Religion, Belief and the European Court of Human Rights

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Introduction

The European Court of Human Rights is (arguably) the foremost guardian of human rights in Europe. Hereinafter referred to as the ECtHR or Court, applications are submitted to it from complainants alleging violations of the European Convention on Human Rights (ECHR), Europe's primary human rights document. For those who have exhausted *domestic* legal remedies, and continue to allege that their rights have been infringed, the Court offers an effective form of *international* redress vis-à-vis its application of European human rights law.

There is little doubt that when it comes to the right to freedom of religion or belief (as well as to other human rights more generally), the ECtHR has been at the vanguard of conflict resolution and standard setting across Europe (Evans, 1997: ch.11). Organized religion may seemingly be in decline in parts of the continent, but legal conflicts with a faith dimension have increased dramatically in recent years. Given the fact that '"religious litigation" is on the rise' (McCrudden, 2018: 126), the ECtHR has been in receipt of a steady stream of religion/belief cases in the last quarter of a century (Uitz, 2007). In this time it has, for example, adjudicated and offered guidance on a wide variety of issues including church-state relations,[1] the freedom to hold religious meetings,[2] the protection of minority places of worship,[3] the recognition/dissolution of churches,[4] the swearing of oaths in court proceedings,[5] public displays of religious symbols in schoolrooms,[6] the limits of proselytism,[7] conscientious objection to military service,[8] and faith-related employment disputes.[9]

In view of the breadth of its jurisprudence in the field of religion and belief, it is impossible, within the confines of this chapter, to do justice to all of the issues examined to date by the Court. Thus, the primary focus of this chapter will be on a single topic that is currently both newsworthy and controversial – religious dress. A light will be shone on this issue as a means of critically analyzing the role of the Court in the difficult and oft acrimonious area of freedom of religion and belief.

As explained below in more detail, Article 9 of the ECHR guarantees the right to freedom of thought, conscience and religion. The Court has been bold in its public pronouncements about the significance of Article 9, and its recognition of the crucial role that beliefs (be they religious or secular in nature) play in the lives of those who hold them.[10] Yet whilst the ECtHR has been clearly willing to 'talk the talk', describing the right to freedom of thought, conscience and religion as a 'precious asset' (Bratza, 2012), it is argued here that there are also key aspects of this right where the Court has been much less keen to 'walk the walk'. In particular, a crucial shortcoming of the Court relates to the deference it has accorded to states on an area like that of religious dress, where there is little common ground in Europe. Despite the ECtHR's obvious achievements in helping to fix the parameters of the right to freedom of religion and belief, it is hard to be overly enthusiastic about the record of a judicial body whose

[1] *Metropolitan Church of Bessarabia and Others v Moldova* (2002) 35 EHRR 306, para 117.
[2] *Dimitrova v Bulgaria* (2015) hudoc.
[3] *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi v Turkey* [2014] ECHR 1346.
[4] *Biblical Centre of the Chuvash Republic v Russia* [2014] ECHR 606.
[5] *Dimitras and Gilbert v Greece* [2014] ECHR 1023.
[6] *Lautsi and Others v Italy* (2012) 54 EHRR 3.
[7] *Larissis v Greece* (1998) 27 EHRR 329.
[8] *Bayatyan v Armenia* [2011] ECHR 1095.
[9] *Eweida and Others v UK* (2013) 57 EHRR 8.
[10] *Kokkinakis v Greece* (1994) 17 EHRR 397, para 34.

interpretation of Article 9 has (at least in some respects) often been synonymous with caution, inertia and deference.

In seeking to analyze, critically, the Court's record in the area of religion and belief, this chapter is structured as follows. First, by way of introduction, a very brief summary is given of the human rights context in which the ECtHR operates. Second, a short overview is provided of the main characteristics of Article 9 of the ECHR. Third, a number of reasons are adduced for why the ECtHR has had to deal with an increase in religious litigation in recent years. Fourth, the emotive and controversial issue of religious dress, which has garnered several applications to the Court in recent years, is then explored as a means of critically analyzing the way in which the ECtHR has interpreted Article 9 of the ECHR. Finally, in the conclusion, the key arguments are summarized and attention is focused on some of the challenges that the Court is likely to face in the future.

Context: the European Court of Human Rights and the European Convention on Human Rights

The European Court of Human Rights is the most 'important, autonomous source of authority on the nature and content of fundamental rights in Europe' (Stone Sweet and Keller, 2008: 3) Based in Strasbourg, France, the ECtHR's primary task is to interpret the European Convention on Human Rights (1950) – an international human rights treaty, drafted under the auspices of the Council of Europe, which has been ratified by 47 European states.

