

Jim Murdoch

Protecting
**the right to freedom
of thought, conscience
and religion**
under the European Convention
on Human Rights

Council of Europe human rights handbooks



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Contents

| | |
|--|----|
| Article 9 of the European Convention on Human Rights | 5 |
| Preface | 6 |
| Freedom of thought, conscience and religion: international and regional standards | 9 |
| Interpreting Article 9 of the Convention: general considerations | 12 |
| Introduction | 12 |
| Applying Article 9: the checklist of key questions | 13 |
| Question 1: Does the complaint fall within the scope of Article 9? | 14 |
| <i>What is meant by “thought, conscience and religion”?</i> | 16 |
| <i>The forum internum</i> | 18 |
| <i>Manifestations of religion or belief</i> | 21 |
| <i>The collective aspect of Article 9</i> | 23 |
| <i>The collective aspect of Article 9 and recognition of “victim” status</i> | 24 |
| <i>Limits to the scope of Article 9</i> | 26 |
| Question 2: Has there been any interference with Article 9 rights? | 26 |
| <i>Positive obligations</i> | 28 |
| <i>Employment and freedom of thought, conscience and religion</i> | 30 |
| <i>Permitting due recognition of religious practices</i> | 33 |
| Question 3: Does the limitation on manifestation of religion or belief have a legitimate aim? | 35 |
| Question 4: Is the limitation on “manifestation” of religion or belief “prescribed by law”? | 37 |
| Question 5: Is the limitation on “manifestation” of religion or belief “necessary in a democratic society”? | 39 |
| <i>Necessity and proportionality; and the nature of “democratic society”</i> | 40 |
| <i>Margin of appreciation</i> | 41 |
| Specific aspects of freedom of thought, conscience and belief arising under Article 9 | 44 |
| Interferences with “manifestation” of individual belief: refusal to undertake compulsory military service | 44 |
| Interferences with “manifestation” of individual belief: proselytism | 46 |
| Interferences with “manifestation” of individual belief: sanctions for wearing of religious symbols | 49 |
| Interferences with individual belief: the requirement to pay “church tax” | 52 |
| Individual “manifestation” of belief: prisoners and religious belief | 54 |
| The requirement of state neutrality: registration of religious faiths, etc. | 55 |

| | | | |
|--|-----------|---|-----------|
| The requirement of state neutrality: controls upon places of worship | 60 | Medical treatment issues: Article 8 | 73 |
| The requirement of state neutrality: interfering in internal disputes between adherents of a religious community | 62 | State recognition of decisions of ecclesiastical bodies: Article 6 | 74 |
| Related guarantees under the Convention having an impact upon the free exercise of conscience or belief | 66 | Discrimination on the basis of religion or belief | 74 |
| Religious convictions and education: Article 2 of Protocol No. 1 | 66 | Article 14 | 75 |
| Freedom of expression and thought, conscience and belief: Article 10 | 69 | Protocol No. 12 | 80 |
| | | Conclusion | 82 |
| | | Index of cases | 86 |

Article 9 of the European Convention on Human Rights

Freedom of thought, conscience and religion

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.

Preface

This handbook examines the scope and content of freedom of thought, conscience and religion as guaranteed in particular by Article 9 of the European Convention on Human Rights and as interpreted by the case-law of the European Court of Human Rights (“the Strasbourg Court”) and by the former European Commission on Human Rights (“the Commission”).¹

The primary responsibility for applying Convention guarantees lies at the national level. The aim is thus to provide a concise guide to assist judges, relevant state officials and practising lawyers who need an understanding of European Convention on Human Rights case-law in applying the treaty in domestic law and administrative practice. The standards and expectations found in the European Convention on Human Rights may apply across Europe, but the subsidiary nature of the scheme of protection categorically requires the domestic decision-maker – and above all, the domestic judge – to give effect to these rights in national law and practice. This work, of course, can only be an introductory text and not a definitive treatise. Nor

1. In the interests of readability, the text generally refers only to the title of cases, with full references of judgments cited appearing in the index of cases, page 86. All the Court’s judgments, and a significant selection of decisions and reports, are published in the HUDOC database, accessible at <http://hudoc.echr.coe.int/>.

can it extend to discussion of the question as to what weight domestic law requires to be given to the Convention. Whether the European Convention on Human Rights is considered as superior law or merely has persuasive force in domestic law is clearly of importance, but whether or not the treaty overrides national law, it is still possible to state with some certainty the key considerations a domestic judge or public official must bear in mind in relevant cases in decision-making at national level.

Article 9 jurisprudence may not be particularly voluminous in contrast to the case-law generated by other provisions of the Convention, but the case-law in this area it is often of some complexity. Much is of comparatively recent origin,² and while certain aspects of freedom of thought, conscience and belief remain to be considered by the Court as it has not yet had the opportunity to provide an authoritative interpretation for all aspects of the subject, a number of important decisions and judgments help clarify the application, nature and importance

2. Violations of Article 9 have been found in 35 judgments between 1959 and 2010 (9 have concerned Greece, 5 Russia, 4 Bulgaria, 3 in respect of Latvia, Moldova Turkey, and Ukraine, and 1 in respect of Austria, Georgia, Poland, San Marino, and Switzerland): European Court *Annual Report 2010* (2011), pp 157-158. The first such judgment establishing a violation of Article 9 – *Kokkinakis v. Greece*, discussed below at p. 36 ff – was delivered in 1993.

of the guarantee. The provision confers protection for an individual's core belief system and for the right to manifest such beliefs either individually or with others, and both in private as well as in the public sphere. The case-law clarifies that state authorities may not only be required to desist from taking action which would interfere with thought, conscience and religion, but also in certain circumstances to take positive measures to nurture and to protect this freedom. The range of issues that may arise under Article 9 is wide: for example, should the display of religious symbols be prohibited in state premises? when may the criminal law prohibit attempts at proselytism? is there a responsibility to recognise exemptions to the duty to undertake military service? can oaths of allegiance be required of public officials or democratically-elected representatives? or is it permissible to prohibit the building of minarets, or the wearing of headscarves? Such questions can – and do – arise on a not infrequent basis in political debate. They may also be posed in legal proceedings in domestic legal systems where the resolution of such challenges by the domestic courts requires a clear awareness of expectations arising under human rights norms.

Discussion of certain key cases found in the jurisprudence helps clarify that the text of the Convention is but a starting-point for an understanding of the guarantee. An awareness of relevant jurisprudence is vital. For lawyers from a continental legal tradition, this may need some further explanation. As one former President of the European Court of Human Rights has

put it, a “moderated doctrine of precedent” is employed by the European Court of Human Rights (“the Strasbourg Court”) to give guidance to national courts and decision-makers on the development of human rights protection.³ This “doctrine of precedent” is necessary in the interests of legal certainty and equality before the law. Yet it is “moderated” by the need to ensure that the Convention continues to reflect changes in society's aspirations and values. The Convention is thus a “living instrument”.⁴ Examination of the case-law also allows an appreciation of the fundamental values which underpin this jurisprudence. These underlying assumptions are often discernible from the Strasbourg Court's decisions and judgments as the opportunity has been taken to elaborate the principles which should be followed by domestic courts and policy-makers. There is thus an important predictive aspect to the Strasbourg Court's case-law, for while in particular instances there may not be a readily available precedent for domestic guidance, the underlying rationale and principle should instruct and inspire.

Two final points. First, this handbook is primarily concerned with Article 9 of the European Convention on Human Rights. However, issues concerning conscience and belief may arise elsewhere in the treaty, and brief reference to certain related guarantees that have some particular impact upon freedom of

3. European Court of Human Rights, *Annual Report 2005*, p. 27.

4. For a recent example of the application of “living instrument”, see *Bayatyan v. Armenia* [GC], discussed below at p. 46 ff.

thought, conscience and religion has been considered necessary. In particular, and as will become apparent from discussion, Article 9 is closely related both textually and in respect of the values underpinning its interpretation to Article 10's guarantee of freedom of expression and to the right of association under Article 11.⁵ Additional provisions provide support, such as Article 2 of Protocol No. 1, which requires that parents' philosophical and religious beliefs are accorded respect in the provision of education to their children. Secondly, in discussing the extent of a state's responsibilities under the European Convention on Human Rights, it will be necessary to consider whether these responsibilities are in any way modified at national level. In particular, Article 57 permits any state, when signing the Convention or when depositing its instrument of ratification,

5. Cf *Young, James and Webster v. the United Kingdom*, §57: "the protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11".

to make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision.

What then follows is a basic introduction to the leading cases in this area. What makes the study of Article 9 (and related guarantees) such a fascinating one is not only the factual background of many cases but the principles of interpretation developed and consolidated over time by the Court. The particular context of many of the cases provides an insight into the rich tapestry of European cultural, religious, historical and cultural diversity. Nevertheless, the Court has sought to impress upon the Continent a unifying set of values which will help Europe to prepare for and be at ease with the challenges posed by an increasingly secular but also increasingly multi-faith society. The clarion-call is to respect and to value pluralism and tolerance. The right to freedom of conscience cannot be taken for granted.

Freedom of thought, conscience and religion: international and regional standards

Guarantees of religious liberty and respect for conscience and belief are inevitably found in the constitutional orders of liberal democratic societies and in international and regional human rights instruments. To some extent, these reflect the concerns at the time of those charged with drafting these instruments. Examples abound, each with perhaps subtly different emphases. In particular, Article 18 of the Universal Declaration on Human Rights of 1948 provides that

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 teaching, practice, worship and observance.

A fuller formulation (which includes a reference to education, but excludes explicit recognition of the right to change religious belief) is found in Article 18 of the International Covenant on Civil and Political Rights of 1966:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and free-

dom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Such guarantees are found in other instruments at a regional level. For example, Article 12 of the American Convention on Human Rights provides that freedom of conscience and religion includes the

freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private,

while Article 8 of the African Charter on Human and Peoples' Rights specifies that

Freedom of conscience, the profession and free practice of religion shall be guaranteed,

and further that

No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

In the European Convention on Human Rights, the key guarantees providing protection for freedom of thought, conscience and religion or belief are found in two provisions.

First, Article 9 provides that:

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.

Secondly, Article 2 of Protocol No. 1 to the European Convention on Human Rights in the context of the right to education provides that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Freedom of thought, conscience and belief is thus viewed primarily as an individual right, albeit an individual right often exercised in association with others. Of course, a community's sense of self-identification may well be associated to a significant extent with a particular religious affiliation. National, regional and international legal instruments reflect this. While some European states are expressly founded upon the principle of secularism (or *laïcité*), thus requiring a separation between state institutions and its representatives on the one hand and religious organisations on the other, many domestic Constitutions specifically recognise a particular denomination as the "established" Church of the State.⁶ Such a situation is not

6. For example, Established Churches exist as a matter of constitutional provision in Nordic countries; in the United Kingdom, both the Church of Scotland and the Church of England are so recognised (although the nature of the establishment is radically different in each instance).

incompatible with freedom of religion, providing that adequate provision is made for individual belief and for the accommodation of other faiths.⁷ At a European level, this awareness of the link between group identity and religious belief is found in an emphasis upon the protection of the rights of members of minorities. In particular, the Preamble to the Framework Convention for the Protection of National Minorities specifically acknowledges that

a 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.

In other words, cultural diversity should be seen as a matter of enrichment rather than division.⁸ In consequence, Contracting States

undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop

7. See further pp. 55 ff below.

8. ETS No. 157 (1995). As at 31 October 2011, the treaty has been ratified by all Council of Europe states with the exception of Andorra, Belgium, France, Greece, Iceland, Luxembourg, Monaco, and Turkey.

their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.⁹

The Framework Convention echoes the underlying assumption – as will be discussed further below – that pluralism and tolerance are the hallmarks of a democratic society in Europe. Other Council of Europe initiatives seek to promote these values. In particular, the European Commission against Racism and Intolerance (ECRI) seeks to combat racism, xenophobia, anti-semitism and intolerance by combating discrimination and prejudice on grounds of race, colour, language, religion, nationality and national or ethnic origin.¹⁰ A Europe of much diversity and many faiths calls for special concern for the protection of the exercise of the freedom of thought, conscience and religion.

9. Framework Convention, Article 5 (1). which entered into force in 1998, See also, e.g., Article 8: “The Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations.”

10. The Commission may make policy recommendations on general themes and disseminates examples of good practice to states while also seeking to promote intercultural understanding and respect in civil society. It may also issue statements on matters of contemporary concern. See e.g. statements on the banning of the construction of minarets in Switzerland: doc CRI (2009) 32, para 33.

Interpreting Article 9 of the Convention: general considerations

Introduction

In recent years, applications alleging a violation of Article 9 of the European Convention of Human Rights have increased both in number and also in their complexity. Indeed, until comparatively recently, the case-law of the Strasbourg Court and of the former Commission under Article 9 was rather limited. Jurisprudence tended to cluster around discrete issues such as freedom of religion in prisons, or conflicts between respect for belief and contractual duties in employment. Further, there were comparatively few cases in which the collective manifestation of belief was in issue. This situation was probably indicative of the high level of respect generally accorded to freedom of thought, conscience and religion in most member states of the Council of Europe at that time, for religious and philosophical tolerance and respect for diversity were long-established values, or at least aspirations actively pursued. In consequence, it was difficult for commentators on Article 9 to discern any underlying principles and values that determined the interpretation of this guarantee. In more recent years, however, the Strasbourg Court has been called upon to address the scope and content of Article 9 in an increasing number of key

cases involving a wide and diverse range of issues, and the resultant decisions and judgments have afforded opportunities to reiterate the central importance played by religious and philosophical belief in European society and to stress the key values of pluralism and tolerance.

Article 9 has a close proximity both textually and in the values it embraces with neighbouring guarantees in the treaty. Article 9 guarantees not only freedom of thought, conscience and religion, but also the active manifestation of such. There is thus a clear link, in terms both of textual formulation and substantive content, with the freedoms of expression and of assembly and association in terms of Articles 10 and 11. Indeed, many applications alleging a violation of an individual's right to participate in the life of a democratic society may also contain a reference to Article 9, although the Strasbourg Court has in many instances been able to conclude that the issues raised by an application can be better resolved by reference to one or other of these other two guarantees, that is, by considering the matter as one concerning freedom of expression and Article 10,¹¹ or as falling within the scope of Article 11's guaran-

11. For example, *Feldek v. Slovakia*; *Van den Dungen v. the Netherlands*.

tee of freedom of association.¹² Article 9 at the same time also embraces some of the values associated with Article 8's requirement of respect for private life. It also has a close link with the right of parents to have their philosophical and religious convictions respected in the provision of their children's education in terms of Article 2 of Protocol No. 1. Both of these guarantees are important in helping to protect and nurture the development of individual identity. Here again, though, it may be more appropriate to consider an issue raised by an applicant under Article 9 in terms of one of these other provisions.¹³ Additionally, aspects of the exercise of belief and conscience can also arise under other guarantees such as Article 6 when these concern the right of access to a court for the determination of a religious community's civil rights,¹⁴ or where property rights are at stake, Article 1 of Protocol No. 1.¹⁵ In consequence, care must be taken in ensuring whether Article 9 is the *lex specialis* in the resolution of a particular case.

Applying Article 9: the checklist of key questions

The guarantee is not absolute. The first paragraph of Article 9 proclaims freedom of thought, conscience and religion, but the second recognises that restrictions upon the manifestation of

conscience or belief may be deemed justified. The first paragraph is inspired by the text of the Universal Declaration on Human Rights; the second paragraph largely replicates the formula used for balancing individual rights against relevant competing considerations found elsewhere in the European Convention on Human Rights, and most obviously in Articles 8, 10 and 11. (This approach is also found in Article 18 of the International Covenant on Civil and Political Rights, as noted above.)

The consequence of the textual formulation is that five key questions require to be addressed:

- ❖ What is the scope of the particular guarantee?
- ❖ Has there been any interference with the right guaranteed?
- ❖ Does the interference have a legitimate aim?
- ❖ Is the interference “in accordance with the law”?
- ❖ Is the interference “necessary in a democratic society”?

In other words, first (in light of the first paragraph) it must be ascertained whether Article 9 is applicable, and if so, whether there has been an *interference* with the guarantee; secondly (in light of the second paragraph) the justification of the interference is assessed to determine whether there has been a *violation* of the provision. (Remember that an application to the Strasbourg Court must also be declared *admissible*, for someone wishing to use the enforcement machinery provided by the European Convention on Human Rights must satisfy a number of admissibility hurdles, including exhaustion of domestic remedies. The discussion of admissibility require-

12. For example, *Refah Partisi (the Welfare Party) and others v. Turkey* [GC].

13. For example, *Hoffman v. Austria*, discussed at p. 79.

14. For example, *Canea Catholic Church v. Greece*.

15. *Holy Monasteries v. Greece*.

ments is largely outwith the scope of this handbook, although brief consideration is given below as to when and to what extent associations such as churches or religious associations can be considered as “victims” for the purposes of bringing an application.)¹⁶

These five questions need to be addressed by reference to existing Article 9 case-law. Discussion of the general application of these tests will also provide an understanding of the interplay between the provision and other Convention guarantees as well as an appreciation of key aspects of the Strasbourg Court’s approach to interpretation. Thereafter, more specific (that is, thematic) aspects of the protection accorded by the guarantee are considered (including such issues as prisoners’ rights, registration of religious bodies and of places of worship, and dress codes). While the case-law and discussion centres largely upon religious belief, it is vital to recall that the same principles apply in respect of other philosophical beliefs not based upon religious faith.

Question 1: Does the complaint fall within the scope of Article 9?

The scope of Article 9 is potentially wide. The provision covers not only private or personal belief, but also collective manifestation of that opinion or belief, either individually or with others. Article 9 thus has both an internal and an external

16. See p. 24 below.

aspect; and the external aspect may involve the practice of belief within either the private or the public sphere.

The imposition upon individuals of action or practice contrary to personal belief, such as a requirement to take a religious oath¹⁷ or to attend a religious ceremony¹⁸ will thus give rise to issues under Article 9; conversely, a restriction placed upon individual action or behaviour mandated by belief, such as a prohibition on the wearing of religious clothing in public¹⁹ or on seeking to persuade others to follow a particular faith²⁰ will also fall within the scope of the guarantee. Burdens placed upon the rights of members to exercise collective freedom of worship such as restrictions on the establishment of places of worship,²¹ the refusal to register religious groups,²² or limitations on freedom of movement preventing members of a community from gathering to worship²³ will likewise do so. State authorities must also refrain from unduly interfering in the activities of religious groups, and failure to do so may give rise to issues under Article 9.²⁴

The primary focus of the guarantee is thus private and personal belief and its individual and collective manifestation. However,

17. *Buscarini and others v. San Marino*, §§34–41, at §34.

18. *Cf Valsamis v. Greece*, §§21–37 (no interference with Article 9 rights), discussed at p. 27 below.

19. *Ahmet Arslan and others v. Turkey*, §§44–52.

20. *Kokkinakis v. Greece*, §§31–33.

21. *Manoussakis and others v. Greece*, §§36–53.

22. See pp. 55 ff below.

23. *Cyprus v. Turkey* [GC], §§242–246.

24. See pp. 62 ff below.

the term “practice” in the text of Article 9 does not cover every act motivated or influenced by a religion or belief.²⁵ Disposal of human remains in accordance with religious wishes does not probably involve freedom of thought, conscience or religion but rather may give rise to respect for private and family life under Article 8.²⁶ Nor is there any obligation upon a state to accommodate a demand from a taxpayer that it should allocate his payments to particular purposes,²⁷ or that the use of a particular language should be permitted in exercising freedom of thought.²⁸ The scope of the provision also does not extend to such issues as the non-availability of divorce,²⁹ allegations of discriminatory treatment in the application of tax regulations,³⁰

25. *Cserjés v. Hungary* (dec.).

26. *X v. Germany* (1981) (but matter can fall within the scope of Article 8). Cf *Sabanchiyeva and others v. Russia* (dec.) (refusal to return bodies of alleged terrorists killed by law-enforcement personnel: admissible under Articles 3, 8 and 9, taken alone and in conjunction with Articles 13 and 14).

27. *C. v. the United Kingdom* (a Quaker opposed the use of any tax paid by him for military purposes; the Commission noted that Article 9 could not always guarantee the right to behave in the public sphere (e.g. refusing to pay tax) in a manner dictated by belief); and *Alujer Fernández and Caballero García v. Spain* (dec.) (the impossibility for members of a church to earmark part of their income tax for the support of their church as was possible for members of the Roman Catholic Church did not give rise to a violation of Article 9 taken with Article 14: the state had a certain margin of appreciation in such a matter on which there was no common European practice).

28. *Inhabitants of Leeuw-St Pierre v. Belgium*.

29. *Johnston and others v. Ireland*, §§62-63 (issues considered under Articles 8, 12 and 14).

30. *Darby v. Sweden*, §§28-35 (application disposed of under Article 1 of Protocol No. 1 taken with Article 14; the Court considered that the establishment of a particular church in a state did not give rise to any Article 9 issue if membership is voluntary (§35)).

or deprivation of a religious organisation’s material resources.³¹ However, if a state goes beyond its core obligations under Article 9 and creates *additional* rights falling within the wider ambit of freedom of religion or conscience, such rights are then protected by Article 14 in conjunction with Article 9 against discriminatory application of domestic law.³² This point is discussed further, below.³³

The protection afforded by Article 9 is essentially a matter for European states to ensure within their jurisdictions, and accordingly very limited assistance can be derived from the provision itself when an individual is under threat of expulsion to another country where it is claimed there is a real risk that freedom of religion would be denied if returned or expelled.³⁴ On the other hand, while immigration control is normally a matter falling outwith the scope of the Convention guarantees,

31. *Holy Monasteries v. Greece*, §§86-87 (matters considered under Article 1 of Protocol No. 1 since the complaint did not concern “objects intended for the celebration of divine worship”).

32. *Savez Crkava “Riječ Života” and others v. Croatia*, §§55-59 and 85-93 (unequal allocation of criteria for rights to have religious marriages recognised as equal to those of civil marriages and to allow religious education in public schools: violation of Article 14 in conjunction with Article 9, for while these rights could not be derived from the ECHR, discriminatory measures were inappropriate).

