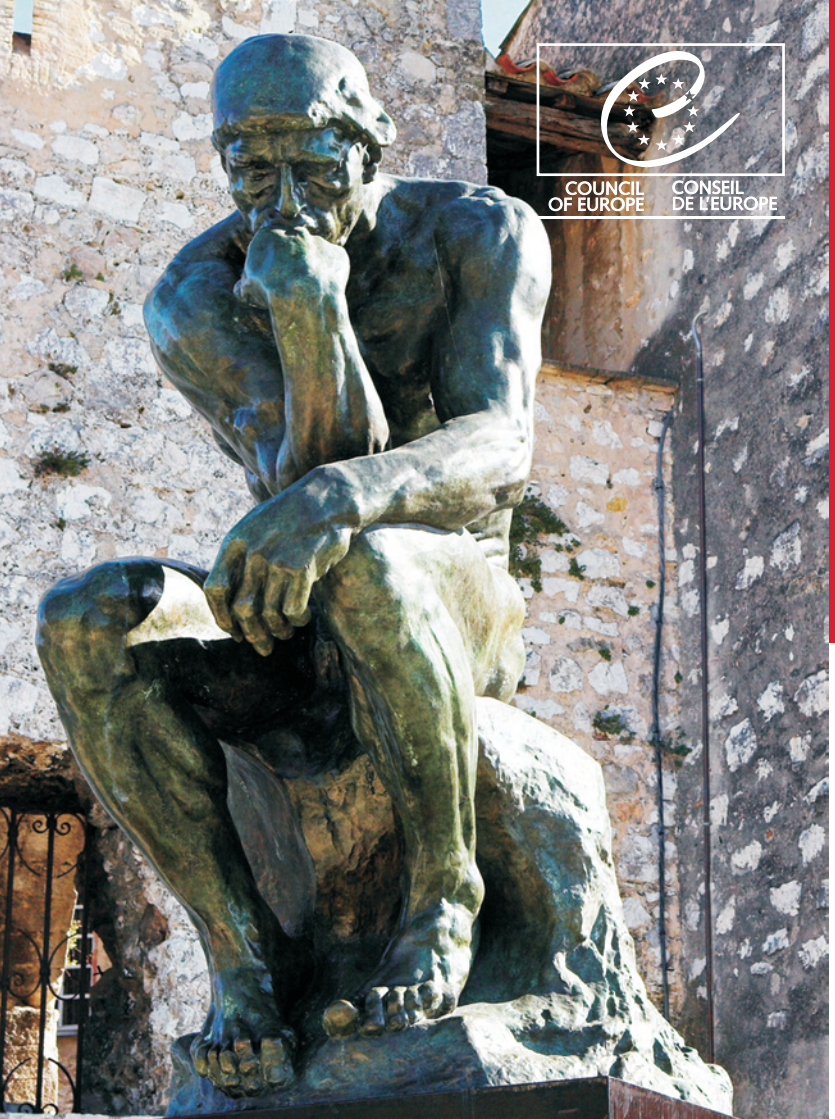

Freedom of thought, conscience and religion

A guide to the implementation of Article 9 of the European Convention on Human Rights

Jim Murdoch

Human rights handbooks, No. 9

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Directorate General
of Human Rights
and Legal Affairs
Council of Europe
F-67075 Strasbourg Cedex

1st printing, June 2007

Printed in Belgium

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Article 9 of the European Convention on Human Rights

Freedom of thought, conscience and religion

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

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

Preface

This Handbook examines the scope and content of freedom of thought, conscience and religion as guaranteed by Article 9 of the European Convention on Human Rights and as interpreted by the case-law of the European Court of Human Rights ("the Strasbourg Court") and by the former European Commission on Human Rights ("the Commission"). Article 9 involves protection for an individual's core belief system and for the right to manifest such beliefs either individually or with others, and both in private as well as in the public sphere. The case-law clarifies that state authorities may not only be required to desist from taking action which would interfere with thought, conscience and religion, but also in certain circumstances to take positive measures to nurture and to protect these rights. This jurisprudence may not be particularly voluminous in contrast to the case-law generated by other provisions of the Convention, but it is often of some complexity and much is of comparatively recent origin.

The aim is to provide a concise guide to assist judges, relevant state officials and practising lawyers who will need to understand European Convention on Human Rights case-law in applying the treaty in domestic law and in administrative practice. The primary responsibility for applying Convention guarantees lies at the national level. The standards and expectations found in the European Convention on Human Rights may apply across Europe, but the subsidiary nature of the scheme of protection categorically requires the domestic decision-maker – and above all, the domestic judge – to give effect to these rights in national law and practice. However, this can only be an introductory text and not a definitive treatise. Nor can it be said that the Strasbourg Court has provided a comprehensive interpretation of Article 9, for it has not had the opportunity as yet to provide an authoritative interpretation for all aspects of the subject, and several issues remain untested. A further caveat is that this work cannot extend to coverage of the question as to what weight domestic law requires to be given to the Convention (that is, is the treaty to be considered as superior law, or merely as having persuasive force?). This is clearly of key domestic importance, but whether or not the Convention overrides national law (as it does in many European countries) is a topic which cannot be discussed in a work of this kind.

What can be addressed, on the other hand, is the question as to how best a domestic judge or public official should approach the question of how to apply the guarantees. This question in turn requires consideration of the case-law. The text of the Convention is but a starting-point for an understanding of the guarantee. For lawyers from a continental legal tradition, this may need some further explanation. As the President of the European Court of Human Rights has put it, a "moderated doctrine of precedent" is employed to give guidance to national courts and decision-makers on the development of human rights protection.[1] This "doctrine of

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

precedent" is necessary in the interests of legal certainty and equality before the law. Yet it is "moderated" by the need to ensure that the Convention continues to reflect changes in society's aspirations and values. Examination of the case-law also allows an appreciation of the fundamental values which underpin this jurisprudence. These underlying assumptions are often discernible from the Strasbourg Court's judgments, for the opportunity has been taken to elaborate the principles which should be followed by domestic courts and policy-makers. There is thus an important predictive aspect to the Strasbourg Court's case-law, for while there may not be a ready-available precedent for domestic guidance, the underlying rationale and principle should instruct and inspire.

Two final points. First, this Handbook is primarily concerned with Article 9 of the European Convention on Human Rights. However, issues concerning conscience and belief may arise elsewhere in the treaty, and brief reference to certain related guarantees that have some particular impact upon freedom of thought, conscience and religion has been considered necessary. In particular, and as will become apparent from discussion, Article 9 is closely related both textually and in respect of the values underpinning its interpretation to Article 10's guarantee of freedom of expression and to the right of association under Article 11. It is also supported by additional provisions such as Article 2 of Protocol No. 1 which requires that parents' philosophical and religious beliefs are accorded respect in the provision of education to their children. Second, in discussing the extent of a State's responsibilities under the European Convention on Human Rights, it will be necessary to consider whether these responsibilities are in any way modified. In particular, Article 57 permits any State, when signing the Convention or when depositing its instrument of ratification, to make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision.

Freedom of thought, conscience and religion: general considerations

Guarantees of religious liberty and respect for conscience and belief are inevitably found in the constitutional orders of liberal democratic societies and in international and regional human rights instruments. These reflect the concerns at the time of those charged with drafting these instruments. Examples abound, each with perhaps subtly different emphases. In particular, Article 18 of the Universal Declaration on Human Rights of 1948 provides that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

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

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Such guarantees are found in other instruments at a regional level. For example, Article 12 of the American Convention on Human Rights provides that freedom of conscience and religion includes the "freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private", while Article 8 of the African Charter on Human and Peoples' Rights specifies that "freedom of conscience, the profession and free practice of religion shall be guaranteed" and further that "no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms".

In such human rights instruments, freedom of thought, conscience and religion is inevitably buttressed by prohibition of discrimination on grounds of religion for the obvious reason that such would clearly have an impact upon the effective exercise of the right. However, there is also a more fundamental principle: "discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations".[2] The 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE further "clearly and unequivocally condemns totalitarianism, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds". The revival of religious fundamentalism (particularly when accompanied by nationalism) poses a challenge to pluralism and community tolerance.

Human rights instruments thus generally make provision for individual and collective freedom of thought, conscience and belief; for respect for parental convictions in the provision of children's

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

education; and for prohibition of discrimination on account of religion or belief. In the European Convention on Human Rights, these key aspects of freedom of thought, conscience and religion or belief are found in three separate provisions.

First, and most crucially, Article 9 provides that:

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

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

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

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

Third, Article 14 of the Convention makes explicit reference to religious belief as an example of a prohibited ground for discriminatory treatment:

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

The prohibition of discrimination found in Article 14 is clearly limited as it applies only to "the rights and freedoms set forth" in the European Convention on Human Rights. But it is also important to note that Protocol No. 12 establishes a more *general* prohibition of discrimination by providing that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Protocol No. 12 thus accords additional protection against discriminatory treatment in those States which have ratified this treaty. (In respect of States which are also members of the European Union, additional protection against discrimination in the areas of employment and occupation also now exists.)[3]

3. See in particular EU Council Directive 2000/78/EC of 27 November 2000.

Interpreting Article 9, European Convention on Human Rights: general considerations

Introduction

Until comparatively recently, the case-law of the Strasbourg Court and of the former Commission under Article 9 was rather limited. Jurisprudence tended to cluster around discrete issues such as freedom of religion in prisons, and conflicts between respect for belief and contractual duties in employment. Further, there were comparatively few cases in which the collective manifestation of belief was in issue. This was probably indicative of the high level of respect generally accorded this guarantee, for religious and philosophical tolerance and respect for diversity were in most member States of the Council of Europe at that time self-evident values. In consequence, it was difficult for commentators on Article 9 to discern any underlying principles and values that determined the interpretation of this guarantee. In more recent years, however, the Strasbourg Court has been called upon to address the scope and content of Article 9 in an increasing number of key cases involving matters as diverse as proselytism, refusals to grant authorisation for places of worship or registration for religious bodies, and prohibitions on the wearing of religious symbols in public places. Such judgments have accorded an opportunity to the Strasbourg Court not only to emphasise the exacting standards state authorities must meet when showing the necessity of any interference with Article 9 rights, but also to reiterate the central importance played by religious and philosophical belief in European society. It may once have been fair to conclude that the underlying rationale for Article 9 decisions and judgments was not always clear, but there is now a greater sense of principle and purpose behind Strasbourg Court disposals.

Nevertheless, case-law under Article 9 still remains comparatively rare. Article 9, as noted, has a close proximity both textually and in the values it embraces with neighbouring guarantees in the European Convention on Human Rights. Article 9 makes provision not only for freedom of thought, conscience and belief, but also for the active manifestation of such. There is thus a clear link, in terms both of textual formulation and substantive content, with the freedoms of expression and of assembly and association in terms of Articles 10 and 11. Many applications alleging a violation of an individual's right to participate in the life of a democratic society may also contain a reference to Article 9. However, the Strasbourg Court has in many instances been able to conclude that the issues raised by an application can be better resolved by reference to one or other of these other two guarantees, that is, by considering the matter as one concerning freedom of expression and Article 10,[4] or as falling within the scope of Article 11's guarantee for freedom of association.[5] Article 9 also at the same time embraces some of the values associated with Article 8's require-

ment of respect for private life. It also has a close link with the right of parents to have their philosophical and religious convictions respected in the provision of their children's education in terms of Article 2 of Protocol No 1. Both of these guarantees are important in helping to protect and nurture the development of individual identity. Here again, though, it may be more appropriate to consider an issue raised by an applicant under Article 9 in terms of one of these other provisions.[6] Additionally, aspects of the exercise of belief and conscience can also arise under other guarantees such as Article 6 when these concern the right of access to a court for the determination of a religious community's civil rights.[7] In short, many applications may seek to raise issues under this guarantee, but often it may be deemed more appropriate to dispose of the matter under a related provision of the European Convention on Human Rights.

Applying Article 9: checklist of questions

The first paragraph of Article 9 proclaims freedom of thought, conscience and religion, but the second recognises that this guarantee is not absolute. The first paragraph is obviously inspired by the text of the Universal Declaration on Human Rights, while the second paragraph largely replicates the formula used for balancing individual rights against relevant competing considerations found elsewhere in the European Convention on Human Rights, and most obviously in Articles 8, 10 and 11. (This formula is in turn also found in Article 18 of the International Covenant on Civil and Political Rights.) In consequence, the textual formulation indicates the necessity of considering first whether Article 9 is applicable, and if so, thereafter whether an interference also constitutes a violation of the guarantee. A well-established checklist is employed to this end:

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

The *applicability* of Article 9 is thus distinct from consideration of the *justification* for any interference. (Further, remember that both applicability and justification are distinct from the issue of the *admissibility* of a complaint lodged with the Strasbourg Court, for someone wishing to use the enforcement machinery provided by the European Convention on Human Rights must satisfy a number of admissibility hurdles, including exhaustion of domestic remedies. Discussion of admissibility requirements is outwith the scope of this Handbook with the exception of some consideration of when and to what extent associations can be considered as "victims" for the purposes of bringing an application.)