The ECtHR consists of 47 judges (i.e. one from each signatory state), chosen from a list of applicants (put forward by member states) by the Parliamentary Assembly of the Council of Europe. In a continent as large as Europe, it is axiomatic that an effective filtering system must be in place to ensure that only the most meritorious claims reach the ECtHR. Prior to 1998, the (now defunct) European Commission of Human Rights undertook that task (Janis *et al.*, 2008: 24-68) whereas today the admissibility of cases is vested in either a single judge for clearly inadmissible applications or, for more complex ones, a committee of three judges. Accordingly, those applications that make their way to the Court are heard by a Chamber composed of seven judges – or, on occasion, by a Grand Chamber of 17 judges, which decides a small number of select cases that raise novel or important issues (Harris *et al.* 2018: 403).

The ECtHR has the jurisdiction to rule on complaints or 'applications' submitted by complainants or 'applicants', concerning alleged violations of the ECHR. These violations must have been allegedly committed by a state party to the Convention, and in this regard the Court is dependent on receiving applications, for it is not permitted to instigate legal proceedings on its own initiative. Violations of the ECHR must directly and significantly affect the applicant, who is typically an individual residing in the defendant state, although (very occasionally) applications have been brought by one state party against another (Harris et al. 2018: 45).

The ECHR guarantees a number of (mainly) civil and political rights, and of these Article 9 is of particular relevance for this chapter (Council of Europe, 2019). Article 9 is drafted in the following terms:

> '9(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.
> 9(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' (European Convention on Human Rights, 1950).

The characteristics of Article 9 of the ECHR

As seen above, Article 9 of the ECHR guarantees the right to freedom of thought, conscience and religion. By way of a general overview, a number of observations can be made about the structure, content and scope of this Article.

Article 9 – a 'qualified' right

To begin with, Article 9 is a 'qualified' right. This can be seen from the relationship between its two constituent parts. Whereas Article 9(1) affirms the right to freedom of thought, conscience and religion in general terms, Article 9(2) is the 'claw-back' clause, stipulating the circumstances in which curbs may be legitimately placed on manifestations of religion or belief. Under Article 9(2) a restriction on the manifestation of one's religion or belief may thus be justified if the restriction satisfies the threefold criteria of being 'prescribed by law', having a legitimate aim, and being 'necessary in a democratic society'.

The first of these (i.e. that a legitimate interference with a Convention right must be 'prescribed by law') requires that such a law is 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct'.[11] The second criterion, of there being a legitimate aim, entails that curbs on *manifestations* of religion or belief may be imposed on the grounds of public safety,[12] public order,[13] health,[14] morals[15] or 'for the protection of the rights and freedoms of others'.[16] And the final, 'necessary in a democratic society', criterion has been construed by the ECtHR as requiring that restrictions on manifestations of religion/belief must be justified by a 'pressing social need', and thereby proportionate to their intended aim.[17]

Forum internum and forum externum

A second feature of Article 9 is the key distinction drawn between the *forum internum* and *forum externum*. The term *forum internum* relates to the fact that Article 9(1) has an 'internal' dimension, whereby it protects a person's 'freedom of thought, conscience and religion' (i.e. one's private beliefs) in absolute terms. As the Court has observed, 'the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent',[18] so the use, for example, of physical threats to force people to deny or adhere to a particular religion/belief is clearly forbidden. In contrast, the *forum externum* relates to the 'external' element of Article 9(1), whereby everyone has the right to manifest a 'religion or belief' in 'worship, teaching, practice and observance' and – subject to the Article 9(2) criteria – restrictions may be legitimately placed on such manifestations.

It can sometimes be difficult to make clear *forum internum/externum* distinctions. A case in point is *Buscarini and others v San Marino,*[19] where the applicants were required to

[11] *Sunday Times v UK* (1979) 2 EHRR 245, para 49.
[12] *Metropolitan Church of Bessarabia and others v Moldova* (2001) 35 EHRR 306, para 113.
[13] *Chappell v UK No 12587/86*, 53 DR 241 (1987).
[14] *X v UK No 7992/77*, 14 DR 234 (1978).
[15] *Gough v UK* [2014] ECHR 1156.
[16] *SAS v France* [2014] ECHR 695.
[17] *Manoussakis v Greece* (1996) 23 EHRR 387, para 44.
[18] *Kosteski v the former Yugoslav Republic of Macedonia* (2006) 45 EHRR 712.
[19] *Buscarini and others v San Marino* (1999) 30 EHRR 208.

swear an oath on the Christian Gospels in order to take their seats in the San Marino Parliament. Whilst it has been argued that the ECtHR should have construed the facts of this case as indicating an interference with the *forum internum* (Taylor, 2005: 130) – which would have then precluded the imposition of restrictions on the applicants' rights – the Court refrained from considering such matters, and held instead that Article 9 had been violated because the obligation to swear an oath was not 'necessary in a democratic society' under Article 9(2). Thus, the ECtHR tends to view the scope of the *forum internum* in fairly narrow terms and, as Carolyn Evans points out, 'States have to act very repressively before the Court … will hold that they have interfered with the *forum internum*' (Evans, 2001: 78).