33. At p. 75.

34. *Z and T v. the United Kingdom* (dec.) (Pakistani Christians facing deportation to Pakistan: while the Court would not rule out the possibility that exceptionally Article 9 may be engaged in expulsion cases, it was difficult to envisage such circumstances which in any event would not engage Article 3 responsibility). See too *Al-Nashif and others v. Bulgaria* (deportation on account of having taught Islamic religion without proper authorisation: in view of finding that deportation would constitute a violation of Article 8, no need to consider Article 9).

the refusal to allow a resident alien to enter a country on account of his religious beliefs may give rise to issues under Article 9 in particular cases.³⁵

What is meant by “thought, conscience and religion”?

Use of the terms “thought, conscience and religion” (and “religion or beliefs” in paragraph 2) suggests a potentially wide scope for Article 9, but the case-law indicates a somewhat narrower approach is adopted in practice. For example, a “consciousness” of belonging to a minority group (and in consequence, the aim of seeking to protect a group’s cultural identity)³⁶ does not give rise to an Article 9 issue. Nor is “belief” the same as “opinion”, for to fall within the scope of Article 9, personal beliefs must satisfy two tests: first, the belief must “attain a certain level of cogency, seriousness, cohesion and importance”; and secondly, the belief itself must be one which may be considered as compatible with respect for human dignity. In other words, the belief must relate to a “weighty and substantial aspect of human life and behaviour” and also be such as to be deemed worthy of protection in European democratic society.³⁷ Beliefs in assisted suicide³⁸ or language pref-

35. *Nolan and K v. Russia*, §§61-75 (exclusion of resident alien on account of activities as a member of the Unification Church: violation). See also *Perry v. Latvia*, §§51-66, discussed below at p. 39; and *El Majaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], §§27-35 (refusal of work permit for position of imam struck out after a subsequent application for permit had been successful).

36. *Sidiropoulos and others v. Greece*, §41.

37. *Campbell and Cosans v. the United Kingdom*, §36.

erences³⁹ or disposal of human remains after death⁴⁰ do not involve “beliefs” within the meaning of the provision. On the other hand, pacifism,⁴¹ atheism⁴² and veganism⁴³ are value-systems clearly encompassed by Article 9. A political ideology such as communism will also qualify.⁴⁴ However, it is important to note that interferences with the voicing of thoughts or the expression of conscience will often be treated as giving rise to issues arising within the scope of Article 10’s guarantee of freedom of expression or the right of association under Article 11.⁴⁵

Much of the jurisprudence focuses upon religious beliefs. At the outset, however, it is important to note that *non*-belief as well as non-religious belief will also be protected by Article 9:

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. It 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

38. *Pretty v. the United Kingdom*.

39. *Belgian Linguistic case*, Law, §6.

40. *X v. Germany* (1981) (but matter can fall within the scope of Article 8).

41. *Arrowsmith v. the United Kingdom*.

42. *Angelini v. Sweden*.

43. *C.W. v. the United Kingdom*.

44. *Hazar, Hazar and Acik v. Turkey*.

45. See for example *Vogt v. Germany*.

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, *inter alia*, freedom to “manifest [one’s] religion”. Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9, freedom to manifest one’s religion is not only exercisable in community with others, “in public” and within the circle of those whose faith one shares, but can also be asserted “alone” and “in private”; furthermore, it includes in principle the right to try to convince one’s neighbour, for example through “teaching”, failing which, moreover, “freedom to change [one’s] religion or belief”, enshrined in Article 9, would be likely to remain a dead letter.⁴⁶

It has not been found necessary to give a definite interpretation to what is meant by “religion”. Indeed, the Court has specifically recognised that

it is clearly not the Court’s task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a “religion”.⁴⁷

In *Kimlya and others v. Russia*, for example, the question arose as to whether the Church of Scientology could be recognised as a “religion”. Where there is no European consensus on the reli-

gious nature of a body (as in this case such as Scientology), the Court “being sensitive to the subsidiary nature of its role” may simply rely upon the position taken by the domestic authorities. Here, a Scientology centre initially registered as a non-religious entity had been dissolved specifically on account of the religious nature of its activities. The use of this ground for the suppression of the centre was sufficient to allow the Court to deem that Article 9 was engaged.⁴⁸ Certainly, what may be considered “mainstream” religions are readily accepted as belief systems falling within the scope of the protection,⁴⁹ and similarly covered are minority variants of such faiths.⁵⁰ Older faiths such as Druidism also qualify⁵¹ as do religious movements of more recent origin such as Jehovah’s Witnesses,⁵² the Moon Sect,⁵³ the Osho movement⁵⁴ and the Divine Light Zentrum.⁵⁵ However, whether the Wicca movement involves a “religion” appears to have been left open in one early case, and thus where there is a doubt as regards this matter, an applicant may be expected to establish that a particular “religion” indeed does exist.⁵⁶

48. *Kimlya and others v. Russia*, §§79–81.

49. See, e.g., *ISKCON and 8 others v. the United Kingdom* (dec.).

50. *E.g. Cha'are Shalom Ve Tsedek v. France* [GC].

51. *Chappell v. the United Kingdom*.

52. *Kokkinakis v. Greece*.

53. *X v. Austria* (dec.) (1981).

54. *Leela Förderkreis e.V. and others v. Germany*.

55. *Omkarananda and the Divine Light Zentrum v. Switzerland*.

56. *X v. the United Kingdom* (dec.) (1977).

46. *Kokkinakis v. Greece*, §31.

47. *Kimlya and others v. Russia*, §79.

The forum internum

At its most basic, Article 9 seeks to prevent state indoctrination of individuals by permitting the holding, development, and refinement and ultimately change of personal thought, conscience and religion. All of this involves what is often referred to as the *forum internum*.⁵⁷ For example,

an intention to vote for a specific party is essentially a thought confined to the *forum internum* of a voter and its existence cannot be proved or disproved until and unless it has manifested itself through the act of voting.⁵⁸

A reading of the text of Article 9 points to the rights to hold and to change ideas as being absolute rights, for paragraph (2) provides that only the “freedom to manifest one’s religion or beliefs” may be limited by domestic law in particular circumstances. The clear implication from the text is thus that freedom of thought, conscience and religion *not* involving a manifestation of belief cannot be subject to state interference. Certainly, it must be possible for an individual to leave a religious faith or community.⁵⁹ In any event, it may be difficult to envisage circumstances – even in the event of a war or national emergency⁶⁰ – in which a state would seek to obstruct the very essence of the rights to hold and to change personal convictions. However, such a situation is not entirely inconceivable,

57. E.g. *Van den Dungen v. the Netherlands*.

58. *Georgian Labour Party v. Georgia*, §120.

59. See *Darby v. Sweden*, noted above at p. 15.

although the sole instance found in the jurisprudence concerns the unlawful deprivation of liberty of individuals in order to attempt to “de-programme” beliefs acquired when members of a sect, the Strasbourg Court deciding that a finding of a violation of Article 5 meant that it was unnecessary to consider any Article 9 issue.⁶¹

Forcing an individual to disclose his beliefs could thus undermine this aspect of the guarantee, for “no one can be compelled to reveal his thoughts or adherence to a religion or belief.”⁶² Thus the requirement that individuals wishing to make a solemn declaration rather than take an oath in court proceedings disclose their religious convictions is incompatible with Article 9.⁶³ Census returns seeking disclosure of religious belief or affiliation certainly give rise to the question as to what legitimate state purposes would be served by having such data.⁶⁴ A requirement to have religious faith disclosed in identity documents is incompatible with an individual’s right not to be

60. Further, Article 15 of the European Convention on Human Rights permits any Contracting State, “in time of war or other public emergency threatening the life of the nation” to take measures derogating from its obligations under the Convention “to the extent strictly required by the exigencies of the situation,” provided that such measures are not inconsistent with its other obligations under international law.

61. *Riera Blume and others v. Spain*, §§31-35.

62. Human Rights Committee, General Comment 22, Article 18, CCPR/C/21/Rev. 1/Add (1993), at para. 3 (in respect of Article 18 of the ICCPR).

63. *Dimitras and others v. Greece*, §§76-78; see similarly *Alexandridis v. Greece*, §§33-41.

64. Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd ed., 2009), at p. 429.

obliged to disclose his religion.⁶⁵ However, there may be two sets of circumstances in which it may be justified to require such disclosure. First, a state may seek to ascertain the values and beliefs held by candidates for public employment on the grounds that they hold views incompatible with the office.⁶⁶ Yet this qualification itself is qualified, for the failure to appoint an individual to a post on the ground of belief may in turn involve an interference with freedom of expression under Article 10. For example, in *Lombardi Vallauri v. Italy* a university lecturer had been refused renewal of a contract for a teaching post at a denominational university since it was considered that he held views that were incompatible with the religious doctrine of the university in which he had worked for some 20 years. A violation of Article 10 was established on account of the failure by the university and by the domestic courts to explain how the applicant's views were liable to affect the interests of the university.⁶⁷ Secondly, an individual seeking to take advantage of a special privilege made available in domestic law on the grounds of belief may be expected to disclose and to justify his beliefs. This may occur, for example, in respect of application for recognition of conscientious objection to a requirement to carry out military service where such an exemption is recognised in domestic law.⁶⁸ It may also arise in other circumstances. In

Kosteski v. "the former Yugoslav Republic of Macedonia", the applicant had been penalised for failing to attend his place of work on the day of a religious holiday. The Strasbourg Court observed as follows:

Insofar as the applicant has complained that there was an interference with the inner sphere of belief in that he was required to prove his faith, the Court recalls that the [domestic] courts' decisions on the applicant's appeal against the disciplinary punishment imposed on him made findings effectively that the applicant had not substantiated the genuineness of his claim to be a Muslim and that his conduct on the contrary cast doubt on that claim in that there were no outward signs of his practising the Muslim faith or joining collective Muslim worship. While the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by [domestic] law which provided that Muslims could take holiday on particular days. ... In the context of employment, with contracts setting out specific obligations and rights between employer and employee, the Court does not find it unreasonable that an employer may regard absence without permission or apparent justification as a disciplinary matter. Where the employee then seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of

65. *Sinan Işık v. Turkey*, §§37-53 (identity cards carried a "religion" data field which could, however, be left blank).

66. *Vogt v. Germany*, §§41-68 (disposal under Articles 10 and 11).

67. *Lombardi Vallauri v. Italy*, §§43-56.

68. See *N. v. Sweden* and *Raninen v. Finland*. See further p. 44 below.

conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion. ...⁶⁹

The qualification “privilege or entitlement not commonly available”, however, suggests a restricted application of this principle. For example, in respect of parents who seek to have their philosophical convictions taken into account in the provision of education for their children, education authorities may not probe too far into the beliefs of such parents. This situation arose in *Folgerø and others v. Norway*, in which domestic arrangements allowing parents to object to certain aspects of the education of their children were considered unsatisfactory in terms of Article 2 of Protocol No. 1:

... it was a condition for obtaining partial exemption that the parents give reasonable grounds for their request. The Court observes that information about personal religious and philosophical conviction concerns some of the most intimate aspects of private life. ... [I]mposing an obligation on parents to disclose detailed information to the school authorities about their religions and philosophical convictions may constitute a violation of Article 8 of the Convention and, possibly also, of Article 9. ... [I]nherent in the condition to give reasonable grounds was a risk that the parents might feel compelled to disclose to the school

authorities intimate aspects of their own religious and philosophical convictions. The risk of such compulsion was all the more present in view of the difficulties highlighted above for parents in identifying the parts of the teaching that they considered as amounting to the practice of another religion or adherence to another philosophy of life. In addition, the question whether a request for exemption was reasonable was apparently a potential breeding ground for conflict, a situation that parents might prefer simply to avoid by not expressing a wish for exemption.⁷⁰

While there is no explicit reference in the text of Article 9 to the prohibition of *coercion* to hold or to adopt a religion or belief (as appears in Article 18 of the International Covenant on Civil and Political Rights), Article 9 issues may also arise in situations in which individuals are required to act against their conscience or beliefs. In *Buscarini and others v. San Marino*, for example, two individuals who had been elected to parliament had been required to take a religious oath on the Bible as a condition of their appointment to office. The respondent government sought to argue that the form of words used (“I swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic...”) was essentially of historical and social rather than religious significance. In agreeing with the Commission that it “would be contradictory to make the exercise of a mandate intended to represent different views of society within

69. *Kosteski v. “the former Yugoslav Republic of Macedonia”*, §39.

70. *Folgerø and others v. Norway* [GC], §98.

Parliament subject to a prior declaration of commitment to a particular set of beliefs”, the Strasbourg Court determined that the imposition of the requirement could not be deemed to be “necessary in a democratic society”.⁷¹ Similarly, domestic law may not impose an obligation to support a religious organisation by means of taxation without recognising the right of an individual to leave the church and thus obtain an exemption from the requirement.⁷² However, this principle does not extend to general legal obligations falling exclusively in the public sphere, and thus taxpayers may not demand that their payments are not allocated to particular purposes.⁷³

Protection against coercion or indoctrination may also arise in other ways. For example, domestic law may deem it appropriate to seek to protect individuals considered in some sense vulnerable (whether on account of immaturity, status or otherwise) against “improper proselytism”, that is, encouragement or pressure to change religious belief which can be deemed inappropriate in the particular circumstances of the case.⁷⁴ Further, as noted, in accordance with Article 2 of Protocol No. 1 the philosophical or religious convictions of parents must be respected by the State when providing education, and thus a parent may prevent the “indoctrination” of his child in school.⁷⁵

71. *Buscarini and others v. San Marino*, §§34-41, at §39.

72. *Darby v. Sweden*, noted above at p. 15.

73. *C. v. the United Kingdom*.

74. *Kokkinakis v. Greece*, discussed below at p. 47 ff.

Manifestations of religion or belief

Article 9 also protects acts intimately linked to the *forum internum* of personal belief.⁷⁶ The specific textual reference to the “freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief, in worship, teaching, practice and observance” underlines that manifestation of belief is an integral part of the protection accorded by the guarantee. For example, “bearing witness in words and deeds is bound up with the existence of religious convictions”.⁷⁷ However, since such “manifestations” of thought, conscience or religious belief at times may appear indistinguishable from the expression of thought or conscience falling within the scope of Article 10’s guarantee of freedom of speech, care must be taken in determining which guarantee ought to apply.

A “manifestation” implies a perception on the part of adherents that a course of activity is in some manner prescribed or required. As noted, the textual formulation of paragraph 1 refers to manifestations by means of “worship, teaching, practice and observance”. What qualifies as a “manifestation” of religion or belief may call for careful analysis, for as the Commission noted in the early case of *Arrowsmith v. the United Kingdom*, the term “does not cover each act which is motivated

75. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, discussed below at p. 68. See also *Angeleni v. Sweden* and *C.J., JJ and E.J. v. Poland* (dec.). See further pp. 66 ff below.

76. *C.J., JJ and E.J. v. Poland* (dec.).

77. *Kokkinakis v. Greece*.

or influenced by a religion or a belief”⁷⁸ The case-law makes clear that such matters as proselytism, general participation in the life of a religious community, and the slaughtering of animals in accordance with religious prescriptions are readily covered by the term. However, a distinction must be drawn between an activity *central* to the expression of a religion or belief, and one which is merely *inspired* or even *encouraged* by it. In *Arrowsmith* the applicant, who was a pacifist, had been convicted for handing out leaflets to soldiers. The leaflets had focused not upon the promotion of non-violent means for dealing with political issues but instead had been critical of government policy in respect of civil unrest in one part of the country. The Commission accepted that any public declaration which proclaimed the idea of pacifism and urged acceptance of a commitment to the belief in non-violence would fall to be considered as a “normal and recognised manifestation of pacifist belief”; but as the leaflets in question had expressed not her own pacifist values but rather her critical observations of governmental policy, their distribution could not qualify as a “manifestation” of a belief under Article 9 even although this had been motivated by a belief in pacifism.⁷⁹ Similarly, the distribution of anti-abortion material outside a clinic will not be deemed to involve expression of religious or philosophical beliefs as this involves essentially persuading women not to have an abortion.⁸⁰ Care is thus needed in determining what is

meant by the term “manifestation”; but in such cases, interferences with the right to disseminate materials of the kind in question will give rise to issues falling under Article 10’s guarantee of freedom of expression.

Establishing whether “worship, teaching, practice and observance” is prescribed or merely motivated by belief may thus not always be straightforward. The refusal to work on a particular day cannot be deemed a manifestation of religious belief, even although the absence from the place of work may have been motivated by such.⁸¹ A refusal to hand over a letter of repudiation to a former spouse in terms of Jewish law also does not involve a manifestation of belief;⁸² nor will the choice of forenames for children (although this may fall within the scope of “thought” within the meaning of Article 9).⁸³ Certainly, the factual situations giving rise to clear interferences with the right to manifest belief tend to involve “manifestations” in the public rather than in the private sphere (for example, through the imposition of sanctions for attempting to convert others, or for wearing religious symbols in university), but it is crucial at this stage to appreciate that not every act in the public sphere attributable to individual conviction will necessarily fall within the scope of the provision.⁸⁴ Many of these cases, however,

78. *Arrowsmith v. the United Kingdom*.

79. *Arrowsmith v. the United Kingdom*, at §§71-72.

80. *Van den Dungen v. the Netherlands*. See also *Knudsen v. Norway* (dec.).

81. *X v. the United Kingdom* (dec.) (1981); and *Kosteski v. “the former Yugoslav Republic of Macedonia”*, §38.

82. *D. v. France* (1983).

83. *Salonen v. Finland*.

84. *Van den Dungen v. the Netherlands*.

point to a central dilemma in this aspect of the case-law: determining whether a particular action constitutes a “manifestation” of, or merely has been motivated by, conscience or belief can require potentially intrusive scrutiny of individual belief and thus an intrusion into the “*forum internum*”. Some retreat from – or at least, relaxation of – the *Arrowsmith* approach is now evident: for example, it is now accepted that the wearing of conspicuous signs of religious beliefs in schools should be considered as a restriction on the freedom to manifest religious faith,⁸⁵ an approach which also avoids the difficulty of becoming embroiled in questions of theology.

The collective aspect of Article 9

As well as those elements of the guarantee relating to the *forum internum* and to individual manifestation of thought, conscience and religion, Article 9 also protects manifestation of belief with others both in the private and public spheres, for as the text of paragraph (1) makes clear, a “manifestation” of belief may take place “either alone or in community with others” and thus may occur both in the private and public spheres. Worship with others may be the most obvious form of collective manifestation. Here, though, other provisions of the Convention may be relevant, either in interpreting Article 9 in light of these requirements, or indeed as the more appropriate provision to determine the particular issue. For example, access to places of

worship and restrictions placed upon adherents’ ability to take part in services or observances will give rise to Article 9 considerations,⁸⁶ and thus in such cases Article 9 needs to be interpreted in light of the protection accorded by Article 11. Further, since a religious community must be guaranteed access to court to safeguard its interests, Article 6 may also be of crucial importance. The close interplay between these three provisions was noted by the Court in the case of *Metropolitan Church of Bessarabia v. Moldova*:

... since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.

In addition, one of the means of exercising the right to manifest one’s religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judi-

85. See, e.g., *Aktas v. France* (dec.) (expulsion from school for refusing to remove various religious symbols). See further p. 49 below.

86. *Cyprus v. Turkey* [GC], §§241-247 (restrictions on movement including access to places of worship curtailed ability to observe religious beliefs).

cial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6.⁸⁷

The protection accorded to this collective aspect of the freedom of thought, conscience and belief by Article 9 is illustrated above all by cases in which state authorities have attempted to interfere in the internal organisation of religious communities. Relevant cases are discussed below.⁸⁸

Where the individual and collective aspects of Article 9 may conflict, it will generally be appropriate to consider that the collective rather than the individual manifestation of belief should prevail, for the reason that “a church is an organised religious community based on identical or at least substantially similar views”, and thus the religious organisation “itself is protected in its rights to manifest its religion, to organise and carry out worship, teaching, practice and observance, and it is free to act out and enforce uniformity in these matters”. In consequence, it will be difficult for a member of the clergy to maintain that he has the right to manifest his own individual beliefs in a manner contrary to the standard practice of his church.⁸⁹ (In any event, the action complained of must involve exercise of state authority rather than action taken by an ecclesiastical body. Thus where a dispute relates to a matter such as use of the liturgy, state responsibility will not be engaged as this involves a chal-

lenge to a matter of internal church administration taken by a body that is not a governmental agency.⁹⁰ This is so even where the religious body involved is recognised by domestic law as enjoying the particular status of an established church.⁹¹)

The collective aspect of Article 9 and recognition of “victim” status

This collective aspect of Article 9 is indeed emphasised by recognition that a church or other religious organisation may be able to establish “victim” status within the meaning of Article 34 of the Convention. In other words, for the purpose of satisfying admissibility criteria, a church may be recognised as having the right to challenge an interference with respect for religious belief when it can show it is bringing a challenge in a representative capacity on behalf of its members.⁹² However, recognition of representative status will not extend to a commercial body. In *Kustannus OY, Vapaa ajatteliija AB and others v. Finland* the first applicant was a limited liability company, the second was a registered umbrella association (of “free-thinkers”), and the third was the manager of the applicant company and a member of one of the branches of the applicant association. The applicant company had been set up with the primary aim of publishing and selling books reflecting and promoting the aims of the philosophical movement. The company

87. *Metropolitan Church of Bessarabia v. Moldova*, §118.

88. At pp. 62 ff.

89. *X v. the United Kingdom* (dec.) (1981). See also *Knudsen v. Norway* (dec.).

90. *Finska församlingen i Stockholm and Teuvo Hautaniemi v. Sweden*.

91. *X v. Denmark* (dec.) (1976).