4. For example, *Feldek v. Slovakia*, no. 29032/95, Reports of Judgments and Decisions 2001-VIII; Appl. no. 22838/93, *Van den Dungen v. the Netherlands,* (1995) DR80, p. 147.
5. For example, *Refah Partisi (the Welfare Party) and others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, Reports 2003-II.
6. For example, *Hoffman v. Austria*, judgment of 23 June 1993, Series A no. 255-C, discussed at p. 56.
7. For example, *Canea Catholic Church v. Greece,* judgment of 16 December 1997, Reports 1997-VIII.

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

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

The complaint must first fall within the scope of Article 9. The provision covers not only the possession of thought, conscience and religion – that is, the sphere of private or personal beliefs – but also collective manifestation of that opinion or belief, either individually or with others. Article 9 thus has both an internal and an external aspect, the latter aspect involving the practice of belief both within the private and also the public sphere. But the primary focus of the guarantee is private and personal belief, since acts in the public sphere dictated by conviction do not necessarily fall within the scope of Article 9 as the term "practice" in the text does not cover every act motivated or influenced by a religion or belief.[8]

What is meant by "thought, conscience and religion"?

Use of the terms "thought, conscience and religion" (and "religion or beliefs" in paragraph 2) suggests a potentially wide scope for Article 9, but the case-law indicates a somewhat narrower approach is adopted in practice. A "consciousness" of belonging to a minority group (and in consequence, the aim of seeking to protect a group's cultural identity)[9] does not give rise to an Article 9 issue. Nor is "belief" the same as "opinion". Rather, personal beliefs to fall within Article 9 protection must "attain a certain level of cogency, seriousness, cohesion and importance" and further be such as to be considered compatible with respect for human dignity. In other words, the belief must relate to a "weighty and substantial aspect of human life and behaviour" and also be such as to be deemed worthy of protection in European democratic society.[10] Beliefs in assisted suicide[11] or language preferences[12] or disposal of human remains after death[13] do not involve "beliefs" within the meaning of the provision. On the

8. *Cserjés v. Hungary* (dec.), no. 45599/99, 5 April 2001.
9. *Sidiropoulos and others v. Greece,* Reports 1998-IV, para. 41.
10. *Campbell and Cosans v. United Kingdom,* judgment of 25 February 1982, Series A no. 48, at para. 36.
11. *Pretty v. the United Kingdom*, no. 2346/02, Reports 2002-III
12. *Belgian Linguistic case,* judgment of 23 July 1968, Series A no. 6, Law, para. 6.
13. Appl. no. 8741/79, *X v. Germany,* (1981) DR24, p. 137 (but matter can fall within the scope of Article 8).

other hand, pacifism,[14] atheism[15] and veganism[16] are value-systems clearly encompassed by Article 9 as is a political ideology such as communism,[17] (although as noted interferences with thought and conscience will often be treated as giving rise to issues arising within the scope of Article 10's guarantee of freedom of expression or the right of association under Article 11.)[18]

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

> *As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*
>
> *While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter.* [19]

The Commission and Court have not found it necessary to date to give a definite interpretation to what is meant by "religion". In the case-law, what may be considered "mainstream" religions are readily accepted as belief systems falling within the scope of the protection,[20] and similarly covered are minority variants of such faiths.[21] Older faiths such as Druidism also qualify[22] as do religious movements of more recent origin such as Jehovah's Witnesses,[23] Scientology,[24] the Moon Sect[25] and the Divine Light Zentrum[26] (but whether the Wicca movement did so appears to have been left open in one case, and thus where there is a doubt as regards

14. Appl. no. 7050/75, *Arrowsmith v. the United Kingdom,* (1978) DR19, p. 5.
15. Appl. no. 10491/83, *Angelini v. Sweden*, (1986), DR51, p. 41.
16. Appl. no. 18187/91 *W v. the United Kingdom,* decision of 10 February 1993.
17. Appl. nos. 16311/90, 16312/90 and 16313/90, *Hazar, Hazar and Acik v. Turkey,* (1991) DR72, p. 200.
18. See for example *Vogt v. Germany,* judgment of 26 September 1995, Series A no. 323.
19. *Kokkinakis v. Greece,* judgment of 25 May 1993, Series A no. 260-A, at para. 31.
20. See, e.g., Appl. no. 20490/92, *ISKON and 8 others v. the United Kingdom,* (1994) DR76, p. 90.
21. E.g., *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, Reports 2000-VII.
22. Appl. no. 12587/86, *Chappell v. the United Kingdom,* (1987) DR53, p. 241.
23. *Kokkinakis v. Greece,* judgment of 25 May 1993, Series A no. 260-A.
24. Appl. no. 7805/77, *X and Church of Scientology v. Sweden,* (1979), DR16, p. 68.
25. Appl. no. 8652/79, *X v. Austria,* (1981) DR26, p. 89.
26. Appl. no. 8188/77, *Omkarananda and the Divine Light Zentrum v. the United Kingdom,* (1981) DR25, p. 105.

this matter, an applicant may be expected to establish that a particular "religion" indeed does exist).[27]

The *forum internum*

Protection of personal thought, conscience and belief obviously begins with the rights to hold and to change these beliefs. This involves the area often referred to as the *forum internum.*[28] At its most basic, Article 9 thus seeks to prevent state indoctrination of individuals and to permit the development, refinement and substitution of personal thought, conscience and religion. A reading of the text points to the rights to hold and to change ideas as being absolute rights, for paragraph 2 provides that only the "freedom to manifest one's religion or beliefs" may be limited by domestic law in particular circumstances. Certainly, it must be possible for an individual to leave a religious faith or community.[29] The clear implication from the text is thus that freedom of thought, conscience and religion *not* involving a manifestation of belief cannot be subject to state interference, although in any event it may be difficult to envisage circumstances – even in the event of a war or national emergency[30] – in which a State would seek to obstruct the very essence of the rights to hold and to change personal convictions. However, such a situation is not entirely inconceivable, although the sole instance found in the jurisprudence concerns the unlawful deprivation of liberty of individuals in order to attempt to "de-programme" beliefs acquired when members of a sect, the Strasbourg Court deciding that a finding of a violation of Article 5 meant that it was unnecessary to consider any Article 9 issue.[31]

Forcing an individual to disclose his beliefs arguably could undermine this aspect of the guarantee, at least where the State cannot advance any compelling justification for this. Such a justification may arise where an individual is seeking himself to take advantage of a special privilege made available in domestic law on the grounds of belief, for example, in respect of conscientious objection.[32] In *Kosteski v. "the former Yugoslav Republic of Macedonia"*, the applicant had been penalised for failing to attend his place of work on the day of a religious holiday. The Strasbourg Court observed as follows:

> *Insofar as the applicant has complained that there was an interference with the inner sphere of belief in that he was required to prove his faith, the Court recalls that the [domestic] courts' decisions on the applicant's appeal against the disciplinary punishment imposed on him made findings effectively*

27. E.g., Appl. no. 7291/75, *X v. United Kingdom,* (1977) DR11, 55 [concerning the "Wicca" faith].
28. E.g. Appl. no. 22838/93, *Van den Dungen v. The Netherlands,* (1995) DR80, p. 147.
29. See *Darby v. Sweden,* noted below at p. 34.
30. Further, Article 15 permits any contracting State, "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under the Convention "to the extent strictly required by the exigencies of the situation", provided that such measures are not inconsistent with its other obligations under international law.
31. *Riera Blume and others v. Spain*, No. 37680/97, paras. 31-35, ECHR 1999-II.
32. See Appl. no. 10410/83, *N. v. Sweden*, (1984) DR40 p. 203; and Appl. no. 20972/92, *Raninen v. Finland*, no. 20972/92, decision of 7 March 1996).

that the applicant had not substantiated the genuineness of his claim to be a Muslim and that his conduct on the contrary cast doubt on that claim in that there were no outward signs of his practising the Muslim faith or joining collective Muslim worship. While the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by [domestic] law which provided that Muslims could take holiday on particular days. … In the context of employment, with contracts setting out specific obligations and rights between employer and employee, the Court does not find it unreasonable that an employer may regard absence without permission or apparent justification as a disciplinary matter. Where the employee then seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion. …[33]

While there is no explicit reference to the prohibition of *coercion* to hold or to adopt a religion or belief (as appears in Article 18 of the International Covenant on Civil and Political Rights), Article 9 issues may also arise in situations in which individuals are required to act against their conscience or beliefs. In *Buscarini and others v. San Marino*, for example, two individuals who had been elected to parliament had been required to take a religious oath on the Bible as a condition of their appointment to office. The respondent government sought to argue that the form of words used ("I, swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic…") was essentially of historical and social rather than religious significance. In agreeing with the Commission that it "would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs", the Strasbourg Court determined that the imposition of the requirement could not be deemed to be "necessary in a democratic society".[34] Similarly, domestic law may not impose an obligation to support a religious organisation by means of taxation without recognising the right of an individual to leave the church and thus obtain an exemption from the requirement.[35] However, this principle does not extend to general legal obligations falling exclusively in the public sphere, and thus taxpayers may not demand that their payments are not allocated to particular purposes.[36]

Protection against coercion may also arise in other ways. For example, domestic law may deem it appropriate to seek to protect individuals considered in some sense vulnerable (whether on account of immaturity, status or otherwise) against "improper

33. Appl. no. 55170/00, 13 April 2006, at para. 39.

34. *Buscarini and others v. San Marino,* Reports 1999-I, paras. 34-41 at para. 39
35. *Darby v. Sweden,* noted below at p. 34.
36. Appl. no. 10358/83, *C v. the United Kingdom,* (1983) DR37, 142.

proselytism", that is, encouragement or pressure to change religious belief which can be deemed inappropriate in the particular circumstances of the case.[37] Further, in accordance with Article 2 of Protocol No. 1 the philosophical or religious convictions of parents must be respected by the State when providing education, and thus a parent may prevent the "indoctrination" of his child in school.[38]

Manifestations of religion or belief

Article 9 also protects acts intimately linked to the *forum internum* of personal belief.[39] For example, "bearing witness in words and deeds is bound up with the existence of religious convictions".[40] The specific textual reference to the "freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance" underlines that manifestation of belief is an integral part of the protection accorded by the guarantee. "Manifestations" of belief appear distinguishable from the expression of thought or conscience falling within the scope of Article 10's guarantee of freedom of speech, and may involve both individual and collective activity (for example, individuals may attempt to persuade others to change their beliefs, and group worship is likely to be an integral aspect of the practice of a religious faith).

A "manifestation" thus implies a perception on the part of adherents that a course of activity is in some manner prescribed or required. What qualifies as a "manifestation" of religion or belief may call for careful analysis, for as the Commission noted in *Arrowsmith v. the United Kingdom*, the term "does not cover each act which is motivated or influenced by a religion or a belief".[41] As noted, the textual formulation refers to "worship, teaching, practice and observance". The case-law makes clear that such matters as proselytism, general participation in the life of a religious community, and the slaughtering of animals in accordance with religious prescriptions are readily covered by the term. However, a distinction must be drawn between an activity *central* to the expression of a religion or belief, and one which is merely *inspired* or even *encouraged* by it.

In *Arrowsmith v. the United Kingdom,* the applicant who was a pacifist had been convicted for handing out leaflets to soldiers. The leaflets had focused not upon the promotion of non-violent means for dealing with political issues but instead had been critical of government policy in respect of civil unrest in one part of the country. The Commission accepted that any public declaration which proclaimed the idea of pacifism and urged acceptance of a commitment to the belief in non-violence would fall to be considered as a "normal and recognised manifestation of pacifist

37. *Kokkinakis v. Greece*, discussed below at p. 40.
38. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, discussed below at p 49. See also Appl. no. 10491/83, *Angeleni v. Sweden,* (1986) DR51, p. 41; and Appl. no. 23380/94, *C.J., J.J and E.J. v. Poland*, (1996) DR84, p. 46.
39. Appl. no. 23380/94, *CJ, JJ and EJ v. Poland,* (1996) DR84, p. 46.
40. *Kokkinakis v. Greece,* judgment of 25 May 1993, Series A no. 260-A, at para. 31.
41. Appl. no. 7050/75, *Arrowsmith v. the United Kingdom* (1978) DR19, p. 5.

belief", but as the leaflets in question had expressed not her own pacifist values but rather her critical observations of governmental policy, their distribution could not qualify as a "manifestation" of a belief under Article 9 even although this had been motivated by a belief in pacifism.[42] Similarly, the distribution of anti-abortion material outside a clinic will not be deemed to involve expression of religious or philosophical beliefs as this involves essentially persuading women not to have an abortion.[43] (Note, though, that interferences with the right to disseminate materials of the kind in question in these two applications did give rise to issues falling under Article 10's guarantee of freedom of expression.) Nor can the refusal to work on a particular day be deemed a manifestation of religious belief, even although the absence may have been motivated by such.[44] A refusal to hand over a letter of repudiation to a former spouse in terms of Jewish law also does not involve a manifestation of belief,[45] nor will the choice of forenames for children (although this falls within the scope of "thought" within the meaning of Article 9).[46]

Such cases illustrate that care is needed in determining what is meant by the term "manifestation". Establishing whether "worship, teaching, practice and observance" is prescribed or merely motivated by belief may thus not always be straightforward. The factual situations in the jurisprudence giving rise to interferences with the right to manifest belief tend to involve "manifestations" in the public rather than in the private sphere (for example, attempting to convert others, or wearing religious symbols in university). Here, the key consideration in resolving a complaint is likely to be the need for state action or its proportionality, but it is crucial at this stage to appreciate that not every act in the public sphere attributable to individual conviction will necessarily fall within the scope of the provision.[47]

