

The Right to Freedom of Religion: A Critical Review

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The right to freedom of religion is guaranteed in most national constitutions in Europe as well as in the European Human Rights Convention (EHRC). The guarantee includes the freedom to manifest a faith or religion, either alone or in community with others, in worship, teaching and practice, and the freedom to observe religious rituals. This article introduces the argument that religious freedom in the former sense is superfluous since the types of manifestation are already covered by other, more general fundamental freedoms, and then moves on to a discussion of whether and to which extent religious rituals ought to receive specific protection as a basic human right. The article focuses on a legal understanding of the right to freedom of religion and draws on case-law, as developed primarily by the ECHR. As the American debate on this issue is quite different on many points, the focus is deliberately and explicitly European.

1 Origins of Religious Freedom

Over the past 50 years, human rights have gained increasing importance in European law. This is reflected in the EHRC, the EU Treaties, the EU Charter and in a number of other conventions, statutes and EU regulations as well as in national constitutions and statutes. The right to freedom of religion is inscribed in the United Nations Universal Declaration of Human Rights, art. 18, and in the International Convention on Civil and Political Rights art. 18. Both the Universal declaration and the ICCPR also prohibit discrimination on the grounds of religion. The European Human Rights Convention, Article 9 protects the right to freedom of religion. In addition, The Convention forbids discrimination on the ground of religion, EHRC Article 14. In practice the two articles overlap, because rules or practices that interfere with religious beliefs/worship tend to affect only some religions but not all. Whereas the wording of art. 14 only covers discrimination with regards to the rights covered by the convention, the ECHR has extended the prohibition to discriminatory measures that fall within the “ambit” of the convention.¹ Prohibition against discrimination on the ground of religion, has also found its way into more specific EU regulation, see e.g. the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.² Anti-discrimination rules can also be found in ILO Convention no. 111 concerning Discrimination in Respect of Employment and Occupation.

The protection of freedom of religion may historically be seen as forming a part of the development away from Absolutism, with religion representing an important foundation for the power of the state, and towards a democratic and secularized system of government. Freedom of religion was first constitutional-

1 See note 16 below.

2 Official Journal of the European Communities 2000 L 303, p. 16.

ized in 1789 as the first *amendment*³ to the American Constitution, and as other European countries were demolishing more or less totalitarian systems of government, freedom of religion was also introduced here. In Denmark, freedom of religion was introduced under the Constitution of 1849. An impression of the conditions originally addressed by the freedom of religion is given by Article 1 of the Danish Succession Act (“Kongeloven”) of 1665. It reads as follows (in English translation and abridged by this author):

“The best beginning for everything is to begin with God. Our first commandment under this Act is therefore for our descendants, children and children’s children in a thousand generations to serve, honour and obey the only right and true God in the manner and fashion revealed by Him in the true and holy Gospel, and our Christian faith and confession as pure and genuine as represented in the Augsburg Confession of A.D.1530, and to keep the inhabitants of this country to that same pure and genuine Christian faith and protect this country from all heretics, zealots and blasphemers.”

Freedom of religion as we know it today is thus based on a constitutional demolition of the state-imposed religious compulsion that had been institutionalized during Absolutism.⁴ After incorporation into national constitutions in the course of this demolition, the right of religious freedom has also been incorporated into more recent international human rights conventions. In the updating of national constitutions, the contents of the international human rights conventions are now often taken into account, and rights are thus allowed to survive, sometimes without much debate about their justification. The question I intend to raise in this article is whether, to what extent and in what way freedom of religion is an interest that deserves protection as a basic right in today’s Europe.

2 Religion

The manifestation of religion springs from an inner belief or conviction that supernatural (transcendental) powers exist that somehow affect – or perhaps even determine – the conditions of human life. This belief or conviction may take many different forms. The most common belief or conviction in our culture group is probably that the supernatural powers may be embodied in a common concept – God – and that these powers affect human life through the human

3 For a brief account of the background of The First Amendment, *See* e.g. “[www. religious-tolerance.org/amend_1.htm](http://www.religious-tolerance.org/amend_1.htm)”.

4 In his *Constitutional Goods*, Alan Brudner writes more generally about the advent of modernism and the associated demolition of religious compulsion: “The pre-modern constitution was a theocracy that ordered human affairs in accordance with a supernatural end known only through a revelation surpassing rational insight. That end was the pre-modern constitution’s conception of the public interest. ... Now, the dissolution of a supernatural end as the public ground of constitutional order entails the privatization of revealed religion – its demolition to the sphere of individual conscience and of civil association – and its consequent pluralization into as many sects as the liberty of conscience and association engender.” Brudner, Alan, 2004, p. 81.

mind or psyche. Another possible interpretation of the importance of faith in human life is that faith in itself is an instrument of spiritual peace, and that the supernatural powers therefore consist in and act through the inner belief in God. Thus, religion may become a matter of solving an existential and emotional question about the meaning of an individual's life. In other interpretations, God is a power that influences people's lives directly by being able to make things happen. In accordance with that interpretation, events that some people would interpret as coincidental may be seen as expressions of God's will. The belief in God may also be reflected in the impression that there is a life after death, and that a person's actions in the present life will shape his or her life after death.

Faith and inner conviction become organized religion when faith is institutionalized. This is typically done through a designation of holy scriptures that constitute the content of faith; a working out of rituals symbolizing the content of faith, and a constitution of authorities determining the proper understanding of faith. Naturally there are considerable variations among different religions, but institutionalization is a necessary step if several persons are to share a common faith.

Apart from representing an institutionalized belief in supernatural powers, it is characteristic of most religions that faith has to be converted to action in various ways. As mentioned above, this may be done through rituals, but may also be extended to include the actions of the believer in his or her everyday life. These may be actions by reference to food, clothing, social manners, personal hygiene and prevention of disease, upbringing of children, etc. Such actions enhance the importance of faith to the individual, so that the individual regards not only direct worship (prayers etc.), but also other more or less ordinary, everyday actions, as religious actions. In their holy scriptures and their authoritative interpretations of them, the great religions of the world (Judaism, Christianity and Islam) have developed very extensive rules governing the lives of believers, which may have a substantial influence on the everyday life of the individual, depending on his or her relations to the relevant religion and its institutions.

The right to religious freedom is an individual right, but has a collective dimension in that the right extends to the manifestation of religion "in community with others". Thus groups of believers and churches may complain about what they perceive as a violation of the rights to associate and assemble for religious purposes. Complaints of this sort are however still viewed as individual in that the churches or the representative(s) of the group are seen as acting on behalf of the members of the church or group.⁵ Some commentators have considered that the collective dimension of religious belief is not sufficiently protected this way, see for instance van Dijk and van Hoof (1998, p. 552-3) and Carolyn Evans (2001, p. 104-5). None of these however articulate exactly which interests they think should be added to the protection under art. 9, and as Evans mentions art. 11 may also be relied on for protection of the collective dimension in cases con-

5 See Appl. 7805/77, *Pastor X and Church of Scientology v. Sweden*, Yearbook XII (1979), p. 244 and subsequently Appl. 12587/86 *A.R.M. Chappell, Decisions and Reports 53* (1987), p. 241 and Appl. 24019/94 *Finska Församlingen i Stockholm and T. Hautaniemi v. Sweden*, Decisions and Reports 85-A (1996), p. 94.

cerning interference with religious associations and assemblies (see also section 3 below for a case-analysis illustrating the interface between art 9 and art 11).

In the following section, I will show how the right to freedom of religion may dissolve and be absorbed by more general rights. The analysis will be based on practice from the European Court of Human Rights, where cases have been decided on the basis of the right to freedom of religion. The analysis is not exhaustive, but serves to show that in many cases, the right to freedom of religion is superfluous because the interests protected by this right is already protected by the more general provisions in the ECHR such as the right to freedom of expression etc.