92. See, for example, *X and Church of Scientology v. Sweden* (dec.); and *Canea Catholic Church v. Greece*, §31.

had been required to pay a church tax, a requirement upheld by the domestic courts as the company was a commercial enterprise rather than a religious community or a public utility organisation. In deciding that the part of the application alleging a violation with Article 9 rights was manifestly ill-founded, the Commission remarked as follows:

The Commission recalls that pursuant to the second limb of Article 9 para. 1 the general right to freedom of religion includes, *inter alia*, freedom to manifest a religion or “belief” either alone or “in community with others” whether in public or in private. The Commission would therefore not exclude that the applicant association is in principle capable of possessing and exercising rights under Article 9 para. 1. However, the complaint now before the Commission merely concerns the obligation of the applicant company to pay taxes reserved for Church activities. The company form may have been a deliberate choice on the part of the applicant association and its branches for the pursuance of part of the freethinkers’ activities. Nevertheless, for the purposes of domestic law this applicant was registered as a corporate body with limited liability. As such it is in principle required by domestic law to pay tax as any other corporate body, regardless of the underlying purpose of its activities on account of its links with the applicant association and its branches and irrespective of the final receiver of the tax revenues collected from it. Finally, it has not been shown that the applicant association would have

been prevented from pursuing the company’s commercial activities in its own name.⁹³

Further, the recognition of representative status in respect of an association of members appears only to extend to religious belief and not to allegations of interference with thought or conscience. In *Verein “Kontakt-Information-Therapie” and Hagen v. Austria* the applicant association was a private non-profitmaking organisation operating drug abuse rehabilitation centres. The dispute concerned a requirement imposed upon therapists to disclose information relating to their clients, a requirement characterised by the applicants as a matter of conscience. For the Commission, this part of the application fell to be rejected *ratione personae*:

... the association does not claim to be a victim of a violation of its own Convention rights. Moreover, the rights primarily invoked, i.e. the right to freedom of conscience under Article 9 of the Convention and the right not to be subjected to degrading treatment or punishment (Article 3), are by their very nature not susceptible of being exercised by a legal person such as a private association. Insofar as Article 9 is concerned, the Commission considers that a distinction must be made in this respect between the freedom of conscience and the freedom of religion, which can also be exercised by a church as such....⁹⁴

93. *Kustannus OY, Vapaa ajattelija AB and others v. Finland.*

94. *Verein “Kontakt-Information-Therapie” and Hagen v. Austria (dec.).*

Limits to the scope of Article 9

The scope of Article 9 cannot be stretched too far. It does not include, for example, matters such as the non-availability of divorce,⁹⁵ the distribution of information persuading women not to undergo abortions,⁹⁶ or a determination of whether the sale of public housing in order to boost a political party's electoral chances involved wilful misconduct on the part of a politician.⁹⁷ Nor does belief in assisted suicide qualify as a religious or philosophical belief, but this is rather a commitment to the principle of personal autonomy more appropriate for discussion under Article 8, as the Strasbourg Court made clear in *Pretty v. the United Kingdom*:

The Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9 §1 of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph. ... To the extent that the applicant's views reflect her commitment to the principle of personal autonomy, her claim is a restatement of the complaint raised under Article 8 of the Convention.⁹⁸

95. *Johnston and others v. Ireland*, §63.

96. *Van den Dungen v. the Netherlands* (dec.).

97. *Porter v. the United Kingdom* (dec.).

98. *Pretty v. the United Kingdom*, §82.

Further, as stressed, it will also be necessary in many instances to consider whether it would be more appropriate to consider a complaint under another provision of the Convention. The deprivation of a religious organisation's material resources, for example, has been held not to fall within the scope of Article 9, but rather to give rise to issues under the protection of property in terms of Article 1 of Protocol No 1.⁹⁹ Similarly, refusal to grant an individual an exemption from the payment of a church tax on the ground of non-registration may be better considered in terms of the right to property taken in conjunction with the prohibition on discrimination in the enjoyment of Convention guarantees rather than as a matter of conscience or religion.¹⁰⁰ A claim that the refusal to recognise marriage with an underage girl as permitted by Islamic law involved an interference with manifestation of belief was deemed not to fall within the scope of Article 9 but rather of Article 12.¹⁰¹

Question 2: Has there been any interference with Article 9 rights?

Once it can be shown that the issue falls within the scope of Article 9, it will be for the applicant to establish that there has been an "interference" with his Article 9 rights. As noted above, an "interference" is distinct from a "violation": the determination that there has been an "interference" with an individual's

99. *Holy Monasteries v. Greece*.

100. *Darby v. Sweden*, §§30-34 See also note, p. 15 above.

101. *Khan v. the United Kingdom* (dec.).

rights merely leads to further consideration under paragraph 2 as to whether this “interference” was or was not justified in the particular circumstances. An “interference” with an individual’s rights will normally involve the taking of a measure by a state authority; it can, where a positive obligation on the part of state authorities is recognised, also involve the failure to take some necessary action. (As discussed above, it is crucial that the challenged action involves that of a *state* rather than of an ecclesiastical body: matters of internal church administration do not involve the exercise of state authority, even where the church is recognised as an established church.¹⁰² However, even where the impugned action is that of a religious organisation, domestic courts may be required to reflect Convention expectations in their decisions, a matter discussed further below.¹⁰³) Further, as a general principle, state authorities are expected to adopt a position of neutrality in respect of religions, faiths and beliefs.¹⁰⁴ Such an obligation is inherent in a pluralist democratic society. In particular, any assessment of the legitimacy of religious beliefs or of the ways in which those beliefs are expressed is incompatible with Article 9:

but for very exceptional cases, 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.¹⁰⁵

Whether there has been an “interference” with the rights of an individual or of a religious organisation may not in practice be difficult to establish. Sanctions imposed upon individuals for proselytism¹⁰⁶ or for wearing items of religious clothing¹⁰⁷ will involve “interferences”, as will curtailing access to places of worship and restricting the ability of adherents to take part in religious observances¹⁰⁸ or the refusal to grant any necessary official recognition to a church.¹⁰⁹ It is appropriate to proceed on the basis that the labelling of a religious organisation as a “sect” may have had a detrimental impact upon the organisation.¹¹⁰ However, not every situation involving a conflict between state authorities and clearly held and sincere convictions on the part of individuals will permit the conclusion to be drawn that there has been an “interference” with Article 9 rights. In the related cases of *Valsamis v. Greece* and *Efstratiou v. Greece*, for example, pupils who were Jehovah’s Witnesses had been punished for failing to attend parades commemorating the country’s national day because of their belief (and that

105. *Hasan and Chaush v. Bulgaria* [GC], §78.

106. *Kokkinakis v. Greece*, discussed below at p. 48.

107. See further page 46 below.

108. *Cyprus v. Turkey* [GC], §§241-247 (restrictions on movement including access to places of worship curtailed ability to observe religious beliefs).

109. Discussed below at pp. 56 ff.

110. *Leela Förderkreis e.V. and others v. Germany*, §84, discussed further at p. 56 below.

102. See p. 24, above.

103. At pp. 32 ff.

104. See, e.g., *Ivanova v. Bulgaria*, discussed at p. 31 below.

of their families) that such events were incompatible with their firmly-held pacifism. The Strasbourg Court considered that the nature of these parades had involved a public celebration of democracy and human rights, and even taking into account the involvement of military personnel, the parades could not be considered to have been such as to have offended the applicants' pacifist convictions.¹¹¹ Such cases illustrate the occasional difficulty that may arise in determining whether an "interference" has occurred. Assessments may also be contentious: here, the dissenting judges were unable to discern any ground for holding that participation in a public event designed to show solidarity with symbolism which was anathema to personal religious belief could be deemed "necessary in a democratic society".

Positive obligations

Under the European Convention on Human Rights, Article 1, contracting states undertake to "secure to everyone within their jurisdiction" the rights and freedoms set out in the Convention and its protocols. In consequence, a state is first under a negative obligation to refrain from interfering with the protected rights. This negative obligation is reflected, for example, in the language used in Article 9 which provides that "[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as ...". The overarching obligation to secure rights is, however, not confined to a requirement that states refrain from

interfering with protected rights: it can also place the state under an obligation to take active steps. The guarantees found in the European Convention on Human Rights have to be practical and effective rights. Hence, Strasbourg jurisprudence contains the idea of "positive obligations", that is, responsibilities upon the State to take certain action with a view to protecting the rights of individuals.

The fundamental principle driving the case-law on positive obligations is the duty on the part of state authorities to ensure that religious liberty exists within a spirit of pluralism and mutual tolerance. For example, it may be necessary for the authorities to engage in "neutral mediation" to help factions resolve internal dispute within religious communities.¹¹² It may also be expected that domestic arrangements permit religious adherents to practise their faith in accordance with dietary requirements, although the obligation may be limited to ensuring there is reasonable access to the foodstuff, rather than access to facilities for the ritual preparation of meat.¹¹³ Further, the authorities must respond appropriately to protect adherents of religious faiths from religiously-motivated attacks, and when such attacks have occurred, to do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting

111. *Valsamis v. Greece*, §§37-38; and *Efstratiou v. Greece*, §§38-39.

112. *Supreme Holy Council of the Muslim Community v. Bulgaria*.

113. *Cha'are Shalom Ve Tsedek v. France* [GC], discussed below at p. 33.

suspicious facts that may be indicative of a religiously induced violence.¹¹⁴ However, it will not generally be considered necessary to take steps to allow an employee to make arrangements to allow him to take part in religious observances,¹¹⁵ even although the burden placed upon an employer (were such a duty to be recognised) is unlikely to be an onerous one in most cases.

It is thus not always obvious whether a positive obligation to protect thought, conscience or religion exists. In deciding more generally whether or not a positive obligation arises, the Strasbourg Court will seek to “have regard to the fair balance that has to be struck between the general interest of the community and the competing private interests of the individual, or individuals, concerned”.¹¹⁶ Further, the Strasbourg Court has not always drawn a clear distinction between the *obligation* to take steps, and approval of state action which has been taken at domestic level with the aim of advancing protection for belief. In other words, there appears to be an important difference between Strasbourg Court approbation of domestic measures taken with a view to promote belief, and cases in which the

failure to take steps to protect belief is determined to have involved an interference.

Whether action is mandatory or merely permissive will always depend on the circumstances. A situation in which the state has actively intervened in the internal arrangements of a religious community in order to resolve conflict between adherents can involve discharge of a positive obligation arising under Article 9. Where this merely involves “neutral mediation” in disputes between different competing religious factions there will be no interference with Article 9 rights, as the case of the *Supreme Holy Council of the Muslim Community v. Bulgaria* makes clear. However, the nature of such an intervention must be considered carefully, for action going beyond mere “neutral mediation” will indeed involve an interference with Article 9 rights. This case concerned efforts made by the respondent government to address long-standing and continuing divisions caused by conflicts of a political and personal nature within the Muslim religious community. The question was essentially whether the resultant change of religious leadership had been the result of undue state pressure rather than the outcome of a decision freely arrived at by the community:

The Government argued that the authorities had merely mediated between the opposing groups and assisted the unification process as they were under a constitutional duty to secure religious tolerance and peaceful relations between groups of believers. The Court agrees that States have such a duty and that discharging it may require engaging in

114. *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, §§138-142 (group attack on a congregation of Jehovah's Witnesses by Orthodox believers involving violent assaults and destruction of religious artefacts, the police being unwilling to intervene or investigate, and little attempt being made to instigate criminal proceedings: violation of Article 14 in conjunction with Articles 3 and 9).

115. Discussed at pp. 30 ff below.

116. For example, *Dubowska and Skup v. Poland*.

mediation. Neutral mediation between groups of believers would not in principle amount to State interference with the believers' rights under Article 9 of the Convention, although the State authorities must be cautious in this particularly delicate area.

Here, though, the Strasbourg Court determined that the authorities had actively sought the reunification of the divided community by taking steps to compel the imposition of a single leadership against the will of one of the two rival leaderships. This went beyond "neutral mediation" and had thus involved an interference with Article 9 rights.¹¹⁷ Such cases also illustrate the interplay between freedom of religion and freedom of association: Article 9 when interpreted in the light of Article 11

encompasses the expectation that [such a] community will be allowed to function peacefully, free from arbitrary State intervention.¹¹⁸

Employment and freedom of thought, conscience and religion

In the area of employment, the protection accorded by Article 9 is somewhat restricted. The Strasbourg Court has proved generally reluctant to recognise any positive obligation on the part of employers to take steps to facilitate the manifestation of belief, for example, by organising the discharge of responsibili-

ties to allow an individual to worship at a particular time or in a particular manner. Employees have a duty to observe the rules governing their working hours, and dismissal for failing to attend work on account of religious observances does not give rise to an issue falling within the scope of Article 9.¹¹⁹ The justification for such an approach is the voluntary nature of employment, and the principle that an employee who leaves his employment is able to follow whatever observances he feels are necessary. This also extends to public sector employment. In *Kalaç v. Turkey*, the Strasbourg Court held that a member of the armed forces had voluntarily accepted restrictions upon his ability to manifest his beliefs when joining up on the grounds of the exigencies of military life (although in any event, in this case the Court was not satisfied that the applicant had been prevented from fulfilling his religious observations):

In choosing to pursue a military career [the applicant] was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians. States may adopt for their armies disciplinary regulations

119. *Konttinen v. Finland* (dec.). See also *Stedman v. the United Kingdom* (dec.). See also *Jehovah's Witnesses of Moscow v. Russia*, §§170-182 (refusal to re-register a religious association and its dissolution in part on account of perceived restrictions imposed by belief upon adherents despite assurances that they determined for themselves their place of employment: violation, the Court noting also that voluntary work or part-time employment or missionary activities were not contrary to the European Convention on Human Rights).

117. *Supreme Holy Council of the Muslim Community v. Bulgaria*, §§76-86 at §§79 and 80, discussed further at p. 63, below.

118. *Supreme Holy Council of the Muslim Community v. Bulgaria*, §73.

forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.

It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque. The Supreme Military Council's order was, moreover, not based on [the applicant's] religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude. According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion.¹²⁰

In short, unless there are special features accepted as being of particular weight, incompatibility between contractual or other duties and personal belief or principle will not normally give rise to an issue under Article 9, and thus action taken as a result of the deliberate non-observance of professional duties is

120. *Kalaç v. Turkey*, §§28-31.

unlikely to constitute an interference with an individual's rights.¹²¹ Indeed, in relation to certain public sector offices, two further restrictions on the exercise of freedom of thought, conscience and religion apply. First, "in order to perform its role as the neutral and impartial organiser of the exercise of religious beliefs, the State may decide to impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part" in the activities of religious movements.¹²² Secondly, a state may seek to ascertain the values and beliefs held by candidates for public employment, or dismiss them on the grounds that they hold views incompatible with their office.¹²³ However, certain caveats apply. Such action may result in unjustified interferences with other Convention rights such as freedom of expression under Article 10.¹²⁴ It may also constitute indirect discrimination on the basis of belief.¹²⁵ Further, the state must remain neutral. In *Ivanova v. Bulgaria* the applicant's dismissal from a non-teaching role in a school on account of her membership of an Evangelical Christian group that had been denied state registration and that had carried on its activities clandestinely and in the face of continuing official and media harassment was held to have involved a violation of Article 9. Significant pressure had been placed on the applicant to resign, but ultimately she had

121. *Cserjés v. Hungary* (dec.).

122. *Refah Partisi (the Welfare Party) and others v. Turkey* [GC], §94.

123. *Vogt v. Germany*, §§41-68 (disposal under Articles 10 and 11).

124. See, e.g., *Lombardi Vallauri v. Italy*, discussed above at p. 19.

125. *Thlimmenos v. Greece* [GC], discussed at p. 79 below.

been dismissed on the ostensible ground of not meeting the requirements for her post as a result of the school's claimed need that the post-holder should hold a university degree. The Court, however, concluded that the real reason for the dismissal was the application of a policy of intolerance towards members of this evangelical group, and found a violation of the guarantee.¹²⁶

The Strasbourg Court has also examined cases involving the dismissal of individuals employed by religious associations. The general principle applies: thus a member of the clergy of an established church is expected not only to discharge religious but also secular duties, and cannot complain if the latter conflict with his personal beliefs, for his right to relinquish his office will constitute the ultimate guarantee of his freedom of conscience.¹²⁷ However, other Convention guarantees may be applicable, for where an individual is dismissed from employment with a religious organisation on the grounds of incompatibility of practice with professed beliefs of the church, careful assessment may be needed as to whether state authorities have discharged the positive obligation upon them to ensure the right to respect for private and family life under Article 8. Here,

domestic courts are expected to ensure that Convention guarantees are "practical and effective" by reflecting this in their determinations. While the autonomy of religious communities is protected against undue state interference under Article 9 read in the light of Article 11's protection for freedom of assembly and association, domestic courts and tribunals must nevertheless ensure that the grounds for dismissal have taken appropriate account of Convention expectations under Article 8, particularly where an employee who has been dismissed by a religious organisation has limited opportunities of finding new employment. The related cases of *Obst v. Germany* and *Schüth v. Germany* illustrate this point. In *Obst*, the European director of public relations for the Mormon church had lost his job for self-confessed adultery; in *Schüth*, the organist and choirmaster of a Roman Catholic parish had been dismissed after it became known that he and his new partner were expecting a child following his separation from his wife. In *Obst*, the Court agreed with the domestic employment court's ruling that the dismissal of the applicant based upon his own decision to confess his infidelity could be viewed as a necessary measure aimed at preserving the church's credibility, for the applicant should have been aware of the contractual importance of marital fidelity for his employer and thus of the incompatibility of the extra-marital relationship in light of the enhanced obligations of loyalty that this particular post entailed. In this case, the domestic courts had also considered the feasibility of a less severe sanction and the degree of likeli-

126. *Ivanova v. Bulgaria*, §§81-86.

127. *Knudsen v. Norway* (dec.). See also, e.g., *Rommelfanger v. Germany* (dec.) (dismissal of a doctor employed in a Roman Catholic hospital for expressing views on abortion not in conformity with the Church's teaching: inadmissible under Article 10); and *Siebenhaar v. Germany*, §§36-48 (contract as kindergarten assistant for the Protestant Church made clear that incompatible religious activities would also be incompatible with employment: no violation of Article 9).

hood that the appellant would find other employment.¹²⁸ In contrast, in *Schiüth* the Court found a violation of Article 8 on account of the failure of the employment courts to have properly balanced the interests of the church as employer with the applicant's right to respect for his private and family life. No mention of his *de facto* family life had been made in the judgment of the domestic courts which had simply reproduced the opinion of the church that its credibility would have been undermined had no dismissal taken place. This had been so even although the domestic courts had also accepted that the post in question was not one in which serious misconduct was entirely incompatible with continuation of employment (as would have been the case of employees whose responsibilities involved counselling or religious teaching, for example). While the contract of employment had limited the applicant's right to respect for private life to a certain degree as it had entailed a duty of loyalty towards the church, such a contract could not be seen as implying an unequivocal undertaking to live a life of abstinence in the event of separation or divorce. Further, in this instance the applicant's chances of finding alternative employment were considered to be limited.¹²⁹

Permitting due recognition of religious practices

A positive obligation to ensure that religious communities may exercise the freedom to worship or otherwise "manifest" their

faiths through teaching or other observation may arise in certain instances. It will always be necessary to examine the facts of each case with particular care. For example, the failure to accord a religious community access to meat from animals slaughtered in accordance with religious prescriptions may involve an interference with Article 9. However, as the judgment in *Cha'are Shalom Ve Tsedek v. France* clarifies, it is the issue of *accessibility* to such meat rather than the grant of authority to carry out ritual slaughter that appears to be crucial. In this case, a religious body sought to challenge a refusal by the authorities to grant the necessary permission to allow it to perform the slaughter of animals for consumption in accordance with its ultra-orthodox beliefs. Another Jewish organisation had received approval for the slaughter of animals according to its own rites which differed only marginally from those of the applicant association. The association alleged that the refusal constituted a violation both of Article 9, and also of Article 14 in conjunction with Article 9. It was uncontested that ritual slaughter constituted a religious observance whose purpose was the supply to Jews of meat from animals slaughtered in accordance with religious prescriptions, an essential aspect of that religion's practice:

[T]he applicant association can rely on Article 9 of the Convention with regard to the French authorities' refusal to approve it, since ritual slaughter must be considered to be covered by a right guaranteed by the Convention, namely

128. *Obst v. Germany*, §§39-53.

129. *Schiüth v. Germany*, §§53-75.

the right to manifest one's religion in observance, within the meaning of Article 9. ...

In the first place, the Court notes that by establishing an exception to the principle that animals must be stunned before slaughter, French law gave practical effect to a positive undertaking on the State's part intended to ensure effective respect for freedom of religion. [Domestic law], far from restricting exercise of that freedom, is on the contrary calculated to make provision for and organise its free exercise. The Court further considers that the fact that the exceptional rules designed to regulate the practice of ritual slaughter permit only ritual slaughterers authorised by approved religious bodies to engage in it does not in itself lead to the conclusion that there has been an interference with the freedom to manifest one's religion. The Court considers, like the Government, that it is in the general interest to avoid unregulated slaughter, carried out in conditions of doubtful hygiene, and that it is therefore preferable, if there is to be ritual slaughter, for it to be performed in slaughterhouses supervised by the public authorities. ...

However, when another religious body professing the same religion later lodges an application for approval in order to be able to perform ritual slaughter, it must be ascertained whether or not the method of slaughter it seeks to employ constitutes exercise of the freedom to manifest one's religion guaranteed by Article 9 of the Convention. In the Court's opinion, there would be interference with the

freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable. But that is not the case.