The collective aspect of Article 9

As well as those elements of the guarantee relating to the forum internum and to individual manifestation of thought, conscience and religion, Article 9 also protects manifestation of belief with others both in the private and public spheres. Worship with others may be the most obvious form of collective manifestation. Access to places of worship and restrictions placed upon adherents' ability to take part in services or observances will give rise to Article 9 issues.[48] In this area, then Article 9 needs to be interpreted in light of the protection accorded by Article 11. Further, since a religious community must be guaranteed access to court to

42. Appl. no. 7050/75, *Arrowsmith v. the United Kingdom* (1978) DR19, p. 5, at paras. 71-72.
43. Appl. no. 22838/93, *Van den Dungen v. the Netherlands,* (1995) DR80, p. 147. See also Appl. no. 11045/84, *Knudsen v. Norway,* (1985) DR42, p. 247.
44. Appl. no. 8160/78, *X v. United Kingdom,* (1981) DR22, p. 27; and *Kosteski v. "the former Yugoslav Republic of Macedonia",* judgment of 13 April 2006, para. 38.
45. Appl. no. 10180/82, *D. v. France,* (1983) DR35, p. 199.
46. Appl. no. 27868/95, *Salonen v. Finland,* (1997) DR90, p. 60.
47. Appl. no. 22838/93, *van der Dungen v. the Netherlands,* (1995), DR80, p. 147.
48. *Cyprus v. Turkey* [GC], no. 25781/94, Reports 2001-IV, paras. 241-247 (restrictions on movement including access to places of worship curtailed ability to observe religious beliefs).

safeguard its interests, Article 6 may therefore also be of crucial importance:

> *… since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.*
>
> *In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring 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.*[49]

The protection accorded to this collective aspect of the freedom of thought, conscience and belief by Article 9 is illustrated above all by cases in which state authorities have attempted to interfere in the internal organisation of religious communities. Where the individual and collective aspects of Article 9 may conflict, it will generally be appropriate to consider that the collective rather than the individual manifestation of belief should prevail, for the reason that "a church is an organised religious community based on identical or at least substantially similar views", and thus "itself is protected in its rights to manifest its religion, to organise and carry out worship, teaching, practice and observance, and it is free to act out and enforce uniformity in these matters". In consequence, it will be difficult for a member of the clergy to maintain that he has the right to manifest his own individual beliefs in a manner contrary to the standard practice of his church.[50]

The collective aspect of Article 9 and recognition of "victim" status

This collective aspect of Article 9 is indeed emphasised by recognition that a church or other religious organisation may be able to establish "victim" status within the meaning of Article 34 of the Convention. In other words, for the purpose of satisfying admissibility criteria, a church may be recognised as having the right to challenge an interference with respect for religious belief when it can show it is bringing a challenge in a representative capacity on behalf of its members.[51] However, recognition of representative status will not extend to a commercial body. In *Kustannus oy*

49. *Metropolitan Church of Bessarabia v. Moldova,* no. 45701/99, Reports 2001-XII, at para. 118.

50. Appl. no. 8160/78, *X v. the United Kingdom*, (1981) DR22, p. 27. See also Appl. no. 11045/84, *Knudsen v. Norway* (1985) DR42, p. 247.

51. See for example Appl. no. 7805/77, *X and Church of Scientology v. Sweden*, (1979) DR16 p. 68; and *Canea Catholic Church v. Greece,* judgment of 16 December 1997, Reports 1997-VIII, para. 31.

Vapaa ajattelija ab, Vapaa-ajattelijain liitto – Fritänkarnas förbund ry and Kimmo Sundström v. Finland, the first applicant was a limited liability company, the second was a registered umbrella association (of "freethinkers"), and the third was the manager of the applicant company and a member of one of the branches of the applicant association. The applicant company had been set up with the primary aim of publishing and selling books reflecting and promoting the aims of the philosophical movement. The company had been required to pay a church tax, a requirement upheld by the domestic courts as the company was a commercial enterprise rather than a religious community or a public utility organisation. In deciding that the part of the application alleging a violation with Article 9 rights was manifestly ill-founded, the Commission remarked as follows:

> *The Commission recalls that pursuant to the second limb of Article 9 para. 1 the general right to freedom of religion includes, inter alia, freedom to manifest a religion or "belief" either alone or "in community with others" whether in public or in private. The Commission would therefore not exclude that the applicant association is in principle capable of possessing and exercising rights under Article 9 para. 1. However, the complaint now before the Commission merely concerns the obligation of the applicant company to pay taxes reserved for Church activities. The company form may have been a deliberate choice on the part of the applicant association and its branches for the pursuance of part of the freethinkers' activities. Nevertheless, for the purposes of domestic law this applicant was registered as a corporate body with limited liability. As such it is in principle required by domestic law to pay tax as any other corporate body, regardless of the underlying purpose of its activities on account of its links with the applicant association and its branches and irrespective of the final receiver of the tax revenues collected from it. Finally, it has not been shown that the applicant association would have been prevented from pursuing the company's commercial activities in its own name.* [52]

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

> *… the association does not claim to be a victim of a violation of its own Convention rights. Moreover, the rights primarily invoked, i.e. the right to freedom of conscience under Article 9 of the Convention and the right not to be subjected to degrading treatment or punishment (Article 3), are by their very nature not susceptible of being exercised by a legal person such as a*

52. Appl. no. 20471/92, *Kustannus oy Vapaa ajattelija ab, Vapaa-ajattelijain liitto – Fritänkarnas förbund ry and Kimmo Sundström v. Finland* (1996), DR85, p. 29.

private association. Insofar as Article 9 is concerned, the Commission considers that a distinction must be made in this respect between the freedom of conscience and the freedom of religion, which can also be exercised by a church as such….[53]

Limits to the scope of Article 9

The scope of Article 9 cannot be stretched too far. It does not include, for example, matters such as the non-availability of divorce,[54] the distribution of information persuading women not to undergo abortions,[55] or a determination of whether the sale of public housing in order to boost a political party's electoral chances involved wilful misconduct on the part of a politician.[56] Nor does belief in assisted suicide qualify as a religious or philosophical belief, but this is rather a commitment to the principle of personal autonomy more appropriate for discussion under Article 8, as the Strasbourg Court made clear in *Pretty v. the United Kingdom*:

The Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1 of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph. … To the extent that the applicant's views reflect her commitment to the principle of personal autonomy, her claim is a restatement of the complaint raised under Article 8 of the Convention.[57]

Further, as stressed, it will also be necessary in many instances to consider whether it would be more appropriate to consider a complaint under another provision of the Convention. The deprivation of a religious organisation's material resources, for example, has been held not to fall within the scope of Article 9, but rather to give rise to issues under the protection of property in terms of Article 1 of Protocol No 1.[58] Similarly, refusal to grant an individual an exemption from the payment of a church tax on the ground of non-registration may be better considered in terms of the right to property taken in conjunction with the prohibition on discrimination in the enjoyment of Convention guarantees rather than as a matter of conscience or religion.[59] A claim that the refusal to recognise marriage with an underage girl as permitted by Islamic law involved an interference with manifestation of belief was deemed not to fall within the scope of Article 9 but rather Article 12.[60]

53. Appl. no. 11921/86, *Verein "Kontakt-Information-Therapie" and Hagen v. Austria* (1988) DR57, p. 81.
54. *Johnston and others v. Ireland*, judgment of 18 December 1986, Series A no. 112, para. 63.
55. Appl. no. 22838/93, *Van den Dungen v. the Netherlands*, (1995) DR80, p. 147.
56. *Porter v. the United Kingdom* (dec.), no. 15814/02, 8 April 2003.
57. *Pretty v. the United Kingdom*, no. 2346/02, Reports 2002-III at para. 82.
58. *The Holy Monasteries v. Greece,* judgment of 9 December 1994, Series A no. 301-A.
59. *Darby v. Sweden* (1990) Series A no. 187, paras. 30-34.
60. Appl. no. 11579/85, *Khan v. the United Kingdom,* (1986) DR48, 253.

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

Once it can be shown that the issue falls within the scope of Article 9, it will be for the applicant to establish that there has been an "interference" with his Article 9 rights. An "interference" with an individual's rights will normally involve the taking of a measure by a state authority; it can, where a positive obligation on the part of state authorities is recognised, also involve the failure to take some necessary action. (An "interference" is distinct from a "violation": determination that there has been an "interference" with an individual's rights merely leads to further consideration under paragraph 2 as to whether this "interference" was or was not justified in the particular circumstances.)

For the purposes of Article 9, though, it is crucial that the challenged involves a state rather than an ecclesiastical body. Thus where a dispute over a matter such as use of the liturgy, state responsibility will not be engaged since such involves a challenge to a matter of internal church administration taken by a body that is not a governmental agency.[61] This is so even where the religious body involved is recognised by domestic law as enjoying the particular status of an established church.[62]

A complaint relating to action taken in respect of an individual's refusal or failure to comply with a legal or administrative obligation on the grounds of conscience or belief may not always allow the conclusion to be drawn that there has been an "interference" with Article 9 rights, even in situations where clearly deep and sincere convictions have been involved. In the related cases of *Valsamis v. Greece* and *Efstratiou v. Greece*, for example, pupils who were Jehovah's Witnesses had been punished for failing to attend parades commemorating the country's national day because of their belief (and that of their families) that such events were incompatible with their firmly-held pacifism. The Strasbourg Court considered that the nature of these parades had involved a public celebration of democracy and human rights, and even taking into account the involvement of military personnel, the parades could not be considered to have been such as to have offended the applicants' pacifist convictions.[63] Such cases illustrate how difficult the assessment of complaints involving Article 9 occasionally can be. The assessment may also be contentious: here, the dissenting judges could discern no ground for holding that participation in a public event designed to show solidarity with symbolism which was anathema to personal religious belief could ever be deemed "necessary in a democratic society".

61. Appl. no. 24019/94, *Finska församlingen i Stockholm and Teuvo Hautaniemi v. Sweden,* (1996) DR85, 94.
62. Appl. no. 7374/76, *X v. Denmark,* (1976) DR5, p. 158.
63. *Valsamis v. Greece,* judgment of 18 December 1996, Reports 1996-VI, paras. 37-38; and *Efstratiou v. Greece,* judgment of 18 December 1996, Reports 1996-VI, paras. 38-39.

Positive obligations

Under the European Convention on Human Rights, Article 1, contracting states undertake to "*secure* to everyone within their jurisdiction" the rights and freedoms set out in the Convention and its protocols. In consequence, a State is first under a negative obligation to refrain from interfering with the protected rights. This negative obligation is reflected, for example, in the language used in Article 9 which provides that "[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as …".

The overarching obligation to secure rights is, however, not confined to a requirement that states refrain from interfering with protected rights: it can also place the State under an obligation to take active steps. The guarantees found in the European Convention on Human Rights have to be practical and effective rights. Hence, Strasbourg jurisprudence contains the idea of "positive obligations", that is, responsibilities upon the State to take certain action with a view to protecting the rights of individuals.

The fundamental principle driving the case-law on positive obligations is the duty on the part of state authorities to ensure that religious liberty exists within a spirit of pluralism and mutual tolerance. For example, it may be necessary for the authorities to engage in "neutral mediation" to help factions resolve internal dispute within religious communities.[64] It may also be expected that domestic arrangements permit religious adherents to practise their faith in accordance with dietary requirements, although the obligation may be limited to ensuring there is reasonable access to the foodstuff, rather than access to facilities for the ritual preparation of meat.[65] However, it will not generally be considered necessary to take steps to allow an employee to make arrangements to allow him to take part in religious observances,[66] even although the burden placed upon an employer (were such a duty to be recognised) is unlikely to be an onerous one in most cases.

It is thus not always obvious whether a positive obligation to protect thought, conscience or religion exists. In deciding more generally whether or not a positive obligation arises, the Strasbourg Court will seek to "have regard to the fair balance that has to be struck between the general interest of the community and the competing private interests of the individual, or individuals, concerned".[67] Further, the Strasbourg Court has not always drawn a clear distinction between the *obligation* to take steps, and approval of state action which has been taken at domestic level with the aim of advancing protection for belief. In other words, there appears to be an important difference between Strasbourg Court approbation of domestic measures taken with a view to promote belief, and cases in which the failure to take steps to protect belief is determined to have involved an interference.

64. *Supreme Holy Council of the Muslim Community v. Bulgaria,* no. 39023/97, 16 December 2004.

65. *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, Reports 2000-VII, discussed below at p. 24.

66. Discussed at p. 22 below.

67. For example, Appl. nos 33490/96 and 34055/96, *Dubowska and Skup v. Poland,* (1997) DR89, 156.

Whether action is mandatory or merely permissive will always depend on the circumstances.

