MARTINUS NIJHOFF PUBLISHERS

Religion and Human Rights 4 (2009) 197–235

Religion & Human Rights
brill.nl/rhrs

The Freedom of Religion or Belief and the Freedom of Expression[1]

Malcolm D. Evans
Professor of Public International Law, University of Bristol, UK

Abstract
There is increasing scrutiny of the practice of states in relation to matters of religion or belief and whilst such practice takes place—and is subject to analysis—on many levels, one of the most important issues concerns the manner in which it bears upon the enjoyment of other fundamental rights. Given the importance placed upon the freedom of expression in the western liberal democratic tradition, it is easy to see why the relationship between religion, belief and expression has become so significant an issue and why the manner in which any tensions are addressed tends to assume something of a totemic significance in the eyes of some observers.

Keywords
religion; belief; expression; neutrality; impartiality; pluralism; tolerance; respect

I. Introduction

Early in 2006 the publication by the Danish paper *Jyllands-Posten* of a series of cartoons of the Prophet Mohammad acted as a catalyst for a debate about the relationship between the freedom of religion and belief and the freedom of expression. It soon became apparent that the 'Cartoons Debate' was merely one aspect of a much broader debate concerning the place of religion and of systems of belief in contemporary society. That more general debate has been reflected in the ever more intense discussions concerning a range of issues, such as the visibility of religious symbols in public spaces and in the workplace and questions concerning the legitimacy of protecting the 'ethos' of a workplace and of associated employment practices. At a more political level it has also found reflection in the discussions concerning non-discrimination, hate speech, incitement to religious hatred and so-called 'defamation of religion(s)'. Although all of these—and other—issues have their own internal dynamics there is a clear thread which connects them, this being the place of religion in the public domain. The significance of this question is becoming ever more apparent and is not only of domestic importance

[1] This article is based on a Report commissioned by the European Parliament's Subcommittee on Human Rights, dated 18 February 2009 and which is available as a Study published by the Directorate General External Policies of the Union, Ref EXPO/B/DROI/2008/56.

DOI: 10.1163/187103109X12459002443619

but is increasingly important. There is increasing scrutiny of the practice of states in relation to matters of religion or belief and whilst such practice takes place—and is subject to analysis—on many levels, one of the most important issues concerns the manner in which it bears upon the enjoyment of other fundamental rights. Given the importance placed upon the freedom of expression in the western liberal democratic tradition, it is easy to see why the relationship between religion, belief and expression has become so significant an issue and why the manner in which any tensions are addressed tends to assume something of a totemic significance in the eyes of some observers.

It is indisputable that there is an inter-connection between these freedoms and it is also true that it is possible to consider the issues which this poses from a variety of disciplinary and conceptual perspectives—political, sociological, theological, etc. This article approaches the question from a legal perspective. The legal dimensions can also be approached from a number of different perspectives—domestic law, international law, public law, private law, canon law, criminal law, etc. Within the current European context, however, it is also indisputable that human rights law provides a principal frame of reference from a practical perspective since approaches adopted at national level must be compatible with human rights approaches and standards. It is also the case that the principle questions which have arisen for resolution from both a practical and policy dimension have been the product of human rights approaches to the issue. It is for these reasons that this article will be largely focussed on European human rights law and as the European Court of Human Rights has the most developed jurisprudence it will be the primary focus of attention in this article. However, the approaches and values which it espouses are fully reflected in the leading United Nations human rights instruments including the Universal Declaration of Human Rights and Fundamental Freedoms (1948) and the International Covenant on Civil and Political Rights (1966), both of which address the freedom of thought, conscience and religion and the freedom of expression in an essentially similar fashion.

Approaching the matter from a human rights perspective has the additional advantage of making it relatively easy to identify the issues which need to be addressed, at the heart of which is the question of the inter-relationship of these two fundamental freedoms. The 'debate' concerning the freedom of religion and belief and of freedom of expression is usually couched in terms of a 'clash' or 'inter-section' of two fundamental rights and freedoms. This is hardly surprising, since they are set out as such in the principle international human rights instruments as well as in the European Convention on Human Rights, which for means of both illustration of this point and for ease of reference are set out as an Appendix at the end of this article.

Considering Articles 18 and 19 of the Universal Declaration of Human Rights, Articles 18 and 19 of the International Covenant on Civil and Political Rights and Articles 9 and 10 of the European Convention on Human Rights and Fun-

damental Freedoms, it is clear that the very manner in which these rights are presented tends to encourage discussion of how they might 'clash' or 'conflict' with each other. However, it is not inevitable that the relationship between these freedoms be seen in this fashion and it will be argued in this article that it is necessary to have a more refined sense of the relationship between them. Indeed, it is the European Convention which draws the sharpest distinction, with Article 9 focussed on thought, conscience and religion and Article 10 on expression. Both the UDHR and the ICCPR, whilst having separate Articles, include 'opinion' alongside expression, with Article 19 of the ICCPR treating opinion and expression in separate sub-sections. Moreover, other legal traditions do not necessarily understand these as being two distinct rights at all and not all regional instruments have consistently adopted the same approach. An interesting alternative approach was offered by the 1994 Arab Charter on Human Rights[2] which did not differentiate between these freedoms but linked them together and provided in Article 26 that 'Everyone has a guaranteed right to freedom of thought, belief and opinion' and in Article 27 that:

> Adherents of every religion have the right to practice their religious observances and to manifest their views through expression, practice or teaching, without prejudice to the rights of others. No restrictions shall be imposed on the freedom of thought, belief and opinion except as provided by law.

As will be seen, this 'synthesised' approach, whilst certainly unfamiliar to those versed in the *structures* of the European and UN systems, had a strong resonance with their practical outworking.[3] The 1994 Charter did not, however, enter into force and was replaced early in 2004 with a revised version[4] which replaced this 'synthesised' approach with two separate Articles, 30 and 32, which are closer to the more familiar approaches found in the ECHR and ICCPR. Nevertheless, what this indicates is that the freedom of expression and freedom of thought, conscience and religion can be seen as closely connected, with 'opinion' as something of a fulcrum between them.

The leading human rights bodies have placed a high value on both the freedom of religion or belief and the freedom of expression. In its General Comment No 22, the UN Human Rights Committee said that 'the right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18(1) is far-reaching and profound. . . . the fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from,

[2] Adopted by the League of Arab States, 15th September 1994.

[3] This might be contrasted with the 1990 Cairo Declaration of Human Rights in Islam, adopted by the Organisation of the Nineteenth Islamic Conference of Foreign Ministers on 5 August 1990, Articles 10 and 22 of which subordinate the enjoyment of both the more general enjoyment of the freedom of religion (which it does not directly mention) and the freedom of expression to Islamic values.

[4] Adopted by the League of Arab States, 22 May 2004, entered into force 15 March 2008.

even in time of public emergency . . .'.[5] Similarly, in its rather brief General Comment on Article 19, the Human Rights Committee has stressed that 'the right to hold opinions without interference' under Article 19(1) 'is a right to which the Covenant permits no exception or restriction'[6] and has indicated its preference for a broad reading of the scope of the freedom of expression, explaining that it 'includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice" . . .'.[7]

Turning to the European Court of Human Rights, in the case of *Kokkinakis v. Greece* the Court said of Article 9 that:[8]

> 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.

In this key statement, which is reproduced as a matter of routine in almost all cases concerning Article 9, the Court acknowledged the significance of the freedom of thought, conscience and religion to the individual and the role it plays in their sense of personal identity. It also recognised how important it is to ensure that there is space for this to be recognised within a democratic society. Rather than see the protection of the freedom of religion or belief as something which is to be enjoyed by individuals and by belief communities *at the expense of* the common good, it sees the enjoyment of the freedom of religion and belief by individuals and belief communities *as the realisation of* a common good. At the same time, it underlines the need to ensure that democratic society remains open and inclusive by highlighting the importance of pluralism.

To the extent that this may require a balancing of interests, the balance to be struck should reflect the importance of the rights enshrined in Article 9 to both the individual and to the ideal of democratic society itself. When individuals and belief communities are able to enjoy their freedom of religion or belief democratic society is itself a beneficiary. This is also reflected in the UDHR when in Article 29(1) it recalls that 'Everyone has duties to the community in which

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[5] UN Human Rights Committee, General Comment No 22, adopted 30 July 1993, para. 1.
[6] UN Human Rights Committee, General Comment No 10, adopted 29 June 1983, para. 1.
[7] *Ibid.*, para. 2.
[8] *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, para. 31.

alone the free and full development of his personality is possible'. Likewise, when it is necessary to limit the enjoyment of that freedom in order to protect wider societal interests, there is a double diminution of democratic freedoms: not only are the freedoms of the individual curtailed, but there has been an inroad into the democratic ideal which seeks to support the flourishing of all forms of religion or belief which are compatible with the underlying principles of democracy, human rights and the rule of law. This carries the implication that when these interests appear to conflict a resolution should be sought which seeks to maximise both, to the extent that this is possible, rather than subordinate the interests of the one to the other.

Turning to Article 10 of the European Convention, the Court has used similar language when stressing the significance of the freedom of expression to the functioning of a democratic society. In the case of *Handyside v. the United Kingdom*, the Court said that Article 10 'constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man (sic)'.[9] As with Article 9, the implications of this are that any restrictions placed upon its enjoyment not only fetters the individual whose freedom is thereby eroded but also has a diminishing effect upon democratic society as a whole. In consequence, there must be a high threshold of tolerance for forms of expression, including those which others within that society might not welcome. As the Court put it in the *Handyside* case,[10] Article 10

> is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.

Once again, this approach is reminiscent of the language found in Article 29 of the UDHR and also of Article 19(3) of the ICCPR where it provides that 'The exercise of the rights provided for in paragraph 2 of this article [the freedom of expression] carries with it special duties and responsibilities', a point further emphasised by the Human Rights Committee in its General Comment on that article.