In this instance, the applicant religious body had sought permission from the authorities for the slaughter of animals carried out in a similar (but not entirely identical) manner by a distinct religious group, but this had been refused. The Strasbourg Court decided that this had not involved an "interference" with Article 9: first, the method of slaughter employed by the ritual slaughterers of the association was identical to the other association, apart from the thoroughness of the examination of the animal after it had been killed; secondly, meat prepared in a manner consistent with the applicant association's beliefs was also available from other suppliers in a neighbouring country. On these grounds, the Strasbourg Court determined that there had not been an interference with the association's rights since it had not been made impossible for the association's adherents to obtain meat slaughtered in a manner considered appropriate. (In any event, even if there had been an interference with Article 9 rights, the Court considered that there would have been no violation of the guarantee as the difference in treatment between the two associations had been in pursuit of a legitimate aim, and had a reasonable relationship of proportionality between the means employed and the aim sought to be realised.)¹³⁰ This judgment perhaps does not fully

address the issue of the extent of the state’s positive obligations to respect religious pluralism. It is not clear from the judgment whether, for example, a state may deem it appropriate to prohibit ritual slaughter on the grounds of animal welfare, and if so, whether it must facilitate in such instances the importation of meat from other countries. The Strasbourg Court’s insistence in its case-law that any tension in society occasioned by religious differences should be addressed not through the elimination of pluralism but by encouraging mutual tolerance and understanding between individuals and groups is clear. But pluralism does not seem to imply an absolute right of groups to insist upon recognition of and protection for their claims: the maintenance of pluralism seems to be distinguishable from its active promotion.

Question 3. Does the limitation on manifestation of religion or belief have a legitimate aim?

The freedom of thought, conscience and religion is not absolute. As noted, paragraph 2 of Article 9 provides that a state may interfere with a “manifestation” of thought, conscience or religion in certain circumstances. As discussed, it will first be necessary to determine whether the impugned decision falls within the scope of Article 9 and whether this involves a “manifestation” of freedom of thought, conscience and religion. Next, it will be necessary to consider whether there has been an

“interference” with the guarantee. Thereafter, the Court will consider whether there has been a violation of Article 9.

Once an “interference” has been established, the onus is upon the state to show that it was justified. This is assessed by reference to three tests: whether the interference pursues a legitimate aim, whether the interference is “prescribed by law”, and whether the interference is “necessary in a democratic society”. The first of these tests is normally straightforward. It must be shown that one or more of the prescribed state interests listed in paragraph 2 cover the situation. These recognised legitimate interests – “the interests of public safety, for the protection of public order, health and morals, or for the rights and freedoms of others” – are in their textual formulation narrower than the interests recognised in Articles 8, 10 and 11 (in particular, national security is not recognised as such an aim in Article 9), but in any event, this test normally will not pose any difficulty for respondent states as inevitably it will be possible to show that the interference has been to further one (or more) of these listed interests. In principle, it is for the state to identify the particular aim it wishes to advance; in practice, an interference purporting to have a legitimate aim will readily be deemed to fall within the scope of one of the listed objectives of the particular guarantee. Thus in *Serif v. Greece*, a conviction for the offence of having usurped the functions of a minister of a “known religion” was accepted as an interference which had pursued the legitimate aim of protecting public order,¹³¹ while in *Kokkinakis v. Greece*, the Strasbourg Court readily agreed

130. *Cha'are Shalom Ve Tsedek v. France* [GC], §74, §§76-78, §80 and §81.

that the prohibition of proselytism sought to protect the rights and freedoms of others.¹³² In *Metropolitan Church of Bessarabia and others v. Moldova*, the Strasbourg Court considered the respondent Government's submissions that the refusal to register a religious community had sought to advance certain interests listed in paragraph 2:

[T]he refusal to allow the application for recognition lodged by the applicants was intended to protect public order and public safety. The Moldovan State, whose territory had repeatedly passed in earlier times from Romanian to Russian control and vice versa, had an ethnically and linguistically varied population. That being so, the young Republic of Moldova, which had been independent since 1991, had few strengths it could depend on to ensure its continued existence, but one factor conducive to stability was religion, the majority of the population being Orthodox Christians. Consequently, recognition of the Moldovan Orthodox Church, which was subordinate to the patriarchate of Moscow, had enabled the entire population to come together within that Church. If the applicant Church were to be recognised, that tie was likely to be lost and the Orthodox Christian population dispersed among a number of Churches. Moreover, under cover of the applicant Church, which was subordinate to the patriarchate of

Bucharest, political forces were at work, acting hand-in-glove with Romanian interests favourable to reunification between Bessarabia and Romania. Recognition of the applicant Church would therefore revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity.

The applicants denied that the measure complained of had been intended to protect public order and public safety. They alleged that the Government had not shown that the applicant Church had constituted a threat to public order and public safety.

The Court considers that states are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety. Having regard to the circumstances of the case, the Court considers that the interference complained of pursued a legitimate aim under Article 9 paragraph 2, namely protection of public order and public safety.¹³³

While this seems to suggest that the test of showing that an interference is for a "legitimate aim" is not a demanding one, it is not inconceivable that a respondent state may have difficulties in particular circumstances.¹³⁴ Note that the aim or purpose of an interference under this first test is distinct from

131. *Serif v. Greece*, §§49-54.

132. *Kokkinakis v. Greece*, §44.

133. *Metropolitan Church of Bessarabia and others v. Moldova*, §§111-113.

assessment of its “pressing social need” in terms of the third test of “necessary in a democratic society”.

Question 4. Is the limitation on “manifestation” of religion or belief “prescribed by law”?

The interference must next be shown by the state as having been “prescribed by law”. This concept expresses the value of legal certainty which might be defined broadly as the ability to act within a settled framework without fear of arbitrary or unforeseeable state interference. Thus the challenged measure must have a basis in domestic law and be both adequately accessible and foreseeable, and further contain sufficient protection against arbitrary application of the law. These issues have only occasionally, though, featured in Article 9 jurisprudence. In any event, the Strasbourg Court may avoid having to give a firm answer to whether an interference is “prescribed by law” if it is satisfied that the interference has not been shown to have been “necessary in a democratic society”.¹³⁵ (Where the interference with Article 9 rights has involved the imposition of a criminal sanction, an applicant may well additionally allege a violation of Article 7 of the Convention, which enshrines the principle of *nullum crimen, nulla poena sine lege*. In such

134. But cf *Bayatyan v. Armenia* [GC], §§112-128 (argument that the imprisonment of an individual for refusal to perform military service had been for the protection of public order and for the rights of others: the Government’s arguments were unconvincing, especially given their pledge to introduce alternative civilian service and, implicitly, to refrain from convicting new conscientious objectors).

135. For example, *Supreme Holy Council of the Muslim Community v. Bulgaria*, §90.

instances, the Strasbourg Court is likely to address the issues raised under Articles 7 and 9 by using a similar approach.¹³⁶)

The classic formulation of the test to be applied is found in a case involving freedom of expression, but this is of equal applicability in respect of Article 9 cases:

In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

But note the degree of qualification added by the Strasbourg Court:

Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent,

136. See, for example, *Kokkinakis v. Greece*, §§32-35; and *Larissis and others v. Greece*, §§39-45.

are vague and whose interpretation and application are questions of practice.¹³⁷

Some examples of the application of this test in Article 9 jurisprudence helps indicate its requirements. In *Kokkinakis v. Greece* the applicant sought to argue that the definition of “proselytism” was insufficiently defined in domestic law thus rendering it both possible for any kind of religious conversation or communication to be caught by the prohibition, and also impossible for any individual to regulate his conduct accordingly. The Strasbourg Court, noting that it is inevitable that the wording of many statutes will not attain absolute precision, agreed with the respondent government that the existence of a body of settled and published national case-law which supplemented the statutory provision was sufficient in this case to meet the requirements of the test of “prescribed by law”.¹³⁸

On the other hand, in *Hasan and Chaush v. Bulgaria*, the test was not held to have been satisfied. In this case, a governmental agency had favoured one faction to another in a dispute over the appointment of a religious leader. Here, shortcomings in domestic law led the Strasbourg Court to conclude that there had been a violation of Article 9:

For domestic law to meet [the requirement of “prescribed by law”] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights

safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

The Court notes that in the present case the relevant law does not provide for any substantive criteria on the basis of which the Council of Ministers and the Directorate of Religious Denominations register religious denominations and changes of their leadership in a situation of internal divisions and conflicting claims for legitimacy. Moreover, there are no procedural safeguards, such as adversarial proceedings before an independent body, against arbitrary exercise of the discretion left to the executive. Furthermore, [domestic law] and the decision of the Directorate were never notified to those directly affected. These acts were not reasoned and were unclear to the extent that they did not even mention the first applicant, although they were intended to,

137. *Sunday Times v. the United Kingdom (no. 1)*, §49.

138. *Kokkinakis v. Greece*, §§37-41. See also *Larissis and others v. Greece*, §§40-42.

and indeed did, remove him from his position as Chief Mufti.

These deficiencies in substantive criteria and in procedural safeguards meant that the interference was “arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability”.¹³⁹

Other cases have led to the establishment of violations on this ground. For example, in *Perry v. Latvia*, a prohibition on a foreign evangelical pastor from exercising his ministry when his residence permit was renewed had not been based upon any provision of Latvian law in force at the material time and thus had not been “prescribed by law”,¹⁴⁰ while in *Kuznetsov and others v. Russia*, an entirely peaceful religious meeting had been terminated by the chairwoman of the regional Human Rights Commission and two senior police officers and a civilian. In the opinion of the Strasbourg Court, “the legal basis for breaking up a religious event conducted on the premises lawfully rented for that purpose was conspicuously lacking”; further, “the Commissioner did not act in good faith and breached a State official’s duty of neutrality and impartiality *vis-à-vis* the applicants’ religious congregation”.¹⁴¹ In *Svyato-Mykhaylivska Parafiya v.*

Ukraine, the failure to register amendments to the statute of the religious organisation following a decision of its governing body to change its denomination from the Russian Orthodox Church to the Ukrainian Orthodox Church had been based upon domestic law which, while accessible, had not been sufficiently “foreseeable”. This had further led to another consequence: the “lack of safeguards against arbitrary decisions by the registering authority were not rectified by the judicial review conducted by the domestic courts, which were clearly prevented from reaching a different finding by the lack of coherence and foreseeability of the legislation”. In these circumstances, a violation of Article 9 had taken place.¹⁴²

Question 5. Is the limitation on “manifestation” of religion or belief “necessary in a democratic society”?

It is clear that freedom to manifest thought, conscience or belief must of necessity on occasion be subject to restraint in the interests of public safety, for the protection of public order, health and morals, or for the rights and freedoms of others. But whether interferences with Article 9 rights can be shown *in the particular circumstances* to have been “necessary in a democratic society” is not often without difficulty.

In applying this fifth and final test, the interference complained of must:

✧ correspond to a pressing social need,

139. *Hasan and Chaush v. Bulgaria* [GC], §§84-85. See also *Bayatyan v. Armenia* [GC], §§112-128 (question of whether conviction for draft evasion was lawful left open).

140. *Perry v. Latvia*, §§51-66.

141. *Kuznetsov and others v. Russia*, §§69-75.

142. *Svyato-Mykhaylivska Parafiya v. Ukraine*, §§121-152.

- ❖ be proportionate to the legitimate aim pursued, and
- ❖ be justified by relevant and sufficient reasons.

Again, the onus is upon the respondent state to show that this test has been met. It is in turn the task of the Strasbourg Court to ascertain whether measures taken at national level and amounting to an interference with Article 9 rights are justified in principle and also proportionate, but there may often be difficulty in determining this as the Strasbourg Court may not be best placed to review domestic determinations. In consequence, it may recognise a certain “margin of appreciation” on the part of national decision-makers. This has the consequence in practice of modifying the strictness of the scrutiny applied by the Strasbourg Court to the assessment of the quality of reasons adduced for an interference with Article 9 rights. To examine this further, some general discussion of certain key concepts of general applicability in the interpretation of the European Convention on Human Rights is necessary.

Necessity and proportionality; and the nature of “democratic society”

The concept of “necessity” is involved – expressly or implicitly – in several articles of the European Convention on Human Rights, but it has subtly different connotations in different contexts. A broad distinction can be drawn between those articles (such as Article 9) which guarantee rights principally of a civil and political nature and that are subject to widely expressed qualifications, and those articles which guarantee rights (pri-

marily those concerning physical integrity and human dignity) which are either subject to no express qualification or subject only to stringent qualifications.

In deciding whether any interference is “necessary in a democratic society”, it is important to bear in mind both the word “necessary” and the words “in a democratic society”. In the context of Article 10, for example, the Strasbourg Court has said that

whilst the adjective “necessary”, within the meaning of [this provision] is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”, and that rather it implies the existence of a “pressing social need”.¹⁴³

The onus of establishing that an interference is justified, and therefore the onus of establishing that an interference is proportionate, rests again upon the state. As is the case in interpreting the necessity of state interferences with other Convention rights, it may be relevant to consider other international or European standards and practice. Thus the Strasbourg Court has made reference in this area to reports by such bodies as the World Council of Churches.¹⁴⁴

The standard of justification required depends, in practice, on the particular context. In principle, the stronger the “pressing social need”, the less difficult it will be to justify the interfer-

143. *Handyside v. the United Kingdom*, §48.

144. As in *Kokkinakis v. Greece*, discussed below, at p. 47.

ence. For example, national security is in principle a powerful consideration. However, the mere assertion of such a consideration does not absolve the state from indicating the justification for advancing such a claim.¹⁴⁵ Similarly, public safety appears to be a compelling social need, and thus a legal requirement applying to all motorcycle drivers to wear crash helmets was readily considered as justified when challenged by Sikhs.¹⁴⁶

In any event, application of the test of necessity (and thus consideration of the extent of recognition of a margin of appreciation) must also take into account the issue whether an interference can be justified as necessary *in a democratic society*. The critical importance of this concept is obvious in Article 9 jurisprudence. The Strasbourg Court has in particular identified the characteristics of European “democratic society” in describing pluralism, tolerance and broadmindedness as its hallmarks. In *Kokkinakis v. Greece*, for example, the Court observed:

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. It 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.¹⁴⁷

Such values may thus determine conclusions that state authorities may properly deem it necessary to protect the religious beliefs of adherents against abusive attacks through expression (as in the *Otto-Preminger-Institut* case discussed below).¹⁴⁸ Article 9 may also require that a perceived threat of disorder is addressed by means that promote rather than undermine pluralism, even although this very pluralism may be responsible for the public order situation requiring state intervention.

Margin of appreciation

Determining whether a measure is necessary and proportionate can never be a merely mechanical exercise, for once all the facts are known, there remains an irreducible value judgment which has to be made in answering the question “was the interference necessary in a democratic society?”. However, at the level of the Strasbourg Court, any assessment of the necessity of an interference with Article 9 rights is closely allied to the issue of subsidiarity of the system of protection established in Strasbourg, for the primary responsibility for ensuring that Convention rights are practical and effective is that of the national authorities. To this end, the Strasbourg Court may accord domestic decision-makers a certain “margin of appreciation”. This concept is, on occasion, difficult to apply in practice. It is

145. See *Metropolitan Church of Bessarabia and others v. Moldova*, discussed above at p. 36.

146. *X v. the United Kingdom* (dec.) (1978).

147. *Kokkinakis v. Greece*, at §31.

148. At p. 71.

also apt to give rise to controversy. The recognition by the Strasbourg Court of a degree of restraint in determining whether the judgment made by national authorities is compatible with the state's obligations under the Convention is thus a principal means by which the Strasbourg Court recognises its subsidiary role in protecting human rights. It is acknowledgment of the right of democracies (albeit within limits established by the Convention) to choose for themselves the level and content of human rights practice that suit them best.

Obviously, though, if the concept were extended too far, the Strasbourg Court could be criticised for abdicating its responsibilities. In the leading judgment of *Handyside v. the United Kingdom*, another case involving freedom of expression, the Court noted that the Convention:

... does not give the Contracting States an unlimited power of appreciation. The Court ... is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with [the Convention guarantee]. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.... It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to

review under [the guarantee] the decisions they delivered in the exercise of their power of appreciation.¹⁴⁹

The margin of appreciation is thus not a negation of the Strasbourg Court's supervisory function since the Court has been at pains to emphasise that any recognised margin of appreciation is limited, and that the Court itself takes the final decision when it reviews the assessment of the national authorities. In relation to freedom of expression concerning attacks on religious belief, for example, the Strasbourg Court has explained how the width of the margin of appreciation depends on the context and, in particular, on the nature of the expression in question and the justification for the restriction:

Whereas there is little scope under Article 10 (2) of the Convention for restrictions on political speech or on debate on questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of "the requirements of the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place

149. *Handyside v. the United Kingdom*, §§49-50.

to place, especially in an era characterised by an ever-growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the “necessity” of a “restriction” intended to protect from such material those whose deepest feelings and convictions would be seriously offended.¹⁵⁰

150. *Wingrove v. the United Kingdom*, §58.

The Strasbourg Court thus recognises that its competence in reviewing certain decision-making in the area of religion is limited. This appears self-evident. The domestic situation is likely to reflect historical, cultural and political sensitivities, and an international forum is not well placed to resolve such disputes.¹⁵¹ Such considerations do not, of course, apply at domestic level where domestic courts will have greater awareness of local circumstances (and potentially greater legitimacy) than the Strasbourg Court. Domestic courts in particular should explore the context in which the freedoms guaranteed by the Convention operate at national level.

151. See also, for example, *Murphy v. Ireland*, discussed below at p. 69.

Specific aspects of freedom of thought, conscience and belief arising under Article 9

The Strasbourg Court's jurisprudence in Article 9 cases illustrates the application of these tests. Case-law also highlights the expectation of state neutrality, pluralism and tolerance in situations often involving the reality of official antagonism, hidden or explicit discrimination, and arbitrary decision-making. This part of the Handbook addresses the main issues that have arisen in the context of this guarantee, primarily in respect of the issue whether interferences can be shown to have been "necessary in a democratic society". As has been already noted, however, certain aspects both of the individual and collective exercise of freedom of thought, conscience and religion remain untested in Strasbourg jurisprudence.

Interferences with "manifestation" of individual belief: refusal to undertake compulsory military service

The extent to which Article 9 imposes a positive duty upon state authorities to recognise exemptions from general civic or legal obligations was until recently open to some doubt. In light of Article 4 §3.b of the European Convention on Human Rights

which makes specific provision for "service of a military character", it was for long thought that Article 9 could not in itself imply any right of recognition of conscientious objection to compulsory military service unless this was recognised by national law,¹⁵² even although virtually all European states still retaining military service obligations had moved towards recognising alternative civilian service.¹⁵³ It was thus not clear whether Article 9 could indeed require a state to recognise such alternative civilian service in instances where an individual otherwise could be compelled to act contrary to his fundamental religious beliefs.¹⁵⁴ Certainly, it had been accepted that compulsory military service could give rise to other Convention considerations, in particular where it could be argued that sanctions for failure to carry out military service requirements could operate in a discriminatory manner¹⁵⁵ or lead to degrading treatment within the meaning of Article 3.¹⁵⁶ In *Ülke*

152. *Johansen v. Norway* (dec.) (Article 4 §3.b does not require states to provide substitute civilian service for conscientious objectors).

153. And see Committee of Ministers' Recommendations No. R (87) 8 and Rec. (2010) 4.

154. *X v. Germany* (dec.) (1977).

v. Turkey, for example, the Strasbourg Court determined that the applicant, a peace activist who repeatedly had been punished for refusal to serve in the military on account of his beliefs, had been subjected to treatment in violation of Article 3 on account of the “constant alternation between prosecutions and terms of imprisonment” and the possibility that this situation could theoretically continue for the rest of his life: this had exceeded the inevitable degree of humiliation inherent in imprisonment and thus was deemed to have qualified as “inhuman” treatment on account of the premeditated, cumulative and long term effects of the repeated convictions and incarceration. Domestic law which failed to make provision for conscientious objectors was “evidently not sufficient to provide an appropriate means of dealing with situations arising from the refusal to perform military service on account of one’s beliefs.”¹⁵⁷

Applications continued to find their way to Strasbourg leading to friendly settlements in certain cases,¹⁵⁸ but in *Bayatyan v.*

Armenia, the Grand Chamber ruled that the failure to permit civilian service as an alternative could now in certain circumstances violate Article 9. The applicant was a Jehovah’s Witness who had been sentenced to imprisonment for 30 months for refusal to perform military service. His offer to carry out alternative civilian service had been repeated during his trial for draft evasion, but the new law permitting civilian service – following upon an undertaking given by the respondent state when joining the Council of Europe some months beforehand to introduce civilian service – had only entered into force a year after his release on parole and after he had served more than 10 months in prison. The Grand Chamber considered that it was now not appropriate to read Article 9 in conjunction with Article 4 §3.b in light of the evolution of the law and practice of European States and of international agreements. The Convention was a “living instrument” and had to reflect such developments. Even although no express reference to a right to conscientious objection could be derived from Article 9,

... [the Court] considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9. ...

The applicant in the present case is a member of Jehovah’s Witnesses, a religious group whose beliefs include the con-

155. For example, *Thlimmenos v. Greece* [GC]. See also *Tsirlis and Kouloumpas v. Greece*, (violation of Article 5, but Article 9 issue avoided); but cf. Commission report of 7 March 1996 (opinion that there had been a violation of Article 14 read in conjunction with Article 9). See also *Autio v. Finland* (lengthier period of service prescribed for civilian service as opposed to military service falls within a state’s margin of appreciation: inadmissible).

156. *Taştan v. Turkey*, §§27-31 (military service obligation imposed upon a 71-year-old who had been forced to undertake the same activities and physical exercises as 20-year-old recruits constituted degrading treatment).

157. *Ülke v. Turkey*, §§61 and 62.

158. For example, *Stefanov. v. Bulgaria* (friendly settlement).

viction that service, even unarmed, within the military is to be opposed. The Court therefore has no reason to doubt that the applicant's objection to military service was motivated by his religious beliefs, which were genuinely held and were in serious and insurmountable conflict with his obligation to perform military service.

It was important to distinguish the applicant's situation from one "that concerns an obligation which has no specific conscientious implications in itself, such as a general tax obligation". The failure to report for military service had involved a "manifestation" of the applicant's religious beliefs, and thus the conviction for draft evasion had constituted an interference with his freedom to manifest his religion. Convincing and compelling reasons to justify any interference with a person's right to freedom of religion were required. Further, almost all European States which ever or still had compulsory military service had introduced alternatives to military service. Accordingly,

the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service.... [T]he imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and

effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the overwhelming majority of the European States.