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

> *The Government argued that the authorities had merely mediated between the opposing groups and assisted the unification process as they were under a constitutional duty to secure religious tolerance and peaceful relations between groups of believers. The Court agrees that States have such a duty and that discharging it may require engaging in mediation. Neutral mediation between groups of believers would not in principle amount to State interference with the believers' rights under Article 9 of the Convention, although the State authorities must be cautious in this particularly delicate area.*

Here, though, the Strasbourg Court determined that the authorities had actively sought the reunification of the divided community by taking steps to compel the imposition of a single leadership against the will of one of the two rival leaderships. This went beyond "neutral mediation" and had thus involved an interference with Article 9 rights.[68]

Employment and freedom of thought, conscience and religion

In the area of employment, the Article 9 appears particularly restricted. For example, a State may seek to ascertain the values and beliefs held by candidates for public employment, or dismiss them on the grounds that they hold views incompatible with their office.[69] Indeed, "in order to perform its role as the neutral and impartial organiser of the exercise of religious beliefs, the State may decide to impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part" in the activities of religious movements.[70]

68. *Supreme Holy Council of the Muslim Community v. Bulgaria,* no. 39023/97, paras. 76-86 at paras. 79 and 80, 16 December 2004, discussed further at p. 42, below.
69. *Vogt v. Germany,* judgment of 26 September 1995, Series A no. 323, paras. 41-68 (disposal under Arts. 10 and 11).
70. *Refah Partisi (the Welfare Party) and others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, at para. 94.

The Strasbourg Court has also been so far reluctant to recognise any positive obligation on the part of employers to take steps to facilitate the manifestation of belief, for example, by organising the discharge of responsibilities to allow an individual to worship at a particular time or in a particular manner. Employees have a duty to observe the rules governing their working hours, and dismissal for failing to attend work on account of religious observances does not give rise to an issue falling within the scope of Article 9.[71] Further, a member of the clergy of an established church is expected not only to discharge religious but also secular duties, and cannot complain if the latter conflict with his personal beliefs, for his right to relinquish his office will constitute the ultimate guarantee of his freedom of conscience.[72] The justification for such an approach is the voluntary nature of employment, and the principle that an employee who leaves his employment is able to follow whatever observances he feels are necessary. In *Kalaç v. Turkey,* the Strasbourg Court held that a member of the armed forces had voluntarily accepted restrictions upon his ability to manifest his beliefs when joining up on the grounds of the exigencies of military life (although in any event, in this case the Court was not satisfied that the applicant had been prevented from fulfilling his religious observations):

> *In choosing to pursue a military career [the applicant] was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians. States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.*
>
> *It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque. The Supreme Military Council's order was, moreover, not based on [the applicant's] religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude. According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion.*[73]

In short, unless there are special features accepted as being of particular weight, incompatibility between contractual or other duties and personal belief or principle will not normally give rise to an

71. Appl. no. 24949/94, *Kotinnen v. Finland,* (1996) DR87, p. 68. See also Appl. no. 29107/95, *Stedman v. the United Kingdom,* (1997) DR89, p. 104.
72. Appl. no. 11045/84, *Knudsen v. Norway,* (1985) DR42, p. 247.
73. *Kalaç v. Turkey*, judgment of 1 July 1997, Reports 1997-IV, at paras. 28-31.

issue under Article 9, and thus action taken as a result of the deliberate non-observance of professional duties is unlikely to constitute an interference with an individual's rights.[74]

Permitting due recognition of religious practices

In most cases, though, it may be relatively straightforward to establish that an interference with Article 9 rights has taken place. Curtailing access to places of worship and restricting the ability of adherents to take part in religious observances will amount to "interferences",[75] as will the refusal to grant any necessary official recognition to a church.[76] In other cases, though, it will again be necessary to examine the facts with particular care. For example, the failure to accord a religious community access to meat from animals slaughtered in accordance with religious prescriptions may involve an interference with Article 9. However, as the judgment in *Cha'are Shalom Ve Tsedek v. France* clarifies, it is the issue of *accessibility* to such meat rather than the grant of authority to carry out ritual slaughter that appears to be crucial. In this case, a religious body sought to challenge a refusal by the authorities to grant the necessary permission to allow it to perform the slaughter of animals for consumption in accordance with its ultra-orthodox beliefs. Another Jewish organisation had received approval for the slaughter of animals according to its own rites which differed only marginally from those of the applicant association. The association alleged that the refusal constituted a violation both of Article 9, and also of Article 14 in conjunction with Article 9. It was uncontested that ritual slaughter constituted a religious observance whose purpose was the supply to Jews of meat from animals slaughtered in accordance with religious prescriptions, an essential aspect of that religion's practice:

> *[T]he applicant association can rely on Article 9 of the Convention with regard to the French authorities' refusal to approve it, since ritual slaughter must be considered to be covered by a right guaranteed by the Convention, namely the right to manifest one's religion in observance, within the meaning of Article 9. …*
>
> *In the first place, the Court notes that by establishing an exception to the principle that animals must be stunned before slaughter, French law gave practical effect to a positive undertaking on the State's part intended to ensure effective respect for freedom of religion. [Domestic law], far from restricting exercise of that freedom, is on the contrary calculated to make provision for and organise its free exercise. The Court further considers that the fact that the exceptional rules designed to regulate the practice of ritual slaughter permit only ritual slaughterers authorised by approved religious bodies to engage in it does not in itself lead to the conclusion that there has been an interference with the freedom to manifest one's religion. The Court considers, like the Government, that it is in the general*

74. *Cserjés v. Hungary* (dec.), no. 45599/99, 5 April 2001.
75. *Cyprus v. Turkey* [GC], no. 25781/94, Reports 2001-IV, paras. 241-247 (restrictions on movement including access to places of worship curtailed ability to observe religious beliefs).
76. Discussed below at p. 44.

interest to avoid unregulated slaughter, carried out in conditions of doubtful hygiene, and that it is therefore preferable, if there is to be ritual slaughter, for it to be performed in slaughterhouses supervised by the public authorities. …

However, when another religious body professing the same religion later lodges an application for approval in order to be able to perform ritual slaughter, it must be ascertained whether or not the method of slaughter it seeks to employ constitutes exercise of the freedom to manifest one's religion guaranteed by Article 9 of the Convention. In the Court's opinion, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable. But that is not the case.

In this instance, the applicant religious body had sought permission from the authorities for the slaughter of animals carried out in a similar (but not entirely identical) manner by a distinct religious group, but this had been refused. The Strasbourg Court decided that this had not involved an "interference" with Article 9. First, the method of slaughter employed by the ritual slaughterers of the association was identical to the other association, apart from the thoroughness of the examination of the animal after it had been killed. Second, meat prepared in a manner consistent with the applicant association's beliefs was also available from other suppliers in a neighbouring country. On these grounds, the Strasbourg Court determined that there had not been an interference with the association's rights since it had not been made impossible for the association's adherents to obtain meat slaughtered in a manner considered appropriate. (In any event, even if there had been an interference with Article 9 rights, there had been no violation of the guarantee as the difference in treatment between the two associations also followed a legitimate aim, and had a reasonable relationship of proportionality between the means employed and the aim sought to be realised.)[77]

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

77. *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, Reports 2000-VII, paras. 73-85, at paras. 74, 76-78, 80 and 81.

Question 3. Is the limitation on manifestation of religion or belief for at least one of the recognised legitimate aims?

The freedom of thought, conscience and religion is not absolute. As noted, Article 9, paragraph (2) provides that a State may interfere with a "manifestation" of thought, conscience or religion in certain circumstances. As discussed, it will first be necessary to determine whether the impugned decision falls within the scope of Article 9 and whether this involves a "manifestation" of freedom of thought, conscience and religion. Next, it will be necessary to consider whether there has been an "interference" with the guarantee. Thereafter, the issue is whether there has been a violation of Article 9. This is assessed by reference to three tests: whether the interference pursues a legitimate aim, whether the interference is "prescribed by law", and whether the interference is "necessary in a democratic society".

An interference must first be shown by the State to have been justified for one of the prescribed state interests listed in paragraph 2. These recognised legitimate interests – "the interests of public safety, for the protection of public order, health and morals, or for the rights and freedoms of others" – are in their textual formulation narrower than the interests recognised in Articles 8, 10 and 11 (thus national security is not recognised as such an aim in Article 9), but in any event, this test will not in practice pose any difficulty for respondent States as inevitably any interference will be deemed by the Strasbourg Court to have been taken in order to further one (or more) of these listed interests. In principle, it is for the State to identify the particular aim it wishes to advance; in practice, an interference purporting to have a legitimate aim will readily be deemed to fall within the scope of one of the listed objectives of the particular guarantee. Thus in *Serif v. Greece,* a conviction for the offence of having usurped the functions of a minister of a "known religion" was accepted as an interference which had pursued the legitimate aim of protecting public order, [78] while in *Kokkinakis v. Greece,* the Strasbourg Court readily agreed that the prohibition of proselytism sought to protect the rights and freedoms of others.[79]

The ease with which a State can establish a legitimate aim for an interference is also illustrated by the judgment in *Metropolitan Church of Bessarabia and others v. Moldova.* Here, the Strasbourg Court considered the respondent Government's submissions that the refusal to register a religious community had sought to advance certain interests listed in paragraph 2:

> *[T]he refusal to allow the application for recognition lodged by the applicants was intended to protect public order and public safety. The Moldovan State, whose territory had repeatedly passed in earlier times from Romanian to Russian control and vice versa, had an ethnically and linguistically varied population. That being so, the young Republic of Moldova, which had been independent since 1991, had few strengths it could depend on to ensure its continued existence, but one factor conducive to*

78. *Serif v. Greece,* judgment of 14 December 1999, Reports 1999-IX, paras. 49-54.
79. *Kokkinakis v. Greece,* (1993) A 260-A, para. 44.

stability was religion, the majority of the population being Orthodox Christians. Consequently, recognition of the Moldovan Orthodox Church, which was subordinate to the patriarchate of Moscow, had enabled the entire population to come together within that Church. If the applicant Church were to be recognised, that tie was likely to be lost and the Orthodox Christian population dispersed among a number of Churches. Moreover, under cover of the applicant Church, which was subordinate to the patriarchate of Bucharest, political forces were at work, acting hand-in-glove with Romanian interests favourable to reunification between Bessarabia and Romania. Recognition of the applicant Church would therefore revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity.

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

The Court considers that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety Having regard to the circumstances of the case, the Court considers that the interference complained of pursued a legitimate aim under Article 9 paragraph 2, namely protection of public order and public safety.[80]

The aim or purpose of an interference is distinct from assessment of its justification. It is thus important to distinguish between the notion of "legitimate aim" in this test, and that of "pressing social need" arising in respect of application of the test of "necessary in a democratic society": while the former will not pose any difficulty to a State seeking to justify an interference with Article 9 rights, the situation is very different in respect of the latter requirement. How the Strasbourg Court disposed of these public order and safety arguments in respect of the "necessary in a democratic society" test in this particular case is considered below.[81]

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

The interference must next be shown by the State as having been "prescribed by law". This concept expresses the value of legal certainty which might be defined broadly as the ability to act within a settled framework without fear of arbitrary or unforeseeable state interference. Thus the challenged measure must have a basis in domestic law and be both adequately accessible and foreseeable, and further contain sufficient protection against arbitrary application of the law. These issues have only occasionally, though, featured in Article 9 jurisprudence. In any event, the Strasbourg Court may avoid having to give a firm answer to whether an interference is "prescribed by law" if it is satisfied that the interference has not been "necessary in a democratic society".[82] (Where the

80. *Metropolitan Church of Bessarabia and others v. Moldova* at paras. 111-113.
81. At p. 45 et seq.

interference with Article 9 rights has involved the imposition of a criminal sanction, an applicant may well additionally allege a violation of Article 7 of the Convention which enshrines the principle of *nullum crimen, nulla poena sine lege.*[83] In such instances, the Strasbourg Court is likely to address the issues raised under Articles 7 and 9 by using a similar approach.[84])

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

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

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

> *Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.*[85]

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

82. For example, *Supreme Holy Council of The Muslim Community v. Bulgaria*, no. 39023/97, para. 90, 16 December 2004.

83. Article 7 provides as follows:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

84. See for example *Kokkinakis v. Greece,* (1983) Series A no. 260-A, paras. 32-35; and *Larissis and Ors. v. Greece,* Reports 1998-I, paras. 39-45.

85. *Sunday Times v. the United Kingdom (no. 1),* judgment of 26 April 1979, Series A no. 30, para. 49.

cient in this case to meet the requirements of the test of "prescribed by law".[86]

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

> *For domestic law to meet [the requirement of "prescribed by law"] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.*
>
> *The Court notes that in the present case the relevant law does not provide for any substantive criteria on the basis of which the Council of Ministers and the Directorate of Religious Denominations register religious denominations and changes of their leadership in a situation of internal divisions and conflicting claims for legitimacy. Moreover, there are no procedural safeguards, such as adversarial proceedings before an independent body, against arbitrary exercise of the discretion left to the executive. Furthermore, [domestic law] and the decision of the Directorate were never notified to those directly affected. These acts were not reasoned and were unclear to the extent that they did not even mention the first applicant, although they were intended to, and indeed did, remove him from his position as Chief Mufti.*

These deficiencies in substantive criteria and in procedural safeguards meant that the interference was "arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability".[87]

86. *Kokkinakis v. Greece,* (1983) Series A no. 260-A, paras. 37-41. See also *Larissis and Ors v. Greece,* Reports 1998-I, paras. 40-42.

87. *Hasan and Chaush v. Bulgaria*, [GC] no. 30985/96, Reports 2000-XI, paras. 84-89 at paras. 84-85.

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

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

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

- correspond to a pressing social need,
- be proportionate to the legitimate aim pursued, and
- be justified by relevant and sufficient reasons.

