating that where there were substantial grounds to believe that a potential deportee, if expelled, would face a real risk of ill-treatment in their native country, a Convention State was bound to not expel that person. The applicant was an Iranian national facing deportation to Iran by Swedish authorities and who, as a converted Christian and a political activist against the regime, was in fear for his life. The Swedish authorities found the man's potential risk of ill-treatment as an activist to be insufficient to stay his deportation, and did not examine the level of risk he faced in Iran as a converted Christian in light of the fact that the man, alleging that his religious faith was a 'private' matter, had not invoked his recent religious conversion as ground for asylum. The Court, however, considered that the Swedish authorities had failed to discharge their duty to assess the level of risk faced by the applicant. The applicant's reluctance to invoke his religious conversion as a ground for asylum notwithstanding, in view of the well-known risk to Christians living in Iran, it was incumbent upon Swedish authorities to carry out an investigation as to whether the individual faced risk as a member of a particular group systematically exposed to ill-treatment in the destination country. Accordingly, the Court found a violation of Articles 2 and 3 ECHR in the proposed deportation.

Emerging from these cases were several important principles related to the rights of individuals facing persecution by intolerant religious majorities. First, authorities could not reject documentary evidence submitted by asylum seekers without any prior verification of its authenticity. Secondly, as concerned the substantiation of an applicant's risk of ill-treatment, in consideration of the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and the position of vulnerability in which asylum seekers find themselves, where a Contracting State was made aware of facts relating to an individual that could expose him or her to a risk of ill-treatment upon returning to their native country, State authorities were obligated to carry out, of their own motion, an assessment of that risk. This applied in particular to situations where the national authorities were made aware of the fact that the asylum seeker

[29] App no 7974/11 (ECtHR, judgment of 19 December 2013).
[30] App no 33210/11 (ECtHR, judgment of 2 October 2012).
[31] ECtHR (GC), App no 43611/11 ECHR 2016.

could, plausibly, be a member of a religious or other group systematically exposed to a practice of ill-treatment.

3 Human rights as a threat to religious freedom: assembly and symbols

Under Article 9 of the Convention, all individuals have a right to publicly manifest their religious faith, whether alone or in community with others. One way in which many do so is by meeting in order to worship in the manner prescribed by their religion.[32] The right to freedom of assembly for purposes of religious worship can conflict with the rights of others. In such cases, the State may have to strike a balance in weighing competing rights of religious expression with other general rights held by individuals of the broader public.

In particular, Article 9 ECHR does not bestow a right for individuals to gather to manifest their religious beliefs wherever they wish,[33] and as provided by Article 9 para 2 ECHR, freedom of worship can be limited by Convention States in the pursuit of certain legitimate aims (the protection of public order and the rights of the people, among others). Such interferences have taken the form of the dissolution of a religious organisation; the interruption of meetings by the police; the denial of legal authorisation, recognition or approval of a religious group that seeks to assemble; and the interference by the State in an intra-denominational dispute.

By and large, where the right of religious worship comes into conflict with the rights of others, the ECtHR has resolved such conflicts by balancing these rights.[34] For instance, in *Karaahmed* (n 21), a group of protestors, incited by leaders of a right-wing political party, disrupted a public prayer held at the Sofia Mosque, insulting and violently assaulting the worshippers. The Court found a violation of Article 9 ECHR (taken in conjunction with Article 11 ECHR, providing for the right to free assembly), determining that the Bulgarian police had failed to minimize the conflict and risk of violence, and therefore had not struck a 'fair balance' between respecting the respective rights of the demonstrators and the worshippers (para 107).