The Court further reiterates that 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. Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.¹⁵⁹

Interferences with "manifestation" of individual belief: proselytism

The text of paragraph 1 of Article 9 specifically refers to "teaching" as a recognised form of "manifestation" of belief. The right to try to persuade others of the validity of one's beliefs is also implicitly supported by the reference in the text to the right "to change [one's] religion or belief". The right to proselytise by

159. *Bayatyan v. Armenia* [GC], at §§ 124 and 126.

attempting to persuade others to convert to another's religion is thus clearly encompassed within the scope of Article 9. But this right is not absolute, and may be limited where it can be shown by the state that this is based upon considerations of public order or the protection of vulnerable individuals against undue exploitation. The jurisprudence distinguishes between "proper" and "improper" proselytism, a distinction reflected in other measures adopted by Council of Europe institutions such as Parliamentary Assembly Recommendation 1412 (1999) on the illegal activities of sects which calls for domestic action against "illegal practices carried out in the name of groups of a religious, esoteric or spiritual nature"; the provision and exchange between states of information on such sects, and the importance of the history and philosophy of religion in school curricula with a view to protecting young persons.

In *Kokkinakis v. Greece* a Jehovah's Witness had been sentenced to imprisonment for proselytism, an offence specifically prohibited both by the Greek Constitution and by statute. The Strasbourg Court at the outset accepted that the right to try to convince others to convert to another faith was included within the scope of the guarantee, "failing which ... "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter". While noting that the prohibition was prescribed by law and had the legitimate aim of protecting the rights of others, the Strasbourg Court, though, could not in the particular circumstances accept that the interference had been shown to have been justified as "necessary in

a democratic society". In its view, a distinction had to be drawn between "bearing Christian witness" or evangelicalism and "improper proselytism" involving undue influence or even force:

The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.

However, the failure of the domestic courts to specify the reasons for the conviction meant that it was impossible to show that there had been a pressing social need for the conviction. The domestic courts had assessed the criminal liability of the applicant merely by reiterating the statutory provision rather than spelling out why the means used by the applicant to try to persuade others had been inappropriate:

Scrutiny of [the relevant statutory provision] shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are

designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case. The Court notes, however, that in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of [the legislation] and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding. That being so, it has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society ... for the protection of the rights and freedoms of others".¹⁶⁰

In contrast, in *Larissis and others v. Greece*, the conviction of senior officers who were members of the Pentecostal faith for the proselytism of three airmen under their command was deemed not to be a breach of Article 9 in light of the crucial nature of military hierarchical structures which the Court accepted could potentially involve a risk of harassment of a subordinate where the latter sought to withdraw from a conversation initiated by a superior officer. The respondent government's arguments that the senior officers had abused their influence, and that their convictions had been justified by the need to protect the prestige and effective operation of the

armed forces and to protect individual soldiers from ideological coercion, were accepted by the Strasbourg Court in this instance:

The Court observes that it is well established that the Convention applies in principle to members of the armed forces as well as to civilians. Nevertheless, when interpreting and applying its rules in cases such as the present, it is necessary to bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.... In this respect, the Court notes that the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It must be emphasised that not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. Nonetheless, where the circumstances so require, States may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces.

160. *Kokkinakis v. Greece*, §§48-49.

The domestic courts had indeed heard evidence that the airmen involved had felt obliged to take part in or had been bothered by the persistent attempts by their superior officers to engage them in conversations about religion, even although no threats or inducements had been made. It was thus clear that the airmen had been subjected to a certain degree of pressure by their officers and had felt constrained to some extent. The conclusion was that in this instance there was no violation of Article 9:

... the Court considers that the Greek authorities were in principle justified in taking some measures to protect the lower ranking airmen from improper pressure applied to them by the applicants in their desire to promulgate their religious beliefs. It notes that the measures taken were not particularly severe and were more preventative than punitive in nature, since the penalties imposed were not enforceable if the applicants did not reoffend within the following three years. ... In all the circumstances of the case, it does not find that these measures were disproportionate.

On the other hand, the Strasbourg Court rejected the respondent government's contentions in the same case that a prosecution for proselytism of civilians had been "necessary in a democratic society", even where it was argued that this had involved the improper exploitation of individuals suffering from personal and psychological difficulties. It was of "decisive significance" that these civilians had not been subjected to pressures and constraints of the same kind as the airmen at the

time the applicants had sought to convert them. Here, there was less in the way of deference shown to the determinations of domestic courts. Even in respect of one of the civilians who had been under some stress on account of the breakdown of her marriage, it had not been shown either that her state of mind was such as to require "any special protection from the evangelical activities of the applicants or that they applied improper pressure to her, as was demonstrated by the fact that she was able eventually to take the decision to sever all links with the Pentecostal Church".¹⁶¹ These cases indicate that states may in certain instances take steps to prohibit the right of individuals to try to persuade others of the validity of their beliefs, even although this right is often categorised by adherents as an essential sacred duty. The cases also clearly indicate, however, that any interference with the right to proselytise must be shown to have been necessary in the particular circumstances.

Interferences with "manifestation" of individual belief: sanctions for wearing of religious symbols

Prohibitions on the wearing of religious symbols have given rise to complaints addressed to the Strasbourg Court under Article 9. These cases can require careful assessment. Restrictions on the wearing of items of clothing or other conspicuous signs of religious belief will now be accepted as involving inter-

161. *Larissis and others v. Greece*, §§50, 54 and 59.

ferences with Article 9 rights to manifest religious beliefs,¹⁶² and assessment has turned upon the reasons advanced for the ban. In this area, however, the Strasbourg Court is likely to recognise a certain “margin of appreciation” on the part of state authorities, particularly where the justification advanced by the state is public safety¹⁶³ or the perceived need to prevent certain fundamentalist religious movements from exerting pressure on others belonging to another religion or who do not practise their religion.¹⁶⁴ Thus in *Dahlab v. Switzerland*, the refusal to allow a teacher of a class of small children to wear the Islamic headscarf was deemed justified in view of the “powerful external symbol which her wearing a headscarf represented: not only could the wearing of this item be seen as having some kind of proselytising effect since it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality, but also this could not easily be reconciled with the message of tolerance, respect for others and equality and non-discrimination that all teachers in a demo-

cratic society should convey to their pupils.¹⁶⁵ Similarly, in *Aktas v. France*, expulsion of pupils from schooling for their refusal to remove various religious symbols (Muslim headscarves and the Sikh keski or under-turban) during lessons was declared inadmissible as the Strasbourg Court considered that the interference with the right to manifest their beliefs could be considered proportionate to legitimate aims of protecting the rights and freedoms of others and of protecting public order; in any event, the expulsions had not been on account of any objection to religious convictions as such and the ban had in any event sought to protect the constitutional principle of secularity.¹⁶⁶

This issue was considered in some details by the Grand Chamber in *Leyla Şahin v. Turkey*. In this case, the applicant complained that a prohibition on her wearing the Islamic headscarf at university and the consequential refusal to allow her access to classes had violated her rights under Article 9. The Strasbourg Court proceeded on the basis that there had been an interference with her right to manifest her religion, and also accepted that the interference primarily had pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. It was also satisfied that the interference had been “prescribed by law”. Accordingly, the crucial question was whether the interference had been “necessary in a

162. *Aktas v. France* (dec.).

163. E.g. *Phull v. France* (dec.) (requirement to remove turban during airport security screening: inadmissible).

164. *Karaduman v. Turkey* (requirement that official photograph could not show a graduate wearing an Islamic headscarf, but only bare-headed). *Köse and 93 others v. Turkey* (dec.) (prohibition on wearing headscarf within limits of religiously oriented school, a general measure imposed upon all students irrespective of belief: inadmissible); *Kurtulmuş v. Turkey* (dec.) (university professor refused authorisation to wear a headscarf); *Dogru v. France*, §§47-78 (exclusion of female pupils from state schools for refusing to remove religious attire during physical education and sports lessons: no violation); and similarly, *Kervanci v. France*, §§46-78.

165. *Dahlab v. Switzerland* (dec.).

166. *Aktas v. France* (dec.).

democratic society”. By a majority, the Court ruled that the interference in issue had been both justified in principle and proportionate to the aims pursued, taking into account the state’s “margin of appreciation” in such cases:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially... in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned.

Of some importance in this instance were the principles of secularism and equality at the heart of the Turkish Constitution. The constitutional court had determined that freedom to manifest one’s religion could be restricted in order to defend the

role played by secularism as the guarantor of democratic values in the state: secularism was the meeting point of liberty and equality, necessarily entailed freedom of religion and conscience, and prevented state authorities from manifesting a preference for a particular religion or belief by ensuring its role as one of impartial arbiter. Furthermore, secularism also helped protect individuals from external pressure exerted by extremist movements. This role of the State as independent arbiter was also consistent with the jurisprudence of the Strasbourg Court under Article 9.

The Strasbourg Court was also influenced by the emphasis on the protection of the rights of women in the Turkish constitutional system, a value also consistent with the key principle of gender equality underlying the European Convention on Human Rights. Any examination of the question of the prohibition upon wearing the Islamic headscarf had to take into consideration the impact which such a symbol may have on those who chose not to wear it if presented or perceived as a compulsory religious duty. This was particularly so in a country such as Turkey where the majority of the population adhered to the Islamic faith. Against the background of extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts, the Grand Chamber was satisfied that the principle of secularism was the paramount consideration underlying the ban on the wearing of religious symbols in universities. In a context in which the values of pluralism,

respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities could consider it contrary to such values to allow religious attire such as the Islamic headscarf to be worn on university premises. Imposing limitations on the freedom to wear the headscarf could, therefore, be regarded as meeting a pressing social need since this particular religious symbol had taken on political significance in the country in recent years. Remark- ing that Article 9 did not always guarantee the right to behave in a manner governed by a religious belief and did not confer on people who did so the right to disregard rules that had proved to be justified, the Strasbourg Court also noted that, in any event, practising Muslim students in Turkish universities were free to manifest their religion in accordance with habitual forms of Muslim observance within the limits imposed by edu- cational organisational constraints.

The application also raised the question of whether there had been an interference with the applicant's right to education in terms of Article 2 of Protocol No. 1. By analogy with the rea- soning applying to disposal of the application under Article 9, the Grand Chamber also accepted that the refusal to allow access to various lectures and examinations for wearing the Islamic headscarf restriction had been foreseeable, had pursued legitimate aims, and that the means used had been proportion- ate. The measures in question had in no way hindered the per- formance of religious observances by students, and indeed the

university authorities judiciously had sought a means of avoid- ing having to turn away students wearing the headscarf while simultaneously protecting the rights of others and the interests of the education system. The headscarf ban in consequence had not interfered with the right to education.¹⁶⁷

Interferences with individual belief: the requirement to pay “church tax”

Article 9 §1 confers protection from compulsion to become indirectly involved in religious activities against an individual's will. Such a situation could arise, for example, in respect of a requirement to pay a church tax. States must respect the reli- gious convictions of those who do not belong to any church, and thus must make it possible for such individuals to be exempted from the obligation to make contributions to the church for its religious activities.¹⁶⁸ (However, as noted, this sit- uation must be distinguished from arguments that an individ- ual's general tax payments to the authorities should not be allocated to particular purposes.¹⁶⁹) To this end, states may legitimately require individuals to notify their religious belief or change of religious belief in order to ensure the effective collec- tion of church taxes.¹⁷⁰

167. *Leyla Şahin v. Turkey* [GC], §§104-162 at §109.

168. *Darby v. Sweden*, opinion of the Commission, §51. See note, p. 15 above.

169. *C. v. the United Kingdom*.

170. See for instance *Gottesmann v. Switzerland*.

In any event, it will be necessary to consider whether the imposition of a church tax is in part to meet the costs of secular as opposed to ecclesiastical purposes. In the case of *Bruno v. Sweden* the Strasbourg Court drew a distinction between taxation for the discharge of public functions, and functions purely associated with religious belief. Legislation allowed for exemption from the majority of the church tax, but still required the payment of a tax (the “dissenter tax”) to meet the cost of tasks of a non-religious nature performed in the interest of society such as the administration of burials, the maintenance of church property and buildings of historic value, and the care of old population records. The Strasbourg Court first confirmed that state authorities have a wide margin of appreciation in determining the arrangements for such responsibilities, and thus rejected the applicant’s submission that these functions were properly the responsibility of secular public administration rather than of religious bodies:

[T]he Court agrees with the Government that the administration of burials, the care and maintenance of church property and buildings of historic value and the care of old population records can reasonably be considered as tasks of a non-religious nature which are performed in the interest of society as a whole. It must be left to the State to decide who should be entrusted with the responsibility of carrying out these tasks and how they should be financed. While it is under an obligation to respect the individual’s right to

freedom of religion, the State has a wide margin of appreciation in making such decisions. ...

But the Strasbourg Court did emphasise that the guarantee required safeguards against compulsion to contribute by means of taxation to purposes which were essentially religious. In this case, however, the proportion of the full amount of church tax payable by individuals who were not members of the church could be shown to be proportionate to the costs of the Church’s civil responsibilities, and thus the applicant could not be said to have been compelled to contribute to the religious activities of the Church. It was also of some importance that public rather than ecclesiastical bodies monitored expenditure and determined the taxation payable:

[T]he applicant, not being a member of the Church of Sweden, did not have to pay the full church tax but only a portion thereof – 25 per cent of the full amount – as a dissenter tax [on the basis that] non-members should contribute to the non-religious activities of the Church. The reduced tax rate was determined on the basis of an investigation of the economy of the Church of Sweden, which showed that the costs for the burial of the deceased amounted to about 24 per cent of the Church’s total costs.

It is thus apparent that the tax paid by the applicant to the Church of Sweden was proportionate to the costs of its civil responsibilities. Therefore, it cannot be said that he was

compelled to contribute to the religious activities of the Church.

Moreover, the fact that the Church of Sweden has been entrusted with the tasks in question cannot in itself be considered to violate Article 9 of the Convention. In this respect, it should be noted that the Church was in charge of keeping population records for many years and it is thus natural that it takes care of those records until they have been finally transferred to the State archives. Also, the administration of burials and the maintenance of old church property are tasks that may reasonably be entrusted with the established church in the country. The Court further takes into account that the payment of the dissenter tax and the performance of the civil activities of the Church were overseen by public authorities, including the tax authorities and the County Administrative Board.

The Strasbourg Court therefore concluded that the obligation to pay this “dissenter tax” did not contravene the applicant’s right to freedom of religion, and declared this part of the application manifestly ill-founded.¹⁷¹

Individual “manifestation” of belief: prisoners and religious belief

Prison authorities will be expected to recognise the religious needs of those deprived of their liberty by allowing inmates to

171. *Bruno v. Sweden* (dec.).

take part in religious observances. Thus where religion or belief dictates a particular diet, this should be respected by the authorities providing this is not unreasonable or unduly burdensome, a principle reiterated in the *Jakóbski v. Poland* judgment, a case in which the refusal to provide a practising Buddhist prisoner with a meat-free diet as required by the dictates of his faith was held to have constituted a violation of Article 9.¹⁷² Further, adequate provision should be made to allow detainees to take part in religious worship or to permit prisoners access to spiritual guidance. In the related cases of *Poltoratskiy v. Ukraine* and *Kuznetsov v. Ukraine*, prisoners on death row complained that they had not been allowed visits from a priest nor to take part in religious services available to other prisoners. The applicants succeeded in these cases on the ground that these interferences had not been in accordance with the law as the relevant prison instruction could not so qualify within the meaning of the Convention.¹⁷³ However, the maintenance of good order and security in prison will normally readily be recognised as legitimate state interests. Article 9 cannot, for example, be used to require recognition of a special status for prisoners who claim that wearing prison uniform and being forced to work violate their beliefs.¹⁷⁴ Further, in responding to such order and security interests, a rather wide margin of

172. *Jakóbski v. Poland*, §§42–55. See also *X v. the United Kingdom* (dec.) (March 1976).

173. *Poltoratskiy v. Ukraine*; and *Kuznetsov v. Ukraine*.

174. *McFeeley and others v. the United Kingdom* (dec.).

appreciation is recognised on the part of the authorities. For example, the need to be able to identify prisoners may thus warrant the refusal to allow a prisoner to grow a beard, while security considerations may justify denial of the supply of a prayer-chain¹⁷⁵ or a book containing details of martial arts to prisoners, even in cases where it can be established that access to such items is indispensable for the proper exercise of a religious faith.¹⁷⁶

These state obligations under the European Convention on Human Rights are also reflected in the European Prison Rules. These rules are non-binding standards which aim to ensure that prisoners are accommodated in material and moral terms respecting their dignity and accorded treatment which is non-discriminatory, which recognises religious beliefs, and which sustains health and self-respect. Thus the rules provide that

the prison regime shall be organised so far as is practicable to allow prisoners to practise their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs.

However,

175. *X v. Austria* (dec.) (1965).

176. *X v. the United Kingdom* (dec.) (May 1976).

prisoners may not be compelled to practise a religion or belief, to attend religious services or meetings, to take part in religious practices or to accept a visit from a representative of any religion or belief.¹⁷⁷

The Rules may indeed be cited by the Court in its judgments.¹⁷⁸

The requirement of state neutrality: registration of religious faiths, etc.

Article 11 in general protects the right of individuals to form together for the purpose of furthering collective action in a field of mutual interest. When Article 9 is read in conjunction with Article 11, the consequence is a high degree of concern for the right to establish religious associations:

[S]ince religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a

177. European Prison Rules, Recommendation Rec (2006) 2, Rules 29 (2)-(3).

178. Rules 29 (2)-(3), cited in *Jakóbski v. Poland*, 7 December 2010.

democratic society and is thus an issue at the very heart of the protection which Article 9 affords.¹⁷⁹

The interplay between Article 9's guarantees for the collective manifestation of belief and Article 11's protection for freedom of association, taken along with the prohibition of discrimination in the enjoyment of Convention guarantees as provided for by Article 14, is thus of considerable significance in resolving questions concerning refusal to confer official recognition. This may be necessary in order to take advantage of privileges such as exemption from taxation or recognition of charitable status which may be dependent in domestic law upon prior registration or state recognition. Arrangements which favour particular religious communities do not, in principle, contravene the requirements of the Convention (and in particular, Articles 9 and 14) "providing there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other Churches wishing to do so".¹⁸⁰

However, domestic law may go further and also require official recognition in order to obtain the legal personality necessary to allow a religious body to function effectively. Where official recognition is necessary for this, mere state tolerance of a religious community is unlikely to suffice.¹⁸¹ The risk with such requirements is that these may be applied in a discriminatory

manner with a view to restricting the spread of minority faiths.¹⁸²

The requirement of state neutrality, on the other hand, does not preclude the authorities from assessing whether the activities of religious bodies or associations may be considered to cause harm or a threat to public order.¹⁸³ Tolerance does not imply that every religious community must be accorded recognition or such privileges as exemption from taxation. Indeed, in particular cases, public authorities may be under a positive obligation to take action against associations considered harmful.

In *Leela Förderkreis e.V. and others v. Germany*, adherents of the "Osho movement" had alleged that the classification of their religious organisation as a "youth sect", "youth religion", "sect" and "psycho-sect", had denigrated their faith and had infringed the state's duty of neutrality in religious matters. While the Strasbourg Court was prepared to proceed upon the assumption that such labelling had involved an "interference" with Article 9 rights as "the terms used to describe the applicant associations' movement may have had negative consequences for them" (but without the need to ascertain the extent and nature of such consequences), it nevertheless held that no violation of the guarantee had taken place:

182. Cf. Framework Convention for the Protection of National Minorities, Article 8: recognition that "every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations".

183. *Manoussakis and others v. Greece*, §40; *Leela Förderkreis e.V. and others v. Germany*, §93.

179. *Metropolitan Church of Bessarabia and others v. Moldova*, §118.

180. *Alujer Fernández and Caballero García v. Spain* (dec.).

181. *Metropolitan Church of Bessarabia and others v. Moldova*, §129.

The Court reiterates that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.

... the Court notes that at the material time the increasing number of new religious and ideological movements generated conflict and tension in German society, raising questions of general importance. The contested statements and the other material before the Court show that the German Government, by providing people in good time with explanations it considered useful at that time, was aiming to settle a burning public issue and attempting to warn citizens against phenomena it viewed as disturbing, for example, the appearance of numerous new religious movements and their attraction for young people. The public authorities wished to enable people, if necessary, to take care of themselves and not to land themselves or others in difficulties solely on account of lack of knowledge.

The Court takes the view that such a power of preventive intervention on the State's part is also consistent with the Contracting Parties' positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate not only to any interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments, but also to interference imputable to private individuals within non-State entities.

An examination of the Government's activity in dispute establishes further that it in no way amounted to a prohibition of the applicant associations' freedom to manifest their religion or belief. [The domestic courts] carefully analysed the impugned statements and prohibited the use of the adjectives "destructive" and "pseudo-religious" and the allegation that members of the movement were manipulated as infringing the principle of religious neutrality. The remaining terms, notably the naming of the applicant associations' groups as "sects", "youth sects" or "psycho-sects", even if they had a pejorative note, were used at the material time quite indiscriminately for any kind of non-mainstream religion. The Court further notes that the Government undisputedly refrained from further using the term "sect" in their information campaign following the recommendation contained in the expert report on "so-called sects and psychocults"... Under these circumstances, the Court considers that the Government's statements ... at least at the time they were made, did not entail overstepping the bounds of what a democratic State may regard as the public interest.

In these circumstances, "having regard to the margin of appreciation left to the national authorities", the interference was found to be justified and proportionate to the aim pursued.¹⁸⁴

184. *Leela Förderkreis e.V. and Others v. Germany*, §§84-101.