Given that both the freedom of thought, conscience and religion and the freedom of expression are seen as essential elements of a plural, democratic society, two key questions need to be addressed. The first is whether there is a formal hierarchical relationship between them. The second question, which has to be informed by the answer to the first, is how to address situations which appear to

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[9] *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, para. 48. The latter phrase is nowadays usually given in a more inclusive formulation, referring to its being 'one of the basic conditions for its progress and for each individual's self-fulfilment'.

[10] *Ibid*.

reveal potential conflicts between them. These issues will be considered in the following section of this article. This will then be followed by a consideration of how the conclusions reached can inform policy approaches to a number of discrete issues which have arisen in practice.

II. The Relationship between Freedom of Thought, Conscience and Religion and the Freedom of Expression

Structurally, the ECHR follows the UDHR and the ICCPR in adopting what might be called a classic human rights formulation. In common with other major human rights instruments, they all set out the right which is to be enjoyed by the individual person,[11] whilst providing for it to be subject to a range of potential limitations intended to safeguard the interests of other individuals or a variety of community interests. Some of those limitations are expressly provided for in the texts themselves whilst others can be derived from the interplay of broader convention principles with the specific rights in question, as developed by and illustrated through the jurisprudence of the Court. These are more difficult to identify and although they are given formal effect through the application of the 'formal sources' of limitation such as Articles 9(2) and 10(2) of the ECHR, it is useful to identify them in their own right since they are key to the 'balancing' which has to take place between the competing interests. It has already been explained that the 'formal' distinction between the freedoms of thought, conscience and religion and the freedom of expression appears at its sharpest from a textual perspective in the European Convention on Human Rights. It is for that reason—as well as because of its particular importance for the European legal space and for decisions (including those involving relations with third countries)—that this section will focus on the ECHR and the jurisprudence of the European Court of Human Rights (though reference will be made for purposes of comparison and cross reference to the work of the UN Human Rights Committee as appropriate). To that extent, it may be seen as both a case study and as indicative of the more generally applicable approaches which are to be taken within the UN system as well as in other regional systems where the distinctions are not so heavily marked.

A. *The Formal Relationship*

An initial question concerns the formal relationship between Articles 9 and 10 of the ECHR and for reasons which will become apparent it is appropriate to look first at Article 9(1). As has been seen, this provides that

[11] It is clear from the caselaw of the Court that these rights are to be enjoyed by both natural and legal persons and 'person' should be understood to be referring to both in this text.

> 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 or observance.

Article 9(1) in fact contains two separate, though intimately connected, rights. It opens by stating that 'everyone enjoys the freedom of thought, conscience and religion'. This provides an essential starting point and Convention bodies have long stressed that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*'.[12] The *forum internum* represents the sphere of 'inner conviction' and is absolutely inviolable. As a result, individuals must be free to adhere to any form of belief that they wish. A similar approach is taken by the UN Human Rights Committee in relation to Article 18, which in General Comment No. 22 said that:

> Article 18 distinguishes the freedom of thought, conscience and religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally.[13]

The reason for this, as the European Court acknowledged in the case of *Kosteski v. the former Yugoslav Republic of Macedonia* is that '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'.[14]

Believing what one wishes does not necessarily carry with it the right to act or to say what one wishes and the second element of Article 9(1) of the ECHR moves beyond the *forum internum* and addresses situations which arise when adherents of a belief seeks to act in accordance with what they consider to be appropriate in the light of their belief. First, it expressly protects[15] the right of a person to change their religion or belief—something which follows naturally from the opening words of the article safeguarding the freedom of thought, conscience and religion itself. Secondly, and in common with Article 18 of the ICCPR, it expressly recognises the right of believers and belief communities to 'manifest' their religion or belief and lists four particular forms that such manifestations may take: worship, teaching, practice and observance. However, the Court has hinted on several occasions that this is not necessarily a definitive list and it

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[12] See, for example, *C v. UK*, 10358/83, Decision of 15 December 1983, 37 Decisions and Reports 142, at p. 147. More recently, see also *Leyla Sahin v. Turkey* [GC], no. 44774/98, para. 105, ECHR 2005-XI where it is stressed that freedom of religion is 'primarily a matter of individual conscience'.

[13] General Comment No 22 (1993), para. 3.

[14] *Kosteski v. the former Yugoslav Republic of Macedonia*, no. 55170/00, para. 39, 13 April 2006.

[15] A contrast might be drawn at this point with Article 18 of the ICCPR which does not expressly mention 'change' but speaks of the right to 'have or adopt'. In General Comment No 22 (1993), para. 5, however, the Human Rights Committee has made it clear that this includes 'the right to replace one's current religion or belief with another or to adopted atheistic views…'.

has interpreted Article 9 in a way which offers protection to a wide range of interests and which suggests that these terms should be broadly construed. Once again, the Human Rights Committee has taken a similar view, commenting that 'the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and the concept of worship extends to rituals and ceremonial acts giving expression to belief, as well as various practices integral to such acts'.[16] Despite this, it will, nevertheless, usually be necessary for an applicant to be able to demonstrate that there has been an impediment placed upon their ability to engage in one of these activities in order to claim that their freedom to manifest their religion or belief has been infringed. It is also important to stress that it is the 'manifestation' of religion or belief which may be subjected to limitations in accordance with the provisions of Article 9(2), and not the freedom of thought, conscience and religion itself, a matter which will be considered further below.

Turning now to Article 10 of the ECHR, this can also be seen as having two distinct dimensions. As has been seen, Article 10(1) provides that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.

A similar distinction as was drawn between the freedom of thought, conscience and religion and the manifestation of religion and belief can be made as regards the freedom to 'hold opinions' and to 'receive and impart information and ideas'. The right to 'hold' opinions may reasonably be seen as akin the freedom of 'thought, conscience and religion' in that it relates to inner and personal views of the person concerned and it is not for the State to prevent a person holding opinions, religious or otherwise, no matter how unpalatable they may be.

This receives powerful affirmation from the work of the Human Rights Committee which in its General Comment on Article 18 makes this express connection with Article 19 of the ICCPR, observing that the freedom of thought, conscience and religion and to have or to adopt a religion 'are protected unconditionally, *as is the right of everyone to hold opinions without interference in article 19(1)*.[17] But the holding of an opinion is merely the precursor to the freedom of expression—the enjoyment of which centres on the receiving and imparting of information and ideas. Moreover, both the holding of opinions and the receipt and imparting of information and ideas are expressly seen as *examples* of the freedom of expression, rather than as lending shape to the substance of the right. It

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[16] *Boodoo v. Trinidad and Tobago*, Communication No. 721/96 (views of 2 August 2002), UN Doc. A/57/40 vol.2 (2002), p. 76 at para. 6.6.

[17] General Comment No 22 (1993), para. 3.

is, then, best to understand Article 10 of the ECHR as an all-embracing provision providing for the transmission of ideas, views and opinions through a potentially limitless array of mediums.

How, then, do these articles stand in relation to each other? It is a central contention of this article that it is a mistake to proceed on the assumption that there is, or might be, a potential 'conflict' between the freedom of expression on the one hand and the freedom of religion on the other. This view—which has been prevalent in so many of the debates concerning religion and expression in recent times—oversimplifies and potentially distorts the web of legal relationships surrounding these two fundamental rights. This contention will be explored in the remainder of this sub-section. By looking at the points of differentiation it will be seen that the freedom of religion and the freedom of expression are, from a human rights perspective, located on a legal continuum rather than standing in opposition to each other. Again, the European Convention of Human Rights will be used as the primary vehicle for this exploration, but the conclusions which flow from it are of general application.

i) *The Nature of the Opinion or Belief*

One critical factor which affects the relationship is the nature of the opinion or belief at issue. It is both unhelpful and unnecessary to seek to distinguish those patterns of thought and conscience which are religious in nature from patterns of belief which are not since all those systems of thought and conscience which fall within the scope of the article are to be equated with 'beliefs', the manifestation of which is to be protected.

However, in the case of *Arrowsmith v. the United Kingdom* the European Commission on Human Rights implicitly endorsed the view of the respondent UK Government that whilst 'ideas' and 'opinions' were indeed protected under Article 10, the use of the term 'belief' in Article 9 indicated a somewhat higher threshold.[18] This was confirmed by the Court in the case of *Campbell and Cosans v. the United Kingdom* where it said that 'the term 'belief' denotes views that attain a certain level of cogency, seriousness, cohesion and importance'.[19] Therefore, whilst all forms of thought, conscience and religion or belief will amount to 'ideas' or 'opinions' the expression of which is protected under Article 10, only those forms of ideas and opinions which attain that higher standard will fall within scope of Article 9. In other words, Article 9 addresses a sub-set of ideas and opinions.

It is clear that what might reasonably be described as the 'mainstream' religious traditions—such as Buddhism, Christianity, Hinduism, Islam, Judaism, Sikhism—all fall within its scope and it has been acknowledged that it embraces Jehovah's

[18] *Arrowsmith v. UK*, no. 7050/77, Commission Report of 12 October 1978, Decisions and Reports 19, p. 5, para. 69.

[19] See *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, para. 36.