The meaning of manifestation

A third characteristic of Article 9 is that it guarantees the right to *manifest* one's religion or belief 'in worship, teaching, practice and observance'. In spite of its centrality to Article 9, the Convention says nothing about what *manifest* means in this context, but guidance on the matter has been provided by the ECtHR. In determining what constitutes a 'manifestation' of religion or belief, the Court takes the view that 'the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case'.[20] Thus, for example, in cases involving a Jehovah's Witness who sought to propagate his beliefs in the community,[21] a Christian who wanted to display a small cross necklace at work,[22] and a Muslim woman who wished to wear Islamic dress in public,[23] the ECtHR held that all of these applicants were *manifesting* their beliefs.

It is noteworthy that the first part of Article 9(1) guarantees 'the right to freedom of thought, conscience and religion', whereas 'belief' is only mentioned in the next clause, which stipulates that 'this right includes freedom to change [one's] religion or belief'. Accordingly, it is commonly accepted that 'religion or belief' should be distinguished from 'thought and conscience', on the basis that Article 9 protects the manifestation of 'religion or belief', whereas expressions of one's 'thought and conscience' are protected by (and confined to) Article 10 of the Convention, which enshrines the right to freedom of expression (Evans, 2001: 52). Thus, it seems clear that 'manifestations' of thought and conscience (unlike manifestations of religion or belief') are *not* covered by Article 9.

'Religion', 'belief' and the scope of Article 9

A fourth point to note about Article 9 is that its scope is wide, for it offers protection to both religious *and* non-religious forms of belief. This was made clear by the ECtHR in *Kokkinakis v Greece*,[24] where it affirmed that Article 9 constitutes 'one of the most vital elements that go to make up the identity of believers and their conception of life … [and] is also a precious asset for atheists, agnostics, sceptics and the unconcerned'. The twin principles of freedom *of*, as well as freedom *from*, religion or belief, are thus protected by Article 9, because the ECtHR has confirmed that Article 9 includes the 'freedom to hold or not to hold religious beliefs and to practise or not to practise a religion'.[25]

The Court's standard test for determining whether a 'belief' should be afforded protection under the Convention, is whether it 'attain[s] a certain level of cogency, seriousness,

[20] *Eweida and Others v UK* (2013) 57 EHRR 8, at para 82.
[21] *Kokkinakis v Greece* (1994) 17 EHRR 397.
[22] *Eweida v UK* (2013) 57 EHRR 8.
[23] *SAS v France* [2014] ECHR 695.
[24] (1993) 17 EHRR 397, para 31.
[25] *Grzelak v Poland*, hudoc (2010) para 85.

cohesion and importance'[26] – and once this threshold has been met, the state may not 'determine whether religious beliefs … are legitimate'.[27] Today a wide range of philosophical beliefs, including secularism,[28] pacifism,[29] veganism,[30] and opposition to abortion,[31] come within the remit of Article 9. The protection of Article 9 has also been afforded to relatively new groups such as the Church of Scientology,[32] but the Court has been cautious in conspicuously avoiding any determination of whether such organizations are quintessentially 'religious', in publicly affirming its reluctance 'to decide in abstracto whether or not a body of beliefs and related practices may be considered a "religion"' for the purposes of Article 9.[33]

The ECtHR's caution in this regard would appear to be entirely warranted, for terms such as 'religion' are nebulous and notoriously difficult to define. However, the question of whether the Court's frequent caution in other contentious areas, such as that of religious dress, is an entirely different matter that will be examined later in this chapter. But first attention is focused on a striking characteristic of ECtHR jurisprudence – the significant increase in Article 9 complaints that have been referred to Strasbourg in recent years.