3 The Incorporation of Freedom of Religion into other Human Rights

The right to religious freedom gives rise to a number of conflicts – both between different religions and between the religions and other considerations/interests. In the following I shall present an analysis of the right to religious freedom, with a special view to whether that right is enjoying protection under other fundamental rights, e.g., the right to freedom of expression and the right to freedom of assembly and association. Since a complete study of the jurisprudence of the ECHR in this regard is not possible within the framework of a single academic article, the following is intended as an outline for discussion, rather than a full analysis. The consequence of this is of course that conclusions can only be tentative.

3.1 *Freedom of Religion and Freedom of Expression*

The right to freedom of expression includes the right to receive information and ideas from and impart them to others. The freedom of expression protects the spoken and the written word as well as other ways of expression (images, films, symbols, signs, gestures, etc.).

An important – probably the most important – part of the exercise of religion is closely connected to the receiving and imparting of information and ideas. The freedom to choose the information and ideas you wish to impart to and receive from others, and the freedom to actually impart/receive such information and ideas, are necessary conditions for religious actions in the form of access to get or buy holy scriptures, access to talk about God (preach) and to listen to such preaching. The freedom of expression also safeguards the possibility of not having to receive information and ideas, thereby protecting the right not to receive religious information and ideas. Under the EHRC, Article 10, the freedom of expression also includes the freedom to hold opinions. Therefore the areas of protection in article 9 and 10 overlap,⁶ which may be illustrated by the following example:

⁶ It should be noted in this connection that freedom of religion and freedom of expression are subject to common overall protection under the US Constitution, *See the First Amendment.*

On 18 February 1999, the ECHR decided a case about two newly elected members of the San Marino parliament, who were forced to swear by the holy gospel⁷ when taking office. The members alleged that taking the oath infringed their right to freedom of religion, and the Court found in their favour.⁸ Due to the religious nature of this case, it was natural to claim infringement of the right to freedom of religion, but it must be considered equally justified to claim infringement of the freedom of expression. This procedure would have been required had it not been the words “the holy gospels”, but other words of the oath, e.g. “to uphold and defend freedom with all my might”, that an elected member of parliament could not endorse. The fact that the elected members of parliament are subject to compulsion of expression as a condition for maintaining their seats must no doubt be seen as a restriction of the freedom of expression, which leads to the question of whether the restriction complies with the conditions of Article 10(2). The issue in *Buscarini* was whether the conditions of Article 9(2) had been met.⁹

The Court could have dismissed the defence of the necessity of the oath just as summarily by referring to the freedom of expression, including the freedom to hold opinions under Article 10. It is, of course, manifestly self-contradictory that membership of parliament – whose very purpose it is to represent the different views and opinions in society – should be conditional upon a prior declaration of allegiance to a specific religion and thereby to a specific set of values.

Similarly, the case of *KOKKINAKIS*,¹⁰ in which it was held that Article 9 had been violated, might just as well have been decided under Article 10. *Kokkinakis* was a Greek citizen and a Jehova’s Witness and had engaged in proselytism by calling on persons in their homes and arguing in favour of Jehova’s Witnesses with a view to convincing these persons to support the Jehova’s Witnesses. A Greek court held *Kokkinakis* liable for violating a law against proselytic activities. In the course of its decision, the ECHR emphasizes that it is necessary to distinguish between “bearing christian witness” and “improper proselytism”. Whereas the former is an expression of a normal social practice (also known from non-Christian denominations), the latter is a deformed version of such a practice characterized by:

“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

7 CASE OF *BUSCARINI AND OTHERS* v. San Marino, application No. 00024645/94.

8 The oath of allegiance ran as follows: “I, . . . , swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic, to uphold and defend freedom with all my might, ever to observe the Laws and Decrees, whether ancient, modern or yet to be enacted or issued and to nominate and vote for as candidates to the Judiciary and other Public Office only those whom I consider apt, loyal and fit to serve the Republic, without allowing myself to be swayed by any feelings of hatred or love or by any other consideration.” (para 8). The two members took the oath in writing, but left out the words “the Holy Gospels”. Subsequently, they told that they would loose their seats in parliament; then they took the oath in its entirety and at the same time brought the case before ECHR.

9 See paras 36-40.

10 *Kokkinakis* v. Greece Application 14307/88.

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.” (para 48).

The Greek authorities had not made this distinction in the case, however; nor had they specified the way in which Kokkinakis had been using “improper means” in connection with his proselytic activities. On those grounds the ECHR found that the restriction could not be considered necessary in a democratic society (para 49).

The point here is that Kokkinakis would have been just as well protected without the existence of Article 9. For the freedom to try and convince others of your views – whether of a religious or any other nature – may be said to follow from the right to freedom of expression in Article 10 (“imparting information and ideas”), and since the decision as to whether or not the restriction can be considered “necessary in a democratic society” will be the same whether the case is argued on the basis of Article 9 or Article 10,¹¹ the outcome must be expected to be the same.¹²

3.2 Freedom of Religion and Freedom of Association and Assembly

The right to freedom of association includes the freedom to create and carry on associations for any purpose whatsoever, in order to act in organized community with others. The freedom of association further includes the right not to be a member of an association. The right to freedom of assembly includes the freedom to meet with others in private or in public. As for the freedom of expression and the freedom of religion, the right to freedom of association and assembly may be restricted on certain conditions.

11 Although the formal wording of the legitimating grounds for interference is formulated differently there is in practice no difference between them. Van Dijk and van Hoof writes: “... there seems to be no difference between the way the Strassbourg organs apply the restriction clause of Article 9 and the restriction clauses of Articles 8, 10 and 11. The emphasis is always laid on whether a restriction is necessary; what interest is sought to be protected is of less importance.” Van Dijk, P. & van Hoof, G.J.H. *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998 pp. 554-555. This is, in my opinion, virtually an unavoidable result of the structure of the protection of rights under Articles 8-11. The considerations likely to be stated to justify restrictions of the protected rights cannot be described in a manner which is at the same time exhaustive and precise. Precise descriptions would soon lead to a need for a revision of the provisions, which would not be appropriate. Instead, open categories have been chosen to cover the description of the considerations that may justify such restrictions. Consequently, not a lot of importance is attached to the specific wording, and therefore it is less important how the interest to be protected by a restriction is categorized.

12 In continuation of KOKKINAKIS I may also mention MURPHY v. Ireland (application No. 44179/98, decided on 10 July 2003). The case concerned a religious organization (the Irish Faith Centre), which wanted to broadcast a commercial on a local radio. The commercial was stopped by the Independent Radio and Television Commission, with reference to a statutory ban on any commercial “... which is directed towards any religious or political end or which has any relation to an industrial dispute”. Arguments were submitted on the basis of art. 9 as well as art. 10, but the decision of the court showed that there were no elements in this case which did not fall within the ambit of art. 10. Thus, there were no independent issues in relation to art. 9.

An important part of the freedom of religion consists in the individual sharing his religion with others in an institutionalized context. In most cases, the establishment of a religious organization, enabling the believers to act in community in internal as well as external dealings is an inseparable part of religion and is at the same time by definition necessary for the existence of a religion. The freedom of assembly and association ensures that groups of persons who share the same religion can meet to observe religious rituals in community, and that they may form and carry on associations for the purpose of observing and disseminating their religion. The freedom of assembly and association further ensures that persons who do not support the association's objects may opt out of the association or even establish a new association. Thereby both the positive and the negative freedoms of religious association. METROPOLITAN CHURCH OF BESSARABIA¹³ illustrates this situation.

The case concerned a church – the Metropolitan Church of Bessarabia – which, despite repeated applications to the Moldovan state, did not obtain recognition as a religious organization. As a result of the failure to obtain recognition, the church was prevented from acting as a religious organization. Concerning this issue, the judgment reads (para 105):

“In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets.”

All three consequences of the failure to obtain recognition of the church must be said to be equally well protected by the right to freedom of assembly and association (possibly coupled with the right to freedom of expression and, for the third and last consequence, by the right to a fair trial) as well as by the right to freedom of religion. The judgment goes on to state, on a positive note, that Article 9 should be interpreted in the light of Article 11.¹⁴ Thus, there seem to be no aspects of the refusal of recognition that could not have been dealt with under other provisions of the EHRC.