Witnesses, the Church of Scientology and many others besides. Its applicability to cogent bodies of thought of a non-religious nature, such as atheism and pacifism, is also well attested. The UN Human Rights Committee has also taken this approach, emphasising the need to adopt an inclusive approach, commenting that 'The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.'.[20] There are, however, limits and in *M.A.B, W.A.T. and J-A. Y.T. v. Canada* the HRC observed that 'a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be broad within the scope of Article 18 of the Covenant'.[21]

Difficulty has also been occasioned by less well established patterns of thought, or by beliefs which, though sincerely held, do not offer up an overall 'guiding outlook' of a similarly encompassing nature. For example, in the case of *Pretty v. the United Kingdom*[22] the applicant suffered from a terminal illness and wished to die but needed assistance in order to commit suicide. Her husband was unwilling to do so since this would be a criminal offence under domestic law. Mrs Pretty argued that this breached her rights under Article 9 of the ECHR since she 'believed in and supported the notion of assisted suicide'. The European Court rejected this, saying that 'not all opinions and convictions constitute beliefs in the sense protected by Article 9(1) of the Convention',[23] choosing to see the issue as being one of personal autonomy under Article 8 of the Convention (concerning respect for family and private life). This suggests that largely personally-held ideas, opinions and beliefs, no matter how seriously taken, will not fall within the scope of Article 9 although they qualify for protection under other provisions of the convention, including Article 10 when it is appropriate.

Some forms of opinions or ideas may, however, be considered incompatible with Convention values altogether and so be unable to benefit from its protection. For example, Article 17[24] expressly seeks to prevent its provisions being used to undermine essential convention values and in the case of *Norwood v. the United Kingdom*, the Court found that the display of a poster by a member of an extreme right wing party that identified Islam with terrorism amounted to a 'vehement attack on a religious group' which was 'incompatible with the values proclaimed and guaranteed by the convention, notably tolerance, social peace

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[20] General Comment No 22 (1993), para. 2.

[21] *M.A.B, W.A.T. and J-A. Y.T. v. Canada*, No. 570/1993, (decision on 8 April 1994), UN Doc. A/49/40 vol. 2 (1994), p. 368 at para. 4.2.

[22] *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.

[23] *Ibid*., para. 82.

[24] Article 17 provides: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.

and non-discrimination' and so did not benefit from the protection of Article 10, the freedom of expression, at all.[25] This approach is consonant with the UDHR, Article 30 of which provides that 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.

ii) *The Question of a 'Manifestation'*

The fine line that is drawn between the freedom of religion or belief and the freedom of expression on the basis of the nature of the opinion or belief in question is made even more malleable by the approach taken to the question of what forms of action amount to a 'manifestation' of a religion or belief. Assuming that the opinion or idea has attained the threshold of significance so as to qualify as a form of religion or belief, a number of other questions need to be asked before it can be determined that a 'manifestation' of that belief is at issue.

If it is asserted that some action or activity is the product of a religion or belief, is it possible simply to deny that this is so on the basis of a scrutiny of the facts, or is it necessary to accept an applicant's 'subjective' characterisation of their actions? It is difficult to see on what basis a Court can determine that a person does not understand an issue to be of a religious nature if they say that, for them, it is. This does not mean that an applicant's characterisation of an act as a manifestation must be accepted in an unquestioning fashion. For example, if a person is seeking to take advantage of a privilege or exemption which is available only to adherents of a particular religious tradition or belief system it may be necessary to consider whether that person is a genuine adherent of the belief system in question.[26]

Even when it is clear that the activity in question is to be taken as a *bona fide* form of manifestation by an applicant, this does not necessarily mean that it is to be taken as a form of manifestation *for the purposes of human rights protection*.[27] For example, the former European Commission on Human Rights, in a passage still regularly cited by the Court, concluded that 'the term "practice" as employed in Article 9(1) does not cover each act which is motivated or influenced by a religion or a belief'.[28]

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[25] *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI.

[26] See, for example, *Kosteski v. the former Yugoslav Republic of Macedonia* no. 55170/00,13 April 2006 where the Court said that 'it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when the claim concerns a privilege or entitlement not commonly available' (para. 39). Care needs to be taken, however, since compelling a person to prove their religious allegiance might become oppressive.

[27] *Arrowsmith v. UK*, no. 7050/77, Commission decision of 12 October 1978, Decisions and Reports 19, p. 5, para. 71.

[28] *Idem*.

The significance of this for current purposes is that it shows, once again, that the line between a 'manifestation' for the purposes of Article 9 and a form of 'expression' for the purposes of Article 10 is a fine one and is easily crossed. For example, the case of *Arrowsmith v. UK* concerned a pacifist who had been distributing leaflets outside an army camp which gave information on how soldiers might claim exemption from serving in a situation of conflict. As far as the applicant was concerned, she was engaged in the practice of pacifism and as such her actions fell within the protective reach of Article 9. The European Commission took the view that whilst the manifestation of pacifism was indeed protected by Article 9 the distribution of leaflets such as those at issue in the case in hand was not. It accepted that the applicant had been 'motivated by her pacifist beliefs' when she distributed them but it did not think that this amounted to a 'manifestation', observing that 'it is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9(1)'. However, the Commission had no difficulty in determining that the distribution of the leaflets was a form of expression for the purposes of Article 10.

Other cases have concerned both religious broadcasting and religious advertising. For example, in the case of *Murphy v. Ireland* the applicant challenged the compatibility of a ban on religious advertising on radio and television with both Article 9 and Article 10. There was no doubt that such a ban interfered with the freedom of expression. It is less obvious how the failure to be able to advertise a religious event on commercial radio prevented the applicant from manifesting his belief in either teaching, worship, practice or observance—though it is arguable that it restricted his opportunity to do so 'with others'. The European Court did not deal with this point directly but said that it felt that 'the matter essentially at issue.... is the applicant's exclusion from broadcasting an advertisement, an issue concerning primarily his means of expression and not his profession or manifestation of his religion'.[29] In consequence, it dealt with the case solely under Article 10, though given the manner in which the Court addressed the question (which will be considered below) it is difficult to see that this made any practical difference to the outcome. This might be contrasted with the subsequent case of *Glas Nadezhhda EOOD and Elenkov v. Bulgaria*,[30] in which the court was faced with the slightly different issue of religious broadcasting, rather than advertising. On the facts of the case the Court decided that the refusal to grant a broadcasting license was in breach of Article 10 but it also found it 'unnecessary' to determine whether there had also

[29] *Murphy v. Ireland*, no. 44179/98, para. 61, ECHR 2003-XI (extracts).
[30] *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. 14134/02, ECHR 2007.

been a breach of Article 9 in the light of this finding. In other words, it did not rule out the possibility that an unjustified interference with religious broadcasting could amount to an interference with the freedom of religion or belief though it obviously, and correctly, saw Article 10 as being the primary right at issue. For current purposes, what needs to be noted is the line between advertising a religion and broadcasting a religious opinion is very difficult to draw. In consequence, the Court, in practice, ensures that this fine characterisation has little impact on the outcome of a case and this again illustrates the need for caution in juxtaposing 'expression' and 'religion' as being values which may need to be balanced against each other.

iii) *A Matter of Chance and/or Choice?*

A further reason for doubting that it is appropriate to approach questions concerning the interplay of the freedom of expression and the freedom of religion in an oppositional fashion follows on from this and it is that it is often a matter of chance and/or choice whether the question is approached from the one perspective or the other. As the cases considered above show, there may often be a choice as to which right is chiefly at issue and it is clearly the case that the parties also have that choice when they frame an application in the first place. Sometimes that choice is made for them by the prior actions of the State itself. For example, the case of *Otto-Preminger-Institut v. Austria* concerned the confiscation and destruction of a film due to be shown in a private cinema which the authorities considered to be potentially inflammatory given its anti-religious nature. This clearly gave rise to an issue under Article 10 as there was an interference with the freedom of expression since the seizure inhibited the expression of 'ideas' and 'opinions' (though on the facts of the case this interference was considered justified). Had the film been shown, however, it is arguable that a claim might have been brought under Article 9 against the state for its failure to ensure that the cinema owner showed proper respect for objects of religious veneration. The substance of the issue remains identical—'should the authorities allow the film to be shown?'. Whether this raises issues primarily under Article 9 or 10 was contingent on the initial response of the authorities to the emergent situation.

What is often forgotten in situations of this nature—and the Danish Cartoons issue provides a good example—is that *either* side might be able to use *either* right to advance its claim. The freedom of expression clearly embraces the right to express ideas and opinions, including those which shock and offend, which are religious in nature. Likewise, the freedom of religion or belief extends to the manifestations of non-religious patterns of thought and conscience, including secularism, agnosticism and atheism, provided they are cogent, reasoned and attain the requisite degree of seriousness. When an act of expression derives from or bears upon matters of religion or belief, there is a convergence towards that common ground which is protected by both rights.

iv) *Conclusion*

In conclusion, we can see that there are a number of reasons why it is unhelpful to think in terms of a 'conflict' between the freedom of religion or belief and the freedom of expression. They are best understood as complementary provisions. The opening words of Article 9 guarantee that all persons are free to believe whatever they wish. The remainder of Article 9 is concerned with a subset of beliefs which inspire those who hold them to seek to act in a certain fashion and therefore offers special protections to the 'manifestation' of those beliefs. Beliefs of all kinds receive the more general protection offered by Article 10, which guarantees the freedom to express opinions and ideas on any subject. Both the manifestation of religion or belief and the expression of ideas and opinions are, however, qualified by the limitation clauses and by Article 17 which sets outer limits on the nature of beliefs to which convention protections extends. Understood in this way, the freedom of religion or belief and the freedom of expression appear to complement each other rather than compete with each other. As would be expected, the same is true of the ICCPR. We have already seen that the close nexus between the freedom of thought, conscience and religion in Article 18, the freedom of opinion in Article 19(1) and the freedom of expression in Article 19(2) is recognised by the Human Rights Committee both in its views on individual communications and in its General Comments. It has also recognised the role that is played by Article 20 of the ICCPR which, like Article 17 of the ECHR, offers something of a 'backstop' to the breadth of protection which those two Articles offer. Thus in *Ross v. Canada* the Human Rights Committee received a communication from an applicant who was facing dismissal from his post as a teacher because of his expression of allegedly anti-Semitic views, which he believed to flow from his Christian beliefs, outside of his employment. The applicant based his claim on both Articles 18 and 19. Canada sought to defend the conduct of the School Board on the basis of Article 20(2). The Committee determined the case on the basis of Article 19, noting that 'restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19(3)', which it felt it ought to consider in the first instance.[31] This clearly illustrates the linear relationship that exists between these rights.

