
Ilias Trispiotis
UCL Faculty of Laws
PhD
I, Ilias Trispiotis, confirm that the work presented in this thesis is my own. Where information is derived from other sources, I confirm that this has been indicated in the thesis.
To my parents, George and Elena, and my brother, Sakis
Abstract

This thesis proposes a theory of interpretation of the right to freedom of religion or belief under the European Convention on Human Rights (ECHR). It investigates the normative relationship between the right to freedom of religion and the values of liberty and equality, as well as the doctrinal implications of that relationship for the connections between the right to freedom of religion and other rights, including the right to freedom from discrimination.

This is a combined normative and doctrinal project. The central normative claim is that the right to freedom of religion is justified on the abstract principle of equal respect for our personal responsibility to assess and choose ethical values for ourselves, authentically and independently from the coercive interference of others. The thesis argues that this principle is the moral bedrock of the rights to freedom of religion and freedom from religious discrimination, and that the moral fusion of the two rights explains their interchangeable use in the jurisprudence of the European Court of Human Rights (ECtHR). Moreover, this thesis argues that the relationship between freedom of religion and equal respect is better explained through a reason-blocking account of the right, according to which the permissibility of state limitations on the right depends on the nature of the justification that must be given for them, not solely on their consequences examined independently of that justification. Compared to interest-based accounts, it is argued that a reason-blocking interpretation of the right better fits significant parts of the jurisprudence of the ECtHR and is ultimately more conducive to distinguishing which kinds of state interference with our choice and expression of ethical values are justifiable.

Finally, this thesis applies this interpretation to various current legal problems: the relationship between freedom of religion and freedom from religious discrimination as well as between religious discrimination and sexual orientation discrimination; the wearing of religious symbols, including the full-face veil, in public; and the regulation of blasphemous forms of expression. Whereas the theory developed in this thesis explains the relevant case law in many of those areas, certain other parts of the jurisprudence of the ECtHR seem to deviate from the proposed theory. In these cases this thesis not only shows why the proposed theory advances a more attractive and more specific account of the scope of the right to freedom of religion, but, importantly, it also shows why that interpretation better fits the principles underlying the jurisprudence of the ECtHR across a number of rights that involve public expressive dimensions, including respect for private life and freedom of expression. So, despite the fact that in certain cases the ECtHR has reached different outcomes to those that the normative theory defended here would point to, overall this thesis aims to show that tracking the normative justification of religious freedom to a more general right to equal respect for ethical responsibility consolidates religious freedom into a more general theory of rights which could be conducive to a more coherent interpretation of the Convention.
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Preface and Acknowledgments

I wrote this thesis as a PhD student at University College London (UCL) Faculty of Laws between September 2010 and June 2015. I was lucky to be working on this project during interesting times for law and religion in Europe. During the past four years issues ranging from religious symbols in schools to registration of religious groups to criminalisation of blasphemy to religious discrimination in employment reached European courts and steered several passionate debates on the scope of the right to freedom of religion and the role of the European Court of Human Rights in securing its equal enjoyment. I feel immensely privileged to engage in those debates from the vantage point of UCL. Three workshops on freedom of religion, organised by UCL Laws between 2011 and 2013, attracted a number of renowned experts and helped my initially fuzzy research proposal on state consensus in matters of religion to evolve into the much more coherent thesis about the interpretation of the right to freedom of religion under the Convention that this PhD includes. I was also significantly benefitted from a number of Current Legal Problems and Legal Philosophy UCL Colloquia as well as from my brief participation in the Religion and Political Theory centre at the UCL School of Public Policy. I had all the support I could ever wish for.

I am grateful to my primary supervisor, Professor George Letsas, for his excellent guidance and, more importantly, for his tireless engagement in lengthy theoretical discussions about religion and human rights that enormously benefitted my thinking. When I embarked on this research project in 2010 I had no training in legal and political philosophy or philosophy of rights. Getting the theoretical underpinnings of this PhD right often felt Sisyphean. George was always patient with my progress and I am most grateful for his encouragement and dedication. I also wish to thank my secondary supervisor, Colm O’Cinneide, for his rigorous comments on various sections of this thesis. His fine judgment and expertise on discrimination law benefitted significant parts of the analysis and added further valuable perspectives. Finally, I wish to thank Professor Stephen Guest, whose kind guidance during the time when George Letsas was on research leave at NYU proved invaluable.

During the PhD I had the privilege to spend an academic year as a Visiting Scholar at Harvard Law School – a choice that despite ultimately delaying this project by several months I will never regret. I am indebted to my academic sponsor, Professor Mark Tushnet, for his constructive comments on my chapter on the relationship between freedom of expression and freedom of religion; now Chapter Seven in this thesis. Both the Harvard Law School SJD/Visiting Scholars colloquium and the workshop on international human rights and religion co-organised by Professor Henry Steiner and Visiting Professor Fionnuala Ní Aoláin in Winter 2012/2013 added invaluable comparative perspectives to the thesis. My intellectual horizons widened decisively thanks to the exciting novel ideas, the bright people and the fascinating opportunities at Harvard.
A much longer version of Chapter Seven has been published as ‘The duty to respect religious feelings: Insights from European human rights law’ (2013) 19(3) Columbia Journal of European Law 499. Moreover, a modified version of the last part of Chapter Five has been published as ‘Alternative lifestyles and unlawful discrimination: The limits of religious freedom in Bull v Hall’ (2014) 14(1) European Human Rights Law Review 39; and a modified version of the last part of Chapter Two have been published in ‘Discrimination and civil partnerships: Taking “legal” out of legal recognition’ (2014) 14(2) Human Rights Law Review 343.

On another note, I wish to thank the National University of Athens, which generously funded this project during dire economic times for Greece. The Leontiou Oikonomidou scholarship of the Law School of the National University of Athens was the key to my financial support during the PhD. Similarly important, both financially and as teaching experience, were the Teaching Fellowships at UCL that I held between 2011 and 2013 as well as the two PhD Research and Innovation Funds that UCL Laws kindly granted me between 2012 and 2013.

I had been fortunate to be part of a wonderful PhD research community during my time at UCL. I will never forget the good and the rainy days (and nights) we spent together with all the usual suspects in the basement of Bentham House – and most notably with Claire, Putri, Larissa, June, Aislinn, Alex, Simon, JF, Oisin, Guillermo, Anna, Olivia, Alberto, Ashleigh, Eleni, Deni and George. I miss you and hope that one day we will all work together again. The PhD Work in Progress Forum that we established and co-organised with Claire Lougarre in 2013/2014 proved a valuable addition to the PhD community and further benefitted my work. My non-PhD friends (the self-proclaimed normal ones) deserve big thanks for their love and patience throughout the emotional rollercoaster of this research project, and most of all Yorgos, Kostas, Stergios, Dimitris, Pegy, Nikoletta, Vasilis, Stathis, Ioanna and Eva. They have all been marvellous.

This PhD is dedicated to my parents, George and Elena, and my brother, Sakis, who tirelessly and lovingly supported me throughout this journey. They had to get used to all the modern peculiarities of communication tech to regularly see my face and to quietly put up with the sometimes-bumpy ride. They deserve every good bit of this project. Without their support it would never have been completed.
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Chapter 1 | Introduction

1

Introduction

Individual and group exemptions from general rules or practices interfering with religious commitments have been products of complex social negotiations and political compromise for a long time in Europe. If one rejects the possibility of haphazard resolution of questions about the scope and role of the right to freedom of religion or belief in European human rights law – as this thesis is inclined to do, not least because those issues are important – then one is left with certain important questions. How should the European Court of Human Rights deal with claims of religious accommodation? What does equal respect for everyone’s conscience entail in a liberal democracy? What is the relationship between the right to freedom of religion or belief and the values of liberty and equality? Do answers to the last two questions unveil anything morally significant about the scope of the right and its connection with other rights, including freedom from discrimination, freedom from religious discrimination, and freedom of expression? Is an interpretation of the right that complements and reinforces, rather than rivals, the values of liberty and equality, and consolidates freedom of religion into a more general theory of rights, plausible?

The central argument of this thesis is that the right to freedom of religion is grounded on our personal responsibility to assess and choose ethical values for ourselves, authentically and independently from the coercive choices of others. This general, albeit substantive, principle of personal ethical responsibility that every government that claims moral authority to coerce us should respect, is the moral bedrock of the right to freedom of religion as well as of other rights, including the right to freedom from religious discrimination. Ethical responsibility helps us explain the role of those rights in a political community as well as distinguish, for instance, which kinds of state interference with our choice and expression of ethical values are justifiable and which are not. The main idea is that the permissibility of state limitations on the right to freedom of religion or belief depends on the nature of the justification that must be given for them, not on their consequences examined independently of that justification. Regardless of whether our perspective is based on freedom of religion or on freedom from discrimination, questions on the justifiability of specific limitations on our rights remain the same. They can be answered by asking, in much more detail, what equal respect for our personal ethical responsibility requires in each case.