The result of *Karaahmed* (n 21) appears beyond dispute; the Court concluded based on video evidence that the police had made minimal efforts to control the demonstration (paras 84, 105). However, as noted previously, the case still exemplifies the pitfalls of rights balancing's

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[32] *Cyprus v Turkey* (GC) App no 25781/94 ECHR 2001 IV 1, paras 243-246.
[33] *Pavlides and Georgakis v Turkey* App nos 9130/09, 9143/09 (ECtHR, decision of 2 July 2013), para 29.
[34] Other such cases include *Jehovah's Witnesses of Moscow* (n 12) para 99-103; *Biblical Centre of the Chuvash Republic v Russia* App no 33203/08 (ECtHR, judgment of 12 June 2014), para 52; *Boychev and others v Bulgaria* App no 77185/01(ECtHR, judgment of 27 January 2011); *Metropolitan Church of Bessarabia and others v Moldova* App no 45701/99 ECHR 2001-XII 81; *Vergos v Greece* App no 65501/01 (ECtHR, judgment of 24 June 2004); *Holy Synod of the Bulgarian Orthodox Church and others v Bulgaria* App nos 412/03, 35677/04 (ECtHR, judgment of 16 September 2010),para 157.

lack of transparency: in this instance, as in many others, the guiding rationale for a judgment, namely the conclusion that Bulgarian authorities failed to ensure that 'proper consideration was given to how to strike [an] appropriate balance' (para 107) between the rights of the worshippers and the demonstrators, is rather opaque.

Of even greater concern is the possibility that balancing has been used as a way to avoid conflicts with Convention States in cases even where a broader, more principled decision-making rationale suggests itself. In *Krupko v Russia*,[35] applicants challenged a decision by the Russian police to break up an annual Jehovah's Witnesses celebration held in the assembly hall of the Agricultural Academy of Moscow. In that case, the Court left aside the issue of the lawfulness of the interference, finding a violation on the narrow grounds that, even granting authorities' concern that the Jehovah's Witnesses had failed to secure proper authorization for their gathering, the police's intervention had, in any case, clearly not been 'necessary in a democratic society' where less invasive remedies were possible (para 56). The Court did not go so far as to declare that Russia's Religions Act, which required certain groups to seek prior authorization of their meetings, even when conducted indoors, was unlawful. Yet it would have had ample grounds in law to do so: not only was the prior authorization requirement unique among Convention States and in international law, which guarantees religious groups the possible of holding indoor meetings without limitations, but the law had also itself also recently been declared unconstitutional by the Russian Constitutional Court on the same grounds[36].

In some cases involving the more radical interference of the dissolution of an existing religious organisations, the Court has also adopted a narrow rationale emphasizing, not systemic flaws in domestic legal frameworks on religious freedom, but procedural missteps by the relevant authorities. In a case involving the dissolution of the Moscow Jehovah's Witness community, the Court found that the allegations made by authorities against the community to justify the dissolution were unsupported by evidence, or instead concerned quite normal manifestations of freedom of religion. Further, the legal framework concerning religious associations had failed to provide for any sanction less drastic than dissolution (*Jehovah's Witnesses of Moscow* (n 12) paras 114, 159). In another case, the dissolution of a religious group had been allegedly motivated by that group's failure to secure legal authorisation and to comply with certain health and safety requirements. However, the Court noted, the applicant group had not been given any prior warning which would have enabled it to bring its conduct in compliance with health requirements, and further, the dissolution was not foreseeable, as domestic jurisprudence could

[35] App no 26587/07 (ECtHR, judgment of 26 June 2014).
[36] See the concurring opinion of Judge Pinto de Albuquerque in *Krupko* (n 35).

have been read to suggest that the organisation in question did not require special authorisation (*Biblical Centre of the Chuvash Republic* (n 34) paras 57-60). In both of these cases, the criteria employed by the Court – prior notice, leniency of sanctions, a lack of 'necessity' for the measures – failed to address core questions of the scope of the right of assembly in a religious context.[37] After all, it is one thing to find that the action of police forces was disproportional, quite another to say that the State lacks the power to criminalize peaceful religious gatherings.