'Court in the crossfire': religious litigation, controversy and the ECtHR

Article 9, the ECtHR and the increase of religious litigation

The ECtHR, like many national courts across Europe, has had to deal with a significant increase in religious litigation in recent years. This can be seen as being part of a wider phenomenon that has been termed the 'juridification of religion' (Årsheim and Slotte, 2017). In seeking to define this term, Russell Sandberg has suggested that it has three dimensions. The first is the way that the 'law comes to regulate an increasing number of different activities' (Sandberg, 2011: 194) – a byproduct of domestic legislation like the Human Rights Act 1998, which incorporated Article 9 of the ECHR into UK law. The second concerns the 'process whereby conflicts increasingly are being solved by or with reference to law' (Sandberg, 2011: 195) – a state of affairs illustrated by a spike in the number of freedom of religion/belief cases ending up before judicial bodies such as the ECtHR. And Sandberg's third dimension of the juridification of religion refers to 'legal framing', which he characterizes as being the way that 'people increasingly tend to think of themselves and others as legal subjects' (Sandberg, 2011: 195) – a characteristic of many of the litigants who have invoked Article 9 of the ECHR in Strasbourg.

Today, at a time when issues pertaining to religion and belief are firmly on the radar of the ECtHR, it is perhaps surprising to recall that for the first three decades of its existence the European Court was not called upon to make a single ruling under Article 9. Indeed, it was not until 1993 that the European Court examined Article 9 in any detail, in the case of *Kokkinakis v Greece*,[34] described then (by one of its judges) as 'the first real proceedings brought before the European Court since its creation which concerns freedom of religion'.[35]

In seeking to explain why the ECtHR has received an unprecedented number of cases with a religious dimension in recent years, a number of possible reasons can be adduced. An

[26] *Campbell and Cosans v UK* (1982) 4 EHRR 293, para 36.
[27] *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, para 78.
[28] *Lautsi and Others v Italy* (2012) 54 EHRR 3.
[29] *Arrowsmith v UK*, No 7050/75, 19 DR 5 (1978).
[30] *H v UK*, No 18187/91 hudoc (1993); 16 EHRR CD 44.
[31] *Knudsen v Norway* No 11045/84, 42 DR 247 (1985).
[32] *Church of Scientology Moscow v Russia* (2007) 46 EHRR 304, para 64.
[33] *Kimlya and Others v Russia* Nos. 76836/01 and 32782/03, hudoc (2009) at para 79.
[34] *Kokkinakis v Greece* (1993) 17 EHRR 397.
[35] Judge Pettiti, *Kokkinakis v Greece* (1993) 17 EHRR 397, 425.

obvious first explanation relates to the changing demography of Europe, for with the continent now home to a significant (and ever expanding) number of minority faith traditions, many age old European customs and traditions, based largely on Judaeo-Christian values, have been (and continue to be) subject to legal challenge (Kayaoglu, 2014). A second factor is an ever greater willingness on the part of some applicants to defend and assert 'secular' or non-religious forms of belief (Morini, 2010), including atheism and agnosticism. A third reason for the rise in religious litigation has been the law's increasing recognition of the principles of non-discrimination (Petersen, 2018) and equality (Rivers, 2012), meaning that human rights law now impacts on freedom of religion in ways that were not historically so – a case in point being recent conflicts between conservative religious believers and members of LGBTIQ+ communities (Wintemute, 2014). A fourth explanation for why the ECtHR has received a hitherto unparalleled number of complaints with a religious dimension relates to the fact that some states (predominantly in Central and Eastern Europe) continue to tolerate practices (e.g. physical attacks on religious minorities)[36] that increase the number of litigants seeking to invoke Article 9. And finally, as noted by Sandberg above, the increase in religious litigation in Strasbourg (as in many other places elsewhere in the west) has been fuelled by the enthusiastic way in which various pressure groups (representing people advocating both freedom *of*, as well as freedom *from* religion) have sought to deploy competing human rights claims on behalf of their clients (Sandberg, 2011: 195).

This increase in religious litigation is perhaps most noticeable in regard to Article 9 challenges to religious dress bans. In recent years, there has been a steep rise in the number of cases brought, particularly by Muslim women, claiming the right to manifest their faith through their clothing, in nations where religious dress restrictions are in place. One might initially assume that a key rationale for the lodging of so many applications of this kind with the ECtHR would be the applicants' high rate of success. Yet such an assumption would be erroneous, because, as will now be discussed, the Strasbourg Court has steadfastly refused to find violations of Article 9 in this area.[37]

Article 9 ECHR and religious dress

Few issues under Article 9 have generated more controversy in recent years than that of state sanctioned curbs on religious dress. Much of the controversy relates to the ECtHR's reluctance to find for those seeking to overturn religious dress bans. The litany of (unsuccessful) applications includes: *Dahlab v Switzerland*, where a Swiss primary school teacher was dismissed for refusing to remove her headscarf, so as not to jeopardize school denominational neutrality;[38] *Şahin v Turkey*, where a medical student was disciplined for refusing to remove her headscarf in a Turkish university, on account of the state's desire to protect secularism and gender equality;[39] *Ebrahimian v France*, where the contract of a hospital social worker was not renewed because of her insistence on wearing an Islamic headscarf, in contravention of the principle of secularism and neutrality in the provision of public services;[40] *Dogru v France*, where a French schoolgirl was expelled for refusing to remove her headscarf in PE lessons (for supposed health and safety reasons);[41] *Bayrak and others v France*, where multiple French