The reason why it so often appears otherwise is that the limitation clauses in all human rights instruments allow for the substantive right to be restricted by the need to protect 'rights and freedoms of others'. Such rights and freedoms obviously include both the freedom of religion or belief and the freedom of expression. Just as it may sometimes be necessary to limit the freedom of expression of one person in order to ensure that another person can enjoy their own freedom to express themselves, so may it be necessary to limit the freedom of expression in

[31] *Ross v. Canada*, No 736/97, (views of 18 October 2000), UN Doc. A/56/40 vol. 2 (2001), p. 69 at para. 10.6.

order that others may enjoy their freedom of religion or belief, and vice versa. In neither situation is one right being prioritised over another. Rather, on the facts of each situation, a balance is to be struck in order to seek to maximise the extent to which the rights and freedoms of all are protected. Approaching this issue from the perspective of maximizing the rights of all yields different outcomes from one which prioritises the one over the other. The limitation clauses will, therefore, now be examined.

B. *The Place for Accommodation: The Limitation Clauses*

The previous section has argued that the freedom of religion or belief and the freedom of expression lie on a continuum and should not be seen as standing in a relationship of 'opposition' to each other. It must also be recognised that the human rights framework permits the exercise of both freedoms to be subject to a variety of limitations, the nature and scope of which differ somewhat, although the practical impact of these differences is in fact slight. This section will briefly review those sources of restraint. The underlying argument is that the manner in which the tensions between the freedom of religion or belief and the freedom of expression are to be resolved lies in the application of the limitation clauses and that, once again, their operation is informed by a number of underlying principles which can be identified from the jurisprudence. Once again, this has the important practical consequence of shifting the focus of attention away from a potential 'clash of rights' and towards the manner in which the exercise of both these rights comes to be harmonised with common underlying convention values and principles.

i) *Common Limitations*

A first source of common restraint are those articles which place overarching limits on the forms of belief or forms of expression which may be protected by the human rights framework. Reference has already been made to Articles 30 of the UDHR, 20(2) of the ICCPR and Article 17 of the ECHR which operate to exclude the expression of certain forms of beliefs, ideas or opinions from the scope of protection altogether. Such provisions should, however, be approached with caution and as a last resort, as indicated by the HRC in *Ross v. Canada*. Although this is not, strictly speaking, a limitation on the enjoyment of a right so much as a limitation of the extent of a right, it has much the same practical effect and can reasonably be seen as a form of potential generic limitation upon the enjoyment of both freedoms.

A further generic limitation concerns the extent to which it is possible to derogate from those rights under strictly defined circumstances. There is a slight difference of approach between the ICCPR and the ECHR in this respect. Article 4(1) of the ICCPR provides that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4(2), however, qualifies this, providing that:

> No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

In other words, whilst it may be possible to derogate from the freedom of expression in times of public emergency threatening the life of the nation under the ICCPR, it is not possible to derogate from the freedom of religion or belief, including the right of manifestation. Moreover, even if one were to derogate from the freedom of expression, such derogation could not be discriminatory on grounds of religion: thus prohibiting the free expression of one form of religious viewpoint would not be acceptable even in an emergency situation (whereas a call for general restraint on expression, religious or otherwise, could be).

Unlike the ICCPR, Article 15 of the ECHR permits states to derogate from a range of rights which includes both the freedom of religion or belief (article 9(1)) and the freedom of expression (article 10(1)). Once again, such derogation is only permitted 'in times of war or other public emergencies threatening the life of the nation' and only 'to the extent strictly required by the exigencies of the situation'. In theory, this could be taken to suggest that in such emergency situations the State might be able to act in a manner which even impinged upon the '*forum internum*'—for example, seeking to persuade or coerce individuals to abandon forms of thinking or of belief which were considered inimical to national security. However, given the primarily personal and private scope of the *forum internum*, it is difficult to see how such intrusions could ever be 'strictly required'. No State has yet considered there to be such a need in the emergency situations which have given rise to notices of derogation. In consequence, it is best to regard this as more of a theoretical than a practical possibility and it would be unwise to see Article 15 as providing a means of restricting the enjoyment of the freedom of thought, conscience and religion *per se*.[32] Article 15 does, however, provide a means of extending the range of situations in which it is legitimate to restrict the manifestation of religion or belief and the freedom of expression beyond those set out in the limitation clauses. Once again, however, no such derogations have ever

[32] However, this does not mean that a derogation under Article 15 can have no bearing on the enjoyment of Article 9 rights, since it may permit the imposition of stricter limitations on the manifestation of religion or belief than would otherwise be acceptable. Restrictions under Article 9(2) will be considered below.

been made, suggesting that the limitations clauses are considered sufficient to protect the relevant interests of the states concerned and it is to these that attention will now be turned.

ii) *The Article Specific Limitation Clauses*

First of all, it is necessary to recall both the similarities and the differences between the various limitation clauses attaching to the freedom of religion or belief and the freedom of expression in both the ICCPR and the ECHR. Though similar in many respects, there are slight—but significant—differences between them. The limitations on the freedom of religion and belief in both the ICCPR and the ECHR are very similar and, as has already been explained, relate only to the freedom to manifest religion or belief, rather than the freedom of thought, conscience or religion *per se*. Both require that any limitation be 'prescribed by law' and that they be 'necessary' in order to achieve one of a number of limited purposes which are essentially the same: in the ICCPR these are 'to protect public safety, order, health, or morals or the fundamental rights and freedoms of others' whilst in the ECHR these are 'public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others'. The chief difference is that in the ICCPR reference is made to the 'fundamental' rights and freedoms of others but this is unlikely to be a meaningful distinction in practice. The only other difference between these limitation clauses is that the ECHR expressly refers to the need for limitations to be necessary *in a democratic society* which underscores the need to ensure that such restrictions are indeed being imposed to serve the interests of all, rather than of a segment of political society within a state. In essence, however, there is a high degree of similarity between these provisions.

There is also a high degree of similarity between the limitation clauses relating to the freedom of expression. Both Article 19(3) of the ICCPR and Article 10(2) of the ECHR offer a justification for the imposition of limitations (something which is absent from the limitation clauses affecting the freedom of religion or belief), pointing out that the exercise of the freedom of expression carries with it duties and responsibilities, and which are reflected in the nature of the limitations which the state may impose. As with the freedom of religion or belief, such limitations must be prescribed by law and be 'necessary' (in the case of the ECHR, in a democratic society) to protect one of a number of interests. Though couched in rather different ways, both cover essentially the same heads, these being (in the words of the ECHR) 'national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others'. Although the ICCPR does not expressly mentions 'territorial integrity', this may reasonably be inferred from the inclusion of national security. Similarly, whilst the ICCPR mentioned 'public order (ordre public)' rather than 'public safety', it is difficult to think that much of significance could turn on this difference, given the other heads of legitimate

restraint which are mentioned. The ECHR also mentions an entire category of legitimate restrictions not directly alluded to in the ICCPR, these being 'preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'. Once again, these could be seen as implicit in the more general ICCPR limitations, though they do tend towards emphasising the legitimacy of a greater degree of control on expression as a consequence. Finally, and significantly, it should be recalled that the ICCPR limitations only apply to the freedom of expression, rather than the freedom to hold opinions (a right found in Article 19(1) of the ICCPR: the limitations provided for in Article 19(3) being limited to the freedom of expression as provided for in Article 19(2)).

There is, then, a high degree of similarity in the approach taken to the limitation clauses in both instruments and both seem to offer a heightened protection for the freedom to 'have' a pattern of thought, conscience, religion or opinion, reserving limitations for the manifestation or expression of such patterns of thought or views. Manifestations of religion or belief are subjected to fewer limitations than the freedom of expression, largely since the freedom of expression may be limited on grounds of national security whereas the freedom to manifest religion or belief may not.

C. *What Are the Principles Affecting the Relationship?*

The previous section has set out the formal framework of limitations. This section aims to provide a more extensive practical guide to how that framework operates in practice and takes the form of a case study of the approaches adopted under the ECHR. The reason for this is that the Court's jurisprudence offers the most detailed guidance on the relevant issues and its study allows for the distillation of principles of more general application which will be of comparative utility when transposed from the European to the broader international context.

i) *Generic Common Principles: Necessary in a Democratic Society and the Margin of Appreciation*

In common with similar clauses in the European Convention, Articles 9(2) and 10(2) require that limitations be both 'prescribed by law' and 'necessary in a democratic society', but with the state enjoying a certain margin of appreciation in determining the necessity of the particular restriction in question.

The essence of the 'prescribed by law' requirement is captured in two ideas: first, that 'the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances' and secondly, that the law must be 'formulated with sufficient precision to enable the citizen to regulate his conduct… to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[33] Both of these criteria call for a rea-

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

sonableness-based assessment which can only be determined on the facts of each case, although the Court has made it clear that in matters concerning fundamental rights 'it would be contrary to the rule of law… for a legal discretion granted to the executive to be expressed in terms of an unfettered power'.[34]

Once it has been determined that it has been 'prescribed by law', it must be determined whether a restriction is 'necessary in a democratic society', which turns on two issues. First, a restriction must pursue one of the legitimate aims set out in those articles, and considered above. In the current context, this will not be a difficult hurdle to surmount. As has already been seen, both the freedom of expression and the freedom of thought, conscience and religion are essential to the flourishing of democratic society and so both must be susceptible to limitations which are necessary for the protection of the other and in all those cases in which there has been a tension to be resolved in the enjoyment of these rights limitations have been seen as fulfilling the legitimate aim of protecting the rights and freedoms of others.