The imposition of a requirement of state registration is thus not in itself incompatible with freedom of thought, conscience and religion, but the state must be careful to maintain a position of strict neutrality and be able to demonstrate it has proper grounds for refusing recognition. However, the process for registration must guard against unfettered discretion and avoid arbitrary decision-making.¹⁸⁵ A state must always take care when it appears to be assessing the comparative legitimacy of different beliefs.¹⁸⁶ In *Regionsgemeinschaft der Zeugen Jehovas and others v. Austria*, a violation of Article 9 was established. For some 20 years, the authorities had refused to grant legal personality to Jehovah's Witnesses. The state had argued that no interference with the applicants' rights had arisen as legal personality had eventually been conferred, and in any event no individual members had been hindered in practising their religion individually; furthermore, the members could themselves have established an association enjoying legal personality in domestic law. The Court was not persuaded:

On the one hand the period which elapsed between the submission of the request for recognition and the granting of legal personality is substantial and it is therefore questionable whether it can be treated merely as a period of waiting while an administrative request was being proc-

essed. On the other hand, during this period the first applicant did not have legal personality, with all the consequences attached to this lack of status [as legal personality allowed it to acquire and manage assets in its own name, to have legal standing before the courts and authorities, to establish places of worship, to disseminate its beliefs and to produce and distribute religious material].

... The fact that no instances of interference with the community life of the Jehovah's Witnesses have been reported during this period and that the first applicant's lack of legal personality may be compensated in part by running auxiliary associations, as stated by the applicants, is not decisive.

Given the importance of this right, the Court considers that there is an obligation on all of the State's authorities to keep the time during which an applicant waits for conferment of legal personality for the purposes of Article 9 of the Convention reasonably short. The Court appreciates that during the waiting period the first applicant's lack of legal personality could to some extent have been compensated by the creation of auxiliary associations which had legal personality, and it does not appear that the public authorities interfered with any such associations. However, since the right to an autonomous existence is at the very heart of the guarantees in Article 9 these circumstances cannot make up for the prolonged failure to grant legal personality to the first applicant.¹⁸⁷

185. *Supreme Holy Council of the Muslim Community v. Bulgaria*, §33.

186. *Hasan and Chaush v. Bulgaria* [GC], §§84-89 at §78.

Even where a State seeks to rely upon national security and territorial integrity as justification for refusal to register a community, proper assessment of such claims is required. Vague speculation is inadequate. In *Metropolitan Church of Bessarabia and others v. Moldova* the applicants had been prohibited from gathering together for religious purposes and had not been able to secure legal protection against harassment or for the church's assets. The respondent government sought to argue that registration in the particular circumstances of this case could lead to the destabilisation of both the Orthodox Church and indeed of society as a whole since the matter concerned a dispute between Russian and Romanian patriarchates; further, recognition could have had an adverse impact upon the very territorial integrity and independence of the state. Reiterating the State's requirement to remain neutral and its role in encouraging mutual tolerance between competing groups (rather than seeking to remove the cause of tension by eliminating pluralism), the Strasbourg Court again stressed that Article 9 excluded state assessment "of the legitimacy of religious beliefs or the ways in which those beliefs are expressed". It was also necessary to read Article 9 alongside Article 11's guarantees against unjustified state interference with freedom of association: and

187. *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, §§87-99 (substantial time taken to determine question of recognition of Jehovah's Witnesses: violation of Article 14 with Article 9).

seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.

By taking the view that the applicant church was not a new denomination, and by making its recognition depend on the will of another ecclesiastical authority that had previously been recognised, the duty of neutrality and impartiality had not been discharged. Nor was the Court satisfied in the absence of any evidence to the contrary either that the church was (as the respondent government submitted) engaged in political activities contrary to Moldovan public policy or to its own stated religious aims, or that state recognition might constitute a danger to national security and territorial integrity.¹⁸⁸ Similarly, in *Jehovah's Witnesses of Moscow v. Russia*, the refusal to re-register a religious association and its subsequent dissolution were held to have taken place without relevant and sufficient grounds having been established. It had been alleged by the authorities that the organisation had forced families to break up, that it had incited its followers to commit suicide or to refuse medical care, that it had impinged on the rights of members, parents who were not Jehovah's Witnesses and their children, and that it had encouraged members to refuse to fulfil

188. *Metropolitan Church of Bessarabia and others v. Moldova*, §§101-142. See also *Pentidis and others v. Greece*, §46 and *Moscow Branch of the Salvation Army v. Russia*, §§71-74,

legal duties. However, no appropriate factual basis for the allegations had been established, and indeed limitations imposed on members had not differed fundamentally from similar limitations on adherents' private lives imposed by other religions. In any event, encouragement to abstain from blood transfusions even in life-threatening situations could not warrant such a far-reaching measure since domestic law granted patients the freedom of choice of medical treatment.¹⁸⁹

A refusal to register a religious community may also carry with it the consequence that the community is thereby precluded from enforcing its interests in the courts. Churches may also hold property, and any interference with these rights is in principle liable to give rise to questions falling within the scope of Article 1 of Protocol No. 1.¹⁹⁰ In *Canea Catholic Church v. Greece* a decision of the domestic courts to refuse to recognise the applicant church as having the necessary legal personality was successfully challenged, the Strasbourg Court considering that the effect of such a decision was to prevent the church now and in the future from having any dispute relating to property determined by the domestic courts.¹⁹¹ In the *Metropolitan Church of Bessarabia and others v. Moldova* case, the

189. *Jehovah's Witnesses of Moscow v. Russia*, §§170-182 (dissolution had entailed a violation of Article 9 read in the light of Article 11; and failure to re-register had involved a violation of Article 11 read in the light of Article 9). See also *Church of Scientology Moscow v. Russia*, §§94-98 (violations of Article 11 read in conjunction with Article 9).

190. See, for example, *Holy Monasteries v. Greece*, §§54-66.

191. *Canea Catholic Church v. Greece*, §§40-42.

Strasbourg Court further noted that Article 9 had to be read in the light of Article 6 and the guarantees of access to fair judicial proceedings to protect the religious community, its members and its assets. The government's assertion that it had shown tolerance towards the church and its members could not be a substitute for actual recognition, since recognition alone had been capable in domestic law of conferring rights on those concerned to defend themselves against acts of intimidation. The refusal to recognise the church had thus resulted in such consequences for the applicants' rights under Article 9 that could not be regarded as necessary in a democratic society.¹⁹² There must thus be a right of access to court for the determination of a community's civil rights and obligations in terms of Article 6 of the European Convention on Human Rights.

The requirement of state neutrality: controls upon places of worship

State regulation of religious organisations may also involve measures such as restrictions placed upon the entry of religious leaders¹⁹³ and the imposition of restrictions to places of

192. *Metropolitan Church of Bessarabia and others v. Moldova*, §§101-142 (assets including humanitarian aid). See also *Pentidis and others v. Greece*, §46.

193. See *El Majaoui and Stichting Touba Moskee v. the Netherlands* (dec.) (prospective imam from outside the European Union refused work permit: admissible; but struck out after relinquishment to the Grand Chamber following the issue of a permit; and *Nolan and K v. Russia*, §§61-79 (refusal to allow Unification Church missionary and his son re-entry on secret orders of security service: violation of Article 9, and not necessary to consider issue under Article 14 taken with Article 9).

worship considered of significance.¹⁹⁴ Again, care is needed to ensure that the legitimate considerations which underpin the rationale for such measures are not used for ulterior purposes to favour or to hinder a particular faith. Planning controls provide another example of measures required in the public interest but which may nevertheless be imposed in bad faith. For example, in *Manoussakis and others v. Greece*, domestic law had required religious organisations to obtain formal approval for the use of premises for worship. Jehovah's Witnesses had sought unsuccessfully to obtain such permission, and thereafter had been convicted of operating an unauthorised place of worship. The Strasbourg Court accepted that national authorities had the right to take measures designed to determine whether activities undertaken by a religious association were potentially harmful to others, but this could not allow the State to determine the legitimacy of either the beliefs or the means of expressing such beliefs. In this instance, the context in which the application arose was also of relevance:

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. Accordingly, the Court takes the view that the authorisation requirement [under domestic law] is consistent with Article 9 of the Convention only in so far as it is intended to allow the Minister to verify

194. E.g. *Chappell v. the United Kingdom*. Cf. *Logan v. the United Kingdom* (dec.).

whether the formal conditions laid down in those enactments are satisfied.

It appears from the evidence and from the numerous other cases cited by the applicants and not contested by the Government that the State has tended to use the possibilities afforded by [domestic law] to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses. ... [T]he extensive case-law in this field seems to show a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.

It was also of some significance that authorisation was still awaited by the time the Strasbourg Court delivered its judgment, and that this authorisation was to come not only from state officials but also from the local bishop. The Court determined that the conviction could not be said to have been a proportionate response.¹⁹⁵ A position of strict neutrality is thus

195. *Manoussakis and others v. Greece*, §§44-53 at §48. See too *Khristiansko Sdruzhenie "Svideteli na Iehova" (Christian Association Jehovah's Witnesses) v. Bulgaria* (suspension of the association's registration followed by arrests, dispersal of meetings held in public and private locations and confiscation of religious materials declared admissible under Articles 6, 9-11 and 14), and (9 March 1998) (friendly settlement ultimately achieved); *Institute of French Priests and others v. Turkey* (friendly settlement) (decision by the Turkish courts to register a plot of land belonging to the Institute in the name of state bodies on the ground that the Institute was no longer eligible for treatment as a religious body as it had let part of its property for various sporting activities: friendly settlement secured after a life tenancy in favour of the priests representing the Institute was conferred).

required, and to this end, the involvement in this procedure of another ecclesiastical authority which itself enjoys state recognition will not be appropriate.

Situations in which rigorous (or indeed prohibitive) conditions are imposed on the adherents of particular faiths, however, must be contrasted with those in which an applicant is seeking to modify the outcome of planning decisions taken in a objective and neutral manner. In *Vergos v. Greece* the applicant had been refused permission to build a prayer-house for the community on a plot of land which he owned on the basis that the land-use plan did not permit the construction of such buildings and that in any event he was the only member of his religious community in his town. The planning authorities had accordingly concluded there was no social need justifying modification of the plan so as to permit the building of a prayer-house. In determining that this interference was “necessary in a democratic society”, the Strasbourg Court accepted that the criterion applied by the domestic authorities when weighing the applicant’s freedom to manifest his religion against the public interest in rational planning could not be considered arbitrary. Having regard to a State’s margin of appreciation in matters of town and country planning, the public interest should not be made to yield precedence to the need to worship of a single adherent of a religious community when there was a prayer-house in a neighbouring town which met the religious community’s needs in the region.¹⁹⁶

The requirement of state neutrality: interfering in internal disputes between adherents of a religious community

Cases in which state authorities have attempted to intervene in matters of internal dispute between members of a religious community illustrate the interplay between freedom of religion and freedom of association. Article 9, when interpreted in the light of Article 11,

encompasses the expectation that [such a] community will be allowed to function peacefully, free from arbitrary State intervention,

and thus

State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion.¹⁹⁷

In any event, some degree of tension is only the unavoidable consequence of pluralism.¹⁹⁸ It is immaterial to the determination of whether an “interference” has occurred with the rights of adherents who are dissatisfied with the outcome of state intervention that they are at liberty to establish a new religious organisation.¹⁹⁹ Intervening in internal disputes between

196. *Vergos v. Greece*, §§36-43..

197. *Supreme Holy Council of the Muslim Community v. Bulgaria* at §73.

198. *Agga v. Greece (no. 2)*, §§56-61.

groups of adherents is likely to be considered as pursuing the legitimate aim of preventing disorder and protecting the rights and freedoms of others, but although a certain amount of regulation may be necessary in order to protect individuals' interests and beliefs, state authorities must take care to discharge their duty of neutrality and impartiality as the autonomy of religious communities constitutes an essential component of pluralist democratic society where several religions or denominations of the same religion co-exist.²⁰⁰

In the *Supreme Holy Council of the Muslim Community v. Bulgaria*, the Strasbourg Court was called upon to determine whether such an interference caused by efforts made by state authorities to address long-standing conflicts within the Muslim religious community had been “necessary in a democratic society”. It decided that this had not been shown to have been so:

The Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the

various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome.

In the present case, the relevant law and practice and the authorities' actions ... had the effect of compelling the divided community to have a single leadership against the will of one of the two rival leaderships. As a result, one of the groups of leaders was favoured and the other excluded and deprived of the possibility of continuing to manage autonomously the affairs and assets of that part of the community which supported it. ... The Government have not stated why in the present case their aim to restore legality and remedy injustices could not be achieved by other means, without compelling the divided community under a single leadership.

The need for such measures had thus not been established. It was also of significance in this particular case that the measures had not been in any event successful as the conflicts in the community had continued. While the authorities did enjoy a certain “margin of appreciation” in determining what measures to take in such circumstances, the authorities had exceeded that margin in this instance. Accordingly, the interference by the authorities had constituted a violation of Article 9.²⁰¹

199. *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, §§122-160.

200. *Miroübovs and others v. Latvia*, §§82-96.

The taking of measures by state authorities to ensure that religious communities remain or are brought under a unified leadership will thus be difficult to justify if challenged, even where the action is purportedly taken in the interests of public order. The responsibility of the authorities to promote pluralism and tolerance clearly trumps any arguments based upon good governance or the importance of ensuring effective spiritual leadership. In *Serif v. Greece* the applicant had been elected as a mufti, a Muslim religious leader, and had begun to exercise the functions of that office. However, he had not secured the requisite state authority to do so, and criminal proceedings were brought against him for having usurped the functions of a minister of a “known religion” with a view to protecting the authority of another mufti who had secured the necessary official recognition. The Strasbourg Court accepted that the resultant conviction had pursued the legitimate aim of protecting public order. However, it was not persuaded that there had been any pressing social need for the conviction. There had been no instance of local disturbance, and the respondent government’s suggestion that the dispute could even have resulted in interstate diplomatic difficulty had never been anything other than a remote possibility. In any case, the function of the state in such instances was to promote pluralism rather than to seek to eliminate it:

201. *Supreme Holy Council of the Muslim Community v. Bulgaria*, §§93-99 at §§93-95.

Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.²⁰²

A similar situation also arose in *Agga v. Greece (no. 2)*. Here, the applicant had been elected to the post of mufti by worshippers at a mosque. This result had been annulled by state officials who thereafter had appointed another mufti to the office. The applicant had declined to step down, and had also in consequence been convicted of the offence of having usurped the functions of a minister of a “known religion” as had also occurred in the *Serif* case. It was again readily accepted that the interference had been for a prescribed interest, that is, the preservation of public order. The application of criminal sanctions had also been foreseeable. But the Strasbourg Court again could not be satisfied that the interference had been “necessary in a democratic society”. There had been no pressing social need for the interference. In its view, “punishing a person for merely presenting himself as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society.” Although religious leaders were recognised by domestic

202. *Serif v. Greece*, §§49-54.

law as having the right to exercise certain judicial and administrative state responsibilities (and thus since legal relationships could be affected by the acts of religious ministers, the public interest may indeed justify measures to protect individuals against deception), in the present instance there had been no indication that the applicant had attempted at any time to exercise these functions. Further, since tension is the unavoidable

consequence of pluralism, it should never be necessary in a democracy for a state to seek to place a religious community under a unified leadership by favouring a particular leader over others.²⁰³

203. *Agga v. Greece (no. 2)*, §§56-61.

Related guarantees under the Convention having an impact upon the free exercise of conscience or belief

It is also appropriate to discuss – albeit briefly – linked considerations concerning religion and belief which have arisen under other provisions of the European Convention on Human Rights. The importance of provisions such as Article 6 and Article 11 has been highlighted in respect of the collective aspect of freedom of religion. Other guarantees also have some bearing upon enjoyment of freedom of thought, conscience and religion. In particular, issues may arise within the context of parental rights in the provision of public education under Article 2 of Protocol No. 1, while limitations on the free expression of religious communities may occasionally arise under Article 10. Further, it is also necessary to note the importance of Article 14's prohibition of discrimination in the enjoyment of Convention rights. The discussion which follows, however, can only provide a basic introduction to these additional concerns.

Religious convictions and education: Article 2 of Protocol No. 1

Questions concerning respect for parents' religious belief in the provision of education of their children may arise under

Article 2 of Protocol No. 1 to the Convention. This first provides that “no person shall be denied the right to education”, and thereafter that “in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. The right to respect for religious and philosophical convictions belongs to the parents of a child and not to the child itself²⁰⁴ or to any school or religious association.²⁰⁵ But the duty to respect any such “convictions” of parents is, however, subordinate to the primary right of a child to receive education, and thus the provision cannot be read in such a manner as to require recognition of a parent's wish, for example, that a child is given a general exemption from attending school on Saturdays on religious grounds,²⁰⁶ let alone that a child be allowed to be educated at home rather than in a school.²⁰⁷

204. *Eriksson v. Sweden*, §93.

205. *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden* (dec.).

206. *Martins Casimiro and Cerveira Ferreira v. Luxembourg* (dec.).

In the context of this provision, “education” suggests “the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young”, while “teaching or instruction refers in particular to the transmission of knowledge and to intellectual development”. “Respect” suggests more than mere acknowledgment or even that a parent’s views have been taken into account, and instead “implies some positive obligation on the part of the State”.²⁰⁸ “Religious and philosophical convictions” is much broader than faith. Thus disciplinary measures may not simply be dismissed as a matter merely of internal administration. In *Campbell and Cosans v. the United Kingdom* parents of pupils objected to the practice of corporal punishment. The Strasbourg Court accepted that the applicants’ views met the test of philosophical conviction in that they related to a “weighty and substantial aspect of human life and behaviour, namely the integrity of the person”, and thus the State’s failure to respect these convictions violated the guarantee since “the imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils”.²⁰⁹

207. *Konrad and others v. Germany* (dec.) (denial of right of home education to Christian parents who objected to private or state schooling on account of sex education, study of fairytales, and inter-pupil violence: inadmissible).

208. *Campbell and Cosans v. the United Kingdom*, §§33 and 37; *Valsamis v. Greece*, §27.

209. *Campbell and Cosans v. the United Kingdom*, §§33-37 at §36.

Such “philosophical convictions” in the setting and delivery of the curriculum may obviously arise within the context of curriculum determination and delivery, but state interests in ensuring that certain factual information – including information of a religious or philosophical nature – forms part of the school curriculum may take precedence over parental considerations in this area.²¹⁰ Furthermore, as the Grand Chamber emphasised in *Lautsi and others v. Italy*, arrangements in education and teaching may indeed reflect historical tradition and dominant religious adherence. The requirement for the presence of crucifixes in classrooms, for example, while conferring upon the majority religion in Italy a “preponderant visibility”, cannot in itself denote a process of indoctrination, as a crucifix is an essentially passive symbol whose influence cannot be deemed comparable to that of didactic speech or participation in religious activities. This conclusion was supported by the fact that the curriculum did not include any compulsory teaching about Christianity, and indeed there were also clear attempts to provide an understanding of other faiths and promote tolerance of others’ beliefs.²¹¹

The essence of the guarantee is “the safeguarding of pluralism and tolerance in public education and the prohibition of indoctrination”.²¹² However, providing indoctrination is

210. *Sluijs v. Belgium*.

211. *Lautsi and others v. Italy* [GC], §§62-77 at §71 (no violation of Article 2 of Protocol No. 1, and no separate issue arising under Article 9, Article 2 of Protocol No. 1 being the *lex specialis* in this area).

avoided, decisions on such issues as the place accorded to religion are covered by a margin of appreciation on the part of national authorities. In *Kjeldsen, Busk, Madsen and Pedersen v. Denmark* parents objected to the provision of sex education to their children. In a crucial part of the judgment which encapsulates the manner for resolving the conflicting interests of the State, of pupils and of their parents, the Strasbourg Court drew a distinction between the imparting of knowledge even of a directly or indirectly religious or philosophical nature, and teaching which sought to inculcate a particular value or philosophy which did not respect the views of a parent. The provision does not “permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable” since most school subjects involved “some philosophical complexion or implications”. However, a school has to ensure that the education provided by way of teaching or instruction conveyed information and knowledge “in an objective, critical and pluralistic manner”. The key guarantee is against the State pursuing an “aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions”, this being “the limit that must not be exceeded”.²¹³

212. *W. and D.M., M. and H.I. v. the United Kingdom*. See also *C.J., J.J and E.J. v. Poland and Bernard and others v. Luxembourg*.

213. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, §53.

Whether such a situation has arisen may require careful assessment. In *Folgerø and others v. Norway* the Grand Chamber (albeit by a bare majority) ruled that the introduction of new arrangements for the teaching of religion and philosophy in primary schools had failed to respect the rights of parents. The new curriculum required a greater emphasis to be placed upon knowledge of the Christian religion, although other faiths were also to be covered in classes. The rights of parents to withdraw their children from classes was also to be restricted: in the past, a parent could withdraw his child from lessons in Christianity. For the majority of the Court, the emphasis upon knowledge about Christianity was not in itself objectionable in light of the importance that Christianity had played in the country’s history and tradition. However, the curriculum’s purported aim of helping provide a Christian and moral upbringing, albeit in co-operation with the home, suggested that the distinctions between Christianity and other faiths and religions were not only quantitative but also qualitative. This in turn called into question the curriculum’s stated aims of addressing sectarianism and promoting pluralism and understanding. In these circumstances, the state had to ensure that parental convictions were adequately protected. The majority of the Court could not be satisfied that these arrangements were sufficient to meet the requirements of Article 2 of Protocol no 1. Not only would parents need to be informed in advance as to lesson plans to allow them to identify and to notify which aspects of teaching would be incompatible with their beliefs, but the requirement

that any request for withdrawal from teaching was to be supported by reasonable grounds also carried the risk that parents would be forced to disclose their own religious and philosophical convictions to an unacceptable extent. Further, schools were to be given authority to respond to requests for withdrawal from teaching by withdrawing the child merely from the activity rather than from the classroom. All of this thus supported the conclusion that the arrangements were highly complex and likely to deter parents from making use of requests for exemption.²¹⁴

Educational issues may also arise within the scope of Article 9, but the influence of case-law under Article 2 of Protocol No. 1 in the disposal of applications is clear. A requirement to attend moral and social education in the absence of any allegation of indoctrination does not give rise to an interference with Article 9 rights.²¹⁵ Further, while a refusal to grant a general exemption from attending school on Saturdays on religious grounds to the sons of the applicants, Seventh Day Adventists, could be regarded as an interference with the manifestation of belief, no general dispensation could be recognised which would adversely affect a child's right to education, a right which

214. *Folgerø and others v. Norway* [GC], §§85-102. See also *Hasan and Eylem Zengin v. Turkey*, §§58-77 (religious culture and ethics syllabus failed to meet the criteria of objectivity and pluralism and restricted the possibility of exemption from instruction: violation).