[36] *Tsartsidze and Others v Georgia* [2017] ECHR 51.
[37] There have been only four cases in which the ECtHR has held that limitations on dress or symbol *do* violate Article 9: *Ahmet Arslan v Turkey* No 41135/98, hudoc, 23 February 2010; *Hamidović v. Bosnia Herzegovina* No 57792/15, hudoc, 5 December 2017; *Eweida v UK* (2013) 57 EHRR 8; and *Lachiri v Belgium* No 3413/09, hudoc, 18 September 2018.
[38] *Dahlab v Switzerland* No 42393/98, hudoc, 15 February 2002.
[39] *Şahin v Turkey* (2007) 44 EHRR 5.
[40] *Ebrahimian v France* No 64846/11, 26 November 2015.
[41] *Dogru v France* (2009) 49 EHRR 8.

school children were expelled for refusing to remove their religious clothing (e.g. Islamic headscarves and Sikh *keski* or 'under-turbans') in accordance with a French Law that banned conspicuous religious clothing in schools so as to protect *laicité*;[42] and *Kose and 93 others v Turkey*, in which numerous Turkish school girls were expelled for refusing to remove their headscarves.[43] Religious dress applications to Strasbourg have also been rejected on other grounds, including public security[44] and public health,[45] while in the recent high profile cases of *SAS v France*, *Dakir v Belgium* and *Belcacemi and Oussar v Belgium* the ECtHR has held that the principle of 'living together' (*vivre ensemble*) justified its rejection of challenges to laws making it a criminal offence to cover one's face in public.[46]

For the (mainly female) applicants in cases such as these, the ability to manifest their faith through what they choose to wear is a fundamental right that raises issues of dignity, autonomy and equal citizenship (Brems, 2014). For such applicants, items of religious dress are much more than a piece of cloth. The implications of this for religious freedom will now be explored in more detail.

What 'religious dress' cases reveal about the ECtHR

The ECtHR case law on religious dress, and especially that regarding legal restrictions imposed on female Muslim dress across Council of Europe states, provides us with some profound insights into the potential fragility of protection afforded to religious freedoms by Article 9. In this regard two points will be made. First, the very nature and structure of Article 9 reflects a stream in European religious history that goes back to the Reformation, and this has significant implications for those seeking to avail themselves of its protection today. Secondly, and more importantly in this context, the heavy reliance by the ECtHR in religious dress cases on the principles of subsidiarity and the margin of appreciation has had a decisive effect on the efficacy of Article 9 as a means of protecting those who wish to manifest their beliefs through the clothing they wear.

The Structure of Article 9 Revisited

As noted above, Article 9 has an unusual structure. The *forum internum* of 'thought, conscience and religion' is afforded absolute protection. No argument of the public good entitles the state to impose, or attempt to impose, limitations on the contents of a person's internally held thoughts and beliefs. It is only when religion or belief is *manifested* that it may legitimately be limited by the state. In drawing this distinction between the *forum internum* and the *forum externum*, Article 9 recognizes that it is when beliefs emerge into the open that they may lead to harmful effects on others.[47]

There is, however, another consequence of Article 9's asymmetry. It is almost inevitable that those faiths in which outward displays or practices play a significant role will fare worse under Article 9 than those that place emphasis on internally held belief. After all – in respect of their 'manifestation' elements – the former type of religion or belief may legitimately be subjected to restrictions under Article 9's second paragraph (Evans, 2001: 200).

[42] *Bayrak and others v France* No 14308/08, hudoc, 26 June 2009.
[43] *Kose and 93 others v Turkey* No 26625/02, hudoc, 24 January 2006 (admissibility). This case was dealt with primarily as a right to education case under Article 2 Protocol 1, ECHR.
[44] *Phull v France* No 35753/03 (admissibility) and *El Morsli v France*, No 15585/06 (admissibility), hudoc, 4 March 2008.
[45] *Chaplin v UK* No 59842/10, hudoc, 15 January 2013.
[46] *SAS v France* [2014] ECHR 695; *Dakir v Belgium* No 4619/12, hudoc, 11 July 2017; and *Belcacemi and Oussar v Belgium* No 37798/13, hudoc, 11 July 2017.
[47] *Kokkinakis v Greece* (1993) 17 EHRR 397, at para 33.