The more critical question is whether the nature of the interference is proportionate to the legitimate aim which is be being pursued and it is at this point that doctrine of the 'margin of appreciation' comes into play. The rationale for the 'margin of appreciation' was set out in the case of *Handyside v. the United Kingdom* in the following terms:[35]

> By reason of their direct and continuous contact with the vital forces or 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 as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

However, the Court has made it clear that the 'margin of appreciation' goes hand in hand with European oversight and that the breadth of the margin of appreciation accorded to states will vary depending on the rights and interests at stake, and that is very much a question for the Court itself to decide. In some areas, the Court has decided that very little, if any, margin of appreciation is given to states. This is particularly true as regards matters in which it considers there to be a 'pan-European' consensus. It is at this point that there is a discernable difference in the approach taken by the Court between Article 9 and Article 10.

ii) *The Principles Relevant to the Intersection of the Freedom of Expression and the Freedom of Religion or Belief*

Whilst there is a relatively uniform consensus concerning the approach to be taken to the margin of appreciation under Article 10, there is no such consensus as regards Article 9. As the Court has said, 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society: even within

[34] *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, para. 84, ECHR 2000-XI.

[35] *Handyside v. the United Kingdom,* judgment of 7 December 1976, Series A no. 24, para. 48.

a single country such conceptions may vary'.[36] In consequence, the Court grants to States a relatively broad margin of appreciation in cases considered under Article 9. Thus in the case of *Leyla Sahin v. Turkey*—concerning the wearing of Headscarves by students in universities in Turkey—the Court said '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… Rules in this sphere will consequently vary from one country to another according to national traditions..... Accordingly the choice and 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'.[37]

This does not give the State an unfettered discretion to determine whether a restriction is proportionate to the aim pursued since the margin of appreciation is a second order principle and that the state is constrained by an overarching primary principle of ensuring that there is a 'priority to rights'.[38] Moreover, it is always open to the Court to narrow that margin should a more general consensus emerge. Nevertheless, unless or until that occurs, it does mean that different responses to similar situations will be acceptable under the Convention framework, providing that they properly reflect a balancing up on the particular issues in the contexts in which they emerge. It also means that there is more latitude for states to restrict forms of religious expression under Article 9 than under Article 10 (despite the limitation clauses being somewhat narrower in scope, as previously discussed). Because of this, it is best to focus attention on the manner in which the Court may seek to limit that latitude by identifying those principles which inform its assessment of the legitimacy of limitations under Article 9 rather than focus on Article 10 where the state enjoys a more limited margin of appreciation. Whilst there may not be a common European approach sufficient to narrow the breadth of the margin of appreciation significantly, a number of key concepts have emerged which, reflecting core Convention values which do provide benchmarks against which to assess the legitimacy of any restriction.

—Neutrality/Impartiality

There has been an important shift in the perception of the role of the State in relation to the freedom of religion and belief and the Court now calls on States to act in a neutral fashion as between religions and as between religious and non-religious forms of belief.[39] It inevitably flows from this that the state is not to privilege religious expression over other forms of expression, or to sub-ordinate

[36] *Otto-Preminger Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, para. 56.

[37] *Leyla Sahin v. Turkey* [GC], no. 44774/98, para. 109, ECHR 2005-XI.

[38] See S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), pp. 201–213.

[39] See, for example, *Hasan and Chaush* v. *Bulgaria* [GC], no. 30985/96, para. 78, ECHR 2000-XI.

the expression of religion or belief to the non-religious. The duty to remain neutral and impartial has been re-iterated on many occasions[40] and it is clear that any evidence that the State has failed to act in such as fashion will require justification under Article 9(2) if it is not to amount to a breach of the Convention.

This duty has a number of facets, perhaps the most important being that 'the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy or religious beliefs *or the ways in which they are expressed*'.[41] Limitations of the freedom of religious expression, in whatever form this may take, require close scrutiny to ensure that they do not breach this duty by favouring one group at the expense of another. From a practical perspective, this makes it important that any restrictions be generic in nature and not focussed upon a particular form of religion or belief. Given the difficulty in establishing the proportionality of generic restrictions upon the freedom of expression or the freedom of religion or belief, the duty of impartiality and neutrality becomes a powerful background factor which supports a maximalist approach to the enjoyment of these freedoms and a minimalist approach to their limitation.[42]

This approach emphasises the responsibility of the State to ensure the realisation of all convention rights within the broader context of democratic society. When combined with the newly emergent responsibility of the state, the goals of neutrality and impartiality become clear, these being the fostering of pluralism and tolerance and the protection of the rights and freedoms of others.

—Fostering Pluralism and Tolerance

The Court sees the fostering of pluralism and tolerance as more than an 'incidental outcome' but as a goal which is to be achieved by the application of the principles and approaches which have already been identified. This raises some difficult and delicate issues. Most religious belief systems advance truth claims which are, in varying degrees, absolutist in nature and reject at least elements of the validity of others. In addition, the need to allow for the 'market place' of ideas requires that there be exchanges of views, expressions of beliefs, ideas and opinions which may be unwelcome and, perhaps, offensive, to others. This is both necessary for the realisation of pluralism and tolerance yet at the same time runs the risk of compromising it. The Court expects believers to cope with a fairly high degree of challenge to their systems of belief in the pursuit of the more general goals of

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[40] See, for example, *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, para. 116, ECHR 2001-XII.

[41] *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, para. 47.

[42] This is reinforced by the suggestion found in *Leyla Sahin* v. Turkey where the Court saw the role of the state as being one of ensuring that religious life within the state *is* neutral and impartial, which is a subtle, but important difference. In principle, this should make it more rather than less difficult to justify restrictions on forms of religious expression.

securing pluralism and tolerance: in the *Otto-Preminger-Institut* case, for example, the Court said that:

> Those who choose to exercise the freedom to manifest their religion.... 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.[43]

Whilst respect for the freedom of religion and belief cannot require others to respect the doctrines and teachings of faith traditions other than one's own (if any) it can, and does, require that one be respectful of them. The role of the State in such cases is to ensure that both believers and non-believers are able to continue to enjoy their convention rights, albeit that they may be troubled or disturbed by what they see and hear around them. As the *Otto-Preminger-Institut* case itself suggests, it is only when the manner in which the views, ideas or opinions are expressed are akin to a 'malicious violation of the spirit of tolerance'[44] that it is for the State to intervene.

D. *The Practical Outworking of the Overarching Principles*

The point at which the limits of state abstention in the interests of neutrality and impartiality and state intrusion in the interests of fostering pluralism and tolerance are re-connected is in the overarching need to protect the rights and freedoms of others, believers and non-believers, both within religious bodies and within the broader political community. This, of course, takes us back to the limitations on the enjoyment of the right permitted on the basis of the limitation clauses and which can only be determined on a case by case basis. Once again, however, there are a number of important strands of thinking which can be identified and which ought to inform policy thinking in regard to the approach to, and practical application of, the limitation clauses.

i) *The Outer Limits of State Abstention: Preservation of the Democratic Polity*

The protection of the general rights and freedoms of others through the preservation of the democratic nature of the state sets the 'outer limits' of what neutrality and impartiality and the promotion of pluralism and tolerance might require of a State and of a society. It has already been noted that Article 15 permits states to derogate from Convention rights in times of national emergency threatening the life of the nation, and that Article 17 requires that convention rights are not used to undermine the rights of others. Our concern at this point is with sets of circumstances in which it is argued that individuals or organizations are negatively impacting upon the democratic framework which the Convention is to uphold.

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[43] *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, para. 47.
[44] *Idem*.

In the case of the *Metropolitan Church of Bessarabia* v. *Moldova* the government argued that its refusal to register the applicant church was justified on the grounds of preserving the territorial integrity of the State.[45] The Court accepted that this was a 'legitimate aim' for the purposes of Article 9(2) in that it sought to protect public order and public safety, although it decided that no evidence has been presented which supported such a conclusion. Such claims are likely to be rare, but where there is such evidence there can be little doubt that the State would be entitled to restrict the activities of believers to the extent necessary to address the risk.

The Court has also said on numerous occasions that democracy is the only political model compatible with the Convention and in a series of cases concerning both Article 10 and Article 11 (the freedom of association) the Court has also made it clear that it is entitled to act in order to preserve the integrity and proper functioning of the internal democratic structures of the State. However, the threshold for such intervention is high. Thus in a series of cases the Court rejected claims by Turkey that it had been entitled to ban political parties whose policies were allegedly antithetical to Turkish democracy, arguing that:

> The fact that such a political project is considered incompatible with the current principles and structures of the Turkish state does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way in which a state is currently organised, provided that they do not harm democracy itself.[46]

The case of *Refah Partisi v. Turkey* is particularly important for current purposes. In that case the Court addressed a situation in which a political party whose policies embraced aspects of Islamic thought and which had been a partner in Government was dissolved, primarily on the grounds that prominent members of the party had called for the introduction of elements of Shar'ia law which, it was claimed, would be incompatible with the principle of secularism which undergirded Turkish democracy. For the avoidance of any doubt, the Court confirmed that a 'political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention'[47] and recalled that in its previous caselaw it had said that 'there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to

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[45] The applicant argued that recognition would 'revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity'. *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, para. 111, ECHR 2001-XII.

[46] *Socialist Party of Turkey (STP) and Others v. Turkey*, no 26482/95, para. 47, 12 November 2003 (emphasis added).

[47] Refah Partisi *(the Welfare Party) and* Others *v. Turkey* [GC], nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 100, ECHR 2003-II.

take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned'.[48] Thus religious believers and religious communities are to be welcomed as participants in the public life of the State, including participation in the democratic process, should they wish to do so.