215. *Bernard and others v. Luxembourg*.

prevailed over the parents' rights to have their religious convictions taken into account.²¹⁶

Freedom of expression and thought, conscience and belief: Article 10

Certain cases have considered the extent to which restrictions on freedom of expression involving aspects of thought, conscience and religion are compatible with Article 10's guarantee of freedom of expression. The exercise of this right by groups or individuals seeking to persuade others may often be better considered in terms of Article 10 guarantees unless this clearly involves a "manifestation" of belief.²¹⁷ For example, restrictions on the amount of expenditure that can be incurred at election time were challenged successfully by an anti-abortionist as a disproportionate restriction of freedom of expression.²¹⁸ Further, expression essentially of a commercial nature may be restricted on the grounds that this is necessary for the protection of the public from misleading claims.²¹⁹

A more difficult case involving religious advertising is *Murphy v. Ireland*, in which the refusal to allow the television screening of a religious advertisement was challenged by the applicant under both Articles 9 and Article 10 of the Convention. While the applicant agreed that Article 10 could permit restrictions of

216. *Martins Casimiro and Cerveira Ferreira v. Luxembourg* (dec.).

217. See discussion of *Arrowsmith v. the United Kingdom*, above at p. 22.

218. *Bowman v. the United Kingdom*, §§35-47.

219. *X and Church of Scientology v. Sweden*.

religious expression which would offend others' religious sensitivities, he also argued that an individual was not protected from being exposed to a religious view simply because it did not accord with his or her own. For the Strasbourg Court, the refusal primarily concerned the regulation of the applicant's means of expression and not his manifestation of religious belief, and thus the case was disposed of in terms of Article 10. State authorities were better placed than an international court to decide when action may be necessary to regulate freedom of expression in relation to matters liable to offend intimate personal convictions. This "margin of appreciation" was particularly appropriate in respect to restrictions on free speech in respect to religion

since what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.

In consequence, the Court accepted that the respondent state was justified in determining that the particular religious sensitivities in Irish society were such that the broadcasting of any religious advertising could be considered offensive. The domestic courts themselves had noted that religion had been a divisive issue in society, that Irish people holding religious beliefs tended to belong to one particular church and so religious advertising from a different church might be considered offensive and open to the interpretation of proselytism, and that the

state authorities had been entitled to take the view that Irish citizens would resent having advertisements touching on these topics broadcast into their homes. For the Strasbourg Court, too, it was important that the prohibition concerned only the audiovisual media, a means of communication which has "a more immediate, invasive and powerful impact". The applicant could still have advertised via local and national newspapers and retained the same right as any other citizen to participate in programmes on religious matters, public meetings and other assemblies. There were thus highly "relevant reasons" under Article 10 justifying the blanket prohibition of the broadcasting of religious advertisements.²²⁰ It is clear from such cases that the context in which the speech takes place is of particular weight. Here, the channel of communication was television. It may be fair, though, to categorise this judgment as one in which the extent of the "margin of appreciation" was particularly broad, for an international judicial forum should be particularly careful to refrain from interfering with domestic determinations on particularly sensitive decisions. On the other hand, it could be argued that the judgment hardly promotes the values of pluralism and broadmindedness.

A related issue is the extent to which state authorities may take action against expression in order to protect the religious sensibilities of adherents of particular faiths by preventing or punishing the display of insulting or offensive material that

^{220.} *Murphy v. Ireland*, §§65-82 at § 67.

could discourage adherents from practising or professing their faith through ridicule. The scope of Article 10's guarantee for freedom of expression encompasses, after all, ideas which "offend, shock or disturb"²²¹, and in any case the maintenance of pluralist society also requires that adherents of a faith at the same time accept that their beliefs may be subject to criticism and to the propagation of ideas that directly challenge these beliefs. However, offensive speech which is intended or likely to stir up ill-will against a group in society – so-called "hate speech" – is unlikely to attract any protection, particularly in light of Article 17 of the Convention which prohibits the abuse of rights. However, the distinction between offensive speech and that which is merely unpopular may be difficult to draw. A sustained campaign of harassment by private individuals or organisations may give rise to State responsibility,²²² but on the other hand, it is legitimate that individuals are free to criticise religious groups, particularly if the criticism concerns the potentially harmful nature of their activities, and when made in a political forum in which issues of public interest are expected to be debated openly.²²³ The Strasbourg Court has recognised that the peaceful enjoyment of the rights guaranteed under Article 9 by adherents of religious faiths at the very least may justify a State in taking action against the dissemination of expression that is, in respect to objects of veneration, gratui-

tously offensive to others and profane. But careful line-drawing will be needed to ensure that the goal of pluralism is not defeated by the measures adopted. For example, in *Otto-Preminger-Institut v. Austria*, the authorities had seized and ordered the forfeiture of a film ridiculing the beliefs of Roman Catholics. In interpreting Article 10's guarantee of freedom of expression, the European Court of Human Rights affirmed that national authorities could indeed deem it necessary to take action to protect adherents of religious beliefs against "provocative portrayals of objects of religious veneration" where such constitute "malicious violation of the spirit of tolerance, which must also be a feature of democratic society". The close relationship between Articles 9 and 10 was of the essence:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to

221. *Handyside v. the United Kingdom*, at §49.

222. *Church of Scientology v. Sweden* (dec.).

223. See *Jerusalem v. Austria*, §§38-47.

inhibit those who hold such beliefs from exercising their freedom to hold and express them.²²⁴

Similarly, in *Wingrove v. the United Kingdom*, the Strasbourg Court rejected a complaint brought under Article 10 concerning the refusal to license a video considered blasphemous by the domestic authorities on the grounds that it was not unreasonable to consider that the interference with freedom of expression may be deemed justified as for the protection of the rights of Christians.²²⁵ These cases support the proposition that a State may take action against expression which is gratuitously offensive. Of importance in both of these cases was the manner in which the opinions had been expressed rather than the content of the opinions themselves. Other cases involving social commentary²²⁶ or discussion of historical events concerning the role played by religious leaders²²⁷ have resulted in greater protection being accorded to expression. However, a case such as *Murphy v. Ireland*, discussed above, can appear to

support restrictions on free expression even where it is difficult to acknowledge that any offence could be taken other than to the mere recognition that another religion or interpretation of religious belief existed.²²⁸ Not all expression considered offensive, shocking or disturbing to the sensitivities of a religious community could (or should) fall outside the protection accorded by Article 10.²²⁹ In principle, it seems appropriate that any protection accorded by Article 9 should be restricted to that which is a “malicious violation of the spirit of tolerance”. In *Klein v. Slovakia*, for example, the conviction of journalist for defamation of the highest representative of the Roman Catholic Church in Slovakia, and thereby for having disparaged a group of citizens for their Catholic faith, was found to have constituted a violation of Article 10. The journalist had written an article critical of the archbishop’s attempts to prevent the distribution of a film on the grounds of its blasphemous nature and strong imagery of sexual connotation; the article had also con-

224. *Otto-Preminger-Institut v. Austria*, at §§56 and 57.

225. *Wingrove v. the United Kingdom*, §60. See also *I.A. v Turkey*, §§21-32 (conviction leading to modest sanction for blasphemy for publication of work examining philosophical and theological issues but involving a slanderous attack on the prophet Mohammed: no violation of Article 10, for notwithstanding the strong attachment to secularism in Turkey, it was legitimate for practising Muslims to consider the work had constituted an unjustified and offensive attack on them).

226. See, e.g., *Vereinigung Bildender Künstler v. Austria*, §§26-39 (at §8: the painting in question “showed a collage of various public figures, such as Mother Teresa, [an] Austrian cardinal ... and the former head of the Austrian Freedom Party ... in sexual positions”; and at §33: “satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate”).

227. *Giniewski v. France*, §§43-56 (conviction for defamation of Christians, and particularly Roman Catholics, for publication of article critical of a papal encyclical and the Roman Catholic Church’s role in the Holocaust: violation, as the article was written by a journalist and historian and concerned a matter of indisputable public interest, and did not seek to attack religious belief as such but confined itself to addressing a Pope’s position).

228. See above at p. 69.

229. See *Church of Scientology and 128 of its members v. Sweden* (dec.); *Paturel v. France*, §§31-51 (conviction for defamation by a member of the Jehovah’s Witnesses of an anti-sect association: violation of Article 10, for the passages considered offensive were value judgments based upon a sufficient factual basis rather than being merely factual assertions); and *Aydın Tatlav v. Turkey*, §§21-31 (strong criticism of religion, but not an abusive attack on the Muslim faith: sanctions constituted a violation of Article 10).

tained allusions to the archbishop's alleged co-operation with the former communist regime. However, while the opinion had been strongly-worded, it had been published in a weekly with rather limited circulation, the article had related exclusively to the archbishop, and it had not unduly interfered with the right of believers to express and exercise their religion, nor had it denigrated the content of their religious faith.²³⁰

Medical treatment issues: Article 8

Domestic courts are on occasion faced with situations in which objection is taken to necessary medical treatment on grounds of conscience or belief (for example, to procedures necessitating a blood transfusion). Most domestic legal systems recognise and respect the absolute right of an adult who suffers from no mental incapacity to make decisions concerning medical treatment, including the right to choose not to receive treatment, even when this may involve a risk to life. Similarly, this principle of autonomy or self-determination is recognised by Article 8. "In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engag-

ing the rights protected under Article 8 §1 of the Convention."²³¹ To this extent, then, individual decision-making based upon personal belief or conscience seems inviolate. Article 8 further encompasses the exercise of parental responsibilities including the right to take decisions concerning the upbringing of their children, again including decisions concerning medical treatment.²³² While there is little consideration of this topic in the case-law, principle would seem to suggest that this authority must be subject to appropriate limitations on such authority for the protection and well-being of children, particularly when there is a threat to life and where countervailing considerations (and in particular, the state's positive obligation to seek to protect life) are highly relevant. A similar case could be made for state intervention in respect of adults whose state of health renders them either vulnerable to undue pressure or who cannot be deemed to be fully competent to take decisions concerning their treatment.²³³

230. *Klein v. Slovakia*, §§45-55.

231. *Pretty v. the United Kingdom* at §83.

232. See *Nielsen v. Denmark*, at §61: "Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life."

233. Cf *Kokkinakis v. Greece*, discussed at p. 47, above; and *Keenan v. the United Kingdom*, §§88-101. But cf *Riera Blume and others v. Spain*, §§31-35, (complaints that "de-programming treatment" involved a violation of Article 9 avoided on account of a finding of violation of Article 5).

State recognition of decisions of ecclesiastical bodies: Article 6

On occasion, the Strasbourg Court has been called upon to consider issues arising from the civil enforcement of decisions of religious bodies concerning application of Article 6's guarantee of fair hearings. In resolving such issues, it will apply general principles of interpretation. In *Pellegrini v. Italy* the applicant challenged the proceedings leading to the issue of a decree of nullity of marriage issued by a Vatican court that had been recognised as having legal effect by the Italian courts. The key issue was whether these domestic courts had duly verified whether the Article 6 guarantees had been secured in the church proceedings before granting the authority to enforce the decree. Since the Strasbourg Court held that the Italian courts had failed to ensure that the applicant had had a fair hearing in the ecclesiastical proceedings before issuing the authority to enforce the judgment of the ecclesiastical court, a review necessary when the decision in respect of which an authority to enforce was sought emanated from the courts of a country that did not apply the Convention, there had accordingly been a breach of Article 6.²³⁴

Discrimination on the basis of religion or belief

Protection for thought, conscience and religion belief is also buttressed by two other provisions. First, Article 14 of the

²³⁴ *Pellegrini v. Italy*, §§40-48.

Convention makes explicit reference to religious belief as an example of a prohibited ground for discriminatory treatment:

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

Secondly, Protocol No. 12 establishes a more *general* prohibition of discrimination by providing that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The prohibition of discrimination found in Article 14 is clearly limited as it applies only to “the rights and freedoms set forth” in the European Convention on Human Rights. Protocol No. 12 thus accords additional protection against discriminatory treatment in those states which have ratified this treaty. Both provisions thus attempt to prevent the effective enjoyment of individual rights on the grounds *inter alia* of belief. The importance of these provisions is specifically acknowledged in an international legal instrument: “discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations.”²³⁵ The context in which Article 14 and

Protocol No. 12 apply may also have implications for those seeking to promote ideologies which fail to respect basic values, for the revival of religious fundamentalism poses a challenge to pluralism and community tolerance calling for an appropriate reaction from national authorities. The 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, for example, “clearly and unequivocally condemns totalitarianism, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds”.

Article 14

As is apparent from its terms, Article 14 does not confer any free-standing or substantive right but rather expresses a principle to be applied in relation to the substantive rights conferred by other provisions: that is, this provision can only be invoked in conjunction with one or more of the substantive guarantees contained in the Convention or in one of the protocols. However, Article 14 is of fundamental importance since an interference with a particular right not considered to constitute a violation of the right may nevertheless be deemed to do so when read in conjunction with Article 14. Here, though, the scope of protection may be wider than first appears. In *Savez Crkava “Riječ Života” and others v. Croatia* Reformed churches

complained that they were unable – in contrast to other religions – to have religious marriages conducted in accordance with their rites recognised as equal to those of civil marriages, or to be permitted to offer religious education in public schools. The respondent state argued that no obligation arose under Article 9 either requiring recognition of religious marriages or the allowing of religious education in public schools. While the Court agreed with this part of the submission, it nevertheless drew a different conclusion:

The Court ... reiterates that the Convention, including its Article 9 § 1, cannot be interpreted so as to impose an obligation on States to have the effects of religious marriages recognised as equal to those of civil marriages. Likewise, the right to manifest religion in teaching guaranteed by Article 9 §1 of the Convention does not, in the Court’s view, go so far as to entail an obligation on States to allow religious education in public schools or nurseries.

Nevertheless, the Court considers that celebration of a religious marriage, which amounts to observance of a religious rite, and teaching of a religion both represent manifestations of religion within the meaning of Article 9 §1 of the Convention. It also notes that Croatia allows certain religious communities to provide religious education in public schools and nurseries and recognises religious marriages performed by them. The Court reiterates in this connection that the prohibition of discrimination enshrined in Article 14 of the Convention applies also to those additional rights,

235. United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, Article 3.

falling within the wider ambit of any Convention Article, for which the State has voluntarily decided to provide. Consequently, the State, which has gone beyond its obligations under Article 9 of the Convention in creating such rights cannot, in the application of those rights, take discriminatory measures within the meaning of Article 14. It follows that, although Croatia is not obliged under Article 9 of the Convention to allow religious education in public schools and nurseries or to recognise religious marriages, the facts of the instant case nevertheless fall within the wider ambit of that Article. Accordingly, Article 14 of the Convention, read in conjunction with Article 9, is applicable to the present case.²³⁶

An applicant must first establish that there is a situation which is comparable to his or her own situation: that is, that the applicant has been treated in a different way to a relevant comparator. The situation of an individual holding humanistic beliefs wishing to use his acquired knowledge for the service of others is not similar to the holder of a religious office, for example.²³⁷ The list of prohibited grounds for discrimination is qualified by the phrase “any ground such as”, and is not exhaustive but merely illustrative. The discriminatory treatment must normally be based upon personal characteristics and not, for example, geographical location. “Status”, though, is not neces-

sarily dependent upon a characteristic that is innate or inherently linked to the identity or the personality of the individual (such as sex or race),²³⁸ but since the text of Article 14 specifically refers to differences of treatment based upon “religion, political or other opinion”, this issue will not be of difficulty in relation to differences of treatment falling within the scope of Article 9. As it may be difficult in practice to establish a *prima facie* case of discrimination even where such discrimination exists (if, for example, a non-discriminatory rule is applied in a discriminatory manner so as to constitute indirect discrimination), the Strasbourg Court has recently accepted in *D.H. and others v. the Czech Republic* that “less strict evidential rules” should apply in the field of discrimination in order to guarantee those concerned “the effective protection of their rights”. This case concerned the placement of Roma schoolchildren in segregated classes, but similar concerns would arise in respect of segregation on account of religious faith. The Court considered that

the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake,

and thus

236. *Savez Crkava “Riječ Života” and others v. Croatia* at §§56-58.

237. *Peters v. the Netherlands*.

238. *Clift v. the United Kingdom*, §§55-62.

when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce.

Here, statistics demonstrating that over 50% of Roma children were placed in special schools for less able children, compared with less than 2% of non-Roma children, indicated that the educational tests on which the placements were based were not unbiased against Roma children.²³⁹

If a relevant comparator is established, the difference in treatment must be shown to be objectively justified, and the onus of establishing this lies upon the state. Thus a difference in treatment is not automatically discriminatory within the meaning of Article 14, but will only be deemed to be so if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

A brief examination of case-law illustrates application of the test. In *Alujer Fernández and Caballero García v. Spain* taxpayers complained that they were unable to allocate part of their payments for the support of their own particular religious communities, and that this constituted discriminatory treatment. The Strasbourg Court observed that

freedom of religion does not entail Churches or their members being given a different tax status to that of other taxpayers.

However, where such agreements or arrangements do exist, these

do not, in principle, contravene the requirements of Articles 9 and 14 of the Convention, provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other Churches wishing to do so.

In this case, since the churches in question had never wished to enter into agreements or to seek such arrangements, the application fell to be dismissed as manifestly ill-founded.²⁴⁰ A difference in treatment between religious groups on account of official recognition of a specific legal status resulting in the conferment of privileges is thus not in itself incompatible with the Convention as long as a framework establishing criteria for conferring legal personality is in place, and also providing that each religious group has a fair opportunity to apply for this status.²⁴¹ In *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* this latter qualification was found not to have been satisfied. For some 20 years, the authorities had refused to grant legal personality to Jehovah's Witnesses. The Court con-

239. *D.H. and others v. the Czech Republic*, §§185-195.

240. *Alujer Fernández and Caballero García v. Spain*, (dec.).

241. *Koppi v. Austria*, §33.

sidered that there had been a violation of Article 14 taken with Article 9:

The Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of that Article. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

The Court finds that the imposition of a waiting period before a religious association that has been granted legal personality can obtain a more consolidated status as a public-law body raises delicate questions, as the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs. Such a waiting period therefore calls for particular scrutiny on the part of the Court.

The Court could accept that such a period might be necessary in exceptional circumstances such as would be in the case of newly established and unknown religious groups. But it hardly appears justified in respect of religious groups with a long-standing existence internationally which are also long established in the country and therefore familiar to the competent authorities, as is the case with the Jehovah’s Witnesses. In respect of such a religious group, the authorities should be able to verify whether it fulfils the requirements of the relevant legislation within a considerably shorter period. Further, the example of another religious community cited by the applicants shows that the Austrian State did not consider the application on an equal basis of such a waiting period to be an essential instrument for pursuing its policy in that field.²⁴²

Claims of discriminatory treatment on the basis of religious or other protected belief or opinion thus require some care in their resolution. In practice, the European Court of Human Rights will generally decline to consider any complaint of discrimination under Article 14 when it has already established that there has been a violation of a substantive guarantee raising substantially the same point. If it is necessary to consider an Article 14 argument, it will also be necessary to determine the most appropriate substantive guarantee with which to consider the complaint, for the case-law of the Court indicates

242. *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* at §§96-98.

that discrimination on the basis of religion or belief may be best addressed by considering Article 14 not in conjunction with Article 9, but in connection with another substantive provision.

Certain cases have also involved the resolution of child custody and access by reference to religious belief. In *Hoffman v. Austria*, for example, the applicant had been denied custody of her child because of her involvement with Jehovah's Witnesses. While the Strasbourg Court held that it was unacceptable for a domestic court to base a decision on the ground of a difference in religion, it did so under Articles 8 and 14 as it concerned the determination of child custody, an aspect of family life. In *Palau-Martinez v. France*, a violation of Article 8 taken in conjunction with Article 14 was similarly established in respect of a decision concerning the care of children following upon the breakdown of a marriage. The determination had proceeded upon a generalised and "harsh analysis of the principles regarding child-rearing allegedly imposed" by the Jehovah's Witnesses faith. While such would have been a relevant factor, it could not have been a sufficient one in the absence of "direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life" in view of the rejection of the applicant's request for a social enquiry report.²⁴³ Neither case seems to rule out entirely in child-custody cases the use of judicial knowledge of the practices of particular

faiths, but both certainly stress that such considerations have to be applied with some care.

Where the legal capacity of a church to take legal proceedings to uphold its interests is restricted by domestic law, an issue may also arise under Article 6's guarantee of access to a court, particularly where no restrictions are placed upon other religious bodies. In *Canea Catholic Church v. Greece* the applicant church could not take legal proceedings in order to protect its property rights, while the Orthodox Church and the Jewish Community were able to do so. Since the situation essentially concerned access to a court for the determination of civil rights, and since there could be no objective and reasonable justification for this discriminatory treatment, the Strasbourg Court found that there was a violation of Article 6 (1) taken in conjunction with Article 14.²⁴⁴

Religious beliefs may also involve consideration of discriminatory treatment in employment and give rise to questions under Article 9 or this provision taken along with Article 14. The case of *Thlimmenos v. Greece* concerned a person who had been refused admission as a chartered accountant because of a criminal conviction. The conviction in question arose from his refusal to wear military uniform during a period of general mobilisation, but on account of his religious beliefs as a Jehovah's Witness. The Strasbourg Court noted that while access to a profession was not as such covered by the Conven-

243. *Palau-Martinez v. France*, §§29-43 at §§38 and 42.