My arguments are tacitly yet decisively supported by an interpretation of liberty and equality as intertwined, rather than antagonistic, values. The following pages
infuse that idea into a substantive theory of the right to freedom of religion or belief. For instance, I argue that the antagonism between liberty and equality-based theories of freedom of religion, much influenced as it is from the popular political theme that liberty and equality conflict, is elusive. The main claim of liberty-based theories is that the right to freedom of religion protects certain enduring and important interests against demands of the common good, and that those interests are so important that they require special protection. That is a familiar theory of what the right to freedom of religion or belief is and what it is for, and the first two chapters of this thesis will give some reasons for thinking that it is in the end an inadequate theory of the right. It fails to adequately capture several important dimensions of our shared legal practice, such as the egalitarian ideal of equal respect that underlies individual complaints about lack of accommodation of religion. It also fails to fit a significant number of important European human rights law cases where individual interests play limited or no role and the ECtHR focuses not on balancing between them, but on tracking and excluding certain impermissible kinds of reason for official action.

More specifically, this thesis argues that the shortcomings of liberty-based approaches that ground freedom of religion or belief on the immunisation of particular interests for their own sake can be overcome through a non-teleological reason-blocking account of the right. Reason-blocking accounts of human rights understand them in terms of exclusion of certain inappropriate kinds of reason for official action, rather than in terms of rendering certain important interests immune to considerations of the common good. Limitations on the right to freedom of religion are unjustifiable not whenever – or simply because – they invade especially important individual interests. They are unjustifiable whenever their interpretation unveils illegitimate moral preferences, such as prejudice, featuring among the interests that a government, unjustifiably, seeks to satisfy. Again, the point of the right to freedom of religion or belief is that legislation limiting the right should not be enacted for certain reasons, rather than simply because of its consequences for important individual or collective interests.

I think that that interpretation captures important dimensions of the moral right to freedom of religion. The first involves the distinction between influence and subordination. Inevitably, our common culture influences our choice of values, our expectations from others, what we like and how we design our everyday lives. A culture that has been historically influenced by a particular religion, exactly the way Europe has been by Christianity,\(^1\) may subsume a plethora of values and socio-legal arrangements that are, unsurprisingly, more reflective of the religious traditions having impacted on its formation. But that does not necessarily breach our rights under freedom of conscience. Our personal ethical responsibility is not inconsonant

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with those inevitable forms of influence. It does forbid subordination, however, which is different. As I explain in Chapter Three, subordination occurs through the deliberate deployment of collective power in order to dictate choices of ethical value and their expression, or to disadvantage certain members of the community because of the views people may have about the value of others or the worthiness of others’ desires. Subordination denies our responsibility to decide for ourselves what ethical values our lives should reflect. It is an affront to dignity even when we are not personally affected or when it is justified on assumptions that that impact is ethically beneficial for the affected people or the community as a whole.

This is not to suggest that the distinction between influence and subordination lies in the pervasiveness of those forms of collective impact. Traffic rules, income tax rates, the distribution of social security benefits, state regulations on environmental protection and neighbourhood planning all drastically affect major decisions about how we can and how we should live. They do not violate our ethical responsibility to define value though. For the distinction between justifiable and unjustifiable instances of state influence lies in their moral justification. Again, the important practical dimension of the principle is that it blocks collective action only whenever it is likely to have been polluted by impermissible kinds of reason, such as reasons connected with personal, rather than political, morality.

A reason-blocking interpretation of the right to freedom of religion also makes better sense of the relationship of the right with freedom from religious discrimination. This is an important challenge for any substantive account of the right to freedom of religion under the ECHR given that, as Chapter Four discusses, the ECtHR uses Articles 9 and 14 (in conjunction with Article 9) of the Convention – on freedom of religion or belief and freedom from religious discrimination respectively – interchangeably and without a consistent pattern in the examination of factually similar complaints. The normative confusion over the relationship between the two rights is exacerbated by the recent surge in individual applications featuring dual legal bases, namely both a complaint of a violation of the individual right to freedom of religion or belief and a complaint of a violation of the right to freedom from discrimination on grounds of religion. Time and again individual applicants claim that the state fails to treat them with equal respect to other citizens whenever it prevents full enjoyment of the expressive dimensions of their conscience, such as to wear religious symbols in public or to have their religious practices accommodated at the workplace. Thus, the argument is that limitations on the right to freedom of religion, either in direct or in indirect ways such as refusal to provide accommodation through exemptions from general rules or practices, encroach both on the right to freedom of religion and on the right to freedom from direct or indirect forms of religious discrimination.

2 See e.g. Eweida and Others v United Kingdom, Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.
A significant idea underlies this argument. That is, at least on an abstract level, the moral right to freedom of religion seems to entail protection from religious discrimination and vice versa; the two rights give the impression of being intertwined since in principle strong protection of freedom of conscience cannot but extend equally to majority and minority (or unpopular) religious and secular convictions. But this abstract idea requires further explication. Is there anything morally important hanging from the practice of the ECtHR that uses those provisions interchangeably? Is freedom from religious discrimination part of the right to freedom of religion? Are violations of the right to freedom from religious discrimination also violations of the right to freedom of religion? Which view best matches our ideals of human dignity?

Chapter Five offers an interpretation of the right to freedom from religious discrimination in order to unravel its relationship with the moral right to freedom of religion. It argues that both discrimination and disadvantage can be understood under descriptive and moralised senses, and that in our shared legal practice, including the jurisprudence of the ECtHR, religious discrimination is used in the moralised sense, meaning wrongful discrimination. I then argue that moralised discrimination depends on a moralised, rather than a descriptive, sense of disadvantage, according to which wrongful disadvantage occurs regardless of how others have been treated. Seeking comparators therefore plays only a diagnostic role in the establishment of disadvantage. That is, the availability or unavailability of comparable cases is not constitutive of a violation of the right to freedom from religious discrimination. Rather, I argue that amidst various moral interpretations of the wrong of discrimination equality-based theories successfully capture that discriminatory rules are wrongful because they count prejudice and stereotypes as valid reasons for collective action, in violation of the principle of political legitimacy that the state has no moral power to enforce obligations unless it treats its members with equal respect and concern. That interpretation of the wrong of religious discrimination explains the interchangeable use of the two provisions by the ECtHR because both rights protect our ethical independence through blocking reasons based on prejudice from the distribution of resources, risks and opportunities. The rights to freedom of religion and freedom from religious discrimination are therefore interwoven, rather than independent, or even antagonistic. This argument also makes sense of the relationship between different grounds of protection from discrimination, such as religion and sexual orientation, and of the principles capable of resolving potential tensions between them.

Central to my argument is the claim that a moral interpretation of the reasons behind limitations on rights is essential to resolve tensions between the right to freedom of religion and other rights. Apart from religious discrimination, I offer such an interpretation in cases involving tensions between the right to freedom of religion

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and the right to freedom from discrimination on grounds of sexual orientation, in
cases of limitations on the right to wear religious symbols in public and in cases on
freedom to express religiously offensive speech. All those arguments spring from the
idea that the moral right to freedom of religion or belief, along with other moral
rights, secures our personal responsibility to define value free from subordination to
the moralistic preferences of others, including the majority of a community. This is
what being treated with equal respect and concern by the state requires.

The argument set out above challenges prevailing orthodoxies concerning
theoretical perspectives on the right to freedom of religion or belief. Significant parts
of the existing European human rights literature theorise law and religion through
conventional dualisms reinforcing fragmentation of rights into a collection of
competing interest groups. The divide between ‘private’ beliefs and ‘public’
manifestation, the distinction between individual believers and religious groups as
well as the emphasis of political theory on secularism and establishment, amongst
various models of constitutional entanglement of church with state, are just some
examples of the prevailing modus operandi. By contrast, this study suggests that those
perspectives on the right to freedom of religion are unhelpful and overshadowed by
the need to interpret the right in harmony with human dignity and our equal
entitlement to the full range of rights including, primarily, our treatment as equals by
the state.

* * *

I elaborate my argument and review opposing arguments in Chapters Two, Three
and Five, but first it is important that I emphasise what I am not arguing. First, the
argument here is not that we should expect the jurisprudence on law and religion to
converge rapidly or completely on an anti-discrimination approach. The rise of
egalitarian forms of theorisation of law and religion involves reliance on the
importance of religion and on respect for its diverse meanings and manifestations, not
a complete convergence with concepts of anti-discrimination law. Indeed, one could
hardly expect total convergence when the principles underlying anti-discrimination
law vary themselves substantially across different grounds of protection. And more
importantly, entrenched national legal arrangements on church and state relations will
limit the spread of anti-discrimination methodologies. While the existing institutional
and cultural landscape of European legal systems will not block the spread of anti-
discrimination techniques by the ECtHR, this landscape will surely channel and
moderate these developments and modify their impact across member states. Thus, to
say that equality-based methods of interpretation of freedom of religion are cropping
up in European human rights law is not to suggest that the ECtHR will soon or ever
experience a total disaggregation of religion into discrimination. As I explore in
greater detail in Chapters Three and Five, reconstructing our answers to questions of
religious exemptions so as to complement equality principles helps us focus on the
justifiability of the reasons behind certain limitations and find answers in a more
principled way. A reason-blocking theory of the moral right to freedom of religion is a rather subdued effort to seek unity where others only see conflict.