In the *Refah Partisi* case the Court also said that 'a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles'.[49] The first proposition is unproblematic since it merely confirms that all participants in the democratic process must respect the principles of democratic governance.[50] As the Court had said previously, 'The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions'.

The second proposition is that such participation must respect what might be called the 'culture' of a particular democratic polity. It is a much more difficult question whether the State is entitled to act in order to buttress elements of its foundational assumptions where they are challenged through a democratic process in a fashion which neither threatens the integrity of the democratic system or runs the risk of imposing extremism on others, but which nevertheless offer a substantially different vision of the nature of the State, from which legislative consequences would inevitably flow. For example, in the case of Turkey the Court has said that 'the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy'[51] and so it considered Turkey entitled to limit the enjoyment of the freedoms of association, expression and religion or belief in order to preserve the political culture of its democracy—provided, always, that those restrictions were legitimate and proportionate under Article 9(2).

This same approach has also been taken to upholding the ethos of state-run institutions which, it is presumed, can legitimately be expected to exemplify the same overarching principles. For example, the case of *Leyla Sahin* v. *Turkey* con-

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[48] *Ibid.*, para. 97, quoting *United Communist Party (OZDEP) and others* v. *Turkey* [GC]. no. 23885/94, para. 57, ECHR 1999-VIII.

[49] *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 98, ECHR 2003-II.

[50] The Court has said, 'a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds'. *Yazar* and others *v. Turkey*, no. 22723/93, 22724/93 and 22725/93, para. 49, ECHR 2002-II.

[51] *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 93, ECHR 2003-II.

cerned the legitimacy of a ban on the wearing of Islamic Headscarves in a state-run university in Turkey, a ban which had been upheld by the Constitutional Court. The Court observed that:[52]

> it is the principle of secularism, as elucidated by the Constitutional Court… which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

This suggests that the state is entitled to look to the character of its institutions as well as to the functioning of its democratic system and ensure that both are consonant with its national ethos. It may be concluded that whilst the State remains free to determine its guiding organisational principles and whilst it remains open to the state to take steps to preserve the nature of its democracy and associated institutions, it may only do so in pursuit of Convention aims of democratic governance informed by pluralism and tolerance. Likewise, those who engage in public life and life in the 'public square', and seek to do so through the exercise of the freedom of expression and of religion or belief may do so on the condition that they respect the principles of democracy and human rights, of tolerance and pluralism. The overarching conclusion is that it is against these values that limitations upon the enjoyment of these rights are to be assessed, rather than as against each other. Once again, the importance of not seeing these rights as being in 'opposition' to each other, or to be weighted against each other, is evident.

ii) *Working with the Limits: Policing the Principle of 'Respect'*

Of all the principles to have emerged from the Convention caselaw, it is the principle of respect which has emerged as the single most important element in determining the scope of the limitations clauses and the interplay between the freedoms of expression and religion or belief. The convention itself does not directly refer to 'respect' in either Article 9 or 10[53] but its centrality to the practical operation of the Convention framework was made clear in the very first case which was decided by the Court on the basis of Article 9, this being *Kokkinakis v. Greece*. This case concerned a member of the Jehovah's Witnesses who had been convicted for unlawful proselytism, a criminal offence under Greek law. At the heart of the case lay the question of balancing the right of the applicant to practice his religion by seeking to share his faith with others against the right of the State to intervene to protect others from unwanted exposure to his point of view.

[52] *Leyla Sahin v. Turkey* [GC], no. 44774/98, para. 116, ECHR 2005-XI.

[53] 'Respect' for parental wishes in matters concerning the education of their children is expressly referred to in Article 2 of the First Protocol to the ECHR.

Although on the facts of the case it was decided that the interference had not been shown to be justified, the Court argued that it may be 'necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and to ensure that everyone's beliefs are respected'.[54] The key, then, is to ensure that when exercising its responsibilities the State adopts an approach which reflects the degree of respect which is to be accorded to the beliefs in question, which may of course be religious or non-religious in nature.

This approach was confirmed in the subsequent case of *Larissis and others v. Greece*, and both of these cases show that in a democratic society it is necessary to ensure that believers be able to manifest their beliefs by bringing them to the attention of others, and by trying to persuade others to their point of view or else the exchange of ideas which underpins a vibrant and plural democracy would be undermined. At the same time, both cases show that the state pursues a legitimate aim when it seeks to limit proselytising activities which run the risk of subjecting individuals to pressure which they might find it difficult to resist. As the Court said when distinguishing between the situation of the airmen from that of the civilians in the *Larissis* case, 'it is of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressure and constraints of the same kind as the airmen'.[55]

This might be loosely characterised as meaning that the role of the State in such situations is to ensure that there is a 'level playing field' between all concerned; the one side free to present their points of view, the other to reject them. More precisely, it might be said that in order to justify a restriction being placed upon a person who seeks to present their views to another what is needed is a nexus or relationship that places one party in a position in which they are unable, or feel unable, to exercise an appropriate degree of thought or reflection before adopting or expressing adherence to the views being placed before them; or that their decision to adopt or express such adherence flows not from an assessment or response to the belief itself but from a perception that it would be prudent to agree, or to be seen to be agreeing, with the person who presented those beliefs to them. The underlying principle is that of ensuring respect for the beliefs of others, given effect in this instance by ensuring that those who enjoy 'superiority' over others,

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[54] *Ibid.*, para. 33.

[55] In this case the applicants who were members of a Pentecostal church and were officers in the Greek Air Force were convicted of various offences connected with their attempts to convert both a number of junior airmen and a number of civilians (in their free time) to their beliefs. The Court noted that whilst the authorities were 'justified in taking some measures to protect the lower ranking airmen from improper pressure' their conviction for seeking to convert the civilians could not be justified on the basis of Article 9(2) since 'the civilians whom the applicants attempted to convert were not subject to the pressure and constraints of the same kind as the airmen. *Larissis and others v. Greece*, judgment of 24 February 1998, *Reports of Judgments and Decisions*, 1998-I, paras 54 and 59.

educationally, socially, politically or in any other fashion, are not unduly advantaged in an exchange of ideas.

The idea of 'respect' is even more evident in those cases which have concerned the behaviour of non-believers which has caused offence to believers, this being the type of case in which the relationship between Article 9 and Article 10 has more frequently arisen in the Convention context. The leading case remains that of *Otto-Preminger-Institut* v. *Austria* which concerned the seizure and forfeiture of a film considered to be blasphemous under Austrian law. In a case brought under Article 10 the European Commission had considered the film in question to be predominantly satirical in nature and felt its prohibition 'excludes any chance to discuss the message of the film'. The Court, however, saw matters differently. It thought that the state has a 'responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines' but that the same time it noted that 'Those who choose to exercise the freedom to manifest their religion.... 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'.[56] This must indeed be true, or else the rights of believers to manifest and propagate their beliefs, as set out in the *Kokkinakis* and *Larissis* cases would be undermined. Indeed, quoting the *Handyside* case, the Court recalled that the freedom of expression embraced ideas which 'shock, offend or disturb the State or any sector of the population', this being one of the demands of maintaining a plural, tolerant and broad-minded society.[57] However, the Court, quoting *Kokkinakis*, also observed that 'a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas... incompatible with the respect for the freedom of thought, conscience and religions of others' and in a passage now regularly found in its jurisprudence, the Court then went on to say that:

> The respect for the religious feelings of believers as guaranteed by Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration: and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of the democratic society.[58]

Indeed, in the case of *Wingrove v. the United Kingdom*, which also concerned a refusal to authorise the re lease of an allegedly blasphemous film, the Court not only reiterated this but also said that individuals were under 'a *duty* to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously

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

[57] *Ibid.*, para. 49, quoting *Handyside v. the United Kingdom,* judgment of 7 December 1976, Series A no. 24, para. 49.

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

offensive to others and profanatory',[59] a view which it confirmed in the later cases of *Murphy v. Ireland*[60] and *İ.A. v. Turkey*.[61]

The idea that there may be a duty to ensure that the deeply held views of believers (both religious and non-religious) are both tolerated and respected has the practical effect of broadening the scope of the freedom of religion or belief quite considerably and, consequentially, limiting the range of restrictions which may be placed upon it by virtue of Articles 9(2) or 10(2). The Court has understood that it is difficult to maintain one's beliefs and practices in a hostile environment since, as was said in the Chamber's judgment in the case of *Refah Partisi v. Turkey*, 'where the offending conduct reaches a high level of insult and comes close to a negation of the freedom of religion of others it loses the right to society's tolerance'.[62] In consequence, it is no longer possible to argue that since even the most virulent comments or the most offensive portrayals of the beliefs of others do not prevent them from continuing to hold to their beliefs and to manifest them in worship, teaching, practice and observance, there had been no interference with their rights at all.

Through these cases the Court has developed the principle of 'respect' as a key factor when balancing the respective interests which are engaged by the interplay between Article 9 and Article 10. Accordingly, believers and non-believers are entitled to the respect of those who express themselves on matters pertaining to their opinions, ideas and beliefs—even though, of course, there may be profound disagreement regarding the *content* of those views, since respect for the believer does not necessarily entail respect for what is believed. This principle is to be taken into account when the necessity of any interference with the manifestation of a religion or belief is being assessed. There is, however, a reciprocal obligation on believers to show respect for the beliefs (religious or non religious) of others in what they do and say. Finally, it should be noted that whilst the principle of respect guides the assessment of the Court in weighing up the proportionality of an interference with the enjoyment of the right, the adoption of what the Court has itself described as a 'rather open ended notion'[63] has the practical effect of reinforcing the need for European supervision of the margin of appreciation that is accorded to states.

iii) *The Special Issue of Objects of Religious Veneration*

In the *Otto-Preminger-Institut* case the Court spoke of 'objects of religious veneration' and, as we have seen, said that provocative portrayals of such objects by

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[59] *Wingrove v. the United Kingdom*, judgement of 25 November 1995, *Reports of Judgments and Decisions* 1996-V, para. 52 (emphasis added).