It is perhaps no accident that this internal/external distinction maps onto one of the central controversies of the European Reformation of the sixteenth century: the debate over whether, in order to attain salvation, or 'justification', it was necessary to perform good works, or whether, as Martin Luther argued, salvation could be achieved by 'faith alone' (*sola fide*). As the historian Geoffrey Elton put it:

> 'Luther held that man was justified (saved) by faith alone: the words *sola fide* came to be the watchword and touchstone of the Reformation. Man could do nothing by his own works–whether works of edification like prayer, fasting, mortification, or works of charity–to compel justification. But if he believed, God of His grace would give him … salvation and eternal life' (Elton, 1963: 16).

Luther's influence, and that of subsequent Protestant thinking, meant that the role of outward manifestation – especially in the form of symbolism and ritual – was significantly reduced in post-Reformation Protestant Europe (Collinson, 2006: 145). Against this historical backdrop, it is comparatively easy for a religion to fall within the scope of absolute protection afforded to the *forum internum* when its doctrine does not place emphasis on external manifestations to any great extent. And it is much more likely that religious adherents who believe it to be their duty to don certain items of clothing when entering public space will attract the restrictive attentions of the state and, moreover, will fall within the scope of the permissible limitations listed in Article 9 paragraph 2. Thus, it is difficult to avoid the conclusion that the structure of Article 9 itself inevitably tends to disfavour those faiths that require items of clothing or symbols to be worn by adherents in the public domain.

Religious dress, subsidiarity and the margin of appreciation

The effect of subsidiarity

If the *structure* of Article 9 makes it more likely that religious dress will be susceptible to restriction by states, the same can be said, *a fortiori*, about the way in which the European Court of Human Rights has *interpreted* and *applied* the limitation provisions in the second paragraph of Article 9. The central explanation for the paucity of protection afforded to applicants claiming breaches of Article 9 because of restrictions imposed on their dress, is the operation of the doctrine of subsidiarity.

Under the ECHR system, the primary responsibility for protecting human rights rests not with the Court but with the States Parties to the Convention. In the words of the Court itself, 'the machinery of protection established by the Convention is *subsidiary* to the national systems safeguarding human rights'.[48] The justification for this subsidiarity is twofold. First, the domestic authorities – parliaments, governments – have *better knowledge* of local conditions and are thus in the best position to strike difficult balances between rights and competing interests; and, secondly, they have *direct democratic legitimation* in that they are voted for by the people of the country in question (Brighton Declaration, 2012; Copenhagen Declaration, 2018). The Grand Chamber of the Court summed up this rationale in the French face-veil case, *SAS v France*:

> 'It is … important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are … in principle better placed than an individual court to evaluate local needs and conditions.

[48] *Handyside v UK* (1976) 1 EHRR 737 at para 48 (emphasis added).

> In matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight'.[49]

The method by which subsidiarity is put into effect in the Court's case law is through a judicially-created doctrine known as the margin of appreciation (Brighton, 2012: para. 11). This is an international law doctrine of judicial self-restraint whereby leeway is given to national authorities as to how they strike difficult balances between qualified Convention rights and competing interests. It is utilized at the point in the Court's analysis where it is considering whether the interference with the protected right is 'necessary in a democratic society' in pursuit of a legitimate state aim – that is to say, when it is considering whether the interference is *proportionate* (Legg, 2012).

Subsidiarity and the margin of appreciation have been particularly prominent in cases involving religious dress. The explanation and justification for this is that across Europe, and against a background of a turbulent history of religious intolerance and conflict, individual states have reached a plethora of unique and delicate compromises in which religious freedom is protected within the context of, more or less, secular constitutional frameworks (Cumper and Lewis, 2012). Given the lack of a pan-European consensus on a common model of church-state relations, the ECtHR evidently feels ill-equipped to second-guess the balances that have been struck by domestic bodies, with their greater local knowledge and democratic legitimacy. In an oft-repeated phrase the Court has summed up its position thus:

> 'In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. This is the case, in particular, where questions concerning the relationship between State and religions are at stake. As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is "necessary"'.[50]