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

Necessity and proportionality; and the nature of "democratic society"

The concept of "necessity" is involved – expressly or implicitly – in several articles of the European Convention on Human Rights, but it has subtly different connotations in different contexts. A broad distinction can be drawn between those articles (such as Article 9) which guarantee rights principally of a civil and political nature and that are subject to widely expressed qualifications, and those articles which guarantee rights (primarily those concerning physical integrity and human dignity) which are either subject to no express qualification or subject only to stringent qualifications.

In deciding whether any interference is "necessary in a democratic society", it is important to bear in mind both the word "necessary" and the words "in a democratic society". In the context of Article 10, for example, the Strasbourg Court has said that "whilst the adjective 'necessary', within the meaning of [this provision] is not synonymous with "indispensable", neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable', and that rather it implies the existence of a 'pressing social need'".[88] The onus of establishing that an interference is justified, and therefore the onus of establishing that an interference is

proportionate, rests again upon the State. As is the case in interpreting the necessity of state interferences with other Convention rights, it may be relevant to consider other international or European standards and practice. Thus the Strasbourg Court has made reference in this area to reports by such bodies as the World Council of Churches.[89]

The standard of justification required depends, in practice, on the particular context. In principle, the stronger the "pressing social need", the less difficult it will be to justify the interference. For example, national security is in principle a powerful consideration. However, the mere assertion of such a consideration does not absolve the State from indicating the justification for advancing such a claim.[90] Similarly, public safety appears to be a compelling social need, and thus a legal requirement applying to all motorcycle drivers to wear crash helmets was readily considered as justified when challenged by Sikhs. [91]

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

> *As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*[92]

Such values may thus determine conclusions that state authorities may properly deem it necessary to protect the religious beliefs of adherents against abusive attacks through expression (as in the *Otto-Preminger-Institut* case discussed below).[93] Article 9 may also require that a perceived threat of disorder is addressed by means that promote rather than undermine pluralism, even although this very pluralism may be responsible for the public order situation requiring state intervention.

Margin of appreciation

Determining whether a measure is necessary and proportionate can never be a merely mechanical exercise, for once all the facts are known, there remains an irreducible value judgment which

88. *Handyside v. the United Kingdom,* judgment of 7 December 1976, Series A no. 24, para. 48.
89. As in *Kokkinakis v. Greece*, discussed below, at p. 40.
90. See *Metropolitan Church of Bessarabia and others v. Moldova*, no.45701/99, Reports 2001-XII, discussed below at p. 45.
91. Appl. no. 7992/77, *X v. the United Kingdom,* (1978) DR14, 234.
92. *Kokkinakis v. Greece,* judgment of 25 May 1993, Series A no. 260-A, at para. 31.
93. At p. 52.

has to be made in answering the question "was the interference necessary in a democratic society?". However, at the level of the Strasbourg Court, any assessment of the necessity of an interference with Article 9 rights is closely allied to the issue of subsidiarity of the system of protection established in Strasbourg, for the primary responsibility for ensuring that Convention rights are practical and effective is that of the national authorities. To this end, the Strasbourg Court may accord domestic decision-makers a certain "margin of appreciation". This concept is, on occasion, difficult to apply in practice. It is also apt to give rise to controversy. The recognition by the Strasbourg Court of a degree of restraint in determining whether the judgment made by national authorities is compatible with the State's obligations under the Convention is thus a principal means by which the Strasbourg Court recognises its subsidiary role in protecting human rights. It is acknowledgment of the right of democracies (albeit within limits established by the Convention) to choose for themselves the level and content of human rights practice that suit them best.

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

> *… does not give the Contracting States an unlimited power of appreciation. The Court … is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with [the Convention guarantee]. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.… It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under [the guarantee] the decisions they delivered in the exercise of their power of appreciation.*[94]

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

> *Whereas there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend*

94. *Handyside v. the United Kingdom,* judgment of 7 December 1976, Series A no. 24, paras. 49-50.

intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of "the requirements of the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever-growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended.[95]

The Strasbourg Court thus recognises that its competence in reviewing certain decision-making in the area of religion is limited. This appears self-evident. The domestic situation is likely to reflect historical, cultural and political sensitivities, and an international forum is not well placed to resolve such disputes.[96]

95. *Wingrove v. the United Kingdom*, judgment of 25 November 1996, Reports 1996-V, para. 58.
96. See also, for example, *Murphy v. Ireland*, discussed below at p. 51.

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

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

Compulsory military service and religious belief

The extent to which Article 9 imposes a positive duty upon state authorities to recognise exemptions from general civic or legal obligations is still open to some doubt. In light of Article 4(3)(b) of the European Convention on Human Rights which makes specific provision for "service of a military character", Article 9 prob-

ably cannot in itself imply any right of recognition of conscientious objection to compulsory military service unless this is recognised by national law. While virtually all European states which have military service obligations now recognise alternative civilian service,[97] it is also still an open question whether Article 9 could indeed require a State to recognise such alternative civilian service in instances where an individual otherwise could be compelled to act contrary to his or her fundamental religious beliefs.[98] Indeed, some recent applications brought to the Strasbourg Court and which have resulted in a friendly settlement or being struck out following upon reforms in domestic arrangements do suggest some review of the Court's attitude to this issue.[99]

There may, too, be the possibility at least to submit that military service requirements may operate in a discriminatory manner, or in a manner which gives rise to other considerations arising under the Convention.[100] For example, in *Ülke v. Turkey,* the Strasbourg Court determined that the applicant, a peace activist who repeatedly had been punished for refusal to serve in the military on account of his beliefs, had been subjected to treatment in violation of Article 3 on account of the "constant alternation between prosecutions and terms of imprisonment" and the possibility that this situation could theoretically continue for the rest of his life. This had exceeded the inevitable degree of humiliation inherent in imprisonment and thus was deemed to have qualified as "inhuman" treatment on account of the premeditated, cumulative and long term effects of the repeated convictions and incarceration. The domestic law which failed to make provision for conscientious objectors was "evidently not sufficient to provide an appropriate means of dealing with situations arising from the refusal to perform military service on account of one's beliefs".[101]

The requirement to pay "church tax"

Article 9 (1) confers protection from compulsion to become indirectly involved in religious activities against an individual's will. Such a situation could arise, for example, in respect of a requirement to pay a church tax. States must respect the religious convictions of those who do not belong to any church, and thus must make it possible for such individuals to be exempted from the obligation to make contributions to the church for its religious activities.[102] (However, as noted, this situation must be distinguished from arguments that an individual's general tax payments to the authorities should not be allocated to particular purposes.[103]) To this end, States may legitimately require individuals to notify their religious belief or change of religious belief in order to ensure the effective collection of church taxes.[104]

97. And see Committee of Ministers Recommendation No. R(87) 8.
98. Appl. no. 7705/76, *X v. Germany,* (1977) DR9, 196
99. For example, 32438/96, *Stefanov v. Bulgaria* (3 May 2001) (friendly settlement).
100. For example, *Thlimmenos v. Greece* [GC], no. 34369/97, Reports 2000-IV. See also *Tsirlis and Kouloumpas v. Greece,* Reports 1997-III (violation of Article 5, but Article 9 issue avoided); but cf. Commission report of 7 March 1996 (opinion that there had been a violation of Article 14 read in conjunction with Article 9).
101. (24 January 2006), at paras. 61 and 62.
102. *Darby v. Sweden*, Series A no. 187, opinion of the Commission, para. 51.
103. Appl. no. 10358/83, *C. v. the United Kingdom,* (1983) DR37, 142.

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

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

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

> *[T]he applicant, not being a member of the Church of Sweden, did not have to pay the full church tax but only a portion thereof – 25 per cent of the full amount – as a dissenter tax [on the basis that] non-members should contribute to the non-religious activities of the Church. The reduced tax rate was determined on the basis of an investigation of the economy of the Church of Sweden, which showed that the costs for the burial of the deceased amounted to about 24 per cent of the Church's total costs.*
>
> *It is thus apparent that the tax paid by the applicant to the Church of Sweden was proportionate to the costs of its civil responsibilities. Therefore, it cannot be said that he was compelled to contribute to the religious activities of the Church.*

104. See for instance Appl. no. 101616/83, *Gottesmann v. Switzerland,* (1984) DR40, p. 284.

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

The Strasbourg Court therefore concluded that the obligation to pay this "dissenter tax" did not contravene the applicant's right to freedom of religion, and declared this part of the application manifestly ill-founded.[105]

Dress codes

Prohibitions on the wearing of religious symbols have given rise to complaints addressed to the Strasbourg Court under Article 9. These cases can require careful assessment. It appears from the jurisprudence that it is normally accepted that such a prohibition involves an interference with the right of individuals to manifest their religion, and assessment has turned upon the reasons advanced for the ban. In this area, however, the Strasbourg Court is likely to recognise a certain "margin of appreciation" on the part of state authorities, particularly where the justification advanced by the State is the need to prevent certain fundamentalist religious movements from exerting pressure on others belonging to another religion or who do not practise their religion.[106] Thus in *Dahlab v. Turkey,* the refusal to allow a teacher of a class of small children to wear the Islamic headscarf was deemed justified in view of the "powerful external symbol which her wearing a headscarf represented: not only could the wearing of this item be seen as having some kind of proselytising effect since it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality, but also this could not easily be reconciled with the message of tolerance, respect for others and equality and non-discrimination that all teachers in a democratic society should convey to their pupils.[107]

The matter was considered further by the Grand Chamber in *Leyla Şahin v. Turkey.* In this case, the applicant complained that a prohibition on her wearing the Islamic headscarf at university and the consequential refusal to allow her access to classes had violated her rights under Article 9. The Strasbourg Court proceeded on the basis that there had been an interference with her right to manifest her religion, and also accepted that the interference pri-

105. *Bruno v. Sweden* (dec.), no. 32196/96, 28 August 2001.

106. Appl. no. 16278/90, *Karaduman v. Turkey,* (1993), DR74, p. 93 (requirement that official photograph could not show a graduate wearing an Islamic headscarf, but only bare-headed).

107. *Dahlab v. Switzerland* (dec.), no. 42393/98, Reports 2001-V.

marily had pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. It was also satisfied that the interference had been "prescribed by law". Accordingly, the crucial question was whether the interference had been "necessary in a democratic society". By a majority, the Court ruled that the interference in issue had been both justified in principle and proportionate to the aims pursued, taking into account the State's "margin of appreciation" in such cases:

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

Of some importance in this instance were the principles of secularism and equality at the heart of the Turkish Constitution. The constitutional court had determined that freedom to manifest one's religion could be restricted in order to defend the role played by secularism as the guarantor of democratic values in the State: secularism was the meeting point of liberty and equality, necessarily entailed freedom of religion and conscience, and prevented state authorities from manifesting a preference for a particular religion or belief by ensuring its role as one of impartial arbiter. Furthermore, secularism also helped protect individuals from external pressure exerted by extremist movements. This role of the State as independent arbiter was also consistent with the jurisprudence of the Strasbourg Court under Article 9.

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

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

The application also raised the question of whether there had been an interference with the applicant's right to education in terms of Article 2 of Protocol No. 1. By analogy with the reasoning applying to disposal of the application under Article 9, the Grand Chamber also accepted that the refusal to allow access to various lectures and examinations for wearing the Islamic headscarf restriction had been foreseeable, had pursued legitimate aims, and that the means used had been proportionate. The measures in question had in no way hindered the performance of religious observances by students, and indeed the university authorities judiciously had sought a means of avoiding having to turn away students wearing the headscarf while simultaneously protecting the rights of others and the interests of the education system. The headscarf ban in consequence had not interfered with the right to education.[108]

Prisoners and religious belief

Prison authorities will be expected to recognise the religious needs of those deprived of their liberty by allowing inmates to take part in religious observances. Thus where religion or belief dictates a particular diet, this should be respected by the authorities.[109] Further, adequate provision should be made to allow detainees to take part in religious worship or to permit them access to spiritual guidance. In the related cases of *Poltoratskiy v. Ukraine* and *Kuznetsov v. Ukraine*, prisoners on death row complained that they had not been allowed visits from a priest nor to take part in religious services available to other prisoners. The applicants succeeded in these cases on the ground that these interferences had not been in accordance with the law as the relevant prison instruction could not so qualify within the meaning of the Convention.[110] However, the maintenance of good order and secu-

108. *Leyla Şahin v. Turkey* [GC], no. 44774/98, Reports 2005-XI, paras. 104-162 at para. 109.
109. Appl. no. 5947/72, *X v. the United Kingdom,* (1976), DR5, p. 8.
110. *Poltoratskiy v. Ukraine,* no. 38812/97, Reports 2003-V; and *Kuznetsov v. Ukraine,* no. 39042/97, 29 April 2003.

rity in prison will normally readily be recognised as legitimate state interests. Article 9 cannot, for example, be used to require recognition of a special status for prisoners who claim that wearing prison uniform and being forced to work violate their beliefs.[111] Further, in responding to such order and security interests, a rather wide margin of appreciation is recognised on the part of the authorities. For example, the need to be able to identify prisoners may thus warrant the refusal to allow a prisoner to grow a beard, while security considerations may justify denial of the supply of a prayer-chain[112] or a book containing details of martial arts to prisoners, even in cases where it can be established that access to such items is indispensable for the proper exercise of a religious faith.[113]

These state obligations under the European Convention on Human Rights are also reflected in the European Prison Rules. These Rules are non-binding standards which aim to ensure that prisoners are accommodated in material and moral terms respecting their dignity and accorded treatment which is non-discriminatory, which recognises religious beliefs, and which sustains health and self-respect. Thus the Rules provide that "the prison regime shall be organised so far as is practicable to allow prisoners to practise their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs". However, "prisoners may not be compelled to practise a religion or belief, to attend religious services or meetings, to take part in religious practices or to accept a visit from a representative of any religion or belief."[114]

Proselytism

The text of paragraph paragraph 1 of Article 9 specifically refers to "teaching" as a recognised form of "manifestation" of belief. The right to try to persuade others of the validity of one's beliefs is also implicitly supported by the reference in the text to the right "to change [one's] religion or belief". The right to proselytise by attempting to persuade others to convert to another's religion is thus clearly encompassed within the scope of Article 9. But this right is not absolute, and may be limited where it can be shown by the State that this is clearly based upon considerations of public order or the protection of vulnerable individuals against undue exploitation. The jurisprudence distinguishes between "proper" and "improper" proselytism, a distinction reflected in other measures adopted by Council of Europe institutions such as Parliamentary Assembly Recommendation 1412 (1999) on the illegal activities of sects which calls for domestic action against "illegal practices carried out in the name of groups of a religious, esoteric or spiritual nature", the provision and exchange between states of information on such sects, and the importance of the history and

111. Appl. no. 8317/78, *McFeely and others v. the United Kingdom,* (1980) DR20, p. 44.
112. Appl. no. 1753/63, *X v. Austria,* (1965), Coll Dec 16, p. 20.
113. Appl. no. 6886/75, *X v. the United Kingdom,* (1976) DR5, p. 100.
114. European Prison Rules, Recommendation Rec (2006) 2, Rules 29(2)-(3).

philosophy of religion in school curricula with a view to protecting young persons.