[60] *Murphy v. Ireland*, no. 44179/98, para. 65, ECHR 2003-XI (extracts).

[61] *İ.A. v. Turkey,* no. 42571/98, paras 29–30, ECHR 2005-VIII.

[62] *Refah Partisi (the Welfare Party) and* Others *v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, para. 75, 31 July 2001.

[63] *Murphy v. Ireland*, no. 44179/98, para. 68, ECHR 2003-XI (extracts).

others may amount to a 'malicious violation of the spirit of tolerance'.[64] It is, then, reasonable to see 'objects of religious veneration' as a class of object receiving a specific and heightened form of protection within the Convention system.

It is possible to understand this term in a narrower or a broader fashion. The *Otto-Preminger-Institut* case concerned a film, 'Das Liebeskonzil' which portrayed 'the God of the Jewish, the Christian and the Islamic religion as an apparently senile old man.... a degree of erotic tension between the Virgin Mary and the Devil [and] the adult Jesus Christ... as a low grade mental defective'.[65] The film at the centre of the subsequent *Wingrove* case, 'Visions of Ecstasy' portrayed 'a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature' and national authorities considered the film to be primarily pornographic in nature, with 'no attempt... to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience"'.[66] The 'objects of religious veneration' at issue in all of these cases might perhaps have been better described as 'figures of religious devotion', since the focus was on the personage of the deity and others to whom religious homage was paid. It is, therefore, possible to understand these cases in a narrow fashion in which only portrayals of such figures themselves would be addressed.

A broader view would be to see an 'object of religious veneration' including all those things which form an element in the religious life of a believer and contribute to the exercise of the freedom to manifest their religion or belief in worship, teaching, practice and observance. This might embrace items as diverse as forms of clothing, utensils, written materials, pictures, buildings and a whole host of additional items impossible to specify. In reality, the concept of an 'object of religious veneration' would seem to be broader than the narrowly focussed idea of the 'deity' and narrower than the broad-based notion of those objects which are connected with the act of religious observance, an approach which seems to have been followed in the case of *İ.A. v. Turkey* in which the key issue was whether the conviction and fining of the author for blasphemy was justified under Article 10(2). This work in question said of the Prophet that 'Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms.... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal'. The Court concluding that 'the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims'[67] and were justified as necessary in a democratic

[64] *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, para. 47.
[65] *Ibid.*, para. 22.
[66] *Wingrove v. the United Kingdom*, judgement of 25 November 1995, *Reports of Judgments and Decisions* 1996-V, para. 61.
[67] *İ.A. v. Turkey,* no. 42571/98, paras 29–30, ECHR 2005-VIII.

society to protect the rights and freedoms of others, and hence fulfil a pressing social need.

What is clear from these cases is that any form of expression which fails to show respect for such 'objects of religious veneration' may be the subject of legitimate restriction under the Convention system. It cannot be overemphasised, however, that this does *not* mean that it is appropriate to fetter the freedom of expression in order that respect be shown to objects of religious veneration. What it does mean is that when views are expressed which may be considered by some to be offensive, it is necessary to be mindful of the hurt that the articulation of such views may cause and the manner in which that expression takes place must be modulated accordingly.[68] Whilst one remains free to express the most unpalatable of views, such views must be expressed in a manner which is properly respectful of the right of others to believe otherwise. In short, one must respect the believer, rather than the belief.

III. Policy Implications

The previous section has outlined the general principles flowing from the caselaw of the European Court of Human Rights which are to be applied when considering situations which involve the interplay between the freedom of expression and the freedom of religion or belief. The key points to stress are the following:

- The freedom of expression and the freedom of religion or belief are best seen as complementary provisions which occupy certain points on a common spectrum of protection which the Convention provides for all forms of ideas and opinions, religious or otherwise. The reason why there are particular elements in this protective framework relating to ideas and opinions which take the form of patterns of religion or belief is because they are needed in order to make the holding of such forms of ideas or opinions meaningful: the freedom of expression is itself sufficient to provide similar levels of protection to ideas and opinions which are not of such a nature.
- The jurisprudence relating to both the freedom of expression and to the freedom of religion or belief is informed and influenced by a number of shared common principles, the most important of which are upholding principles of democracy, and of respect. These values are used to shape outcomes in specific fact situations.

[68] Thus in *İ.A. v. Turkey*, *ibid.*, para. 29 the Court said that 'the present case concerns not only comments that offend or shock, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam'.

- There are, however, a number of particular factors which will also shape outcomes. The first is the requirement that states act in a fashion which is impartial and neutral in relation to matters of religion or belief. The second relates to the margin of appreciation which is accorded to states.
- When an issue is approached from the perspective of Article 9(2), the Court is willing to accord a relatively generous margin of appreciation to states, on the grounds that there is no clear pan-European consensus on questions of religion or morality. Whilst religion or belief is therefore seen as a 'common good' there can be no shared vision of how this is to be reflected in practice, other than to be sure that limitations placed upon its enjoyment are consonant with the underlying principles and values previously outlined. When one turns to restrictions imposed on the exercise of the freedom of expression, however, there is a clearer sense of a common European approach and so the breadth of the margin of appreciation is said to be comparatively narrow.
- However, this does not mean that situations which are taken from the perspective of Article 10 receive a higher degree of protection from state intrusion than those taken from the perspective of Article 9. What it does mean is that all forms of expression of ideas and opinions—religious or non religious—one is dealing with matters at a point on the spectrum at which the outworking of the values of democracy and the principles of respect inevitably tend towards relatively common outcomes.
- When one is dealing with the more particular forms of protection offered to ideas and opinions which equate to a religion or belief for convention purposes, the outworking of these values may be more context specific and so the nature of European supervision must reflect this. To do otherwise would be to fail to respect the shared underlying values themselves. The conclusion, once again, is that there is no ground for seeing in the different approach to the margin of appreciation any sense of 'hierarchy' or primacy between these two fundamental freedoms.

These conclusions have a number of implications for policy formation in numerous areas. It is beyond the scope of this article to consider them all, or to consider any in great detail, but the following sections will highlight some key issues.

A. *The Group Dimension and the Collective Dimension*

Like-minded individuals have always gravitated towards each other and human rights law emphasises the freedom of association as well as the freedom to enjoy one's private life. The freedom of collectives to exercise the freedom of expression is well established, as is the right of collective bodies to exercise the freedom of thought, conscience and religion. The close nexus between the individual and

collective identity is evident from those numerous decisions in which the Court of Human Rights has stressed that the freedom of religion or belief carries with it the need to be able to acquire legal personality and the right for communities of believers to be able to enjoy their associative life together—something which may be approached from the perspective of the freedom of association as well as from the freedom of religion or belief.

However, it must not be forgotten that the reason why the collective is entitled to protection is that it is the form of organisation which has been adopted (or is legally necessary) for the enjoyment of the right of the individuals. The reason why 'legal persons' have standing in some (though not in all) areas of international law is that they are recognised as the appropriate vehicle through which the substantive right of the individual is to be enjoyed and thus protected. It is not the role of human rights law to protect the 'vehicle' at the expense of the right, nor to protect the 'vehicle' in its own right and particular care needs to be taken to ensure that this is not the case.

This is a difficult matter since there is a substantial degree of confusion between, on the one hand, 'collective dimension' of individual rights which the collective is entitled to enjoy and which it is entitled to seek protection and, on the other, 'collective rights' *per se*, which are better understood as 'group rights', that is, rights belonging to the group as such. The most well attested of such rights is probably the right to self-determination of peoples, which is expressly provided for as a group right in Article 1 of the ICCPR. Being a group right, it is well established than individuals cannot lodge communications with the Human Rights Committee alleging violations of this right under the First Optional Protocol to the ICCPR since as an individual complaints procedure this only permits communications to be lodged in respect of the *individual* rights in the Covenant. The African Charter on Human and Peoples' Rights also gives express recognition to a number of groups as opposed to individual rights.[69] Difficult though this distinction is, it is important that it be made since it makes it clear why it is inappropriate to seek to 'protect' a particular form of religion or belief from forms of expression which challenge it: doing so moves beyond the protection of the 'collective dimension' of the individual right and strays into the protection of the right of a 'group' *per se*. This would only be legitimate if the group and its identity were an object of specific human rights protection and as regards the various forms that religion or belief systems take, this is simply not the case. For example, Christianity, as a form of religion and Christians, as a group, are not objects of human rights protection. It is the freedom of religion or belief, which may take the form of Christianity, Islam, humanism, etc, which is protected and as a result of this, the collectives which these and all other forms of belief generate are entitled to consequential protection. This is not to say that international human rights

[69] See African Charter on Human and Peoples' Rights (1981), Articles 19–23.

law could not generate or recognise particular groups as having particular interests. Indeed, the recognition of the rights of minorities, indigenous peoples, women, children and other specific vulnerable groups etc all in different ways and to varying degrees do just that. Being religious, or being of a particular religion, is not, however, analogous.

A particular policy consideration which flows from this concerns the increasing trend towards focussing on particular forms of religious intolerance and discrimination, such as 'Islamophobia' and 'Christianophobia'. This has the practical effect of switching the focus of attention away from the enjoyment of the right and towards the protection of the group. Whilst these may be very real sociological phenomena, they do not map onto legal categories and can have a distorting effect on our understanding of the applicable human rights framework. At a more general policy level, it can be argued that approaching issues of religious freedom from these perspectives also tends to exacerbate the overall tensions within the international political community. Rather than focussing on the enjoyment of the freedom of the individuals in concrete situations, it tends to promote an unhelpful comparative analysis of the situation of various religions. This not only runs the risk of generating a 'victim culture' and placing a premium on polarisation, but it also encourages politicisation: indeed, it is not unconnected with the issues posed by the rise of 'defamation/derision' as an issue, which will be considered below.