The consequence of this 'wide margin of appreciation' is that the scrutiny of a domestic measure that interferes with a person's manifestation of their religion or belief is necessarily diminished. Indeed, in some cases at least, it is hard to avoid the suspicion that despite the ringing tones of its oft-repeated mantra that Article 9 constitutes a 'precious asset', the Court does not really see the value in the manifestation of belief through dress. Moreover, there has even been a suggestion (in its case law) that the Court itself may well regard certain forms of clothing, worn as a matter of religious duty, as running counter to human rights principles themselves. For example, in the case of *Leyla Şahin* – the medical student who fell foul of the ban on headscarves in Turkish universities – the ECtHR referred to the headscarf as a 'powerful external symbol' that 'might have some kind of proselytising effect seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality'.[51] Thus, the Court suggested, in express terms, that a religious obligation to wear types of clothing, especially when applied to women only, may be at odds with the principle of equality; and it implicitly suggested that such an obligation may run counter to the values of autonomy and dignity that provide the undergirding of international human rights norms (Universal Declaration on Human Rights Preamble, 1948). On the basis of judicial statements such as this, it is hardly surprising that, in Article 9 cases, religious manifestation

[49] *SAS v France* [2014] ECHR 695, at para 129.
[50] *Hamidović v. Bosnia Herzegovina* No. 57792/15, hudoc, 5 December 2017 at para 38.
[51] *Şahin v Turkey* (2007) 44 EHRR 5, at para 111.

through dress has often counted for little when placed in the proportionality balance against competing state interests.

In the more recent cases on the criminalization of covering the face in public places, the ECtHR has evidently moved away from its earlier position that Islamic dress was necessarily inimical to equality, dignity and autonomy. Thus in *SAS* v *France*, which concerned the blanket ban on covering the face in public places, the French Government argued, following the Court's logic in *Şahin*, that the ban was necessary to protect (*inter alia*) women's equality and dignity. However, in departing from its earlier position, the ECtHR said that the state was *not* entitled to invoke gender equality in order to ban a practice that is *defended by women themselves,* for that could entail an understanding of Article 9 that would permit individuals to be protected 'from the exercise of *their own* fundamental rights and freedoms'.[52] Moreover, nor could the ban be justified by arguments rooted in respect for human dignity, for whilst the face-veil might be 'perceived as strange by many of those who observe it', it nevertheless 'is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy'.[53] Furthermore, in relation to autonomy, the Court accepted that the ban would have a 'significant negative impact' on women who had '*chosen* to wear the full face veil' and indeed may have the effect of isolating them and *restricting their autonomy*, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for a private life. [54]

However, despite this apparent softening in its approach, the ECtHR in *SAS* nevertheless ultimately accepted that the criminalization of face covering fell within France's margin of appreciation and was necessary for the 'protection of the rights of others', in the sense of safeguarding the 'ground rules of social communication and more broadly the requirements of "living together"'.[55] The Court reasoned that France was 'seeking to protect a principle of interaction between individuals which in its view was essential for the expression of pluralism, tolerance and broadmindedness'. It was thus held to be a democratic 'choice of society' to criminalize the full-face-veil in public places in France.[56]

Blunting the proportionality analysis

A major problem with the wide-margin-of-appreciation approach adopted by the ECtHR is that it tends to blunt the proportionality analysis, so that assertions by states as to the necessity of bans are accepted almost at face value, notwithstanding the absence of *evidence* that any harm has either occurred, or is likely to occur. Indeed, the comparison with the Court's response to applications where states have banned *political* symbols that are worn or publically displayed is stark. For example, in cases involving a prosecution for wearing the Communist five-pointed star,[57] or displaying a political banner associated with a right wing political movement,[58] the Court has afforded states only a very *narrow* margin of appreciation because of a perceived European consensus in the importance of peaceful *political* expression.

By way of contrast, however, the Court's deferential approach in religious dress cases tends to send out a message to those (often minority applicants) wishing to manifest their beliefs through the clothing they wear, that it is of little consequence that they *themselves* are not causing harm. Such people are swept up on a broad swathe of prohibition, irrespective of

[52] *SAS v France* [2014] ECHR 695, at para 119 (emphasis added).
[53] Ibid at para 120.
[54] Ibid at para 146 (emphasis added).
[55] Ibid at para 153.
[56] Ibid.
[57] *Vajnai v Hungary* No. 33629/06, hudoc, 8 July 2008.
[58] *Fáber v Hungary* No. 40721/08, hudoc, 24 July 2012.

the absence of any evidence either of 'bad behaviour' on their part, or of evidence that the bans are really necessary to meet the objectives claimed.[59] This inevitably results in the impression, for these applicants and their co-religionists, that their beliefs and concerns are not taken seriously either by their own state's authorities or by the ECtHR.