Second, the argument is not that religion cannot conflict with the state duty to treat everyone with equal respect and concern. To argue, however, that the right to freedom of religion should be interpreted in harmony with that fundamental state duty is not to deny that religion, as a doctrine, cannot conflict with equality legislation, such as legislation protecting from discrimination on grounds of sexual orientation, marital status or disability. In modern societies there is a remarkable range of moral, ideological and religious conflicts. Citizens are deeply divided on issues of taxation, social welfare, religion, sexual expression, abortion, environmental protection, urban planning, foreign policy, and the list could continue indefinitely. But conflicts between religion and homosexuality, or between the pro-life and pro-choice movements, are not about the best way to achieve peaceful coexistence in a liberal democracy. They are about fundamental values.

There are two main ways to address those fundamental conflicts. The first is to ground our political and legal arguments on first-order principles concerning fundamental beliefs about, for instance, religion, abortion, or homosexuality. This is what Trigg, among others, suggests when he argues that religious commitments take second place to the idea of equal, inherent human dignity that animates the Convention, which assumes the role of ‘civil religion, and cannot be questioned.’ Sullivan boldly claims that the ‘European way to be religious is to be secular.’ Thus, a sense that the courts resolve conflicts between fundamental values by preferring some of these values and disregarding others underlies this type of criticism. The familiar idea that liberal neutrality can never be truly liberal or genuinely neutral depends on that very same sense.

But there is a second way to resolve conflicts between fundamental values. We can ground our arguments on second-order principles about which first-order principles can justify the exercise of political and legal power. Liberalism, as shaped by thinkers such as Rawls and Dworkin, holds that we should pursue those fundamental conflicts in the second way. The state is a human creation subject to certain moral constraints on the forms and extents of individual subordination to the collective will. For Kant and Rawls the right is prior to the good, which means that the principles that define our rights and duties should be neutral between competing conceptions of the good life. This is not to suggest that those principles are neutral themselves. Rather, they depend on the non-teleological idea that ‘the sovereign power of the state over the individual is bounded by a requirement that individuals

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8 This is why Kant argues that to arrive at the moral law we should stay away from our contingent interests. Similarly Rawls argues that to deliberate about the principles of a theory of justice we should imagine ourselves behind a ‘veil of ignorance’ where we know nothing about our aims, attachments, or conceptions of the good. See M. Sandel, Justice: What’s the Right Thing to Do? (Penguin, 2009) 242.
remain inviolable in certain respects, and that they must be treated equally. Of course the idea that the right is prior to the good echoes the familiar moral intuition that the ends do not always justify the means. Rather, there are principles of right, associated with how citizens may (or may not) be treated by the state, which should not be violated for reasons of expediency or because most people prefer so. Thus, to ground our arguments on second-order principles means that defending a woman’s right to abortion does not require debate on whether the Catholic position that human life must be protected from conception is right or wrong. We do not have to argue that religious arguments are wrong. We only have to insist that, under the best interpretation of human rights, first-order principles, such as fundamental religious beliefs, must not ground coercive prohibitions of individual choices no matter how many people share them.

Likewise regarding equal rights for homosexuals. Defending equal rights regardless of sexual orientation does not require an argument about the moral rightness of homosexuality. Rather, we can base our defense of equal rights on the narrower political principle that private sexual conduct should not fall under state control or impose disadvantage. As I discuss in greater detail in Chapter Three, the seminal, albeit significantly overlooked, distinction between teleological and non-teleological accounts of rights is central to the theory of freedom of religion that this thesis defends.

Finally, the argument is not that juridification (or judicialisation) of religion or a sturdy anti-discrimination toolbox can resolve every tension in the area of law and religion. The 1990s have witnessed the proliferation in the EU of demands for legal rights of various sorts: economic and social rights; fundamental human rights; and antidiscrimination rights for various groups – including religious minorities. In the past decade, apart from freedom of religion, discrimination has also experienced a multifaceted, profound juridification in Europe. An expansive literature on discrimination law explores this juridification and identifies a number of factors that have encouraged it, including increasing emphasis on human rights and the expanding scope of EU regulation.

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9 Nagel, Secular Philosophy and the Religious Temperament, 113.
Meanwhile, recent trends in law and religion scholarship focus on the desirability of a robust and judicially enforceable anti-discrimination rights framework at European level.\(^{16}\) Although most scholars are attracted to the idea, proliferation of legally enforceable anti-discrimination rights has been associated with the spread of a European variant of American ‘adversarial legalism’,\(^{17}\) which involves justiciable regulations backed by strict public enforcement and increased opportunities for private enforcement.\(^{18}\) That sort of legalism has started to shift the European landscape by dramatically increasing judicial review of administrative decisions and practices and raising litigation rates and costs.\(^{19}\) It has also prompted the debut of newfangled constitutional jargon such as ‘Americanization of Europe’\(^{20}\) and ‘Eurolegalism’,\(^{21}\) which American constitutional scholars have coined to describe recent developments in European human rights regulation.\(^{22}\) Importantly, in the United States adversarial legalism has contributed to the weakening of anti-discrimination law after transforming American courts into an arena for social and ideological conflict as different groups and interests have been mobilised ‘to use the judiciary to contest, rather than to promote or enforce, anti-discrimination laws and programs that were intended to redress social inequality.’\(^{23}\)


\(^{21}\) Kelemen, Eurolegalism (cited above).


Without necessarily embracing that skepticism, this thesis is careful not to cultivate unrealistic expectations of anti-discrimination law as a sufficient mechanism to achieve social inclusion of disadvantaged groups, or even strong protection of the right to freedom of religion or belief. From a policy perspective, as exemplified in EU law by the complementarity between the anti-discrimination Directives and the European employment strategy, equality laws need to be buttressed by principles of social inclusion and solidarity to achieve broader social objectives, such as integration and equal participation. This study is aware of all these concerns as well as of the availability of ‘new governance’ legal tools and negotiation strategies that stretch beyond mere legal prohibitions. The focus, however, will be on the moral principles underlying the rights to freedom of religion and freedom from discrimination and their implications for a substantive theory of rights, rather than on the policy ramifications of furthering juridification of discrimination in European human rights law.

There is overlap between some of the arguments found in the literature on discrimination theory and parts of the argument developed in this thesis, for instance, arguments concerning the role of liberty and equality in explaining why discrimination is wrongful. However, while the normative connections between the rights to freedom of religion and freedom from discrimination that are part of the focus of this thesis are related to broader efforts of theorisation of discrimination law, they are not synonymous with those. It is more than interesting that the emerging trend of theorisation of law and religion coincides with an emerging trend of theorisation of discrimination law and that both share important concepts, such as liberty-based and equality-based theoretical accounts. Those efforts of theorisation in religion and discrimination currently follow divergent paths and whereas recent works have attempted to connect the two by picking and sewing threads from each seemingly independent normative tradition, those processes continue to arise non-systematically. Broader processes of theorisation of human rights have certainly...

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29 See Wintemute, ‘Accommodating religious beliefs: Harm, clothing or symbols, and refusals to serve others’. Also Gibson, ‘The God “dilution”?’ (both cited above).
supported the developments described in this thesis, but these broad processes do not provide an adequate explanation for the necessity to spell out the conditions under which a political community has moral power to create and enforce obligations against its members’ conscience.

This thesis builds on the rich literature on law and religion, but the focus here differs. Much of the leading scholarship on law and religion in Europe analyses how and to what extent the ECtHR should protect public manifestations of religion in various fora and forms, and highlights the role of domestic constitutional arrangements of church and state relations in the interpretation of the right to freedom of religion by the ECtHR. Meanwhile, there is – enduring\(^{30}\) – consensus that the ECtHR lacks a coherent, principled account of the competing interests at stake and how they should be properly balanced.\(^{31}\) While this thesis shares those concerns, it does not concentrate on questions of how European legal systems protect freedom of religion or to what extent, if at all, the jurisprudence of the ECtHR affects domestic constitutional arrangements of church and state. Rather, the research question of this thesis concerns what the state duty to treat everyone’s ethical responsibility with equal respect means for a substantive theory of the rights to freedom of religion and freedom from discrimination, and how this affects traditional interpretative patterns of law and religion. Thus, this study aims to contribute to the existing literature through the introduction of a specific normative analysis of the right to freedom of religion that incorporates equal respect into the core of the right, and through explicating how this normative argument could resolve existing doctrinal problems concerning different forms of accommodation of conscience as well as freedom from religious discrimination. This study is equally concerned with the construction and defence of a particular normative argument linking freedom of religion, equal respect and ethical independence and with the practical implications of this process of theorisation for the interpretation of the Convention.