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

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

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

> *Scrutiny of [the relevant statutory provision] shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case. The Court notes, however, that in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of [the legislation] and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding. That being so, it has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society … for the protection of the rights and freedoms of others".*[115]

115. *Kokkinakis v. Greece,* judgment of 25 May 1993, Series A no. 260-A, at paras. 48-49.

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

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

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

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

On the other hand, the Strasbourg Court rejected the respondent government's contentions in the same case that a prosecution for proselytism of civilians had been "necessary in a democratic society", even where it was argued that this had involved the improper exploitation of individuals suffering from personal and psychological difficulties. It was of "decisive significance" that these civilians had not been subjected to pressures and constraints of the same kind as the airmen at the time the applicants had sought to convert them. Here, there was less in the way of deference shown to the determinations of domestic courts. Even in respect of one of the civilians who had been under some stress on account of the breakdown of her marriage, it had not been shown either that her state of mind was such as to require "any special protection from the evangelical activities of the applicants or that they applied improper pressure to her, as was demonstrated by the fact that she was able eventually to take the decision to sever all links with the Pentecostal Church".[116] These cases indicate that States may in certain instances take steps to prohibit the right of individuals to try to persuade others of the validity of their beliefs, even although this right is often categorised by adherents as an essential sacred duty. The cases also clearly indicate, however, that any interference with the right to proselytise must be shown to have been necessary in the particular circumstances.

116. *Larissis v. Greece*, judgment of 24 February 1998, Reports 1998-I, 362, paras. 40-61, at paras. 50, 54 and 59.

Interfering in internal disputes between adherents of a religious community

Cases in which state authorities have attempted to intervene in matters of internal dispute between members of a religious community illustrate the interplay between freedom of religion and freedom of association. Article 9 when interpreted in the light of Article 11 "encompasses the expectation that [such a] community will be allowed to function peacefully, free from arbitrary State intervention", and thus "State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion".[117] In any event, some degree of tension is only the unavoidable consequence of pluralism.[118]

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

> *The Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to*

117. *Supreme Holy Council of the Muslim Community v. Bulgaria,* no. 39023/97, 16 December 2004 at para. 73.
118. *Agga v. Greece (no. 2),* nos. 50776/99 and 52912/99, paras. 56-61, 17 October 2002.

reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome.

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

The need for such measures had thus not been established. It was also of significance in this particular case that the measures had not been in any event successful as the conflicts in the community had continued. While the authorities did enjoy a certain "margin of appreciation" in determining what measures to take in such circumstances, the authorities had exceeded that margin in this instance. Accordingly, the interference by the authorities had constituted a violation of Article 9.[119]

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

119. *Supreme Holy Council of the Muslim Community v. Bulgaria,* no. 39023/97, 16 December 2004, paras. 93-99 at paras. 93-95.

such instances was to promote pluralism rather than to seek to eliminate it:

> *Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.*[120]

A similar situation also arose in *Agga v. Greece (no. 2)*. Here, the applicant had been elected to the post of mufti by worshippers at a mosque. This result had been annulled by state officials who thereafter had appointed another mufti to the office. The applicant had declined to step down, and had also in consequence been convicted of the offence of having usurped the functions of a minister of a "known religion as had also occurred in the *Serif* case. It was again readily accepted that the interference had been for a prescribed interest, that is, the preservation of public order. The application of criminal sanctions had also been foreseeable. But the Strasbourg Court could not again be satisfied that the interference had been "necessary in a democratic society". There had been no pressing social need for the interference. In its view, "punishing a person for merely presenting himself as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society." Although religious leaders were recognised by domestic law as having the right to exercise certain judicial and administrative state responsibilities (and thus since legal relationships could be affected by the acts of religious ministers, the public interest may indeed justify measures to protect individuals against deception), in the present instance there had been no indication that the applicant had attempted at any time to exercise these functions. Further, since tension is the unavoidable consequence of pluralism, it should never be necessary in a democracy for a State to seek to place a religious community under a unified leadership by favouring a particular leader over others.[121]

The requirement for state registration

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

> *[S]ince religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to*

120. *Serif v. Greece*, no. 38178/97, Reports 1999-X, paras. 49-54.

121. *Agga v. Greece (no. 2)*, nos. 50776/99 and 52912/99, paras. 56-61, 17 October 2002.

> *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.*[122]

The interplay between Article 9's guarantees for the collective manifestation of belief and Article 11's protection for freedom of association, taken along with the prohibition of discrimination in the enjoyment of Convention guarantees as provided for by Article 14, is thus of considerable significance in resolving questions concerning refusal to confer official recognition. This may be necessary in order to take advantage of privileges such as exemption from taxation or recognition of charitable status which may in domestic law be dependent upon prior registration or state recognition. Arrangements which favour particular religious communities do not, in principle, contravene the requirements of the Convention (and in particular, Articles 9 and 14) "providing there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other Churches wishing to do so".[123]

However, domestic law may go further and also require official recognition in order to obtain the legal personality necessary to allow a religious body to function effectively. The risk with such requirements is that these may be applied in a discriminatory manner with a view to restricting the spread of minority faiths.[124] Where official recognition is necessary for this, mere state tolerance of a religious community is unlikely to suffice.[125] The imposition of a requirement of state registration is not in itself incompatible with freedom of thought, conscience and religion, but the State must be careful to maintain a position of strict neutrality and be able to demonstrate it has proper grounds for refusing recognition. Furthermore, the process for registration must guard against unfettered discretion and avoid arbitrary decision-making.[126] While the State is "entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population",[127] it may not appear to be assessing the comparative legitimacy of different beliefs.[128]

Even where a State seeks to rely upon national security and territorial integrity as justification for refusal to register a community, rigorous assessment of such claims is required. Vague speculation is inadequate. In *Metropolitan Church of Bessarabia and others*

122. *Metropolitan Church of Bessarabia and others v. Moldova,* no. 45701/99, Reports 2001-XII, at para. 118.
123. Appl. no. 53072/99, *Alujer Fernández and Caballero García v. Spain,* decision of 14 June 2001.
124. Cf. Framework Convention for the Protection of National Minorities, Article 8: recognition that "every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations".
125. *Metropolitan Church of Bessarabia and others v. Moldova,* no. 45701/99, Reports 2001-XII, para. 129.
126. *Supreme Holy Council of the Muslim Community*, no. 39023/97, 16 December 2004, para 33.
127. *Manoussakis and others v. Greece*, judgment of 26 September 1996, Reports 1996-IV at para. 40.
128. *Hasan and Chaush v. Bulgaria*, [GC] no. 30985/96, Reports 2000-XI, paras. 84-89 at para. 78.

v. Moldova, the applicants had been prohibited from gathering together for religious purposes and had not been able to secure legal protection against harassment or for the church's assets. The respondent government sought to argue that registration in the particular circumstances of this case could lead to the destabilisation of both the Orthodox Church and indeed of society as a whole since the matter concerned a dispute between Russian and Romanian patriarchates; further, recognition could have had an adverse impact upon the very territorial integrity and independence of the State. Reiterating the State's requirement to remain neutral and its role in encouraging mutual tolerance between competing groups (rather than seeking to remove the cause of tension by eliminating pluralism), the Strasbourg Court again stressed that Article 9 excluded state assessment "of the legitimacy of religious beliefs or the ways in which those beliefs are expressed". It was also necessary to read Article 9 alongside Article 11's guarantees against unjustified state interference with freedom of association: and "seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention." By taking the view that the applicant church was not a new denomination, and by making its recognition depend on the will of another ecclesiastical authority that had previously been recognised, the duty of neutrality and impartiality had not been discharged. Nor was the Court satisfied in the absence of any evidence to the contrary either that the church was (as the respondent government submitted) engaged in political activities contrary to Moldovan public policy or to its own stated religious aims, or that state recognition might constitute a danger to national security and territorial integrity. [129]

A refusal to register a religious community may also carry with it the consequence that the community is thereby precluded from enforcing its interests in the courts. Churches may also hold property, and any interference with these rights is in principle liable to give rise to questions falling within the scope of Article 1 of Protocol No. 1.[130] In *Canea Catholic Church v. Greece,* a decision of the domestic courts to refuse to recognise the applicant church as having the necessary legal personality was successfully challenged, the Strasbourg Court considering that the effect of such a decision was to prevent the church now and in the future from having any dispute relating to property determined by the domestic courts.[131] In the *Metropolitan Church of Bessarabia and others v. Moldova* case, the Strasbourg Court further noted that Article 9 had to be read in the light of Article 6 and the guarantees of access to fair judicial proceedings to protect the religious community, its members and its assets. The government's assertion that it had shown tolerance towards the church and its members could not be

129. *Metropolitan Church of Bessarabia and others v. Moldova*, no. 45701/99, Reports 2001-XII, paras. 101-142. See also *Pentidis and others v. Greece*, judgment of 9 June 1997, Reports 1997-III, para. 46 and *Moscow Branch of the Salvation Army v. Russia*, judgment of 5 October 2006, paras. 71-74, Reports 2006-.
130. See, for example, *The Holy Monasteries v. Greece,* judgment of 9 December 1994, Series A no. 301-A, paras. 54-66.
131. *Canea Catholic Church v. Greece*, Reports 1997-VIII, paras. 40-42.

a substitute for actual recognition, since recognition alone had been capable in domestic law of conferring rights on those concerned to defend themselves against acts of intimidation. The refusal to recognise the church had thus resulted in such consequences for the applicants' rights under Article 9 that could not be regarded as necessary in a democratic society.[132] There is thus a right of access to court for the determination of a community's civil rights and obligations in terms of Article 6 of the European Convention on Human Rights.

Controls upon places of worship

The regulation of religious organisations – and even the implicit favouring of one religion over others – can also include the imposition and enforcement of planning controls.[133] Again, care is necessary in order to ensure that the legitimate considerations which underpin the rationale for planning consent are not used for ulterior purposes. For example, in *Manoussakis and Ors v. Greece,* domestic law had required religious organisations to obtain formal approval for the use of premises for worship. Jehovah's Witnesses had sought unsuccessfully to obtain such permission, and thereafter had been convicted of operating an unauthorised place of worship. The Strasbourg Court accepted that national authorities had the right to take measures designed to determine whether activities undertaken by a religious association were potentially harmful to others, but this could not allow the State to determine the legitimacy of either the beliefs or the means of expressing such beliefs. In this instance, the context in which the application arose was also of relevance:

> *The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. Accordingly, the Court takes the view that the authorisation requirement [under domestic law] is consistent with Article 9 of the Convention only in so far as it is intended to allow the Minister to verify whether the formal conditions laid down in those enactments are satisfied.*
>
> *It appears from the evidence and from the numerous other cases cited by the applicants and not contested by the Government that the State has tended to use the possibilities afforded by [domestic law] to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses. … [T]he extensive case-law in this field seems to show a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.*

It was also of some significance that authorisation was still awaited by the time the Strasbourg Court gave judgment, and that this

132. *Metropolitan Church of Bessarabia and others v. Moldova*, no.45701/99, Reports 2001-XII, paras. 101-142 (assets including humanitarian aid). See also *Pentidis and others v. Greece*, judgment of 9 June 1997, Reports 1997-III, para. 46
133. Including restrictions on access to places considered significant: Appl. no. 12587/86, *Chappell v. the United Kingdom,* (1987) DR53, p. 241. Cf. Appl. no. 24875/94, *Logan v. the United Kingdom,* (1996) DR86, p. 74.

authorisation was to come not only from state officials but also from the local bishop. The Court determined that the conviction could not be said to have been a proportionate response.[134] A position of strict neutrality is thus required, and to this end, the involvement in this procedure of another ecclesiastical authority which itself enjoys state recognition will not be appropriate.