Another way that individuals of faith choose to communicate their belief is through the wearing of religious clothing or symbols, an action which is therefore protected by Article 9 para 1 ECHR (*Eweida* (n 13) para 89). As with other manifestations of the right to religious freedom, the right to wear religious clothing and symbols is not absolute.[38]

The Court's case-law purports to treat differently three different realms in which religious adherents may wear symbols to manifest their faith: the public space; schools and universities; and the workplace. The distinction is justified on the grounds that the aims of the State in these respective realms may differ, as well as its duties. For instance, the State may require public servants to show discretion in manifesting their faith in the name of protecting the principles of secularism. The same may be true in the case of public school teachers, in view of the susceptibility of children.

In one seminal case, *Ahmet Arslan and others v Turkey,*[39] the Court found a violation in the criminal conviction of a religious group on the basis of legislation banning the wearing of certain types of religious costumes in public places. The Court agreed that the aims of the legislation – ensuring compliance with the secular democratic principles underpinning the Turkish republic, and protecting public security, order, and the freedoms of others – were legitimate. Yet it found that criminal sanctions vis-à-vis such aims had not been necessary: the prohibition had been directed at, not public servants, but ordinary citizens, and had targeted clothing worn not in specific public establishments, but throughout the public space. Furthermore, there was

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[37] Making a similar critique, see the concurring opinion of Judge Pinto de Albuquerque in *Krupko* (n 35).

[38] For instance, the bodies of the Convention have always refused to acknowledge the merits of complaints where the freedom to wear religiously associated items of clothing has been limited by security concerns. This has included dismissals of applications by: a Sikh fined for refusing to remove his turban in order to comply with a regulation requiring motorcyclists to wear a crash helmet (*X v UK* App no 7992/77 (1978) 14 DR 234); a Sikh obligated to remove his turban when passing the walk-through scanners at the airport (*Phull* (n 10)); an applicant requesting a visa required to remove her veil for an identity check (*El Morsli v France* App no 15585/06 (ECtHR, decision of 4 March 2008)); applicants obligated to appear bare-headed in identity photographs for official documents (*Karaduman v Turkey* App no 16278/90 (1993) 74 DR 93; *Arac v Turkey* App no 39573/11 (ECtHR, decision of 15 April 2014); *Mann Singh v France* App no 24479/07 (ECtHR, decision of 13 November 2008)). Likewise, the Court has refused to recognise the right to conscientious objection to taxation, even where motivated by protected faiths such as Quakerism (*C. v UK* App no 11882/85 (Commission Decision, 7 October 1987)) and opposition to abortion (*Bouessel du Bourg v France* App no 20747/92 (Commission Decision, 18 February 1992)).

[39] App no 41135/98 (ECtHR, judgment of 23 February 2010).

little evidence to suggest that the applicants, in wearing a specific type of clothing, had constituted a threat to public order or engaged in proselytism on passers-by in the streets.

Conversely, in a similar much-discussed case, *S.A.S.* (n 17), the Court upheld a French ban on wearing in public of clothing intended to cover the face (therefore including the burqa and the niqab). Distinguishing *Arslan* (n 39), it noted that the full-face Islamic veil was unique in entirely concealing the face, and accepted the French government's argument that, as the face plays an important role in human interaction and the open interpersonal relationships that constitute community life in society, the veil could be perceived as raising a barrier against others, and thereby breaching the right of all to live together in a space of socialisation. In this connection, the Court considered that the ban could be upheld as necessary to ensure the 'protection of the rights and freedoms of others' (n 17 para 140).

In the case of religious symbols being displayed public educational institutions such as primary schools and universities, the Court's case-law describes two different categories depending on whether the applicant demanding the right to wear religious clothing is a teacher or a student. As individuals, teachers qualify for protection of Article 9 of the Convention; at the same time, as public servants they have a duty to refrain from ostentatiously expressing their religious beliefs in public.[40] The Court places great importance on the possible proselytising effect that religious clothing or symbols may have on pupils, particularly in virtue of pupils' age and susceptibility. For instance, the Court upheld a prohibition on a State primary school teacher wearing an Islamic headscarf in the performance of her teaching duties. The Court reasoned that the headscarf was 'hard to square with the principle of gender equality' and '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.' Furthermore, the Court felt, the headscarf constituted a 'powerful external symbol' capable having a persuasive effect upon young students: 'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect'.[41]