This also seems to have been the case in MANOUSAKIS,¹⁵ where a group of members of Jehova's Witnesses had in vain applied for permission to conduct

13 METROPOLITAN CHURCH OF BESSARABIA and others vs. Moldova, application No. 00045701/99. The judgment was delivered on 13/12/2001.

14 The court states: “Moreover, 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, *See* Hasan and Chaush, cited above, § 62. 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 judicial 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 ...” (para 118).

15 MANOUSSAKIS vs. Greece, application No. 18748/91.

church services and carry on other ceremonies from some premises they had taken on lease. The group was not given a definite answer, but nevertheless began conducting church services. Subsequently, they were accused of having:

“... established and operated a place of worship for religious meetings and ceremonies of followers of another denomination, and in particular, of the Jehovah Witnesses’ denomination without authorisation from the recognised ecclesiastical authorities and the Minister of Education and Religious Affairs, such authorisation being required for the construction and operation of a church of any faith.” (para 12).

At first instance the defendants were acquitted, but were later fined. Then they brought the case before the ECHR, which in the course of its decision said that, the Greek appellate court:

“... relied expressly on the lack of authorisation from the Minister of Education and Religious Affairs. The latter, in response to five requests made by the applicants between 25 October 1983 and 10 December 1984, replied that he was examining their file. To date [1996], as far as the Court is aware, the applicants have not received an express decision. Moreover, at the hearing a representative of the Government himself described the Minister’s conduct as unfair and attributed it to the difficulty that the latter might have had in giving legally valid reasons for an express decision refusing the authorisation or to his fear that he might provide the applicants with grounds for appealing to the Supreme Administrative Court to challenge the express administrative decision.” (para 51)

On those grounds the Court concluded that the restriction did not meet the conditions of Article 9(2), and that it was therefore in violation of Article 9. It seems obvious that the case would have had the same outcome if it had been argued on the basis of Article 11, as this provision must be considered to cover the right to establish religious associations and to assemble with a view to observing religious rituals.

3.3 Freedom of Religion and the Prohibition Against Discrimination on the Ground of Religion

An overlap with the freedom of religion under Article 9 is also to be found in Article 14, which a.o. prohibits discrimination on the ground of religion. Thus, Article 14 provides protection against discrimination on the ground of religious conviction within the ambit covered by any one of the other provisions of the Convention.¹⁶ In the circumstances, such a prohibition against discrimination

16 Even if the provision by its tenor only prohibits discrimination in the enjoyment of the rights and freedoms generally recognized under the Convention, the ECHR has extended the scope of protection to cover situations that are related to the enjoyment of any of the other rights of the Convention without being protected by them. This implies that the prohibition against discrimination applies whenever a case impinges on a subject falling within the ambit of the other Convention rights (cf. the use of the expression “falls within the ambit” in *INZE vs. Austria*, application 8695/79 at para 36). As the prohibition also covers both direct and indirect discrimination (and is thereby aimed at promoting substantive as well as procedural equality, *See also Van Dijk, P. & van Hoof, G.J.H, Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, p. 719), the scope of protection has today been

provides the citizens with the same protection as the right to freedom of religion. This may be illustrated by the case of LEYLA SAHIN.¹⁷

The case concerns a woman who had been banned from the Istanbul University because she refused to take off a religious headscarf. As the Turkish courts found the ban to be in compliance with current law and therefore did not overrule the decision of the University, the case was brought before the ECHR. In that connection the woman invoked Articles 8, 9, 10 and 14, and Article 2 of Protocol 1. The Court, in its first (chamber) decision initially took account of Article 9 and, following a thorough analysis of the case, came to the conclusion that there was no violation of Article 9. With regard to the other articles.

“The applicant alleged that the ban on wearing the Islamic headscarf in higher-education institutions had infringed her right under Article 2 of Protocol no. 1 to the Convention. She also said that it obliged students to choose between religion and education and discriminated between believers and non-believers. That in her view, constituted an unjustified interference with her rights guaranteed by Article 14 of the Convention, taken together with Article 9. Lastly she complained of a violation of Articles 8 and 10 of the Convention. The Court finds that no separate question arises under the other provisions relied on by the applicant, as the relevant circumstances are the same as those examined in relation to Article 9, in respect of which the Court has found no violation.” (para 116).

Even if Article 14 was not cited with Article 2 of Protocol no. 1, but with Article 9, it is obvious that the outcome would have been the same. This is also the Court’s conclusion in its second (grand chamber) decision, where the Court simultaneously points out that the applicant’s argument for a violation of art 14 is too abstract and general and therefore insufficient. The grand chamber elaborates:

“As regards the complaint under Article 14, taken individually or together with Article 9 of the Convention or the first sentence of Article 2 of protocol No. 1, the Court notes that the applicant did not provide detailed particulars in her pleadings before the Grand Chamber. Furthermore, as has already been noted (see paragraphs 99 and 158 above), the regulations on the Islamic headscarf were not directed against the applicant’s religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions. Consequently, the reasons which led the Court to conclude that there has been no violation of article 9 of the Convention or Article 2 of Protocol No. 1 incontestably also apply to the complaint under Article 14, taken individually or together with the aforementioned provisions.” (para 165).

Thus, if the case had been dealt with solely under article 14, the legal analysis, and the weighing and balancing involved in deciding whether or not the interference/discrimination was legitimate would basically have amounted to the same thing.

considerably extended in relation to the wording (“the rights and freedoms set forth in this Convention”) of the provision.

17 LEYLA SAHIN v. Turkey, application No. 44774/98.

It is not possible to review all cases about freedom of religion here, for the purpose of establishing whether the freedom is protected by means of other fundamental rights provisions. It appears from the above that at least in a number of cases about the core area of religious freedom there seems to be an unnecessary amount of double protection. Similar double protection may probably exist in respect of a number of other fundamental rights provisions, such as e.g., Articles 8 (the right respect for private life) and 12 (the right to marry and to found a family) of the EHRC. Against this background it does not seem unreasonable to conclude that on a number of points the part of the right to freedom of religion that concerns the right to manifest one's religion through church service, teaching and prayers is superfluous. At any rate, the right to freedom of expression, association and assembly etc. provides such ample protection that only the right to manifest one's religion through observance of religious rituals seems to have an independent significance. This leaves the question of the justification of securing independent protection at fundamental rights level for the observance of religious rituals.

4 The Protection of Religious Rituals

As illustrated above, freedom of religion is to a large extent protected under the other rights provided for by the EHRC. Only with regards to the practice of rituals do there seem to be an area where the other rights cannot provide protection. It is therefore relevant to discuss whether, and if so, to which extent, the performance of such rituals deserve protection as basic human rights. The remaining part of the article will be dedicated to an analysis of this question. For the purpose of this analysis it may however be useful first of all to consider the type of actions for which such protection has been sought.¹⁸

4.1 *Clothing etc.*

One of the most common examples of invocation of the freedom of religion is associated with the wish to wear specific items of clothing. The cases are similar in that the wish to wear a specific item of clothing is being claimed as a right that may be inferred from the right to freedom of religion. What is being claimed in these cases is that the wearing of the item of clothing in question is an integral part of the claimant's religion. By way of example may be mentioned Muslim women wishing to wear scarves, veils and/or loose-fitting clothes; male Sikhs wishing to wear turbans; male Jews wishing to wear skull-caps. In the same category, but slightly different, is the wish of male Rastafaris to keep their dread-

18 The following examples have been found in ECHR case law and in the international literature in the area, *See* in particular Ahdar, Rex J., *Law and Religion*, Ashgate, UK, 2000, Poulter, Sebastian, *Ethnicity, Law and Human Rights: The English Experience*, Oxford University Press, UK, 1999, Evans, Malcom D., *Religious Liberty and International Law in Europe*, Cambridge University Press, UK 1997, Evans, Carolyn, *Freedom of Religion under the European Convention on Human Rights*, Oxford University Press (ECHR Series), UK 2001, Van Dijk, P. & van Hoof, G.J.H, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, and Barry, Brian, *Culture & Equality*, Harvard University Press, UK, 2002.

locks, and the wish of male Jews to keep curly hair in front of their ears. Also the right to a religiously motivated tattoo falls within this category.