Methodology and Chapter Structure

The argument of the thesis will develop in six chapters, excluding the introduction and the conclusion. More specifically, Chapters Two and Three will examine the relationship between the right to freedom of religion or belief and the values of liberty and equality, as well as the connections of our interpretation of the right with different conceptions of human rights in general, including interest-based and reason-blocking approaches. Chapters Four and Five will then focus on the relationship between the right to freedom of religion and the right to freedom from discrimination, including freedom from religious discrimination. Finally, Chapters Six and Seven will discuss two distinctive themes of law and religion, namely the wearing of religious symbols in public and state limitations on blasphemy. The exact methodological relationship both between those chapters and between is outlined in further detail below.

Before returning to the structure of the thesis, a few methodological points require clarification. Firstly, this is a project that combines normative and doctrinal elements. The aim of this research is to assess the degree to which an interpretation of freedom of religion that links the right to a particular conception of the values of liberty and equality, which I call equal respect for ethical responsibility, is reflected in the case law of the European Court of Human Rights. In fact, Chapters Three, Four and Five show that the case law of the ECtHR, properly analysed, already follows an interpretation of the right to freedom of religion according to those terms. Chapters Six and Seven, on the wearing of religious symbols and blasphemous speech respectively, highlight, on the other hand, that the ECtHR often deviates from such an interpretation. It is of course no coincidence that those parts of the case law have been repeatedly criticised, and this thesis will make specific suggestions about how those areas of case law could be adapted to improve consistency, not only with other cases on freedom of religion, but also with the jurisprudence of the ECtHR on freedom of expression and respect for private life, and with other international human rights law mechanisms, such as the UN Human Rights Committee.

Moreover, theoretical analyses of human rights usually undertake either of two main forms. The first is to focus on questions about the nature of rights, viz. whether freedom of religion and freedom from discrimination should be classified as human rights and what distinguishes them from other legal and political rights. The following pages, however, presume that our established national and international human rights legal practice provides sufficient answers to the classificatory question. Thus, the analysis treats both freedom of religion and freedom from discrimination as human rights and although occasionally I refer to them as ‘rights’, I mean ‘human rights’ throughout. A second group of questions focuses on the grounds of human

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rights, or what is usually referred to as their normative justification. The question then is not whether there is a right to freedom of religion, but the circumstances under which we enjoy it. The following analysis takes up the second theoretical standpoint.

Meanwhile, we use the values of liberty and equality in two senses. We use each as a flat description that carries itself no suggestion of endorsement or complaint, and we also use each of them normatively to identify political virtues or ideals that we do endorse.\(^34\) I think that those two senses – flat and normative – of the value of liberty permeate our conversations about freedom of religion as well. That is, we use religious freedom in a flat sense to indicate absence of constraint. We claim, for instance, that some people’s religious freedom is constrained by laws prohibiting symbols in public schools.\(^35\) On the other hand, we use religious freedom in the normative sense to describe the ways in which we believe people ought to be protected in their religion or belief. When Christians claim that their religious freedom has been in danger in Europe lately,\(^36\) they use religious freedom in that second, normative, way. They do not mean that people in other parts of the world enjoy better protection, but that they are themselves less protected in the specific ways contemplated by religious freedom as a fundamental moral right: to act and express themselves in accordance with their conscience, for example. It is mainly through this normative lens that freedom of religion will be examined in this study.

The liberal egalitarian ideal of the state duty to show equal respect and concern towards everyone draws influence from the work of Ronald Dworkin.\(^37\) The idea it expresses, namely that everyone is worthy of equal concern and respect merely by virtue of being human, is a familiar theme in liberal theory and political philosophy that finds expression in the moral and political philosophy of Immanuel Kant\(^38\) and can also be traced in the liberal theories of John Locke, Thomas Paine and John Stuart Mill.\(^39\) This is certainly not to suggest that the idea is uncontroversial. On the contrary, the ideal of equality has been widely contested.\(^40\) Raz argues that nothing significant, other than rhetorical vigour, is added to the claim that each person is entitled to respect and concern by saying that each person is entitled to equal respect and concern.\(^41\) John Finnis adds that paternalist programmes guilty of far-reaching restrictions because of forgetting that ‘personal authenticity’ is an important adjunct of human well-being should be criticised for exactly that failure, not on the basis of denial of equal respect and concern. Moreover, according to Frankfurt, equality has

\(^35\) See e.g. *Dogru v France*, Application no. 27058/05, 4 December 2008.
\(^36\) Parliamentary Assembly Council of Europe, *Resolution 2036: Tackling intolerance and discrimination in Europe with a special focus on Christians*, adopted by the Assembly on 29 January 2015 (8th Sitting).
\(^38\) Best known as Kant’s theory of the categorical imperative. See Immanuel Kant, *Groundwork on the Metaphysics of Morals* (1785).
no moral importance as such because the mere fact that one person has or is entitled to something is no reason for another person ‘to want the same thing or to think himself entitled to it.’ And those are critical voices from inside the liberal tradition lato sensu. Outside that tradition, the critique of equality by both conservative and socialist thinkers is much more radical.

Even so, the research question and space constraints of this thesis do not leave enough space for direct engagement in the dialectic on the value of equality or on the validity of egalitarian principles of justice. This is not to suggest that my arguments do not take sides though. In various sections, and especially in Chapters Three and Five, I argue that the claim that everyone is entitled to respect for his personal ethical responsibility, instead of equal respect, as well as the implications of this claim, are obscure. When a collective decision injures some people but is nevertheless supported by the claim that the community as a whole will be better off, or that the fulfillment of some widespread important interests in the community requires it, the most plausible objection springs from the impact of that decision on the affected minority. The claim that such a decision does not treat people as equals because, for instance, it does not properly consider the damage it causes to a specific section of the community is just a natural extension of that sort of objection. It is this comparative aspect that puts ‘meat on the bones of the concept of treating a person with the respect that personhood requires.’

Turning to the structure of the thesis in more detail, Chapter Two starts with the popular idea that the right to freedom of religion or belief comes into conflict with other rights as well as with the demands of equal treatment, and that some form of reconciliation is therefore essential. The principles of this process of reconciliation are then commonly derived either from liberty or from equality-based theories of freedom of religion, which presumably furnish opposing accounts of the scope of the right and its relationship with other rights. Those two theories are habitually portrayed in an antagonistic fashion. Chapter Two challenges this dualist narrative. I examine various versions of liberty-based theories of freedom of religion and argue that their most plausible and attractive interpretation, namely the one best explaining the legal practice of the ECtHR in the examination of complaints about violations of the right to freedom of religion, is egalitarian. That is, it includes an egalitarian dimension of equal respect that ultimately both theories of the right to freedom of religion share.

Chapter Three develops this argument further. I argue that a reason-blocking account of our right to freedom of religion or belief makes better sense, compared to an interest-based account, both of the diffusion of interests that underlie the right and of the seminal distinction between influence and subordination. Moreover, a reason-blocking account of the right makes better sense in connection with the more abstract principles of equal ethical responsibility and authenticity, which are discussed in

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42 H. Frankfurt, Necessity, Volition, and Love (Cambridge University Press, 1999) 149-150 Notably Frankfurt draws a distinction between equality and respect. He considers the former as aiming at outcomes ‘that are matched specifically to the particularities of the individual’ while the latter as matched ‘specifically to the particularities of the individual.’

43 D. Hellman, When is Discrimination Wrong? (Harvard University Press, 2008) 175.
detail. In my view, this reason-blocking account of the right also explains certain morally important parts of the jurisprudence of the ECtHR; and more specifically, why in a significant number of cases the ECtHR does not balance between individual and other collective interests and focuses instead on reading principles such as neutrality, impartiality, autonomy and non-subordination into the text of Article 9 of the Convention. A reason-blocking interpretation of the right helps us make sense both of those principles and of the methodological discrepancies between cases that involve balancing and cases that do not. More precisely, it helps us recognise that actually the ECtHR focuses on the interpretation of the reasons underlying certain specific limitations on our right and not on the satisfaction of important interests for their own sake.

The interconnections between equality and the right to freedom of religion have certain implications for the relationship between the right to freedom of religion and the right to freedom from discrimination. Chapters Four and Five investigate that relationship from different perspectives. Chapter Four sets the doctrinal basis, organises the relevant typologies, and highlights some important issues relating to direct and indirect discrimination. It also tracks the implementation of the provisions protecting from religious discrimination through a parallel examination of Articles 9 and 14 (read in conjunction with Article 9) of the Convention. The main argument of the chapter is that the ECtHR, in the relevant parts of its jurisprudence, makes no principled distinction between the two provisions to the extent that the relationship between religious freedom and religious discrimination ends up being doctrinally confusing.