Situations in which rigorous (or indeed prohibitive) conditions are imposed on the adherents of particular faiths, however, must be contrasted with those in which an applicant is seeking to modify the outcome of planning decisions taken in a objective and neutral manner. In *Vergos v. Greece*, the applicant had been refused permission to build a prayer-house for the community on a plot of land which he owned on the basis that the land-use plan did not permit the construction of such buildings and that in any event he was the only member of his religious community in his town. The planning authorities had accordingly concluded there was no social need justifying modification of the plan so as to permit the building of a prayer-house. In determining that this interference was "necessary in a democratic society", the Strasbourg Court accepted that the criterion applied by the domestic authorities when weighing the applicant's freedom to manifest his religion against the public interest in rational planning could not be considered arbitrary. Having regard to a State's margin of appreciation in matters of town and country planning, the public interest should not be made to yield precedence to the need to worship of a single adherent of a religious community when there was a prayer-house in a neighbouring town which met the religious community's needs in the region.[135]

134. *Manoussakis and others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, paras. 44-53 at para. 48.

135. *Vergos v. Greece,* no. 65501/01, 24 June 2004.

Related guarantees under the European Convention on Human Rights having an impact upon the free exercise of conscience or belief

It is also appropriate to discuss – albeit briefly – linked considerations concerning religion and belief which have arisen under other provisions of the European Convention on Human Rights. The importance of provisions such as Article 6 and Article 11 has been highlighted in respect of the collective aspect of freedom of religion. Other guarantees also have some bearing upon enjoyment of freedom of thought, conscience and religion. In particular, issues may arise within the context of parental rights in the provision of public education under Article 2 of Protocol No. 1, while limitations on the free expression of religious communities

may occasionally arise under Article 10. Further, it is also necessary to note the importance of Article 14's prohibition of discrimination in the enjoyment of Convention rights. The discussion which follows, however, can only provide a basic introduction to these additional concerns.

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

Questions concerning respect for parents' religious belief in the provision of education of their children may arise under Protocol 1, Article 2 of the Convention. This first provides that "no person shall be denied the right to education", and thereafter that "in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions". In the context of this provision, "education" suggests "the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young", while "teaching or instruction refers in particular to the transmission of knowledge and to intellectual development". "Respect" suggests more than mere acknowledgment or even that a parent's views have been taken into account, and instead "implies some positive obligation on the part of the State".[136]

The right to respect for religious and philosophical convictions belongs to the parents of a child and not to the child itself[137] or to any school or religious association.[138] But the duty to respect any such "convictions" of parents is, however, subordinate to the primary right of a child to receive education, and thus the provision cannot be read in such a manner as to require recognition of a parent's wish, for example, that a child is given a general exemption from attending school on Saturdays on religious grounds.[139]

Such beliefs may obviously arise within the context of curriculum determination and delivery, but state interests in ensuring that certain factual information – including information of a religious or philosophical nature – forms part of the school curriculum may take precedence over parental considerations in this area.[140] The essence of the guarantee is "the safeguarding of pluralism and tolerance in public education and the prohibition of indoctrination".[141] In *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, parents objected to the provision of sex education to their children. In a crucial part of the judgment which encapsulates the manner for resolving the conflicting interests of the State, of

136. *Campbell and Cosans v. the United Kingdom,* judgment of 25 February 1982, Series A no. 48, at paras. 33 and 37; *Valsamis v. Greece* 1996-VI, 2312, at para. 27
137. *Eriksson v. Sweden,* judgment of 22 June 1989, Series A no. 156, para. 93.
138. Appl. no. 11533/85, *Jordebo Foundation of Christian Schools and Jordebo v. Sweden,* (1987) DR51, p. 125.
139. *Martins Casimiro and Cerveira Ferreira v. Luxembourg* (dec.), no. 44888/98, 27 April 1999.
140. Appl. no. 17568/90, *Sluijs v. Belgium,* (9 September 1992).
141. Appl. nos. 10228/82 and 10229/82, *W. & D.M. and M. and H.I. v. the United Kingdom*, (1984) DR37, p. 96. See also Appl. no. 23380/94, *C.J., J.J and E.J. v. Poland*, (1996) DR84, p. 46; and Appl. no. 17187/90, *Bernard and others v. Luxembourg,* (1993) DR75, p. 57.

pupils and of their parents, the Strasbourg Court drew a distinction between the imparting of knowledge even of a directly or indirectly religious or philosophical nature, and teaching which sought to inculcate a particular value or philosophy which did not respect the views of a parent. The provision does not "permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable" since most school subjects involved "some philosophical complexion or implications". However, a school has to ensure that the education provided by way of teaching or instruction conveyed information and knowledge "in an objective, critical and pluralistic manner". The key guarantee is against the State pursuing an "aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions", this being "the limit that must not be exceeded".[142]

Similarly, an issue such as disciplinary measures may not simply be dismissed as a matter merely of internal administration. In *Campbell and Cosans v. the United Kingdom*, parents of pupils objected to the practice of corporal punishment. The Strasbourg Court accepted that the applicants' views met the test of philosophical conviction in that they related to a "weighty and substantial aspect of human life and behaviour, namely the integrity of the person", and thus the State's failure to respect these convictions violated the guarantee since "the imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils".[143]

Educational issues may also arise within the scope of Article 9, but the influence of case-law under Article 1 of Protocol No. 1 in the disposal of applications is clear. A requirement to attend moral and social education in the absence of any allegation of indoctrination does not give rise to an interference with Article 9 rights.[144] Further, while a refusal to grant a general exemption from attending school on Saturdays on religious grounds to the sons of the applicants, Seventh Day Adventists, could be regarded as an interference with the manifestation of belief, no general dispensation could be recognised which would adversely affect a child's right to education, a right which prevailed over the parents' rights to have their religious convictions taken into account.[145]

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

Certain cases have considered the extent to which restrictions on freedom of expression involving aspects of thought, conscience

142. *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* judgment of 7 December 1976, Series A no. 23, para. 53.

143. *Campbell and Cosans v. the United Kingdom,* judgment of 25 February 1982, Series A no. 48, paras. 33-37 at para. 36.

144. Appl. no. 17187/90, *Bernard and others v. Luxembourg,* (1993) DR75, p. 57.

145. Appl. no. 44888/98, *Martins Casimiro and Cerveira Ferreira v. Luxembourg,* (27 April 1999).

and belief are compatible with Article 10's guarantee of freedom of expression. The exercise of this right by groups or individuals seeking to persuade others may often be better considered in terms of Article 10 guarantees unless this clearly involves a "manifestation" of belief.[146] For example, restrictions on the amount of expenditure that can be incurred at election time were challenged successfully by an anti-abortionist as a disproportionate restriction of freedom of expression.[147] Further, expression essentially of a commercial nature may be restricted on the grounds that this is necessary for the protection of the public from misleading claims.[148]

A more difficult case involving religious advertising is *Murphy v. Ireland*, in which the refusal to allow the television screening of a religious advertisement was challenged by the applicant under both Articles 9 and Article 10 of the Convention. While the applicant agreed that Article 10 could permit restrictions of religious expression which would offend others' religious sensitivities, he also argued that an individual was not protected from being exposed to a religious view simply because it did not accord with his or her own. For the Strasbourg Court, the refusal primarily concerned the regulation of the applicant's means of expression and not his manifestation of religious belief and thus determined that the issue was better considered in terms of Article 10. State authorities were better placed than an international court to decide when action may be necessary to regulate freedom of expression in relation to matters liable to offend intimate personal convictions. This "margin of appreciation" was particularly appropriate in respect to restrictions on free speech in respect to religion "since what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations". In consequence, the Court accepted that the respondent State was justified in determining that the particular religious sensitivities in Irish society were such that the broadcasting of any religious advertising could be considered offensive. The domestic courts themselves had noted that religion had been a divisive issue in society, that Irish people holding religious beliefs tended to belong to one particular church and so religious advertising from a different church might be considered offensive and open to the interpretation of proselytism, and that the state authorities had been entitled to take the view that Irish citizens would resent having advertisements touching on these topics broadcast into their homes. For the Strasbourg Court, too, it was important that the prohibition concerned only the audio-visual media, a means of communication which has "a more immediate, invasive and powerful impact". The applicant could still have advertised via local and national newspapers and retained the same right as any other citizen to participate in programmes on religious matters, public meetings and other assemblies. There were thus highly "relevant reasons" under Article 10 justifying the blanket prohibition of the broad-

146. See discussion of *Arrowsmith v. the United Kingdom*, above at p. 15.
147. *Bowman v. the United Kingdom,* Reports 1998-I, paras. 35-47.
148. Appl. no. 7805/77, *X and Church of Scientology v. Sweden,* (1979) DR16, p. 68.

casting of religious advertisements.[149] It is clear from such cases that the context in which the speech takes place is of particular weight. Here, the channel of communication was television. It may be fair, though, to categorise this judgment as one in which the extent of the "margin of appreciation" was particularly broad, for an international judicial forum should be particularly careful to refrain from interfering with domestic determinations on particularly sensitive decisions. On the other hand, it could be argued that the judgment hardly promotes the notion of pluralism and broadmindedness.

A related issue is the extent to which state authorities may take action against expression in order to protect the religious sensibilities of adherents of particular faiths by preventing or punishing the display of insulting or offensive material that could discourage adherents from practising or professing their faith through ridicule. The scope of Article 10's guarantee for freedom of expression encompasses, after all, ideas which "offend, shock or disturb"[150], and in any case the maintenance of pluralist society also requires that adherents of a faith at the same time accept that their beliefs may be subject to criticism and to the propagation of ideas that directly challenge these beliefs. However, offensive speech which is intended or likely to stir up ill-will against a group in society – so-called "hate speech" – is unlikely to attract any protection, particularly in light of Article 17 of the Convention which prohibits the abuse of rights.

However, the distinction between offensive speech and that which is merely unpopular may be difficult to draw. A sustained campaign of harassment by private individuals or organisations may give rise to State responsibility,[151] but on the other hand, it is legitimate that individuals are free to criticise religious groups, particularly if the criticism concerns the potentially harmful nature of their activities, and when made in a political forum in which issues of public interest are expected to be debated openly.[152] The Strasbourg Court has recognised that the peaceful enjoyment of the rights guaranteed under Article 9 by adherents of religious faiths at the very least may justify a State in taking action against the dissemination of expression that is, in respect to objects of veneration, gratuitously offensive to others and profane. But careful line-drawing will be needed to ensure that the goal of pluralism is not defeated by the measures adopted. For example, in *Otto-Preminger-Institut v. Austria*, the authorities had seized and ordered the forfeiture of a film ridiculing the beliefs of Roman Catholics. In interpreting Article 10's guarantee of freedom of expression, the European Court of Human Rights affirmed that national authorities could indeed deem it necessary to take action to protect adherents of religious beliefs against "provocative portrayals of objects of religious veneration" where such constitute

149. *Murphy v. Ireland*, no. 44179/98, para. 73, ECHR 2003-IX.
150. *Handyside v. the United Kingdom,* (1976) Series A no. 24, at para. 49.
151. Appl. no. 8282/78, *Church of Scientology v. Sweden,* (1980) DR21, p. 109.
152. See *Jerusalem v. Austria,* no. 26958/95, Reports 2001-II, paras. 38-47.

"malicious violation of the spirit of tolerance, which must also be a feature of democratic society". The close relationship between Articles 9 and 10 was of the essence:

> *Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.* [153]

Similarly, in *Wingrove v. the United Kingdom*, the Strasbourg Court rejected a complaint brought under Article 10 concerning the refusal to license a video considered blasphemous by the domestic authorities on the grounds that it was not unreasonable to consider that the interference with freedom of expression may be deemed justified as for the protection of the rights of Christians.[154] These cases support the proposition that a State may take action against expression which is gratuitously offensive. Of importance in both of these cases was the manner in which the opinions had been expressed rather than the content of the opinions themselves. However, a case such as *Murphy v. Ireland,* discussed above, can appear to support restrictions on free expression even where it is difficult to acknowledge that any offence could be taken other than to the mere recognition that another religion or interpretation of religious belief existed.[155] Not all expression considered offensive, shocking or disturbing to the sensitivities of a religious community could (or should) fall outside the protection accorded by Article 10.[156] In principle, it seems appropriate that any protection accorded by Article 9 should be restricted to that which is a "malicious violation of the spirit of tolerance".

Medical treatment issues: Article 8

Domestic courts are on occasion faced with situations in which objection is taken to necessary medical treatment on grounds of conscience or belief (for example, to procedures necessitating a blood transfusion). Most domestic legal systems recognise and respect the absolute right of an adult who suffers from no mental incapacity to make decisions concerning medical treatment, including the right to choose not to receive treatment, even when

153. *Otto-Preminger-Institut v. Austria,* judgment of 20 September 1994, Series A no. 295-A, at paras. 56 and 57.