Green lights and road maps

Perhaps even more worrisome than the dulled proportionality analysis sketched out above is the knock-on effect of judgments like *SAS* and *Şahin* with regard to the protection of Article 9 rights across the European continent. The doctrines of subsidiarity and the margin of appreciation – as they operate in the context of Article 9 – are designed to afford leeway to states in order to take account of their own unique historical, political and constitutional journeys toward becoming rights-respecting liberal democracies. They provide a mechanism by which the ECtHR can take into account the delicate balancing acts that each state, with its own unique history and constitutional arrangements, has had to perform. But there is currently a political climate in which restrictions (and calls for restrictions) on the Islamic veil have become widespread across European states *whatever* their individual historical and constitutional complexions (Michaels, 2018). In such circumstances the case law of the ECtHR in this area has effectively shown a 'green-light' to states, providing governments and parliaments with the moral and legal justifications they need to enact such provisions. In addition, the case law of the Court has ironically provided states with legal/procedural quasi-road-maps by which they may identify those arguments that are likely to be well received by the ECtHR and thereby implement their bans in such a way as to effectively withstand a Strasbourg challenge. Thus, governments in Europe that have introduced restrictions on religious dress, or which plan to do so in the future, will be able to 'cherry-pick' the arguments that have previously held sway or are likely to find favour with the Court, with the intention of withstanding any Article 9 challenge in Strasbourg.

Conclusion

In this chapter the issue of religious dress has been used as a lens for scrutinizing the ECtHR's record in the field of religion and belief, and it is argued that the Court has been overly deferential to states in this area. However, this criticism of ECtHR religious dress jurisprudence is tempered, to some degree, by recognition of the significant challenges faced by the Strasbourg Court in interpreting Article 9 of the ECHR. After all, the Court has the invidious task of having 'to consolidate universal standards of rights protection, in the face of wide national diversity and a steady stream of seemingly intractable problems' (Stone Sweet and Keller, 2008: 3). Indeed, few areas of the ECHR are as daunting in this regard as Article 9, for the Court must seek to ensure that the Convention affords proper respect to a plethora of faiths, creeds and philosophies in a continent that is, simultaneously, ever more religiously diverse yet increasingly secular in nature. Yet be that as it may, the deference afforded by the Court to states in the field of religious dress by removing the effective bite from the Court's proportionality analysis is problematic for a number of reasons.

For a start, it risks creating the impression of an overwhelmingly male court riding roughshod over the concerns of mainly female complainants. Moreover, it conveys the message that items of religious dress are little more than mere items of cloth, whereas for the believer such garments often are directly associated with their most cherished values, notions of self and personal identity. And finally the ECtHR's approach may foster perceptions of 'secular

[59] See the dissent of Judge Tulkens in *Şahin v Turkey* (2007) 44 EHRR 5.

fundamentalism', which could risk further alienating those radicals in some faith communities who already have little confidence in the ability of Europe's judges to protect their traditions (Leiken, 2012).

The challenges posed in respect of those wishing to claim their Article 9 rights are unlikely to go away anytime soon. In the course of this chapter a softening in the approach of the Court in some of its judgments has been identified, not least in regard to its rejection of France's arguments in *SAS* in respect of equality, dignity and autonomy. If Article 9 is to avoid becoming a dead letter – useless in all but the most clear and obvious cases of disproportionate interference – a conscious effort needs to be made by the ECtHR to adapt its approach still further, to reduce the margin of appreciation, and to give such litigants at least a 'fair-go' when their cases come before the Court. Like the proverbial 'curate's egg', the ECtHR's record on the right to freedom of religion and belief is 'good in parts'. But from the perspective of the individual constrained from being able to manifest her faith by dressing as she would choose, these 'good parts' may offer scant consolation.

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Abstract

This chapter examines the protection granted by the European Court of Human Rights (the Court) in relation to the right to freedom of religion or belief under Article 9 of the European Convention on Human Rights. After introducing the Court, the Convention and Article 9, the topic is examined through the prism of the often controversial subject of legal bans on forms of religious dress that have been implemented in many Council of Europe states. Attention is focused on the proscription of items often worn by Muslim women, such as Islamic headscarves and face-veils. It is argued that both the structure of Article 9 itself, *and* the way in which it has been interpreted by the Court's judges, has to led to very weak levels of protection being afforded to such applicants. The reasons for this paucity of protection lie deep in European history and politics. Whilst the Court's deferential posture may, arguably, be justifiable in terms of the fact that the protection it offers is *subsidiary* to that offered by States Parties to the Convention, nevertheless the scant hope that such applicants (who are often members of vulnerable minorities) have when bringing their cases raises serious questions as to the effectiveness of the Convention, and threatens to undermine much of the laudable work that has been undertaken elsewhere by the Court.

Keywords

European Court of Human Rights; Article 9 ECHR; freedom of religion; freedom of belief; conscience; religious dress; subsidiarity; proportionality; margin of appreciation.

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