Unraveling that seeming confusion requires analysis of the moral wrong of religious discrimination. Chapter Five engages in that inquiry. The chapter discusses descriptive and moralised conceptions of discrimination and disadvantage, and challenges the claim that egalitarian accounts of freedom of religion are based on inconsistent analogies between religion and other non-religious claims. I argue that, under a moralised sense, disadvantage is not inherently comparative and that the availability, activation or selection of comparators is not constitutive of a violation of our rights to freedom of religion and freedom from religious discrimination. Rather, religious discrimination is morally wrong because it counts stereotypes and prejudice towards certain religious groups among the legitimate interests that a government can satisfy. The duty of a political community to treat the independence and authenticity of its members as equally important blocks those impermissible kinds of reason from the justification of political action, even if that action would improve the welfare or well-being of the community as a whole. This principle unifies the moral rights to freedom of religion and freedom from religious discrimination, and explains why the ECtHR uses the two rights interchangeably. Freedom of religion is intertwined with freedom from discrimination to the extent that state measures failing to show equal respect and concern regardless of conscience could never be compatible with either of those rights.

Even taken together, the normative arguments presented in Chapters Two, Three and Five cannot fully capture the practical implications of the proposed theory.
of interpretation of the right to freedom of religion. For even though the interpretative principles underlying significant parts of the case-law of the ECtHR – including cases on proselytism, equal rights of registration for religious groups, regulation of religion outside the workplace and religious discrimination – seem to be congenial, when properly analysed, to the argument that the right to freedom of religion normatively flows from a more general right to equal ethical responsibility, this is not the case throughout the jurisprudence of the ECtHR. So, in order to explore and understand the pathways linking ethical responsibility, equality and freedom of religion, this thesis also includes detailed discussions of two particular and distinctive areas of law and religion that seem to stand in tension with the proposed theory.

More precisely, Chapter Six examines cases of prohibitions on religious symbols in public spaces, including the recent S.A.S. v France on the blanket prohibition on full-face veils from the public space. I argue that the reason-blocking theory of the right to freedom of religion that Chapters Three and Five develop does not entail complete lack of limitations on the wearing of symbols in public, but that the justifiability of those limitations depends on a moral inquiry focusing on the reasons behind those limitations in order to ensure protection from subordination to the moralistic preferences of the majority. Given that the jurisprudence of the ECtHR has recently recognised a right to ‘living together’, as a legitimate dimension of the rights of others that could justify limitations on our rights under the Convention, the chapter distinguishes between a responsibility and a conformity interpretation of ‘living together’. I argue that in cases involving state limitations on the wearing of religious symbols in public a reason-blocking interpretation of freedom of religion not only favours a responsibility conception of ‘living together’, but also shows why that interpretation better fits the jurisprudence of the ECtHR across a number of rights that involve public and potentially offensive expressive dimensions, including respect for private life and freedom of expression. So, despite the fact that in cases on religious symbols in public the ECtHR has reached different outcomes to those that the normative theory defended here would point to, Chapter Six shows that tracking the normative justification of religious freedom to a more general right to equal respect for ethical responsibility consolidates religious freedom into a more general theory of rights which could be conducive to a more coherent interpretation of the Convention.

Chapter Seven discusses justifiability of state restrictions on religiously offensive speech. The chapter challenges the approach of the ECtHR, which has been over-protective of religiously offensive forms of expression. More specifically, similarly to the approach followed in Chapter Six, the ECtHR is criticised because the more general duty to treat everyone’s ethical responsibility with equal respect is incompatible with a right not to be offended in one’s religious beliefs. This chapter will also argue that a reason-blocking approach would improve consistency both internally, given that the ECtHR has repeatedly held that freedom of expression protects speech that ‘offends, shocks or disturbs’, and externally with international human rights law, where the latest soft law developments support criminalisation of

44 See e.g. Handyside v United Kingdom, Application no. 5493/72, 7 December 1976, at §49.
expression inciting to violence and not bans on merely offensive forms of expression. Once again, according to a reason-blocking approach limitations on offensive forms of expression are unjustifiable neither because we think that we can secure more individual rights by rejecting such limitations, nor because the interests of the artists are more important than the interests of the affected religious believers. They are unjustifiable simply because the values and considerations supporting the putative right not to be offended in one’s religion are incompatible with the very idea of equal respect for our personal ethical responsibility that the right to freedom of religion itself asserts.

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A theory of interpretation of the right to freedom of religion that forbids restrictions justified on certain impermissible kinds of reason favours a tolerant state that does not privilege religion over non-religion. This is one the main burdens of the argument that this study offers. I hope that any disagreement will be supported with reasons about why my arguments are wrong. You might reject the distinction between influence and subordination that I find crucial, or you might disagree about the claim that the inquiry under either Article 9 or Article 14 involves the same concerns, that is, to smoke out impermissible reasons underlying restrictions on freedom of conscience. Nevertheless, if we accept that the normative justification of our moral right to freedom of religion is our personal responsibility to make deep ethical choices independently and authentically, then any contrary argument about the scope of the right to freedom of religion and its interaction with prohibition of discrimination has to fit that principle. Disagreeing with some, or all, of the practical implications of the forthcoming argument is not enough, I think, to declare it wrong.

This PhD thesis was written with the aim to be as meticulous and methodologically sound as possible, but I cannot prevent that some of my conclusions about the limits of the right to freedom of religion and its relationship with liberty and equality will be controversial. I do not think, of course, that any substantive theory of the right to freedom of religion can make hard cases, many of which will be examined in the following pages, look easy and straightforward. My aim, however, is not to resolve every issue of law and religion, but to channel further thought about why sufficient protection of the right to freedom of religion cannot but include principles in the interpretation of Article 9 ECHR. My argument is that the way to add principles to the area of law and religion is through constructing, testing, and evaluating different conceptions of liberal equality in order to figure out which of them best fits the history and practice of the Convention. Ultimately, this thesis interprets freedom of religion, ethical responsibility and human dignity on the basis of an ideal, liberal equality, so controversy is expected and welcome.
[W]hile the Court does not consider that an individual’s decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck.

_Eweida and Others v United Kingdom_¹

In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.

_Leyla Şahin v Turkey_, Dissenting opinion of Judge Tulkens²

### 2.1. Introduction

This chapter discusses a familiar idea that dominates the phenomenology and jurisprudence on law and religion, namely that there is an inherent tension between the right to freedom of religion and the demands of equal treatment, the rights of others, and various important collective interests. The overarching conclusion is that there should be some form of reconciliation or compromise, possibly through granting certain religious exemptions from general laws. However, there is ambiguity and discord with regard to the principles underlying that process of reconciliation. Is it liberty (which favours religious exemptions) or equality (which favours equivalent protection for religious and important non-religious claims) that should prevail?

The following pages will closely examine liberty and equality-based theories of freedom of religion and will argue that the antagonism between the two is illusory. Liberty-based theories of freedom of religion are more plausible if taken to include a

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¹ _Eweida and Others v United Kingdom_, Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, §109.
² _Leyla Şahin v Turkey_, Application no. 44774/98, 10 November 2005, Dissenting opinion of Judge Tulkens, §4.
moral principle of equal respect, which this chapter will develop towards the end, at their core. If this is correct, what follows is that freedom of conscience and equal treatment cannot but be interpreted together, as mutually supportive, rather than as conflicting, norms.

This chapter sets parts of the foundations of a normative theory of the right to freedom of religion that Chapter Three and Chapter Five will revisit and refine. Chapters Four, Six and Seven will then show how that approach could make better sense, or even improve, the current jurisprudence of the ECtHR. One of the core points is that, even if we disagree on the specific applications of the right to freedom of religion, the values of liberty and equality, interpreted in light of each other, help us to better understand what claims of accommodation of conscience mean and what makes them true or false. Different views about accommodation of conscience may represent common adherence to the values of liberty and equality, but different conceptions of what equal protection for freedom of conscience is.

2.2. Liberty and Equality-Based Theories of Freedom of Religion

It is often argued that the reasons for variations in granting religious exemptions from general and neutral rules stem from the fact that legislatures and policy makers try to balance between two goals. One is the maintenance of state neutrality in public institutions and, sometimes, the public space, which is perceived as an essential entailment of equality between all fundamental beliefs. The other is ensuring the maximum possible freedom of religion or belief for everyone. Different national answers reflect different approaches on how to ‘balance’ between those two goals. This familiar ‘balancing’ formula is often used in constitutional theory to resolve conflicts between rights or between rights and collective goals. Time and again the ECtHR engages in context-sensitive ‘balancing’ involving the justification, necessity and proportionality of state limitations on freedom of religion or belief on the one hand, and the importance of the right for the individual or group on the other. Of course ‘balancing’, as both Habermas and Dworkin have argued, suggests in itself no principled basis for deciding how much we should protect human rights. The balancing metaphor seems to assume that courts can decide the extent of human rights protection through a form of cost-benefit analysis, just the way communities decide on various policy matters such as urban planning or the construction of high-speed trains. But this strategy is inappropriate to recognise and protect human rights. Most

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7 J. Habermas, Between Facts and Norms (Polity Press, 1996) 256-259
political decisions require a cost-benefit analysis in which disadvantages to some are weighed against the overall benefit to the community. However, some injuries to individuals are so grave that they cannot be justified by declaring that that is what the public wants. We recognise and protect rights precisely because we want to safeguard individuals from these grave harms.