B. *Defamation of Religion(s)*

In recent years there has been an increasing interest in issues concerning 'defamation' of religion(s). The use of this terminology is not altogether helpful since it is increasingly taken to imply an approach to the inter-action of the freedoms of religion or belief with the freedom of expression which seeks to prioritise the former at the expense of the latter. The concept of defamation is familiar in domestic legal contexts where it permits individuals to protect themselves against forms of expression which damage their reputation. As a concept, it does not translate well into international human rights law which aims at protecting individuals from the actions of states. Whilst human rights law may require states to provide means through which individuals can assert their rights and defend their interests, it is not the role of human rights law to require states to fetter the expression of opinions or views *ab initio*. It is one thing for a state to provide a private law framework within which reputational issues can be raised, it is quite another to construct legal apparatus to permit the state to prevent the expression of opinions which others consider improper, unless there is a very clear human rights rationale to do so.

There is, however, a more subtle argument that is also bound up with the idea of 'defamation of religion(s)' and which does resonate more strongly with human rights thinking. This is that just as religion or belief may be an important element

in the personal identity of an individual, so likewise can religion or belief be seen as an important element in the identity of a society. Given that individuals live in society and experience and enjoy both their freedom of expression and of religion or belief within that broader societal setting, ensuring that there is proper respect for religion or belief in that broader societal space is a necessary corollary of the freedom itself. At first sight, there may be a superficial attraction to this argument since it can be used to curtail abuse of the freedom of expression by legitimating state action taken against those who speak ill of the beliefs of others, something which could be seen as a justifiable reflection of the principle of 'respect'. It is, however, problematic on a number of levels.

First, it has already been stressed that it is not the role of the state to take measures against those whose actions or forms of expression are either not in accordance with, or challenge, a particular form of religion or belief. On the contrary, the primacy given to exchanges of ideas within a democratic society ensures that there must be a 'free market place' in this regard, and the role of the state is to ensure that there is a 'level playing field' as between those who present and receive views (as illustrated by cases such as *Kokkinakis* and *Larrisis*, and many others). The State may also intervene in order to ensure that the rights of individuals are not trenched upon but this does not justify intervention in order to ensure that general respect shown for the tenets of a particular faith or particular faiths. This would contradict the requirement that States be neutral and impartial in their engagement with matters of religion or belief.

This makes it very difficult, if not impossible, to justify the use of legal measures to penalise those who act or express themselves in a fashion which does not accord with the views of a particular religion or religions or belief system. As has been seen, there are however, limits to this need for neutral abstention. This can be summed up as being when such intervention is necessary to protect the rights and freedoms of others. The key point here is that since this is an individual right, it is the rights of other individuals which fall to be protected, rather than the views which they may hold. Provided that the forms of expression which are considered offensive to religious believers do not put at risk the ability of believers to continue in their adherence to, and practice of, their religion or belief—for example, creating a hostile social climate, state intervention is unlikely to be justifiable. It is likely to be the case that the threshold for intervention may be higher in the case of those adhering to a 'majority' religion or belief system than for a 'minority' religion or belief system, given their greater vulnerability to general societal pressures.

It is clear that the expression of views is not to be limited merely because others consider those views to be offensive. The caveat on this is that when the manner in which such expression made is provocative—and particularly when directed at objects of religious veneration—then it may fail to show sufficient respect for the views of others and so be justifiably subject to sanction. However, it is not the case

that these individual freedoms can be used in such a way as to ensure that 'respect' is shown for a form of religion or belief *per se*. The focus must, then, be on protecting the freedom of expression and the freedom of religion or belief of individuals, rather than on protecting either forms of expression (e.g. the media) or forms of belief (e.g. Christianity, Islam, Atheism, etc.). However, it is increasingly difficult to see how 'blasphemy' laws (or their equivalents) which seek to criminalize forms of speech which challenge or offend particular religions can be compatible with the evolving human rights framework. Rather, what is needed are generally applicable laws on freedom of expression and of religion which apply to all in equal measure, and limitations of which are assessed on a case by case basis against the principles and values outlined above.

C. *Hate Speech*

The issue of hate speech has already been discussed and it is unnecessary to repeat what has been said. In the light of the discussion on defamation, however, it is appropriate to recall briefly that the exercise of the freedom of expression has the capacity to create a climate in which the freedom of individuals to enjoy their freedoms of religion or belief may be significantly diminished. As one commentator has observed 'defamation of religions is a social and cultural phenomenon which does not in itself amount to a violation of human rights, but which provides a fertile context in which such violations may occur'.[70] It is at this point that the international human rights framework does indeed permit—indeed, requires—states to take measures to ensure that there is a climate in which the rights of all can be enjoyed to the fullest extent possible and which might be understood as offering a degree of protection akin to that sought under the rubric of 'defamation'.

It is important to distinguish between general provisions seeking to criminalise forms of speech which is offensive to religions or to religious believers from forms of speech or other forms of expression which advocate the incitement of national, religious or racial hatred. Such forms of expression are clearly an abuse of that right and are easily justified as necessary to protect the rights and freedoms of others[71] and such limitations are expressly required under Article 20(2) of the ICCPR. Once again, such laws do not limit the freedom of expression in order to protect or support a particular religious group or point of view *as such*. Rather, they seek to limit forms of expression which have the potential to cause harm to individuals and which are incompatible with the principles of tolerance and

[70] See J. Rivers, 'The Question of Freedom of Religion or Belief and Defamation', *Religion and Human Rights* 2 (2007) 113–118 at 115.

[71] See, for example, the case of *Faurisson v. France*, No. 550/93 (views of 8 November 1996), UN Doc. A/52/40 vol. 2 (1999), p. 84 in which the UN Human Rights Committee concluded that the criminal offence of Holocaust Denial in French law was justified as a necessary restriction upon the freedom of expression under Article 19(3) of the ICCPR.

respect and as such, serve the broader community interest. The focus is, rightly, on the protection of the individual as a member of the broader community rather with the protection of the members of a particular 'group' *per se*. Whilst there is of course an element of 'group' protection here, in that religious hate speech is addressed, this remains generic and cannot be used to justify taking specific measures which have the effect of restricting forms of speech which challenge the doctrines or practices of particular forms of religion or belief. This is reflected in the views expressed by the UN Special Rapporteur on the Freedom of Religion or Belief, who has taken the view that 'expressions should only be prohibited under [ICCPR] article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group'.[72] This again underlines the place of the individual and of the particular threats they face at the heart of the scheme of protection. Indeed, to do otherwise could well be counter productive: as the Special Rapporteur has pointed out, 'At the global level, any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance'.[73]

IV. Conclusion

This article opened by recalling the debate which was prompted by the publication of cartoons of the Prophet Muhammad in the *Jyllands-Posten* newspaper. By way of response to that incident, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression as well as the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance issued a joint press release which serves as a fitting summary of, and conclusion to, the analysis presented above. In that statement,[74] the Special Rapporteurs:

> … recall that religion or belief, for anyone who professes either, is one of the fundamental elements in his or her conception of life and that freedom of religion or belief is protected as one of the essential rights by Article 18 of ICCPR. They also recall that respect for the right to freedom of expression, as articulated in article 19 of ICCPR, constitutes a pillar of democracy and reflects a country's standard of justice and fairness. While both rights should be equally respected, the exercise of the

[72] See UN Doc. HRC 2/3 (20 September 2006), Report of the Special Rapporteur on freedom of religion or belief, Asthma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, para. 47.

[73] *Ibid*., para. 50.

[74] UNOG press release HR06006E of 8 February 2006.

> right to freedom of expression carries with it special duties and responsibilities. It requires good judgment, tolerance and a sense of responsibility.
>
> Peaceful expression of opinions and ideas, either orally, through the press or other media, should always be tolerated. The press must enjoy large editorial freedom to promote a free flow of news and information, within and across national borders, thus providing an arena for debate and dialogue. Nevertheless, the use of stereotypes and labelling that insult deep-rooted religious feelings do not contribute to the creation of an environment conducive to constructive and peaceful dialogue among different communities. . . . .
>
> The Special Rapporteurs urge all parties to refrain from any form of violence and to avoid fuelling hatred. They also encourage States to promote the interrelated and indivisible nature of human rights and freedoms and to advocate the use of legal remedies as well as the pursuance of a peaceful dialogue on matters which go to the heart of all multicultural societies.

This article has shown these conclusions and recommendations are firmly grounded. The analysis of the relationship between the freedom of religion or belief and the freedom of expression offered above shows that these freedoms share common foundations and are mutually reinforcing. This is not to say that there will not be tensions between them in specific instances but this is true of all human rights, and the resolution of those tensions must be in accordance with the overarching principles of the relevant human rights framework. Given the nexus between these fundamental freedoms it is both artificial and unhelpful to juxtapose them in an oppositional fashion or seek to determine a hierarchy of significance between them. Rather, it is necessary to identify the important contribution of both rights to the functioning of a tolerant, plural and democratic society and seek to ensure that there is a maximizing of both rights in situations of tension, rather than a relativising of the one in the interests of the other. Approaching practical issues from this perspective should assist in realizing the underlying policy objectives.

Appendix

Relevant Instruments

The Universal Declaration of Human Rights (UDHR)

Article 18

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.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Both of the above Articles are subject to a common limitation provided for in Article 29 of the UDHR, which provides:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The International Covenant on Civil and Political Rights (ICCPR)

Article 18

(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)....

Article 19

(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

The European Convention on Human Rights and Fundamental Freedoms (ECHR)

Article 9

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

(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.

Article 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.