244. *Canea Catholic Church v. Greece*, §§43-47.

tion, it treated the complaint as one of discrimination on the basis of the exercise of freedom of religion. Although states could legitimately exclude certain classes of offenders from various professions, the particular conviction in question could not suggest dishonesty or moral turpitude. The treatment of the applicant therefore did not have a legitimate aim, and was in the nature of a disproportionate sanction as one additional to the substantial period of imprisonment he had already served. There was accordingly a violation of Article 14 taken in conjunction with Article 9. In a key passage in this judgment, the Strasbourg Court indicated that states may indeed be under a positive duty to treat individuals differently in certain situations: that is, that discrimination can also occur when the same treatment is accorded individuals who ought to be treated differently:

The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. 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. ...

The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. ...

It is true that the authorities had no option under the law but to refuse to appoint the applicant a chartered accountant. ... In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.²⁴⁵

Protocol No. 12

It is clear that Protocol No. 12 has a potentially wide scope. In *Sejdić and Finci v. Bosnia and Herzegovina*, the first judgment concerning the guarantee, constitutional arrangements which restricted eligibility to stand for parliament or for the presi-

245. *Thlimmenos v. Greece* [GC], §§39-49 at §§44, 47 and 48.

dency to those declaring affiliation to one of the three dominant ethnic groups in the state (that is, ethnic groups whose identity was to a significant extent based upon religious belief) were held to have violated Article 14 taken with Article 3 of Protocol No. 1 (in respect of parliamentary elections) and Protocol No. 12 (in respect of elections to the presidency). These arrangements had derived from the Dayton Peace Agreement which had brought about an end to hostilities in the country.²⁴⁶ In its second judgment on the protocol, *Savez Crkava "Riječ Života" and others v. Croatia*, the inability of Reformed churches to provide religious education in public schools or to conclude state-recognised marriage ceremonies was found to have violated Article 14 taken in conjunction with Article 9, thus allowing the Court to consider it unnecessary to rule on the Protocol No. 12 issue. The judgment did, however, allow discussion of the applicability of the protocol. The text indicated that the prohibition of discrimination was not restricted to "any right set forth by law" but also extended to the prohibition of discrimination by a public authority, and explicit refer-

246. *Sejdić and Finci v. Bosnia and Herzegovina* [GC], §§42-56.

ence to the explanatory report suggested that four categories of cases could fall within the scope of the provision:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).²⁴⁷

247. *Savez Crkava "Riječ Života" and others v. Croatia*, §§103-115 (decisions whether to enter agreements with religious authorities were a matter for state discretion and thus did not concern "rights specifically granted to them under national law", but the issue did fall within the third category specified in the explanatory report; and noting the explanatory report's comment that it was not necessary to specify which elements fell to be considered under each of the paragraphs as the paragraphs were complementary, the distinctions not clear-cut, and "domestic legal systems may have different approaches as to which case comes under which category").

Conclusion

Freedom of thought, conscience and religion is a vital human right. The jurisprudence of the European Court of Human Rights (and of the former European Commission on Human Rights) provides powerful restatements of the importance of the values inherent in Article 9. A proper appreciation of these underlying principles and ideals is critical: in particular, freedom of thought, conscience and religion must be seen as helping to maintain and enhance democratic discussion and the notion of pluralism. Its two facets – the individual and the collective – are crucial. 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.²⁴⁸

Furthermore,

the autonomous existence of religious communities is indispensable for pluralism in a democratic society. ... What is at stake here is the preservation of pluralism and the proper

functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome.²⁴⁹

In other words, the protection of individual belief must promote rather than discourage mutual respect for and tolerance of others' beliefs. Thus the duties upon a state go beyond the responsibility of merely refraining from interfering with Article 9 rights, and the provision can also call for positive action on the part of state authorities to ensure that the right is an effective one. On the other hand, the interests of pluralism dictate at the same time that those holding religious beliefs cannot expect to have these beliefs protected against all criticism and must

tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.²⁵⁰

The reconciliation of competing considerations is the essential task required by Article 9, but subject to supervision by the

248. *Kokkinakis v. Greece* at §31.

249. *Supreme Holy Council of the Muslim Community v. Bulgaria* at §93.

250. *Otto-Preminger-Institut v. Austria* at §47.

European Court of Human Rights in Strasbourg through the use of a well-established checklist. In particular, any interference has to be in accordance with the law, for a prescribed state interest, and be shown as being “necessary in a democratic society”. It is this last aspect of the test that often is of most difficulty. The exercise requires a proper appreciation of the crucial role freedom of thought, conscience and belief plays in a liberal democracy, and an acceptance of the importance of religious and philosophical convictions for the individual. On the other hand, an international judicial forum may not be as well-placed as the domestic authorities in carrying out such an evaluation, and thus a relatively wide “margin of appreciation” on the part of local decision-makers is relevant in many of the judgments from the Strasbourg Court. While this may indeed be an appropriate doctrine of restraint on the part of an international tribunal, it does not necessarily imply that at a domestic level the same should be apparent. The rigorous scrutiny of reasons advanced for an interference with this right of fundamental importance both for individuals and also society as a whole will help protect that pluralism and diversity necessary to advance human awareness and understanding of the individual’s place in society and in the wider moral and spiritual universe.

The principle of according respect for thought, conscience and religion may now be considered a prerequisite of democratic society, but the manner in which this is secured in European States does vary considerably. There is no standard European

“blueprint”. At domestic level, there is still a rich diversity of constitutional and legal arrangements that reflect the rich tapestry of European history, national identity, and individual belief. Secularism is a constitutional principle in certain states; in others, one particular religion may enjoy recognised status as an Established Church but the implications of such recognition can vary; elsewhere, certain religious communities may enjoy particular financial benefits through conferment of taxation benefits or recognition of charitable status. This relationship between religion and State will generally reflect local tradition and practical expediency. As far as minority faiths are concerned, religious tolerance has been a practised political principle for centuries in some European countries. In others, this notion will be of more recent origin. In every society, however, members of minority communities may still feel themselves marginalised on account of belief.

How the Strasbourg Court has approached the interpretation of Article 9 and related guarantees has depended to a large extent upon the particular issue in question. It appears more willing to tackle denial of recognition of legal personality and the consequences of this (including such matters as denial of access to a court and the inability to uphold claims to the protection of assets) than other matters perceived to be of religious or philosophical obligation (such as the observation of religious holy days, or the requirement to engage in proselytism). The workplace has attracted comparatively little protection until recently, while the school classroom is accorded more scrutiny.

The *forum internum* is largely sacrosanct, but the public sphere much less so on account of a somewhat restrictive test of what will be recognised as a “manifestation” of belief and also in view of the need to take account of countervailing interests. It is easier for the state to justify restrictions on religious advertising on television than on the preaching by door-to-door evangelicals, even although it may be easier for an unwilling audience to switch off a broadcast than to confront those seeking to convert others.

This lack of consistency in the jurisprudence is, though, probably inevitable as it in some measure reflects the remarkable diversity in domestic arrangements. The religious and philosophical movements that have shaped European civilisation can indeed be viewed in respect of its peoples’ intellectual and spiritual life as having had as profound an impact as the elemental forces that have carved out the continent’s geographical features. While for long synonymous with “Christendom”, Europe has been at different times and to different extents influenced by other beliefs including Judaism and Islam. In turn, the continent’s contribution to the history of ideas and philosophy has been considerable, both through individual thinkers such as Plato, Aristotle, Hume and Kant as well as by means of major shifts in religious and philosophical understanding marked, for example, by the Renaissance, the Reformation, and the Enlightenment. If “Europe” is indeed to a large extent a construct of beliefs, value-systems and attitudes, this has been built up over the centuries through the medium of

certain fundamental liberties, in particular of thought, of expression, and of association. Yet the products of this intellectual exercise have not always been positive. Pluralism, tolerance, belief and secularism may now generally be said to co-exist in European society, but this has not always been so. Religion and nationalism and group identity perhaps have been too closely intertwined: at different times and in different ways religious intolerance and persecution have blighted the continent, while more recently the extremism associated with certain political doctrines have involved serious and systemic violations of human rights. The lessons of history show that these fundamental liberties are both vital but also necessarily subject on occasion to restraint.

These lessons from the past help suggest how best to address issues of contemporary importance, for while Europe had become an increasingly secular society towards the end of the twentieth century, fundamentalism is now a growing phenomenon in the twenty-first. Across Europe, religion may have been a dormant force for some time but it is now one which is re-emerging. Domestic bodies regularly require to address the accommodation of increasing diversity in belief across a range of issues including education, medical treatment, planning controls, and state employment. In particular, the contemporary challenges posed by the emergence of political parties offering religious manifestos, a growth in religious intolerance triggered in part by security considerations, and community concerns that the display of religious symbols may have an impact upon

community coherence all call for some assessment of the appropriateness of state responses.

This kaleidoscope of national arrangements must now be viewed through the prism of democracy, the rule of law and human rights. But the European Convention on Human Rights does not impose a set of rigid requirements: the treaty merely sets out certain minimum standards, and religious traditions and differences in constitutional arrangements regulating church and State will continue to form part of the continent's landscape, providing always that these are compatible with

Convention expectations. This diversity is respected by the Strasbourg Court, and the historical and political context of religion and belief will often be reflected in its judgments. Europe lacks a common approach to resolving the question of the interplay between religion and state at a domestic constitutional level, and is much the richer for it. What Europe now possesses, on the other hand, is a set of legally binding guarantees which strengthens the position of individuals and of groups such as religious associations in advancing their claims for respect for thought, conscience and religion.

Index of cases

Cases are cited with the date of the judgment or, where appropriate, the decision (dec.). Where both decision and judgment are referred to in the text, each date appears in the index entry. Cases not final at the time of writing are marked with an asterisk.

Please refer to the HUDOC on-line database, <http://hudoc.echr.coe.int/>, for further information.

A, B

- Agga v. Greece (no. 2), 17 October 2002 **62**,
64-65
- Ahmet Arslan and others v. Turkey, 23
February 2010 **14**
- Aktas v. France (dec.), 30 June 2009 **23**, **50**
- Alexandridis v. Greece, 21 February 2008 **18**
- Al-Nashif and others v. Bulgaria, 20 June
2002 **15**
- Alujer Fernández and Caballero García v.
Spain (dec.), 14 June 2001 **15**, **56**, **77**
- Angeleni v. Sweden (dec.) 3 December 1986
16, **21**
- Arrowsmith v. the United Kingdom (dec.),
16 May 1977 **16**, **21-22**
- Autio v. Finland (dec.) 6 December 1991 **45**
- Aydın Tatlav v. Turkey, 2 May 2006 **72**
- Bayatyan v. Armenia (GC), 7 July 2011 **7**,
37, **39**, **45-46**
- Belgian Linguistic case, 23 July 1968 **16**
- Bernard and others v. Luxembourg (dec.), 8
September 1993 **68-69**
- Bowman v. the United Kingdom, 19
February 1998 **69**
- Bruno v. Sweden (dec.), 28 August 2001
53-54
- Buscarini and others v. San Marino, 18
February 1999 **14**, **20-21**

C

- C. v. the United Kingdom (dec.), 15
December 1983 **15**, **21**, **52**
- C.J., J.J and E.J. v. Poland (dec.), 16 January
1996 **21**, **68**
- C.W. v. the United Kingdom (dec.), 10
February 1993 **16**
- Campbell and Cosans v. the United
Kingdom, 25 February 1982 **16**, **67**
- Canea Catholic Church v. Greece, 16
December 1997 **13**, **24**, **60**, **79**
- Cha'are Shalom Ve Tsedek v. France (GC),
27 June 2000 **17**, **28**, **33**, **35**

Chappell v. the United Kingdom, (dec.), 14 July 1987 **17, 61**
 Church of Scientology and 128 of its members v. Sweden (dec.) 14 July 1980 **71-72**

Church of Scientology Moscow v. Russia, 5 April 2007 **60**
 Clift v. the United Kingdom, 13 July 2010 **76**

Cserjés v. Hungary (dec.), 5 April 2001 **15, 31**
 Cyprus v. Turkey (GC), 10 May 2001 **14, 23, 27**

D

D. v. France (dec.), 6 December 1983 **22**
 D.H. and others v. the Czech Republic, 13 November 2007 **76-77**
 Dahlab v. Switzerland (dec.), 15 February 2001 **50**

Darby v. Sweden, 23 October 1990 **15, 18, 21, 26, 52**
 Dimitras and others v. Greece, 3 June 2010 **18**
 Dogru v. France, 4 December 2008 **50**

Dubowska and Skup v. Poland (dec.), 18 April 1997 **29**

E, F, G

Efstratiou v. Greece, 18 December 1996 **27-28**
 El Majjaoui and Stichting Touba Moskee v. the Netherlands, dec. 14 February 2006, judgment (GC) 20 December 2007 **16, 60**
 Eriksson v. Sweden, 22 June 1989 **66**

Feldek v. Slovakia, 12 July 2001 **12**
 Finska församlingen i Stockholm and Teuvo Hautaniemi v. Sweden (dec.), 11 April 1996 **24**
 Folgerø and others v. Norway (GC), 29 June 2007 **20, 68-69**

Georgian Labour Party v. Georgia, 8 July 2008 **18**
 Giniewski v. France, 31 January 2006 **72**
 Gottesmann v. Switzerland (dec.), 4 December 1984 **52**

H

Handyside v. the United Kingdom, 7 December 1976 **40, 42, 71**
 Hasan and Chaush v. Bulgaria (GC), 26 October 2000 **27, 38-39, 58**

Hasan and Eylem Zengin v. Turkey, 9 October 2007 **69**
 Hazar, Hazar and Acik v. Turkey (dec.), 10 December 1992 **16**
 Hoffman v. Austria, 23 June 1993 **13, 79**

Holy Monasteries v. Greece, 9 December 1994 **13, 15, 26, 60**
 Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria, 22 January 2009 **63**

I, J

- I.A. v Turkey, 13 September 2005 **72**
- Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden (dec.) 6 March 1987 **66**
- Inhabitants of Leeuw-St Pierre v. Belgium (dec.), 16 December 1968 **15**
- Institute of French Priests and others v. Turkey (friendly settlement), 14 December 2000 **61**
- ISKCON and 8 others v. the United Kingdom (dec.), 8 March 1994 **17**
- Ivanova v. Bulgaria, 12 April 2007 **27, 31-32**
- Jakóbski v. Poland, 7 December 2010 **54-55**
- Jehovah's Witnesses of Moscow v. Russia, 10 June 2010 **30, 59-60**
- Jerusalem v. Austria, 27 February 2001 **71**
- Johansen v. Norway (dec.), 14 October 1985 **44**
- Johnston and others v. Ireland, 18 December 1986 **15, 26**

K

- Kalaç v. Turkey, 1 July 1997 **30-31**
- Karaduman v. Turkey (dec.), 3 May 1993 **50**
- Keenan v. the United Kingdom, 3 April 2001 **73**
- Kervanci v. France, 4 December 2008 **50**
- Khan v. the United Kingdom (dec.), 7 July 1986 **26**
- Khristiansko Sdruzhenie "Svideteli na Iehova" (Christian Association Jehovah's Witnesses) v. Bulgaria, 3 July 1997 **61**
- Kimlya and others v. Russia, 1 October 2009 **17**
- Kjeldsen, Busk Madsen and Pedersen v. Denmark, 7 December 1976 **21, 68**
- Klein v. Slovakia, 31 October 2006 **72-73**
- Knudsen v. Norway (dec.), 8 March 1985 **22, 24, 32**
- Kokkinakis v. Greece, 25 May 1993 **6, 14, 17, 21, 27, 35-38, 40-41, 47-48, 73, 82**
- Konrad and others v. Germany (dec.), 11 September 2006 **67**
- Konttinen v. Finland (dec.), 3 December 1996 **30**
- Koppi v. Austria, 10 December 2009 **77**
- Köse and 93 others v. Turkey (dec.), 24 January 2006 **50**
- Kosteski v. "the former Yugoslav Republic of Macedonia", 13 April 2006 **19-20**
- Kurtulmuş v. Turkey (dec.), 24 January 2006 **50**
- Kustannus OY, Vapaa ajattelija AB and others v. Finland (dec.), 15 April 1996 **24-25**
- Kuznetsov and others v. Russia, 11 January 2007 **39**
- Kuznetsov. v. Ukraine, 29 April 2003 **54**

L

- Larissis and others v. Greece, 24 February 1998 **37-38, 48-49**
- Lautsi and others v. Italy, 18 March 2001 **67**
- Leela Förderkreis e.V. and others v. Germany, 6 November 2008 **17, 27, 56-57**
- Leyla Şahin v. Turkey (GC), 10 November 2005 **50-52**

Logan v. the United Kingdom (dec.), 6 September 1996 **61**

Lombardi Vallauri v. Italy, 20 October 2009 **19, 31**

M, N, O

Manoussakis and others v. Greece, 26 September 1996 **14, 56, 61**

Miroiubovs and others v. Latvia, 15 September 2009 **63**

Martins Casimiro and Cerveira Ferreira v. Luxembourg (dec.), 27 April 1999 **66, 69**

Moscow Branch of the Salvation Army v. Russia, 5 October 2006 **59**

McFeeley and others v. the United Kingdom (dec.), 15 May 1980 **54**

Murphy v. Ireland, 10 July 2003 **43, 69-70, 72**

Metropolitan Church of Bessarabia and others v. Moldova, 13 December 2001 **23-24, 36, 41, 56, 59-60**

N. v. Sweden (dec.), 11 October 1984 **19**

Nielsen v. Denmark, 28 November 1988 **73**

97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia, 3 May 2007 **29**

Nolan and K v. Russia, 12 February 2009 **16, 60**

Obst v. Germany, 23 September 2010 **32-33**
Omkanananda and the Divine Light Zentrum v. Switzerland (dec.) 19 March 1981 **17**

Otto-Preminger-Institut v. Austria, 20 September 1994 **41, 71-72, 82**

P, Q, R

Palau-Martinez v. France, 16 December 2003 **79**

Phull v. France (dec.), 11 January 2005 **50**

Paturel v. France, 22 December 2005 **72**

Poltoratskiy v. Ukraine, 29 April 2003 **54**

Pellegrini v. Italy, 20 July 2001 **74**

Porter v. the United Kingdom (dec.), 8 April 2003 **26**

Pentidis and others v. Greece, 9 June 1997 **59-60**

Pretty v. the United Kingdom, 29 April 2002 **16, 26, 73**

Perry v. Latvia, 8 November 2007 **16, 39**

Raninen v. Finland (dec.), 7 March 1996 **19**

Peters v. the Netherlands, 30 November 1994 **76**

Refah Partisi (the Welfare Party) and others v. Turkey (GC), 13 February 2003 **13, 31**

Religionsgemeinschaft der Zeugen Jehovas and others v. Austria, 31 July 2008 **58-59, 77-78**

Riera Blume and others v. Spain, 14 October 1999 **18, 73**

Rommelfanger v. Germany (dec.), 6 September 1989 **32**

S

- Sabanchiyeva and others v. Russia (dec.), 6 November 2008 **15**
- Salonen v. Finland (dec.), 2 July 1997 **22**
- Savez Crkava “Riječ Života” and others v. Croatia, 9 December 2010 **15, 75-76, 81**
- Schüth v. Germany, 23 September 2010 **32-33**
- Sejdić and Finci v. Bosnia and Herzegovina (GC), 22 December 2009 **80-81**
- Serif v. Greece, 14 December 1999 **35-36, 64**
- Sidiropoulos and others v. Greece, 10 July 1998 **16**
- Siebenhaar v. Germany, 3 February 2011 **32**
- Sinan Işik v. Turkey, 2 February 2010 **19**
- Sluijs v. Belgium, 9 September 1992 **67**
- Stedman v. the United Kingdom (dec.) 9 April 1997 **30**
- Stefanov. v. Bulgaria (friendly settlement), 3 May 2001 **45**
- Sunday Times v. the United Kingdom (no. 1), 26 April 1979 **38**
- Supreme Holy Council of the Muslim Community v. Bulgaria, 16 December 2004 **28-30, 37, 58, 62-64, 82**
- Svyato-Mykhaylivska Parafiya v. Ukraine, 14 June 2007 **39**

T, U, V

- Taştan v. Turkey, 4 March 2008 **45**
- Thlimmenos v. Greece (GC), 6 April 2000 **31, 45, 79-80**
- Tsirlis and Kouloumpas v. Greece, 29 May 1997 **45**
- Ülke v. Turkey, 24 January 2006 **44-45**
- Valsamis v. Greece, 18 December 1996 **14, 27-28, 67**
- Van den Dungen v. the Netherlands (dec.) 22 February 1995 **12, 18, 22, 26**
- Verein “Kontakt-Information-Therapie” (KIT) and Siegfried Hagen v. Austria (dec.), 12 October 1988 **25**
- Vereinigung Bildender Künstler v. Austria, 25 January 2007 **72**
- Vergos v. Greece, 24 June 2004 **62**
- Vogt v. Germany, 26 September 1995 **16, 19, 31**

W, X, Y, Z

- W. and D.M., M. and H.I. v. the United Kingdom (dec.) 6 March 1984 **68**
- Wingrove v. the United Kingdom, 25 November 1996 **43, 72**
- X and Church of Scientology v. Sweden, (dec.), 5 May 1979 **24, 69**
- X v. Austria (dec.), 15 February 1965 **55**
- X v. Austria (dec.), 15 October 1981 **17**
- X v. Denmark (dec.), 8 March 1976 **24**
- X v. Germany (dec.), 10 March 1981 **15-16**
- X v. Germany (dec.), 5 July 1977 **44**
- X v. the United Kingdom (dec.) 5 March 1976 **54**
- X v. the United Kingdom (dec.), 12 July 1978 **41**
- X v. the United Kingdom (dec.), 12 March 1981 **22, 24**

X v. the United Kingdom (dec.), 18 May
1976 **55**

X v. the United Kingdom (dec.), 4 October
1977 **17**

Young, James and Webster v. the United
Kingdom, 13 August 1981 **8**

Z and T v. the United Kingdom (dec.) 28
February 2006 **15**

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