Balancing has therefore to be accompanied by principles, that is, by moral arguments that appeal to ideas about fairness and rights instead of consequences. But which are those principles, and why are they useful? For instance, are there any circumstances under which a ‘balancing’ analysis would for some reason be inappropriate? How can a fair state grant conscientious exemptions from general rules and, at the same time, claim that it treats everyone equally regardless of religion or belief?

It is important to answer those questions, especially given that significant parts of the literature concentrate on the seemingly irresoluble tensions between freedom of religion and other rights. Accommodation of religion is allegedly in tension with fundamental rights such as freedom of expression or freedom from discrimination,9 with human rights in general,10 or even with law;11 and those tensions seem hard to reconcile.12 For instance, Zucca argues that ‘a religion that claims exclusive truth cannot possibly reach a compromise on issues that involve the denial of those very truths.’13 Rosenfeld contends that the constitutional treatment of religion challenges the foundations of the ‘Enlightenment project’, which is characterised by reason, secularism, division between the public and private spheres and ‘substantive equal treatment’ for competing conceptions of the good within the polity.14 However, as this chapter will later argue, this controversial distinction between faith and rationality does not say much about the scope or role of our moral right to freedom of religion or belief.15 Others claim that human rights sit uneasily with religion because religious groups ‘misuse’ human rights to make ‘self-interested’ claims.16 Finally, with regard to legal interpretation, it has been argued that courts should concentrate not on ‘theoretical conflicts between comprehensive views’, but on ‘practical conflicts’ about

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11 Zucca, ‘Prince or Pariah?’, 10.
‘how to behave under certain circumstances.’ But the distinction between theoretical and practical conflicts bypasses that ‘practical’ conflicts cannot be resolved in ways distinct from moral arguments about the value of the right to freedom of religion and its normative justification, that is, about what this right entails, what it is for and what assumptions about it fit with an attractive interpretation of the Convention as a whole.

Meanwhile, we usually encounter conflict in two ideas, which seem to belong to the moral right to freedom of religion or belief. That is, a state may not burden freedom of religion, but must not discriminate in favour of any religion. It is precisely that uncertainty about the relationship between the right to freedom of religion or belief and the state duty of equal treatment that is exemplified in recent complaints before the ECtHR, which build on the idea that failure to accommodate the applicants’ conscience not only limits their right to freedom of religion, but also demonstrates state failure to treat them with equal respect to other citizens. A fusion of freedom of religion and equality emerges from the surge in individual applications with dual legal bases, namely both a complaint of a violation of the individual right to freedom of religion or belief and a complaint of a violation of the right to freedom from discrimination on grounds of religion. Seeking to make sense of such developments, an emerging literature explores the increasing role of equality norms in the examination of freedom of religion claims by the ECtHR. Some scholars argue that framing freedom of religion claims as equality claims promises better chances of success before the courts. For instance, Wintemute notes that the ‘very limited success’ of the ‘liberty’ approach, which is based on Article 9 ECHR, is a good reason to consider an alternative ‘equality approach’, which is based on indirect discrimination and engages Article 14 in conjunction with Article 9 ECHR. The assumption is that robust anti-discrimination protection will lead to stronger protection of freedom of religion for majority and minority groups alike. Other scholars disagree. Leigh and Hambler argue, for instance, that an approach based on

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19 Eweida v United Kingdom is an example among many. Chapter Five will discuss cases on religious discrimination in further detail.
individual conscience, rather than on freedom from discrimination, protects the interests of individual believers much more satisfactorily.\textsuperscript{23} Especially with regard to \textit{Ladele v United Kingdom},\textsuperscript{24} a case involving a registrar who was dismissed because of her refusal to register same-sex civil partnerships based on her conscience, an approach based on liberty of conscience also fits the principle that public bodies should not be allowed to ‘pick and choose’ which ‘human rights they prefer by prioritising one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance.’\textsuperscript{25}

Not all authors engaged in these debates mean precisely the same thing when they invoke notions such as equality between believers and non-believers, freedom of conscience or reasonable accommodation. While perhaps no concept can capture all those different understandings of what the right to freedom of religion entails in European human rights law, two distinct substantive theories of religious freedom, liberty and equality-based, come close. In the following pages I will attempt to explain why. But first there are two points that have to be made. First, it is noteworthy that liberty and equality-based theories of the right to freedom of religion generate different political implications.\textsuperscript{26} Second, to a significant extent their distinction draws influence from the American constitutional jurisprudence,\textsuperscript{27} where the relationship between the free exercise, non-establishment, and due process clauses of the US constitution has proved puzzling.\textsuperscript{28} However, the different construction of the ECHR, which neither includes a non-establishment clause, nor expressly singles out religion for special constitutional attention, requires caution.\textsuperscript{29}

The idea that there are two distinct and antagonistic accounts of the right to freedom of religion derives from the perennial rivalry between liberty and equality in political philosophy. The political roots of the antagonism emerge more clearly in arguments that hold that the question in cases of accommodation of religion is whether equality should ‘trump’ freedom.\textsuperscript{30} For instance, Trigg argues that equality is just one priority among others and that freedom of religion is a basic right ‘that cannot simply be discarded because it competes with other priorities.’\textsuperscript{31} He criticises Recommendation 1804 of the Council of Europe for pursuing a secular agenda that

\textsuperscript{24} Eweida and Others v United Kingdom (cited above).
\textsuperscript{25} Leigh and Hambler, ‘Religious symbols, conscience, and the rights of others’, 24.
\textsuperscript{27} Indicative of that influence is that most analyses discuss the American jurisprudence as paradigms of the rivalry between liberty and equality jurisprudence. See e.g. Laborde, ‘Equal Liberty, Nonestablishment, and Religious Freedom’.
\textsuperscript{29} As the American constitution does in its Free Exercise clause.
\textsuperscript{31} ibid 38.
disregards religious objections to homosexual practices and abortion. Recommendation 1804 urges contracting states to gradually remove from legislation ‘elements likely to be discriminatory from the angle of democratic religious pluralism’, which, according to Trigg, means that ‘religious principles must be abandoned in favour of the removal of some form of discrimination, but not, it appears, of discrimination against religion.’ He concludes that ‘in the pursuit of equality, it seems, some beliefs are still more equal than others.’

For reasons that will be further analysed in Chapter Three, I think that the claim that the ECtHR and the Council of Europe treat religion and equality as comprehensive views and that they ultimately take sides in a debate between fundamental values whenever they valorise equality as a principle, or as bedrock of particular social policies, misunderstands the role and function of human rights. Still, the antagonism between liberty-based and equality-based approaches of freedom of religion and its enduring impact in human rights theory deserves to be closely examined. Schematically, liberty-based theories of religion hold that the government should not unduly interfere with individual conscience and that freedom of religion requires ‘special’ protection by the state. By contrast, equality-based theories maintain that freedom of religion is a fundamental right that should enjoy equivalent, rather than ‘special’, protection to other rights and freedoms. Importantly, equality-based theories do not preclude religious exceptions to general and neutral rules. Rather, their main political difference from liberty-based approaches is that such exemptions should not be granted preferentially to religious reasons, but that those should be treated on a par with other important reasons for action, such as philosophical beliefs, family commitments, or even health predicaments. Finally, although the two theories are predominantly portrayed in competition, this is not always the case. Some argue that liberty-based complement equality-based theories, which, more specifically, means that in some areas, such as marriage, religious groups have to enjoy ‘special’ protection (which favours a liberty-based approach) whereas in other areas, such as economic distribution, religious and non-religious groups have to be treated analogously (which favours an equality-based approach).

I do not suggest that the foregoing brief description of liberty and equality-based approaches fully captures the two theories, or that a theory of the moral right to freedom of conscience necessarily has to side with either of them. The only aim of the following pages is to shed light to the relationship between the two because, I think, that that investigation will be useful for one of the main research questions of this thesis, namely the relationship between the right to freedom of religion or belief and the values of liberty and equality.