At the same time, the plethora of cases in which bans on students wearing religious symbols – most commonly, the Islamic headscarf or the Sikh turban – have been upheld suggests that distinctions among wearers of the religious symbol play little role in the Court's case-law in practice. In these cases, the guiding rationale was, not the fear of proselytism by an

[40] *Kurtumulus v Turkey* App no 65500/01 (2006) Reports of Judgments and Decisions 2006-II; *Karaduman v Turkey* App no 16278/90 (1993) 74 DR 93.
[41] *Dahlab v Switzerland* App no 42393/98 ECHR 2001-V 447.

authority figure, but rather the State's margin of appreciation to preserve the constitutional principle of secularism in public institutions of learning (*Leyla Şahin* (n 8)).[42]

As for the wearing of religious clothing in the workplace, the Court has generally upheld the prerogative of the employer to ensure and protect workplace order by dismissal of an employee who chooses to manifest his or her religious faith. A commercial company may legitimately impose a dress code on its employees in order to protect a specific commercial image; this interest, however, must be balanced against the individual's right to manifest his or her religion.[43] The Court found a violation of Article 9 ECHR where a private company dismissed an employee for refusing to conceal the Christian cross she wore, while certain other symbols of other religions (turban or hijab) were authorised (*Eweida* (n 13) para 94). In the same case, however, the Court found no violation in a case where a nurse working in a geriatric ward was transferred for refusing to remove the cross she wore on a chain around her neck. In the particular instance, the Court accepted that the prohibition had had a legitimate aim, namely to avoid the risk that a disturbed patient might seize and pull the chain (*Eweida* (n 13) para 98-100).[44]

The duties of public servants or the fear of improper proselytism are often invoked as criteria guiding judgments in this realm. At the same time, the Court's condoning of restrictions upon the full veil in the public sphere, religious headgear worn by students in schools, and the headscarf in the workplace (although, with exceptions, not the cross) suggests that, not State values nor individual autonomy, but rather, the margin of appreciation, deployed in unpredictable or unprincipled ways, may be driving the Court's jurisprudence in this regard.

As evidenced by this quick survey of the Court's jurisprudence in the particular realm of cases where religious exercise is construed as a threat to human rights, it is difficult to find a coherent rationale to explain these results. We suggest that, here, an excessive solicitude for State claims alleging threats to the general public by particular forms of religious worship, whether gatherings or the wearing of symbols, may be at work.

In the final section, we conclude by proposing that an autonomy-enhancing principle would be a more parsimonious, principled, and ultimately fair criterion for assessing religious

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[42] See, also, *Köse and others v Turkey* (decision) App no 26625/02 ECHR 2006-II 339; *Dogru v France* App no 27058/05 (ECtHR, judgment of 4 December 2008); *Kervanci v France* App no 31645/04 (ECtHR, judgment of 4 December 2008); *Gamaleddyn v France* App no 18527/08 (ECtHR, decision of 30 June 2009); *Aktas v France* App no 43563/08 (ECtHR, decision of 6 June 2011); *Ranjit Singh v France* App no 27561/08 (ECtHR, decision of 6 June 2011); *Jasvir Singh v. France* App no 25463/08 (ECtHR, decision of 6 June 2011).

[43] A recent decision by the ECJ held that an internal company rule prohibiting the visible wearing of any political, philosophical, or religious sign does not constitute direct discrimination on the basis of religion. At the same time, an employer could not invoke the wishes of a customer in no longer being served by a employee wearing an Islamic headscarf as a reason to dismiss said employee (Cases C-157/15, *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions* (ECJ, 14 March 2017) and C-188/15 *Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole Univers* (ECJ, 14 March 2017)).

[44] See, also, *Ebrahimian v France* App no 64846/11 ECHR 2016.

freedom claims, both in the context of groups of individuals seeking to worship in community and individuals manifesting their faith by wearing religious symbols or clothing.