Some cases involve a right of exemption from the duty to adhere to a particular workplace dress code established by a private employer as part of the employee's duties, e.g. in department stores, airline companies and supermarkets, so that the right is being invoked as an employee's right to exemption from the contractual relationship without sanction. Other cases involve a right of exemption from statutory security requirements or requirements as to personal hygiene, e.g. on a building site, in connection with riding a motorbike and with work in food production. Finally, a case might involve a right of exemption from the duty to wear a uniform, as in public service (e.g. as a police officer) or military service.

4.2 Public holidays

Another type of cases is about freedom of religion as a ground for non-compliance with statutory or contractual obligations at specified times. These cases concern certain days that are designated by the person's religion as days of rest, days of fast, days of prayer, days of celebration, etc., and the precedence given to the religious obligations associated with such days over the person's civil obligations. Christians consider Sundays, and in particular the days around the celebration of the birth of Jesus, as holidays. Some Christians also consider Saturdays as holidays. Both Christians and Muslims fast for a few days a year.

Some cases involve a right of exemption from a contractual duty to work on certain days, e.g. Sundays. Other cases may involve a right to receive welfare benefits from the state despite the fact that the person is not available for the labour market on certain holidays. A case may also involve a right of exemption from special types of assignment or from warnings or orders on the ground of incapacity of performing certain assignments due to physical impairment in connection with a fast.

4.3 Food and stimulants, etc.

A third type of case concerns religious rules about food and stimulants. First of all, these may involve a religious ban on eating or drinking certain things, either a total ban or restrictions concerning certain times, see also para 2. above. Cases in point include restrictions on eating and drinking during the daytime in certain periods, and general bans on eating certain kinds of meat. Secondly, these cases may involve treatment of food in a certain way as prescribed by religion. Cases in point would be the rule that animals must be slaughtered in certain specified ways, or that certain kinds of food should not be mixed, e.g., that milk products must be stored and consumed separately from other food. Thirdly, it may be a matter of certain stimulants being required under religious rules to be consumed at certain times. A case in point is the taking of hallucinogenic substances.

Some cases have involved a right of exemption from the rules on cruelty to animals, hygiene, etc., as the treatment of food according to certain religious prescriptions is an integral part of the right to freedom of religion. The main example here is the right to use certain methods of slaughtering animals. Other cases are about the right to take illegal substances in connection with religious ceremonies. Finally, there are cases where a religious ban on certain types of

food is being used as an argument for a right to receive special treatment in public institutions, e.g., in connection with hospital treatment, service of custodial sentences, meals prepared on site for children in kindergarten, etc.

4.4 Other matters

As a final point should be mentioned a number of cases involving the handling of the dead as motivated by religion, polygamy, arms possession, duty of secrecy, etc.

Cases involving the handling of the dead may arise in connection with religious prescriptions, specifying that a dead person should not be buried until after a certain period after death, or that the dead are to lie in open coffins during the burial ceremony. Cases involving polygamy may be about persons belonging to religions that accept polygamous marriages wishing to have all their wives acknowledged as their lawful wives. Cases about arms possession may arise out of the fact that religious rituals may involve the use of weapons (typically special knives and sabres), and that persons belonging to religions that observe such rituals claim exemption from prohibitions against carrying the weapons. Cases involving a duty of secrecy may concern priests who learn of criminal acts etc. in the course of confidential conversations with members of their congregations, and who require the duty of confidentiality owed under their religion to be acknowledged by civil authorities.

4.5 The Level of Protection for Religiously Motivated Action

The above account of the different examples of invocation of the freedom of religion, taken as a right to perform religious rituals is not exhaustive, but provides an adequate illustration of the issues with which I am concerned. Before I pursue an analysis of whether there are any good reasons for offering special protection of religious rituals, it might be worth saying a few words about the case that most authors in the field consider as the leading case.

In the Commission's decision of 12 October 1978 in the *Arrowsmith* case (appl. 7050/75, D&R no. 19, p. 5) it was held that a woman who held pacifist beliefs (she was described as "undisputedly a convinced pacifist", pr. 68) was not protected under article 9 from punishment as a result of an unlawful distribution of pacifist leaflets. The legal ground for Ms. Arrowsmith's conviction was the Incitement to Disaffection Act 1934, which made it illegal to encourage soldiers to desert. The Commission examined the case both in the light of art. 5, 9, 10 and 14 (which might give further support to the theory that other rights might absorb the legitimate protection of religious beliefs and activities, that I put forth in 3 above) and decided that there had not been a violation of any of the rights in question. With regards to art. 9, the central argument of the Commission for establishing that there had not been a breach of the convention, was that the distribution of leaflets did not express the pacifist beliefs of Ms. Arrowsmith. This required of the commission to perform some interpretive activity to the convention:

"The Commission considers that the term "practice" as employed in Article 9.1. does not cover each act which is motivated or influenced by a religion or a belief.

It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned, they cannot be considered to be as such protected by Article 9.1. even when they are motivated or influenced by it.” (Arrowsmith, pr. 71).

It was on this background, that Ms Arrowsmith’s distribution of leaflets, could not be seen to be protected under art. 9. This part of the decision has attracted some critical comments. Thus, e.g. Carolyn Evans says:

“It seems very peculiar that to suggest that a pacifist who spends her time appealing to soldiers to refuse to participate in the use of armed force could be seen to be practising her belief less than someone who outlined the pacifist ideals to the world at large.” (Evans 2001, p. 113).

But this, I believe is a misdirected criticism. First, the distributed leaflets could not properly be labelled pacifist leaflets since they did not recommend total abstinence from violent means, but only abstinence from violent means, which is being used in the *wrong* way.¹⁹ But judgments about right or wrong uses of violence quite obviously involve political judgment. The Commission, I think, was therefore right to say that “the leaflets did not express pacifist views.” (pr. 75).

Secondly, the distinction between appealing to soldiers and appealing to the world at large makes perfect sense in this context. It is precisely because of the political nature of the distributed leaflets that it may be seen as a further argument against protection that the leaflets were distributed to soldiers who might shortly be posted to Northern Ireland rather than to the public in general. Therefore I do not think there is anything peculiar about the decision.

To this, it should be added that even if the leaflets distributed by Ms Arrowsmith had been purely pacifist in nature, it should be noted that the general distinction made by the Court between actions which express belief and actions which are motivated by belief, are utterly relevant and necessary although perhaps it is not always clear whether a performed action belongs to one or the other category. However, I think that the distinction serves to ensure that the right to freedom of religion cannot be exploited to argue that every possible derivation or interpretation of general religious prescriptions deserves protection under art. 9. According to this interpretation of the Arrowsmith decision, actions which are based on derivations of beliefs should not be offered protection. This seem to fit with subsequent practice from the commission, which has stressed that only those actions whose performance are *necessary* for the practice of the belief in question are protected under article 9.²⁰ In *C v. UK*, appl. No. 10358/83, published in D&R 37 at p. 142, this was expressed, by saying that the protection of

19 See pr. 72 of the decision where the quote from the leaflet – particularly the part which says “... I’d be willing to fight for a cause I can believe in. But what is happening in Ireland is all wrong” – makes it quite clear that Ms Arrowsmith, although she might have been a pacifist, was not, at least not with this particular leaflet engaged in an expression of pacifist beliefs.

20 See Evans (1997), p.307ff.

rituals are extended only to acts which are “intimately linked” to the belief in question, which means that protection can only be afforded to acts of worship or devotion which are aspects of the practice of a religion or a belief in a generally recognised form”. This view is confirmed in recent ECHR case law. Thus in *PRETTY v. UK*²¹ the Court said (para 82):

“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. As found by the Commission, the term ‘practice’ as employed in article 9 § 1 does not cover each act which is motivated or influenced by a religion or belief ... [here follows a reference to *ARROWSMITH*].”²²

It may of course be very difficult to draw the line, but as a general principle it must be assumed that only actions of an *inherently* religious nature are covered. Thus, church services and actual religious rituals would be covered, whereas religious prescriptions concerning matters which are not directly connected to a religious ceremony would not be. ECHR case law is not quite clear in this area, however. A special form of ritual slaughter of animals was, for example, held to be covered by Article 9 in *CHA’ARE SHALOM VE TSEDEK*.²³ In the course of the decision the ECHR stated:

“It is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite or ‘rite’ (the word in the French text of the Convention corresponding to ‘observance’ in the English), whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion.” (para 73).