154. *Wingrove v. the United Kingdom,* judgment of 25 November 1996, Reports 1996-V, para. 60

155. See above at p. 51.

156. See Appl. no. 8282/78, *Church of Scientology and 128 of its Members v. Sweden,* (1980) DR21, p. 109.

this may involve a risk to life. Similarly, this principle of autonomy or self-determination is recognised by Article 8. "In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 (1) of the Convention."[157] To this extent, then, individual decision-making based upon personal belief or conscience seems inviolate. Article 8 further encompasses the exercise of parental responsibilities including the right to take decisions concerning the upbringing of their children, again including decisions concerning medical treatment.[158] While there is little consideration of this topic in the case-law, principle would seem to suggest that this authority must be subject to appropriate limitations on such authority for the protection and well-being of children, particularly when there is a threat to life and where countervailing considerations (and in particular, the State's positive obligation to seek to protect life) are highly relevant. A similar case could be made for state intervention in respect of adults whose state of health renders them either vulnerable to undue pressure or who cannot be deemed to be fully competent to take decisions concerning their treatment.[159]

Discrimination in the enjoyment of Convention rights on the basis of religion or belief: Article 14

Freedom of thought, conscience and religion is also buttressed by Article 14's prohibition of discrimination on the ground of religious or political opinion. The European Court of Human Rights has on several occasions been faced with applications alleging that an individual has been subjected to discriminatory treatment on the basis of religion or belief. The principle of non-discrimination is expressed in the European Convention on Human Rights in Article 14:

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

The list of prohibited grounds for discrimination is qualified by the phrase "any ground such as", and is not exhaustive but merely illustrative. However, discrimination must be based upon personal characteristics and not, for example, geographical location. As is

157. *Pretty v. the United Kingdom*, no. 2346/02, Reports 2002-III at para. 83.

158. See *Nielsen v. Denmark*, judgment of 28 November 1988, Series A no. 144, at para. 61 "Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life."

159. Cf *Kokkinakis v. Greece,* discussed at p. 40, above; and *Keenan v. the United Kingdom*, no. 27229/95, paragraphs 88-101, ECHR 2001-III. But cf *Riera Blume and others v. Spain*, No. 37680/97, paras. 31-35, ECHR 1999-II (complaints that "deprogramming treatment involved a violation of Article 9 avoided on account of a finding of violation of Article 5).

apparent from its terms, Article 14 does not confer any free-standing or substantive right but rather expresses a principle to be applied in relation to the substantive rights conferred by other provisions: that is, this provision can only be invoked in conjunction with one or more of the substantive guarantees contained in the Convention or in one of the protocols. However, Article 14 is of fundamental importance since an interference with a particular right not considered to constitute a violation of the right may nevertheless be deemed to do so when read in conjunction with Article 14. The applicant must first establish that there is a situation which is comparable to his or her own situation: that is, that the applicant has been treated in a different way to a relevant comparator. The situation of an individual holding humanistic beliefs wishing to use his acquired knowledge for the service of others is not similar to the holder of a religious office, for example.[160] If such a situation is comparable, the remaining issue will then be whether the difference in their treatment has a justification which is both objective and reasonable. Here, the onus of establishing this lies upon the State. Thus a difference in treatment is not automatically discriminatory within the meaning of Article 14, but will only be deemed to be so if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In *Alujer Fernández and Caballero García v. Spain*, taxpayers complained that they were unable to allocate part of their payments for the support of their own particular religious communities, and that this constituted discriminatory treatment. The Strasbourg Court observed that "freedom of religion does not entail Churches or their members being given a different tax status to that of other taxpayers". However, where such agreements or arrangements do exist, these "do not, in principle, contravene the requirements of Articles 9 and 14 of the Convention, provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other Churches wishing to do so." In this case, since the churches in question had had never wished to enter into agreements or to seek such arrangements, the application fell to be dismissed as manifestly ill-founded.[161]

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

160. Appl. no. 22793/93, *Peters v. the Netherlands,* 30 November 1994.

161. Appl. no. 53072/99, *Alujer Fernández and Caballero García v. Spain,* decision of 14 June 2001.

Article 14 not in conjunction with Article 9, but in connection with another substantive provision.

Certain cases have involved the resolution of child custody and access by reference to religious belief. In *Hoffman v. Austria*, for example, the applicant had been denied custody of her child because of her involvement with Jehovah's Witnesses. While the Strasbourg Court held that it was unacceptable for a domestic court to base a decision on the ground of a difference in religion, it did so under Articles Articles 8 and 14 as it concerned the determination of child custody, an aspect of family life.[162] In *Palau-Martinez v. France,* a violation of Article 8 taken in conjunction with Article 14 was similarly established in respect of a decision concerning the care of children following upon the breakdown of a marriage. The determination had proceeded upon a generalised and "harsh analysis of the principles regarding child-rearing allegedly imposed" by the Jehovah's Witnesses faith. While such would have been a relevant factor, it could not have been a sufficient one in the absence of "direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life" in view of the rejection of the applicant's request for a social enquiry report.[163] Neither case seems to rule out entirely – or the use of perceptions concerning particular faiths – in child-custody cases, but both certainly stress that such considerations have to be applied with some care.

Where the legal capacity of a church to take legal proceedings to uphold its interests is restricted by domestic law, an issue may also arise under Article 6's guarantee of access to a court, particularly where no restrictions are placed upon other religious bodies. In *Canea Catholic Church v. Greece,* the applicant church could not take legal proceedings in order to protect its property rights, while the Orthodox Church and the Jewish Community were able to do so. Since the situation essentially concerned access to a court for the determination of civil rights, and since there could be no objective and reasonable justification for this discriminatory treatment, the Strasbourg Court found that there was a violation of Article 6(1) taken in conjunction with Article 14.[164]

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

162. *Hoffman v. Austria,* judgment of 23 June 1993, Series A no. 255-C.
163. *Palau-Martinez v. France* (16 December 2003), paras. 29-43 at paras 38 and 42.
164. *Canea Catholic Church v. Greece,* judgment of 16 December 1997, Reports 1997-VIII, paras. 43-47.

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

> *The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. …*
>
> *The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. …*
>
> *It is true that the authorities had no option under the law but to refuse to appoint the applicant a chartered accountant. … In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.*[165]

State recognition of decisions of ecclesiastical bodies: Article 6

On occasion, the Strasbourg Court has been called upon to consider issues arising from the civil enforcement of decisions of religious bodies concerning application of Article 6's guarantee of fair hearings. In resolving such issues, it will apply general principles of interpretation. In *Pellegrini v. Italy,* the applicant challenged the proceedings leading to the issue of a decree of nullity of marriage issued by a Vatican court that had been recognised as having legal effect by the Italian courts. The key issue was whether these

165. *Thlimmenos v. Greece* [GC], no. 34369/97, Reports 2000-IV, paras. 39-49 at paras. 44, 47 and 48.

domestic courts had duly verified whether the Article 6 guarantees had been secured in the church proceedings before granting the authority to enforce the decree. Since the Strasbourg Court held that the Italian courts had failed to ensure that the applicant had had a fair hearing in the ecclesiastical proceedings before issuing the authority to enforce the judgment of the ecclesiastical court, a review necessary when the decision in respect of which an authority to enforce was sought emanated from the courts of a country that did not apply the Convention, there had accordingly been a breach of Article 6.[166]

166. *Pellegrini v. Italy*, no. 30882/96, Reports 2001-VIII.

Conclusion

Freedom of thought, conscience and religion is a vital human right. The jurisprudence of the European Court of Human Rights (and of the former European Commission on Human Rights) provides powerful restatements of the importance of the values inherent in Article 9. A proper appreciation of these underlying principles and ideals is critical: in particular, freedom of thought, conscience and religion must be seen as helping to maintain and enhance democratic discussion and the notion of pluralism. Its two facets – the individual and the collective – are crucial. This freedom is, "in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[167] Furthermore, "the autonomous existence of religious communities is indispensable for pluralism in a democratic society. … What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome."[168] In other words, the protection of individual belief must promote rather than discourage mutual respect for and tolerance of others' beliefs. Thus the duties upon a State go beyond the responsibility of merely refraining from interfering with Article 9 rights, and the provision can also call for positive action on the part of state authorities to ensure that the right is an effective one. On the other hand, the interests of pluralism dictate at the same time that those holding religious beliefs cannot expect to have these beliefs protected against all criticism and must "tolerate and

167. *Kokkinakis v. Greece,* judgment of 25 May 1993, Series A no. 260-A, at para. 31.

168. *Supreme Holy Council of the Muslim Community v. Bulgaria, Supreme Holy Council Of The Muslim Community v. Bulgaria,* no. 39023/97, 16 December 2004, at para. 93.

accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".[169]

The reconciliation of competing considerations is the essential task required by Article 9, but subject to supervision by the European Court of Human Rights in Strasbourg through the use of a well-established checklist. In particular, any interference has to be in accordance with the law, for a prescribed state interest, and be shown as being "necessary in a democratic society". It is this last aspect of the test that often is of most difficulty. The exercise requires a proper appreciation of the crucial role freedom of thought, conscience and belief plays in a liberal democracy, and an acceptance of the importance of religious and philosophical convictions for the individual. On the other hand, an international judicial forum may not be as well-placed as the domestic authorities in carrying out such an evaluation, and thus a relatively wide "margin of appreciation" on the part of local decision-makers is apparent in many of the judgments from the Strasbourg Court. While this may indeed be an appropriate doctrine of restraint on the part of an international tribunal, it does not necessarily imply that at a domestic level the same should be apparent. The rigorous scrutiny of reasons advanced for an interference with this right of fundamental importance both for individuals and also society as a whole will help protect that pluralism and diversity necessary to advance human awareness and understanding of the individual's place in society and in the wider moral and spiritual universe.

The principle of according respect for thought, conscience and religion may now be considered a prerequisite of democratic society, but the manner in which this is secured in European States does vary considerably. There is no standard European "blueprint". At domestic level, there is still a rich diversity of constitutional and legal arrangements that reflect the rich tapestry of European history, national identity, and individual belief. Secularism is a constitutional principle in certain States; in others, one particular religion may enjoy recognised status as an Established Church but the implications of such recognition can vary; elsewhere, certain religious communities may enjoy particular financial benefits through conferment of taxation benefits or recognition of charitable status. This relationship between religion and State will generally reflect local tradition and practical expediency. As far as minority faiths are concerned, religious tolerance has been a practised political principle for centuries in some European countries. In others, this will be of more recent origin. In every society, however, members of minority communities may still feel themselves marginalised on account of belief.

How the Strasbourg Court has approached the interpretation of Article 9 and related guarantees has depended to a large extent upon the particular issue in question. It appears more willing to tackle denial of recognition of legal personality and the consequences of this (including such matters as denial of access to a court and the inability to uphold claims to the protection of assets)

169. *Otto-Preminger-Institut v. Austria,* judgment of 20 September 1994, Series A no. 295-A, at para. 47.

than other matters perceived to be of religious or philosophical obligation (such as conscientious objection to military service, observing religious holy days, and proselytism). The workplace attracts comparatively little protection, but the school classroom much more (unless it involves the display of religious symbols). The *forum internum* is largely sacrosanct, but the public sphere much less so on account of a restrictive test of what constitutes a "manifestation" of belief together with the obvious need to take account of countervailing interests. It is easier for the State to justify restrictions on religious advertising on television than on the preaching by door-to-door evangelicals, even although it is more straightforward for an audience to deal with the former than the latter.

This lack of consistency in the jurisprudence is, though, probably inevitable as it in some measure reflects the remarkable diversity in domestic arrangements. The religious and philosophical movements that have shaped European civilisation can indeed be viewed in respect of its peoples' intellectual and spiritual life as having had as profound an impact as the elemental forces that have carved out the continent's geographical features. While for long synonymous with "Christendom", Europe has been at different times and to different extents influenced by other beliefs including Judaism and Islam. In turn, the continent's contribution to the history of ideas and philosophy has been considerable, both through individual thinkers such as Plato, Aristotle, Hume and Kant as well as by means of major shifts in religious and philosophical understanding marked, for example, by the Renaissance, the Reformation, and the Enlightenment. If "Europe" is indeed to a large extent a construct of beliefs, value-systems and attitudes, this has been built up over the centuries through the medium of certain fundamental liberties, in particular of thought, of expression, and of association. Yet the products of this intellectual exercise have not always been positive. Pluralism, tolerance, belief and secularism may now generally be said to co-exist in European society, but this has not always been so. Religion and nationalism and group identity perhaps have been too closely intertwined: at different times and in different ways religious intolerance and persecution have blighted the continent, while more recently the extremism associated with certain political doctrines have involved serious and systemic violations of human rights. The lessons of history show that these fundamental liberties are both vital but also necessarily subject on occasion to restraint.

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

siderations, and community concerns that the display of religious symbols may have an impact upon community coherence all call for some assessment of the appropriateness of state responses.

This kaleidoscope of national arrangements must now be viewed through the prism of democracy, the rule of law and human rights. But the European Convention on Human Rights does not impose a set of rigid requirements: the treaty merely sets out certain minimum standards, and religious traditions and differences in constitutional arrangements regulating church and State will continue to form part of the continent's landscape, providing always that these are compatible with Convention expectations. This diversity is respected by the Strasbourg Court, and the historical and political context of religion and belief will often be reflected in its judgments. Europe lacks a common approach to resolving the question of the interplay between religion and state, and is much the richer for it. What Europe now possesses, on the other hand, is a set of legally-binding guarantees which strengthens the position of individuals and of groups such as religious associations in advancing their claims for respect for thought, conscience and belief.

Directorate General of Human Rights and Legal Affairs
Council of Europe
F-67075 Strasbourg Cedex

http://www.coe.int/human_rights/

These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and especially judges, in mind, but are accessible also to other interested readers.