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33 ibid 24(2).
Chapter 2 | Freedom of Religion, Equality, and Harm

2.3. Liberty-Based Theories of Freedom of Religion

2.3.1. Religion or belief?

Before starting our examination of liberty-based accounts of freedom of religion, it is important to delve deeper into the existing European human rights landscape. This is important because amongst all the plausible accounts of the right to freedom of religion or belief we have to adopt those that are consistent with our common legal practice. A first important question is whether religious and non-religious beliefs enjoy equivalent protection under the ECHR. As its title suggests, Article 9 of the Convention protects freedom of religion or belief. And, in fact, the jurisprudence of the ECtHR does not favour theistic over non-theistic beliefs as to the level of protection that they enjoy under the Convention. Rather, any belief that attains a certain level of cogency, seriousness, cohesion and importance falls within the protective scope of the article. In *Campbell and Cossans v United Kingdom*, the ECtHR held that philosophical opposition to corporal punishment of children involves ‘a weighty and substantial aspect of human behaviour’ and as such it reaches the required level of cogency, seriousness, cohesion and importance to fall within the protection of the Convention. Another example is the Church of Scientology, which the ECtHR has recognised to fall within the protective scope of Article 9 without engaging in debates about the nature of religion that have concerned other national courts. By the same token, the ECtHR has held that pacifism falls within the protective scope of Article 9 and so are atheism, the Druids, the Raëlian Movement, the Osho Movement and the Divine Light Zentrum. All these non-theistic beliefs are protected on a par with more traditional religions such as Islam, Judaism, Buddhism, Hinduism and various denominations of Christianity.

Meanwhile, the ECtHR – and the European Commission of Human Rights before that – have also avoided the controversial territory of defining what constitutes religion or belief for the purposes of Article 9 and they rarely hold that something

36 ibid
37 ibid §§16-17.
38 X and Church of Scientology v Sweden, Application no. 7805/77, 1978, §70. Also Church of Scientology Moscow v Russia, Application no. 18147/02, 5 April 2007.
39 R v Hodkin, UK Court of Appeal, December 2013. See also the reversal in R v Hodkin, UK Supreme Court 2014.
41 Angeleni v Sweden, Application no. 10491/83 (1986).
43 Movement Raélien Suisse v Switzerland, Application no. 16354/06, 13 July 2012.
44 Leela Förderkreis E.V. and Others v Germany, Application no. 58911/00, 6 November 2008.
46 Karaduman v Turkey, Application no. 16278/90 (1993).
49 ISKCON and Others v United Kingdom, Application no. 20490/92, 8 March 1994.
50 See e.g. Knudsen v Norway, Application no. 11045/84 (1985).
alleged to be a religion or belief is not. Only a handful of exceptions to that practice exist. An example is *X v Germany*, where the Commission found that the applicant’s aversion to being buried in a cemetery dominated by Christian symbols fell outside the scope of Article 9 as his wish did not contain a ‘coherent view of fundamental problems.’ A very basic level of intellectual or moral coherence is probably the only requirement for a religion or belief to qualify for protection under the Convention.

That generous approach is also congenial to the practice of UN bodies. For instance, in General Comment No. 22, the UN Human Rights Committee adopts an analogously wide interpretation of the right, which includes freedom to choose a religion or belief, and ‘the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as to retain one’s religion or belief.’ Furthermore, similar flexibility emerges in the practice of various national European courts, including the UK courts. In March 2015, the UK Employment Appeal Tribunal (‘EAT’) held in *General Municipal and Boilermakers Union v Henderson* that left-wing democratic socialism is a protected belief under Section 10 of the UK Equality Act 2010 (Religion or belief). The appellant had suffered direct discrimination and harassment in virtue of his socialist political beliefs. The EAT found a violation of the Equality Act 2010 on the basis that ‘the law does not accord special protection for one category of belief’ and that ‘philosophical beliefs may be just as fundamental or integral to a person’s individuality and daily life as are religious beliefs.’ This approach is unsurprising, given previous cases from the UK courts, such as *Grainger v Nicholson*, where the Employment Appeal Tribunal held that a belief in man-made climate change – and the moral imperatives arising from it – was protected under the Employment Equality (Religion or Belief) Regulations 2003. Also protected is the belief that public service broadcasting promotes cultural interchange and social cohesion.

Meanwhile, the Convention offers absolute protection to the right to believe, or change one’s beliefs. However, freedom of manifestation ‘through worship, teaching, practice and observance’ is subject to restrictions provided that they

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53 ibid §138.

54 General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), 30 July 1993. ICCPR/C/21/Rev.1/Add.4.


56 ibid §62.

57 ibid.


60 Article 9§1 ECHR.

61 Article 9§2 ECHR.
pursue a legitimate aim and that they are necessary in a democratic society.\textsuperscript{62} Although there is strong consensus that the protective scope of the right to freedom of manifestation includes certain seminal activities such as, for example, the organisation and registration of religious communities and the building of places of worship,\textsuperscript{63} significant disagreement remains about other, more unusual, practices. Commonly cited examples include practices that are not supported by dominant interpretations of religious dogmas or by the majority of a group.\textsuperscript{64} Different theological interpretations impose different requirements with regard, for instance, to the wearing of religious clothing or symbols.\textsuperscript{65} Many Muslim women choose to leave their face and head uncovered. Not all Jewish men wear the yarmulke. Many Muslim men would refuse to shake hands with a woman, while others would not even consider it prohibited. Similar examples exist for countless forms of behaviour incited by religious or non-religious forms of conscience. Of course the binary distinction between belief and practice glosses over the profound interconnections between the two,\textsuperscript{66} and the criticism that the ECtHR has attracted for employing the distinction to privilege protection of beliefs over practices is familiar. For instance, Peroni argues that the ECtHR ‘valorises’ autonomous and private forms of religiosity over more habitual and public forms.\textsuperscript{67} But note that that line of criticism does not come from a theological or a taxonomic perspective. Rather, it is associated, tacitly or explicitly, with a normative analysis of the moral right to freedom of religion which, as Peroni argues, connects the binary distinction between belief and practice with the reproduction of ‘inegalitarian relations’ between religions that are based on private and religions based on public forms of manifestation.\textsuperscript{68} I will return precisely to that relationship between religion and equal treatment later in this chapter.

It is notable, however, that whether a particular practice is compulsory, or even central, to a particular belief system often plays little role in the jurisprudence of the ECtHR. In \emph{Leyla Sahin v Turkey}, a case about a student who was disciplined and eventually suspended from university because she was wearing a headscarf, the ECtHR readily accepted the individual argument that wearing a headscarf is a protected form of religious manifestation.\textsuperscript{69} In \emph{Eweida}, the ECtHR accepted that the fact that wearing a visible cross at work was motivated by the applicant’s Christian faith was sufficient to count as a protected form of manifestation of her religion under

\begin{itemize}
\item \textsuperscript{62} On the application of the limitations included in Article 9§2 ECHR see C. Evans, \emph{Freedom of Religion under the European Convention on Human Rights} (Oxford University Press, 2001) 133-167.
\item \textsuperscript{63} Hasan and Chaush v Bulgaria, Application no. 30985/96, 26 October 2000.
\item \textsuperscript{64} Stychin, ‘Faith in the future’, 752.
\item \textsuperscript{65} \emph{Eweida v United Kingdom} (cited above).
\item \textsuperscript{66} P. Danchin, ‘Of prophets and proselytes: Freedom of religion and the conflict of rights in international law’ (2008) 49(2) \emph{Harvard International Law Journal} 249.
\item \textsuperscript{67} L. Peroni, “‘Deconstructing ‘legal’ religion in Strasbourg’ (2014) 3(2) \emph{Oxford Journal of Law and Religion} 235.
\item \textsuperscript{68} ibid
\item \textsuperscript{69} \emph{Leyla Sahin v Turkey}, Application no. 30943/96, 10 November 2005 (Grand Chamber).
\end{itemize}
Moreover, the majority reminded that the manifestation of religion or belief is not limited to acts that are ‘intimately linked’ to religion or belief. Rather, the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case... [and] there is no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question. In addition, the ECtHR consistently favours a broad interpretation of the ‘close and direct nexus’ requirement. As Lady Hale has argued, that approach is undoubtedly good news for members of the Church of England and indeed of the Church of Ireland, which impose so few mandatory requirements.

Another point is that the criteria of cogency, seriousness, cohesion and importance are fairly ambiguous and their application is unclear at times. As above-mentioned, the ECtHR has been criticised for not adopting a formal definition of what constitutes religion or belief and for simply ignoring the issue ‘by dealing with controversial cases on different grounds’. According to Evans, the hands-off approach of the ECtHR only magnifies the conceptual confusion in this area. For instance, in X v Austria, a case where the applicant challenged his conviction for neo-Nazi activities based on his rights under Article 9 ECHR, the Commission did not consider whether Nazism constitutes a belief capable of manifestation. Rather, it moved directly to a discussion under Article 9(2) regarding the justifiability of the restriction, which implied that Nazism is a protected and capable of manifestation belief. In Hazar and Açik, a case based on a complaint about an unjustifiable limitation of the right to freedom of manifestation of Communist beliefs, the Commission followed a similar approach.