4 Conclusion

The jurisprudence of the ECtHR in cases involving the conflict between religious expression and other human rights has been, so to speak, a mixed bag. Whereas protection of human rights against religious threats has been robust, the reverse cannot quite be claimed. Where the rights of religious believers have been threatened by the State or by the broader public, the Court has favoured either narrow proportionality analysis over clear, categorical statements of the principles that justify limitations upon the right of assembly, or a selective and superficial treatment of individual autonomy that downplays the centrality of the manifestation of belief to the speaker and overemphasizes the broader public's suggestibility to persuasion by the content of those symbols. In both contexts, the effect has been to exaggerate the potential 'threat' to public order and morals posed by manifestations of religious belief.

At the same time, under the principle of subsidiarity built into the Convention system, domestic courts are the 'first line' of rights defence.[45] Furthermore, great deference by the Court is necessary when a State claims a threat to its order (*Refah Partisi* (n **Error! Bookmark not defined.**) para 102). Yet a mechanically applied practice of deference is unable to distinguish the 'imminent' danger posed by religious actors in *Refah Partisi* (n **Error! Bookmark not defined.**) from the negligible one of those in *Krupko* (n 35). In so doing, the Court has, we argue, demonstrated an excessive deference to State-initiated claims that manifestations of religious belief – through peaceful assembly and symbols – may pose threats to public 'order'.

Here we propose that in the realm of Article 9 jurisprudence involving competing rights, a criterion of jurisprudence that takes seriously and prioritizes *individual autonomy* would be, not only most consistent with the principles and values of the Convention, but also possible to implement in a way that is consistent, parsimonious, and fair. We briefly articulate what form this rationale might take, and suggest several benefits to its adoption.

The protection of individual autonomy as the main criterion for analysis of Article 9 cases involving freedom of religious assembly and expression already underpins some of the cases we have discussed. For instance, considerations of the autonomy of religious believers

[45] Hersch Lauterpacht, one of the forefathers of the European Convention, argued that the Court's jurisdiction would be of a "residuary character," with domestic courts the first and main line of rights protection. The Court's first president, Lord McNair, averred similarly that the ECtHR no more than "crowns the edifice" that is the larger system of domestic courts interpreting and applying Convention law. Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015), at 1. See, also, Kanstantsin Dzehtsiarou et al (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Taylor and Francis 2014).

appear, too, in the Court's protection of the right 'to try to convince one's neighbour' as an essential element of religious freedom (*Kokkinakis* (n 14) para 31) for the religious speaker, even while it protects the listener from 'improper' or coercive proselytism (the application of improper pressure in order to induce the listener to accept the beliefs of the faith in question, by offering material or social advantage, or exploiting power differentials, for example) (*Larissis* (n 18) para 45).

And while the Court, in the much-discussed full-veil case, *S.A.S*, explicitly rejected the idea that the aim of the ban had been related to women's autonomy, the dissenting opinion pointed out that by the French authorities' own admission, the ban had clearly been motivated by a fear of paternalism:

> The first report 'on the wearing of the full-face veil on national territory', by a French parliamentary commission, saw in the veil 'a symbol of a form of subservience' …. The explanatory memorandum to the French bill referred to its 'symbolic and dehumanising violence' … The full-face veil was also linked to the 'self-confinement of any individual who cuts himself off from others whilst living among them'. Women who wear such clothing have been described as 'effaced' from the public space …[46]

As the French parliamentary reports made plain, the ban on the full-face veil had its origins in concerns that women, firstly, could not autonomously choose to wear the garment in view of oppressive cultural structures, and secondly, that the wearing of the veil per se excluded the wearer from full participation in society.