The introductory phrase “It is not contested” suggests that it might successfully have been argued that this religious practice is not protected under Article 9. It could have been argued that Jews are not ordered by their religion to eat meat, and that eating meat is therefore not a reflection of their religious faith, cf. the principle in *ARROWSMITH*. Indeed, eating meat is not a compulsory element of the ceremonies or rituals whereby the Jewish religion is manifested. It could be argued, that eating meat is not a constituent part of the Jewish religion and therefore should not be protected as such.²⁴ However, the ECHR reaches the

21 *PRETTY* (application No. 2346/02), decided on 29 April 2002.

22 It should be noted that in its reasoning, ECHR here Seems to be taking account of two arguments at the same time, without any possibility of separation, viz (1) that the belief in the right to have one’s life ended at one’s own option (assisted suicide) is not a religion in the sense protected by Article 9, and (2) that not every act arising out of a religious conviction is protected under Article 9.

23 *Cha’are Shalom ve Tsedek v. France* (Application no. 27417/95) decided on 27 June 2000.

24 It should be noticed however, that ECHR in the subsequent paragraph 74 stated, that: “It follows that the 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

result that France did not violate Article 9 by other means. Thus, it is stated in the judgment that followers of the religion in question are not precluded from having meat treated in accordance with the prescriptions of their faith (since such meat could legally be imported). It is further stated (para 84) that even if such meat had not been available, it would not have constituted a violation of Article 9, if the consideration for public health could justify a ban on treating meat in accordance with the prescriptions of the claimants' religion. This statement is used in the decision (para 87) to prove that there had been no violation of Article 14.

Thus, as also Carolyn Evans²⁵ has noted, the ECHR case law is not entirely consistent. Not only does the Court not apply the AROWSMITH test consistently, the test itself raises some difficult questions about how the Court might find out exactly where the line should be drawn between actions which express directly / are necessary for / are intimately linked with a certain belief, on the one hand and, actions which are merely motivated by / are contingent in relation to / are only remotely connected to that belief on the other. This is indeed difficult and it raises the question about how one can assure that religious beliefs are properly protected. Carolyn Evans expresses her worries about this

“... it is important not to lose sight of the fact that general legislation may impose serious restrictions on religion or belief, particularly the religion or belief of relatively small and powerless groups. Such groups cannot necessarily rely on the democratic processes to see to their needs.” (Evans 2001, p. 198)

This might well be true, but general legislation always impose restrictions on action – that is after all the whole point of legislation – and one may ask then, whether and why one should attach special importance to the fact that such restrictions may sometimes apply to actions which are motivated by religious beliefs? Evans seems to think so. In the concluding chapter of her study she expresses the view that the current case-law of the ECHR does not give adequate protection to religious freedom and that the ECHR does not deal respectfully with the most deeply held beliefs of many applicants. She therefore calls for religions and beliefs to be treated with more respect and for an acknowledgement that states has interfered in important aspects of religious practices on more occasions than appears from the existing case law (Evans 2001, p. 208). This all seems to presuppose that more and better protection should be awarded to religiously motivated actions (rituals). But why? In the following I shall attempt to examine the extent to which religious beliefs deserve special protection in the first place.

covered by a right guaranteed by the Convention, namely the right to manifest one's religion in observance, within the meaning of Article 9. “The last part of this, could, of course be taken to mean that ritual slaughter is covered by article 9 *tout court*. On that reading ritual slaughter is taken to be an observance of religious beliefs almost by definition.”

25 Evans 2001, chapters 6.5 and 6.6.

5 Should Religion Enjoy Special Protection?

The right to freedom of religion is a very special fundamental right since it protects a particular type of opinions and a particular type of actions. Where the freedom of expression protects all types of opinions and ideas, the freedom of religion specifically protects religious opinions and ideas, such as sermons. Where the freedom of assembly protects all types of assemblies, freedom of religion specifically protects religious assemblies, such as church services. Why should religious opinions and ideas enjoy such a privileged status compared to other opinions and actions?²⁶

One of the most manifest objections to such privileged status is that the various religions must be considered sub-cultures, and that there is no reason to protect religious cultures over other cultures, such as, e.g., art, sport, literature, science, music or politics. Some people spend a lot of time and much energy, engaging in considerations about the meaning of life, others use their energy trying to find the answer to the optimum way of promoting world peace, and others again on composing the ultimate love song. Why is one type of activity more worthy of protection than the other?

A possible answer – to the believer maybe an obvious one – is that religion is a more fundamental or more comprehensive culture. This may be understood as a claim that religious convictions are more important to human life than, e.g., playing or listening to music, since religious convictions comprise all human life from beginning to end, whereas other cultures, such as musical communities, comprise only parts of human life. The fact that religion is so fundamental and essential to human life means that it should enjoy a privileged position with regard to human rights protection as well.

On the other hand, however, it must be said that some people do not believe in God or supernatural powers. Others feel that religion is opium to the people because their belief in life after death makes it hard for them to react appropriately by reference to the injustices taking place in our society here and now. Others again feel that it is not possible to deal with transcendence in any rational way. Thus, any claim about the specifically fundamental character of religions must be modified so that, in the nature of things, the special importance applies to believers only.

In continuation of this, it may be said in turn that faith actually plays a vital part to a very large section of the population, and that it should therefore be given particular attention in the formulation of current law. It may be added that faith in itself is the fundamental element in human development. It is through faith that man develops his view of the world and his moral and ethical opinions. Even the atheist is a believer in that sense for in this case the belief that God does not exist shapes his/her philosophy of life. Since everyone does not share the same faith, the different religious ideas cannot be protected sufficiently through the general democratic process. Against that background, it may be ar-

26 For a similar analysis of this issue, See Shiffrin, Steven H., *The Pluralistic Foundation of the Religion Clauses* in *Cornell Law Review*, Vol. 90, 2004, p. 48 et seq.

gued that opinions and ideas and actions reflecting a person's religious conviction need special protection over other convictions.

In the protection of religious freedom under Article 9 of the EHRC, this point of view seems to have been accepted. However, the protection has been extended – probably on the basis of the acknowledgment that it is not possible to clearly define a religious conviction – so that religious ideas and other fundamental philosophies of life are accorded equal treatment. Thus, in practice the freedom of religion includes more than religious convictions. Van Dijk and van Hoof write that the words “religion or belief”:

“... not only cover the traditional religions and (non-religious) beliefs, but also all kinds of minority views. For instance pacifism, and probably also communism is regarded as a ‘belief’ falling within the ambit of article 9. Even veganism (strict vegetarianism) may fall within the scope of the article.” (Van Dijk and van Hoof, 1998, p. 548).

Thus, freedom of religion is really a freedom of philosophy of life, covering religious as well as secular philosophies.²⁷ The important dividing line in order to obtain protection is not between religious and non-religious convictions, but between convictions that are part of a total philosophy of life and convictions that are not. However, this is not enough to justify the protection of freedom of religion, but only to create further confusion; for when does a conviction require special protection due to its very nature? It is not hard to imagine the inventiveness displayed in order to produce a specific conviction as part of a total philosophy of life, and thereby as an element of the freedom of religion. The issue of justification then remains.

In contemplating the reasons why religions / philosophies of life might deserve special protection, I have decided to discuss only the issues that are strictly relevant to the case at hand. Thus I do not consider religious arguments for the right to religious freedom.²⁸ There are two reasons for this. First, religious arguments will by their very nature be attached to a specific religion and will therefore only be considered valid from within that particular religion. Thus Muslims may not be particularly convinced by arguments based on the Holy Scriptures and Christians may not be particularly convinced by arguments based on the Quran. Furthermore there may even be divisions within the religions, so that, for instance, one group of Muslims may be convinced that the Quran prescribes a right to religious freedom whereas another group of Muslims may be convinced that that is not the case. Furthermore, the weakness of the religious argument is that it will be unpersuasive to those who do not believe.