At the same time, if the autonomy principle underpins some of the Court's Article 9 jurisprudence, it has been inconsistently applied, frequently giving way to the margin of appreciation with little discernible explanation as to when or why the latter principle should take precedence. In *Krupko* (n 35), as noted, the Court found a violation on grounds of necessity in a democratic society, but left untouched a law which departed from international practice and which had already been declared unconstitutional by the Russian Constitutional Court.[47] In other cases, symbols are sometimes treated as if they possessed their own content and meaning; sometimes not. For instance, while the Court has held that crucifixes in public classrooms did not necessarily 'encourage[] the development of teaching practices with a proselytising tendency', in cases involving Islamic symbols like the headscarf in the classroom, the Court has

[46] ECHR, *S.A.S. v France* (n 17), para 6.
[47] As the dissenting opinion in *Krupko* pointed out, the right to assemble indoors is guaranteed without any limitations in many European countries (eg, Czechoslovakia, Denmark, Germany, Greece, Italy, and Spain).

accepted that these symbols *per se* may have a 'proselytising effect' or may be 'hard to square' with Convention values like gender equality, tolerance, and non-discrimination.[48]

We submit that in the context of religious freedom, a flawed theory of individual autonomy is at work. On the one hand, this jurisprudence routinely conceives of the listener or witness to manifestations of religious belief as implausibly susceptible to conversion, all the while exaggerating the inherent 'proselytising effect' that religious symbols have in context. On the other side, insufficient recognition has been granted to the centrality to individual identity that religious claims have for the speaker. As a result, the Court has sometimes granted excessive credence to arguments advanced by States that demonize such displays as a violation of 'public order'.[49]

In this regard, we would propose that a more realistic treatment of autonomy in these cases would partly mitigate these problems. Such an approach might:|

- Conceives of manifestations of religious belief as involving far weightier autonomy claims for the speaker than for the listener/observers. Consequentially, a claim about the right of the 'public' to not be exposed to an offensive practice (the wearing of the veil, the witnessing of a demonstration) must be met with caution;
- Does not treat ordinary expressions of religious belief as improper intrusions upon the listener, or upon the public more broadly, except insofar as these involve 'improper' or coercive means. The Court's jurisprudence on proselytism is a guide here: ordinary attempts 'to try to convince one's neighbour' are protected under the Convention except where these involve the application of pressure, the offering of material or social advantage, or the exploitation of power differentials, and so forth (*Kokkinakis* (n 14) para 31; *Larissis* (n 18) para 45);
- Limits claims by the State that religious symbols are per se a disruption of 'public order' or a violation of secularism (the State would enjoy a greater margin of appreciation in the context of public spaces, where the wearer is a public servant, or where the State can prove a disruption or threat); and

[48] *Lautsi and others v Italy* (GC) App no 30814/06 ECHR 2011-III 61, para 74; *Dahlab* (n 41); *Leyla Şahin* (n 8). It is worth recalling that the Court has, on repeated occasions, stated that the State's role as the 'neutral and impartial organiser' of the exercise of various religions, faiths and beliefs, and its 'duty of neutrality and impartiality' are incompatible with the power to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed; see *Hasan and Chaouch* (n 8) para 76; *Leyla Şahin* (n 8) para 107.

[49] This appears to be more the case in the case of symbols and clothing than in the context of religious assembly (contrast, for instance, *Dahlab* (n 41) and *Karaahmed* (n 21)).

- Avoids, to the extent possible, inquiries into the content of a symbol, for instance in attempting to remedy 'symbolic' violence. In this regard, allegations of the 'proselytising effect' of symbols should be supported with evidence.

A host of complex jurisprudential questions will remain unresolved by this exercise, of course. Religious expression, whether in the staging of a public prayer or the wearing of a turban, necessarily comprises both collective and individual dimensions which must be reconciled. The question of whether individual autonomy is best realized through state intervention or abstention will endure, as will situational decisions about reconciling multiple competing interests.

At the same time, the Court must refrain from upholding State-imposed sanctions that, under the guise of concerns for public order or proselytism, criminalize practices that a majority finds merely distasteful. A manifestation of religious belief may not be limited merely on the grounds that it is 'perceived as strange by many of those who observe it' (*S.A.S.* (n 17) para 120). In light of the critique presented here of the Court's jurisprudence in two contested realms of freedom of religious exercise, a more robust and realistic account of individual autonomy would help give a better account of claims of religious freedom and the significance they hold for people of faith, as well as yield a jurisprudence that is more principled, reasoned, and just.