The second reason is a methodological one, and has to do with the fact that reason cannot be dependent on belief. If religious freedom is an interest that deserves special protection, it must be possible to demonstrate this without appealing to faith, otherwise the argument will not apply in the universal sense that we

27 A more or less similar situation is probably seen in the the interpretation of ICCPR. ECHR case law will probably affect the interpretation of EU legislation in this area.

28 For a view over Christian arguments for religious freedom, see Ahdar, Rex J. & Leigh, Ian, *Religious Freedom in the Liberal State*, chapter 1, Oxford University Press, UK, 2005.

associate with the business of giving reasons for something. In other words, the reasons given for a special right to freedom of religion must not be conditional upon certain beliefs, for if that is the case, reason will, so to speak, be censured by faith.²⁹ Thus we must turn our attention to non-religious arguments for supporting a right to freedom of religion.

Carolyn Evans in theorizing the Freedom of religion under the ECHR, examines a number of arguments that may support the special status religion has been given in human rights law. Under the heading Instrumental Arguments, she discusses what may be called *the tolerance for peace argument*.³⁰ This argument says that we ought to be tolerant towards people of other faiths because if we are not social problems might occur.³¹ Since religious diversity is a fact of life, we will do better to avert the suffering that follows from religious intolerance and persecution and recognise instead, that such tolerance and persecution causes social problems without necessarily bringing about the desired purposes of a politics of intolerance and persecution.³² Evans says:

“Even if some people perceive that the best society of all is one where all people accept the same, true religion (or no religion at all), they might understand that religious diversity is a fact of life that must be accommodated. Thus they might wish to avert the suffering that religious intolerance and persecution brings, recognizing that it causes social problems without necessarily bringing a religiously cohesive society any closer.” (Evans p. 23).

History of course supports this argument (see the historical argument below). It is nevertheless not entirely convincing. First of all the argument does not seem

29 Alan Gewirth, in his *Reason and Morality*, explains why belief cannot function as a condition for accepting reason: “It is indeed the case that there have also been historical demands that reason itself in turn pass various justificatory tests set by religious faith, aesthetic rapture, and so forth. But the very scrutiny to determine whether these tests are passed must itself make use of reason. For example, salient powers of reason must be used in order to check whether the products of logical and empirical rationality are consistent with the propositions upheld on the basis of faith, or whether the use of reason is compatible with the experiencing of aesthetic feelings and the like. Thus any attack on reason or any claim to supersede it by some other human power or criterion must rely on reason to justify its claims.” Gewirth, Alan, *Reason and Morality*, Chicago University Press, USA, 1978, p. 23. While there may be said to be a difference between conditioning reasoning and overruling it (Gewirths argument focuses on the latter case), there is enough similarity, to use his argument in the present case. Had the belief in question been a justified one, based for instance on lack of evidence for something (perhaps combined with a pressing need to supply reasons based on whatever indices available), then the two cases would have been different. But when the belief in question is of a religious nature, and when the argument is not of a theological nature, but as here, of a politico-legal nature, then the use of belief-conditions will invalidate the argument.

30 See also Ahdar, Rex J. & Leigh, Ian, *Religious Freedom in the Liberal State*, Oxford University Press, UK, 2005, p. 52-54 (civic peace).

31 For an analysis of what tolerance requires, Evans refers to Raz, *the morality of freedom* (p. 401-402).

32 Such a desired purpose might for example be religious homogeneity in society, which in turn – perhaps paradoxically – might be *See n* as a presupposition for social peace.

to make any distinction between tolerance and special treatment. While most people will probably agree with the general recommendation, that one ought to be tolerant *vis a vis* other religions and that one ought to refrain from persecution and harassment of people who do not share ones own belief, this does not necessarily amount to an embrace of a principle that peoples religious beliefs should then receive special constitutional protection. Other beliefs, convictions, and forms of life might well be entitled to the same toleration etc. as religious beliefs. Furthermore one might argue that things which are not the result of belief, but of nature, should at least in some cases receive even more protection against intolerance. Thus, perhaps race, nationality, ethnicity and sex, should be better protected than religious beliefs, because these things cannot be amended, whereas beliefs can change over time and adapt to new times.³³ Secondly, as Evans points out (Evans p. 23), the tolerance for peace argument treats religious tolerance as a means to an end, the end being social harmony. Thus to the extent that such harmony can be achieved without showing religious tolerance, there may be no need for a right to freedom of religion (*ibid.*). Thirdly, religion is not the only, and perhaps not even the most significant, source of social disorder. Poverty, politics, ethnic and cultural diversity, may be as destabilising as religion, if not more. That of course is not an argument in and of itself for not showing tolerance, but it does support the view that religion should not be singled out for special protection.

The historical argument is more empirical than normative. The argument is based on the assumption that throughout the past religion has been used as a basis to justify persecution and repression. Evans explains:

“This argument can be construed, so as to claim that there is nothing particularly important about freedom of religion as such except for the fact that historically religion has been used as a basis to justify persecution and repression.” (Evans 2001, p. 24).

The argument amounts to saying that in order to prevent these past events from being repeated, religion ought to be expressly protected. While there is undoubtedly much truth in the assumption about past offences being based on religion (although it should be noted both that religion and politics were not quite so separated in the past as it is in today’s Europe, and that what might have appeared as religious persecution could well have had other non-religious motives) one should be careful not to make any Humean mistakes here. Some of the religious persecutions that have occurred in the past have indeed, as Evans says, had the character of horrors. Most people will object to this as much as Evans. However, the fact of these historical events does not in and of itself lead to the inevitable conclusion that religion must then receive special protection. Of course the historical argument is linked to and supports the tolerance for peace argument, in the sense that history provides examples of religious persecution leading to social turbulence. The historical argument could support the idea of special protec-

33 Here it might well be worth mentioning that religious beliefs are also being used as justification for other forms of discrimination. One common example of this is the Catholic Church, which refuse women access to priesthood.

tion if it was true that our history was characterised by persecution solely on the ground of religion. However, our history is full of examples of persecution on other grounds: Race, political conviction, nationality etc. But even if religion had been the only source of persecution it is not evident that a special constitutional protection would have the effect of preventing these horrors. The political and social forces in play during at least some of these events were so powerful, that laws, whether international, constitutional or otherwise, would not have prevented them from happening. Neither will they be able to do so in the future if such forces should be released again. The point is not that the law is useless, but only that it has its limits, and that it makes no sense to legislate for situations, which cannot be controlled through the medium of the law anyway. Furthermore, attempts to promote religious tolerance through the medium of special treatment, may, depending on what this is taken to require, cause an escalation of potential conflicts, and thence further disorder rather than the opposite. Finally, if anything, the historical events of religious persecution, should not lead us to protect *religious* beliefs, but should rather prompt us to protect individuals and groups from *persecution*, whatever its roots.

Having discarded religious reasons, Evans presents what may be referred to as *the autonomy and pluralism argument*. This is linked to a liberal theory which:

“... argues that freedom of religion or belief is an essential and independent component of treating human beings as autonomous persons deserving of dignity and respect. If society so treat people it will commit itself to at least a weak notion of value pluralism, which will allow for a choice between a variety of religious beliefs, practices, and communities to exist and to be given some protection in that society. Thus respect for individual autonomy will also promote the notion of tolerance and pluralism in a society.” (Evans p. 29)

This is a fairly straightforward and probably pretty widely accepted view of what liberalism entails. Autonomy implies the right to decide for oneself, and this is of course the very core of liberalism. The only problem with this is - and this is symptomatic for all theories of liberalism - that it is not clear exactly how far this individual freedom should be accepted? It is not so much that it is difficult, theoretically to limit this freedom. Already Kant formulated a viable principle for this limitation: One's freedom only extends so far as it does not infringe on any co-citizens' right to exercise his/her freedom. But exactly how far is this, and what count as infringements? The answers to these questions are of course highly political. Although, some theorists have produced arguments that specify the Kantian equality clause somewhat, there remains plenty of scope for political manoeuvring. Thus, the autonomy argument do not bring much to the party, for the question to be answered here is still whether this or that action ought to be specially protected.

But even if respect for individual autonomy – however one define this – is accepted as a foundation for constitutional law, this cannot function as an argument for setting up a special protection for religious (or philosophical) beliefs. Evans quotes two attempts to theorise the role of religion within a liberal context. First she quotes Rawls for, saying that “... equal liberty of conscience is the

only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or suppress others if it wishes.” (Evans 2001, p. 31³⁴). The method of the original position notwithstanding, this scarcely amount to an argument, for it seems that religious and moral doctrines are arbitrarily singled out. There are however many other areas in which a person in the original position would not want to compromise his autonomy. Examples are: Political freedom; freedom in personal matters such as sexual preferences; freedom to choose ones partner; freedom of expression etc. etc. There seem to be no good reason then, to single out religious and moral belief in this regard. Secondly Evans quotes McDougal, Lasswell and Chen: “One of the most distinctive acts available to man as a rational being is the continual redefinition of the self in relation to others and to the cosmos. Thus, each individual must be free to search for the basic postulates in a perspective that will unify the experiences of life.” (Evans 2001, p. 31³⁵). Whether it is true or not, that such a “continual redefinition” is most distinctive to man, and whether or not one accepts the move from is to ought in this argument, it nevertheless amounts to no more than an argument in favour of a general freedom to soul search oneself. I shall have no quarrel with this, but once again, it does not support the special treatment contained in the right to freedom of religion.³⁶

Rex Ahdar and Ian Leigh discuss a number of liberal justifications for religious liberty. One of these might be called *the checks and balance argument*. Ahdar and Leigh discuss a supposition that the gulf between the all powerful state and the isolated individual needs to be filled with intermediate / mediating institutions and that religious bodies have a role to play in this regard. They say:

“... religion may serve a pro-democratic role in that religious bodies may check the totalitarian tendencies of the large, expanding modern state. In *The Culture of Disbelief*, Carter, Drawing upon Alexis de Tocqueville’s nineteenth-century critique of American society, argued [that] religions, at their best, can serve a valuable role as ‘independent mediating institutions’ operating as ‘bulwark[s] against government tyranny’” (Ahdar and Leigh, p. 54-55³⁷).

To support this claim, Ahdar and Leigh, again quoting Carter, refer to the faith of believers, a faith which involves allegiance to something other, and higher, than the state. By operating with an independent normative standard, religions can have a taming effect on states, and thus operate to resist or prevent tyranny. This is a pretty ambitious argument, and in some ways not unimpressive. The problem with it however, is that it is ultimately a religious argument. To argue

34 Evans refers to John Rawls, *A Theory of Justice*, p. 207.

35 Evans refers to Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, *The Right to Religious Freedom and World Public order: The emerging norms of Non-Discrimination*, 74 Mich. L. Rev. 1976, p. 873

36 Evans on the other hand Seems to embrace the argument – perhaps because there is no better alternative. See Evans p. 31-32.

37 Ahdar and Leigh refer to Stephen L. Carter, *The Culture of disbelief: How American Law and Politics Trivialize Religious Devotion*, p. 36-37.

that religious bodies can and should operate as a counterbalance to governmental power, is to introduce faith-based arguments against secular ones, and this will inevitably fail on both of the two criteria mentioned in the introduction to this analysis. Thus religious bodies will always be religious bodies of a particular faith and creed, and hence the bulwark will be based on particular beliefs, which in turn can only be valid from the point of view of those who adhere to this particular religion. Those who do not share the belief will scarcely perceive this as a pro-democratic move. Furthermore it is not obvious that religious institutions are the best to carry out this bulwark-function. Checks and balances can be carried out in a number of ways: through a functional division of power, through a vertical division of power (as between federation and states), through independent democratic legitimation chains for government and parliament respectively (as in presidential systems of government), through protection of parliamentary minorities in parliament (for example by demanding qualified majority in some cases), through access to referendum on certain issues, etc., etc. It is not at all clear that religion is better at serving democracy than political parties or interest groups. Indeed religious bodies may themselves have a political agenda (examples of this are abortion issues, access to birth control, sexual equality, freedom of sexual orientation, etc., etc.). If religious bodies are given more official power *vis a vis* governments it is quite likely that these bodies will become even more political. Finally, some people believe that religions are themselves tyrannical and authoritative precisely because of their reliance on revelation rather than democratic discourse. It seems then that the checks and balances argument, although superficially persuasive, is after all incapable of supporting a special status/protection for religion.

As an extension of the autonomy and pluralism argument discussed above Ahdar and Leigh introduce what could be labeled *the duty vs. preference argument*. This argument takes the liberal route of claiming that there ought to be a right to respect for individual autonomy, but then tries to single out religious beliefs for special protection by emphasizing the special character of religious belief. The sincere believer, they argue, is under a special form of pressure when the demands of the state conflict with the religious norms that form part of his/her belief. This is because the believer is subject to a sort of external, extra-temporal compulsion, which is “quite unlike other forms of compulsion” (Ahdar and Leigh, p. 59). The special character of religious suffering is due to the character of the religious conviction, which is not a preference or choice, but a duty imposed on the individual by God:

“Assimilating religious freedom to a general right to choose risks mis-describing the nature of religious conviction and obscuring the reasons why, historically, religion was accorded special constitutional protection [in America?]. Religion is as much about duty as choice. ... a central theme of many religions runs contrary to liberal thinking – one has a *duty* to seek the truth, to worship and obey God. Liberalism’s broad protection of personal autonomy risk’s ‘confus[ing] the pursuit of preferences with the performance of duties’”. (Ahdar and Leigh p. 62.³⁸)

38 The quote at the end of the quote is referred to as: “Sandel, *Liberalism and the limits of justice*”.

So the problem for the believer is that he does not choose God – God chooses him,³⁹ and that releases a duty for him/her. Thus when there is a conflict between what the state demands and what God demands, there is a conflict of duty, whereas in most other cases, where the autonomy argument applies, state demands simply diminish the opportunity to pursue preferences. What does this argument amount to then? On one interpretation this is simply a religious argument for special treatment of religious convictions, for it presupposes an acceptance of the existence of a revelation as a duty imposing event. This is unacceptable not only to non-believers but also to those who do not believe in the religion from which the revelation is said to spring. Thus a claim that one has been chosen by the Christian God is unlikely to be accepted as a true revelation by people who are religious, but not Christians, for instance Muslims or Jews. On another interpretation the argument is not religious, but states that people can in some circumstances feel the pressure of their convictions with such intensity, that state interference in the form of legal requirements are perceived as painful interference with their belief. On this reading of the argument, it is not the religious character of the conviction which is decisive, but rather the quality of the perceived conviction and its relationship to the conflicting legal requirement. Thus this is not an argument for special treatment of religions, but rather of life-forms which are based on deeply felt beliefs. The European Court of Human Right, as mentioned above, has expanded the concept of religion to this extent, and the requirement for receiving protection under art. 9 seems to be whether or not a specific belief/action is part of a philosophy of life or not. If a belief/action forms part of a coherent belief-system, then the special protection under art. 9 is activated. This form of protection might be perceived as valuable to the preservation of autonomy and pluralism and on this reading the argument is similar to the autonomy and pluralism argument above and hence also similarly vulnerable to the objections I have pointed out there. It should however be noted that the argument here is different from the above argument as we are here considering whether philosophies of life as opposed to free standing value preferences should receive special protection? There might be some scope for arguing that philosophies of life should receive special protection, but ultimately the argument for legal protection would have turned on the special harm that is incurred by restraining the freedom of those who adhere to overall philosophies of life as opposed to the mere narrowing down of opportunities that is incurred by those whose values are not part of an overall belief-system. It is difficult to see, however, that interference in someones belief-system should necessarily cause more harm than interference with someones strongly held values. Thus, as an example, I might believe strongly in sexual equality and may be committed to wearing gender-neutral clothes at my work-place without being a feminist or subscribing to equal opportunities as a more abstract philosophy of life. When my values in this regard is being confronted with a duty imposed on me, for instance by my employer who orders me to dress “suitably” (i.e. according to my gender), I may be as upset and frustrated about not being able to pursue this value preference as

39 Ahdar, Rex J. & Leigh, *Religious Freedom in the Liberal State*, Oxford University Press, UK, p. 62.

someone who was a feminist or a subscriber to the philosophy of equal opportunities. Thus it is hard to see why the subscription to a particular philosophy – as opposed to adhering to free-standing values – makes the duty to behave in a way which is contrary to one's values more difficult to bear. The argument, in other words, seems to rest on an unfounded supposition that interference with belief-systems are somehow more harmful to the individual than interference with free-standing values. Since this supposition is unfounded, the argument is not strong enough to support special protection for religious (or other coherent) belief systems.

Steven D. Smith in his “The Rise and Fall of Religious Freedom in Constitutional Discourse”, presents a number of non-religious arguments for the special right to freedom of religion, and rejects all of them.⁴⁰ Some of these are identical to the ones described above, and his arguments for rejection are in some respects similar. One of the arguments he deals with, which have not been mentioned above, might be called *the development of democratic civic virtue argument*.⁴¹ What this argument says, basically, is that religions are particularly suited to foster the moral character of persons that makes them good citizens in a democratic society. Thus, religion performs the task of providing the moral character in persons, which are indispensable and foundational for a well functioning democracy. If this is true, there will be good reasons to give room for religion to flourish, but the argument rests on an assumption about the role of religion in the formation of the moral character of persons, which goes unsupported. The argument in other words rests on an arbitrary stipulation, which may be true or false. Unless the assumption is given further support, there really is no argument at all. Religions may influence personhood, but so may families, schools, friends, and non-religious institutions, that the person is enrolled in, see also Smith, p. 200. Furthermore, the religious influence may be seen to be destructive of democratic civic virtue in so far as religions are non-democratic institutions (clerical institutions may not be filled on the basis of elections) with a non-democratic ideology (God is more often than not portrayed as an authority with which one should not argue). Finally, as Smith points out, if religions are important for fostering the moral character of persons, this speaks as much against freedom of religion as it speaks in favour of it. Since the fostering of civic virtue can be seen as being of vital interest to the state, it is a matter of high importance to the state to control this process. If religion is important in this process, the state will be well advised to survey and if needs be to regulate religious affairs in order to protect the moral cohesiveness of society.

Smith raises another argument which, again, is an extension of the autonomy and pluralism argument discussed above, and which may be called *the religious pluralism as a check on religious tyranny argument*.⁴² According to this argu-

40 140, University of Pennsylvania Law Review, November 1991, p. 149-240.

41 Smith calls this The Civic Virtue Rationale; Smith, Steven D., *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 University of Pennsylvania L.R. 149, 1991, p. 199-202.

42 Smith simply calls this The Pluralism Rationale; Smith, Steven D., *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 University of Pennsylvania L.R. 149, 1991, p. 204-207.

ment religious diversity in society has the function of securing that a single religion do not encroach on governmental power, and thereby install a particular religious regime as part of the regulatory scheme of the state (the law). This argument is vulnerable to the means-end critique I raised in the tolerance for peace argument outlined above, but there are also other problems with it. Thus it is not obvious how religious pluralism – even if it exists and even if it is accepted that such pluralism should be promoted through a special right to religious freedom – can prevent a particular religion from exercising its influence on government and hence on the regulatory scheme of the state. If the argument is that a special constitutional protection of religions will prevent regulatory schemes from having an effect on other religions, then the argument is viciously circular and can be disregarded. If the argument on the other hand is that religious pluralism is effective in securing a spread in the religious affiliation among the people's representatives, it has more going for it. In this case, if it can be established that the promotion of religious plurality will assure that there is not one big majority and a number of small minority religions in the community, then this will add further credibility to the argument. The spread of religious affiliation, it can be argued, will, if religions are allowed to flourish through special protection, approach the normal distribution curve. If religion is seen as potentially authoritarian or dangerous in other ways (cf. the development of democratic civic virtue argument above), creating religious diversity may be a means of checking these dangerous tendencies within religion. Still the whole argument seems to rest on the assumption that religious diversity is somehow more important as a means of combating tyranny than other forms of diversity: social, political, ideological, sexual, ethnical, etc. It remains therefore unconvincing in so far as it remains a stipulation that religious pluralism is more attractive and/or more needed as a fence against tyranny than other forms of pluralism.

Following an analysis of a number of arguments for special protection of religion, it might be worth to reflect a bit on the regulatory context in which such a special protection is supposed to take effect. In a democracy everyone is free to hold any conviction about anything, subject to the limitations that follow from a regard for other people's rights to express their opinions. However, the right to *act* in accordance with one's conviction does not follow from this freedom of conviction. The rules that have been adopted in accordance with democratic decision-making processes, and that respect citizens' fundamental rights, are the rules applying to *all* citizens of society. If any convictions held involve the exercise of actions that are not permitted under existing law, these rules must be changed by the usual democratic means. Until then, such actions must be abstained from. The fact that a person is convinced that God is demanding such an action is not enough to permit the action. In a democratic society it must also be possible to convince other people that the action should be permitted. If a person nevertheless feels that some convictions should enjoy such a privilege that they can substantiate exemptions from the general rules specifying which actions are permitted, and which are not, the question remains why precisely actions motivated by religion⁴³ should enjoy such protection. For an illustration of this issue a few examples may be mentioned:

43 As already mentioned, secular philosophies of life are also covered.

Persons who are convinced that in some situations it will enhance rather than impair traffic safety if the driver matches the speed of the other cars will not be exempted from observing speed limits. Why then should persons who are convinced that God has ordered them to wear a specific type of headgear be exempted from wearing a crash-helmet when riding a motor-bike?⁴⁴

Persons who believe that efficiency in agriculture creates the best conditions for a good life because it contributes to the production of the cheapest possible food are not exempted from the rules governing cruelty to animals on that account. Why then should persons who believe that God has ordered them to slaughter animals in a certain way be exempted from the same rules? The question is simply why deviations from general standards based on religion should be accepted, while other deviations are not accepted. What is the quality in religious conviction that implies that it may justify a claim for special protection of certain types of action? Why is the reference to faith in divine prescriptions particularly convincing? Why are actions motivated by religion not treated on equal terms with, e.g., politically motivated actions? I have not been able to find any satisfactory answer to these questions.

6 Conclusion

In my opinion there is every reason to maintain that the human rights protection to be granted in a democratic society must be based on a foundation of good and rational grounds. Having completed the above analysis, it appears to me that the right to freedom of religion does not fully live up this requirement, since it is either covered by other provisions or based on the unfounded assumption that religious action is supposed to deserve special protection as compared to other actions. As the right to freedom of religion explicitly includes religious rituals, this aspect of religious freedom cannot be ignored. Since there seem to be no strong non-religious arguments for the right to freedom of religion the restrictive interpretation of this freedom which has been developed in the case law of the ECHR seems very reasonable. Although there may be arguments in favour of displaying tolerance in this area, it ought not to be possible on the basis of religious opinions or religious rituals to hinder the application of democratically adopted laws which comply with all other fundamental rights, and which reasonably serve a recognized secular purpose.

44 It is not a valid argument that the former situation is likely to cause danger to other persons than the motorist who is exceeding the speed limit, whereas the latter situation is only likely to cause danger to the motorcyclist himself, for in the example it may be implied that exceeding the speed limit enhances traffic safety. In addition, in the motorcyclist example it may be argued that any further injury sustained by the motorcyclist due to his failure to wear a crash-helmet, in the case of an accident, may affect the person causing the accident in the form of increased guilt and emotional trauma. If the motorcyclist dies due to a crash, it may in the worst-case scenario involve criminal liability for involuntary manslaughter, which could have been avoided if a helmet would have allowed the motorcyclist to survive, had he worn one.

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