Different approaches to definition of religion bring to the fore the familiar distinction between objective and subjective (or functional) approaches. Objective approaches mainly pay attention to whether a particular practice is compulsory, or at least integral to a belief system, in order to decide whether its manifestation is protected under the right to freedom of religion or belief. Objective approaches,

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however, suffer from significant shortcomings. Focusing on religion, a plethora of theological interpretations and disembodied practices\(^{81}\) makes it difficult to ascertain which forms of manifestation are mandatory and to what extent.\(^{82}\) And, importantly, theological disputes raise ‘the question of the kind of authority the court will accept as giving a proper and accurate account of what is essential to the religion.’\(^{83}\) Those authorities are often elderly and male, which exacerbates the danger that entrusting the level of human rights protection to their judgment may constitute ‘a form of empowerment of conservative interpreters of the particular religious tradition and an undermining of more modern (and possibly more liberal) versions.’\(^{84}\) By contrast, subjective approaches aim to tackle those very difficulties. According to subjective accounts of religion, it should just be established that ‘the relevant person or group regards his or her behaviour as conforming to a religious prescription, regardless of the lack of support of the practice by other believers.’\(^{85}\) This is not to suggest, however, that a subjective approach guarantees unlimited protection to all actions inspired by religion or belief. This is another issue that this chapter will revisit towards the end.

Nonetheless, the practice of the ECtHR shows that the distinction between the two approaches is not as clear-cut as it is often supposed. The discussion so far suggests that the ECtHR adopts neither an objective, nor a subjective approach to freedom of manifestation of religion or belief. Rather, it follows a hybrid approach that involves application of certain objective criteria, viz. seriousness, cogency, coherence and importance, but at the same time is sufficiently subjective in its application so as to leave ample scope for protection of a plurality of religious and non-religious beliefs. I think that an important ingredient in this hybrid approach is the insistence of the ECtHR that national authorities should steer clear from determining the value or validity of religious beliefs, and from choosing which are more eligible for protection.\(^{86}\) The jurisprudence of the ECtHR repeatedly and consistently highlights that having convictions of duty that are equally imperative to religion does not require a theistic religion. That principle connotes a particular moral theory of freedom of religion based on our personal responsibility to define value in our lives, which is equally shared by believers and atheists. The next chapters will elaborate on that theory; the analysis has to return now to the examination of liberty-based accounts of freedom of religion or belief.

\(^{81}\) The difficulties in defining religion have led some theorists to the argument that freedom of religion is ‘impossible‘; see W. F. Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2005).

\(^{82}\) Hatzis, ‘Personal religious beliefs in the workplace’.


\(^{84}\) ibid


\(^{86}\) See Moscow Branch of the Salvation Army v Russia, Application no. 72881/01, 5 October 2006, §58.
2.3.2. **Uniqueness of religion**

Already in 1651, Thomas Hobbes, in *Leviathan*, describes modern man as an anxious Prometheus, whose heart, instead of liver, is everyday pecked out ‘by fear of death, poverty, or other calamity, and has no repose, nor pause of his anxiety, but in sleep’.  

Belief in God emerges as solace, assistance and source of explanation in Hobbes’s thought – all at the same time. The God of monotheism arises out of the need of modern man to approach and obey a single omnipotent deity ‘in the hope of getting him to do our bidding in the struggle with nature.’ Hobbes’s humanistic – and interestingly strategic – reconstruction is just one example of a theory aiming to show that religion plays a distinctive role in our lives; that it satisfies basic psychological needs, such as existential uncertainty, and gives meaning to collective identities and social goals. 

Hegel, in his 1829 lectures on the ‘proofs’ of the existence of God, writes that religion is an elevation of thought ‘into the kingdom of thought’ that involves faith, feeling, intuition, imagination and, above all, ‘pure spirit’. Other theorists from cognitive anthropology and neuropsychology argue that the way our minds work entails belief in some form of religion. According to Barrett, belief in God may well be inevitable given ‘the sorts of minds we are born with in the sort of world we are born into’.

Trigg notes that ‘religion, or at least the impulses that help to produce the characteristic features of so-called religious belief, is a basic component of humanity’. The building blocks of religion – our impulses to believe in disembodied minds, supernatural agency, and teleology to explain natural phenomena – cannot be removed. Behavioural studies actually confirm that religious beliefs, activities and affiliations affect a wide range of behavioural patterns, including banalities such as financial decisions.

But what does the distinctive psychology of religion and emotion mean for law? Does, for instance, our ability to think and act ‘religiously’ draw on religion’s distinctive psychological, emotional and anthropological dimensions? There is some skepticism about that. For instance, Arnal and McCutcheon argue that far from being ‘natural’ or ‘universal’, thinking and acting religiously is a specific category of

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91 ibid 6.
94 ibid.
reasoning which is political in its origins and effects; a ‘by-product’ of modern secularism.\footnote{W. Arnal and R. T. McCutcheon, *The Sacred is the Profane: The Political Nature of ‘Religion’* (Oxford University Press, 2012) 17-31.} Perhaps more famously, almost a century ago Freud wrote that religion is best seen as an obsessional neurosis, arising from ‘emotions and conflicts that originate early in childhood and lie deep beneath the rational, normal surface of the personality.’\footnote{Z. Freud, *The Future of an Illusion* (1927) (reprinted: Penguin, 2008). See also D. Pals, *Nine Theories of Religion* (2nd Ed., Oxford University Press, 2015) 71.} It is religion, according to Freud, that arises in response to deep emotional conflicts or weaknesses – not the other way round. He also believed that once psychoanalysis resolved such issues, religion would naturally disappear from the human scene.\footnote{Pals, *Nine Theories of Religion*, 72.}

In any event, even if we disagree about the religious, political, social or psychological origins of religious reasoning, it seems that we need another, independent, argument to demonstrate that religious claims are unique, apart from distinctive, and should therefore be singled out for stronger (or ‘special’)\footnote{D. Laycock, ‘The remnants of free exercise’ (1990) 1 Supreme Court Review 16.} constitutional protection compared to other important yet non-religious commitments. Such arguments often assume an empirical tone. There is no comparison, it is argued, between the need to wear a cross and the urge to wear a designer’s bag, no matter how much someone might want to wear the latter. But, in this simple form, the jump from distinctiveness to uniqueness of religion is misleading. Equivalent protection of religious and non-religious forms of conscience does not entail that religion is comparable with *any* other conviction or impulse, ‘however frivolous’.\footnote{Eisgruber and Sager, *Religious Freedom and the Constitution*, 101.} Although, as Chapters Three and Five will discuss in further detail, a coherent egalitarian interpretation of the right to freedom of religion or belief requires more than seeking comparators, there exist analogous obligations in categoricity and importance to religion, such as health. As much as certain religions require the wearing of symbols, certain health predicaments or disabilities require the wearing of special clothing or protective equipment that involve adjustments to our public life to accommodate.\footnote{S. Shiffrin, ‘Egalitarianism, choice-sensitivity, and accommodation’, in R. J. Wallace, P. Pettit, S. Scheffler and M. Smith (eds.) *Reason and Value: Themes from the Work of Joseph Raz* (Oxford University Press, 2004) 270-302.}

The idea that religion, apart from distinctive, is constitutionally unique has also been supported by the claim that individuals suffer special damage whenever their right to freedom of religion is limited. Religion is unique because if religious liberty is denied individuals suffer a special and egregious kind of damage, which makes it wrong for the community to cause despite any potential beneficial effects for others.\footnote{R. Trigg, *Equality, Freedom, and Religion* (Oxford University Press, 2012).} This type of argument is particularly attractive to those who feel special deprivation whenever religious freedom is limited. It is, however, a difficult argument to pursue. First, there are many people, perhaps the majority in many European...
countries where religiosity is falling, that do not exercise their political liberties ‘in more than a minimal way’. They would not have counted their loss of freedom of religion as something particularly important. Thus, if we want to argue in favour of a right to certain liberties, we must find another ground. That would be to argue, on grounds of political morality, that it is wrong to deprive individuals from certain liberties, for some reason, apart from direct psychological damage and notwithstanding that the community as a whole might be better off by doing so. But this interpretation of rights underlies the justification of various political liberties, not just the right to freedom of religion.

Moreover, it has been argued that there are no secular commitments comparable to religious obligations and that ‘religious freedom is a matter less of rights rather than of duties… it is a matter of rights derived from duties’. Religious followers answer to divine commands, outside of their control, which take precedence over other secular commitments because their violation puts them at risk of eternal damnation. The distinction between religious and secular obligations rests on the idea that religious people owe ‘dual allegiance’ to both divine and ‘subordinate’ earthly authorities in juxtaposition to non-religious people who face no such tragic dilemmas between compliance with man’s or with God’s law.

The argument from religious obligations has a metaphysical essence and rests upon a number of – predominantly Christian – assumptions about jurisdical dualism involving the spiritual and the temporal. Singing out religious obligations also requires difficult theological distinctions between religions that involve divine commands and religions that do not, such as, for instance, Scientology. It is unlikely that human rights laws can be crafted to reflect such distinctions given the

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105 According to the 2011 UK census, between 2001 and 2011 the number of people describing themselves as having no religion rose from 15% to 25% of the population. See ‘Census shows rise in foreign-born’ BBC News, 11 December 2012, at <http://www.bbc.co.uk/news/uk-20675307>.
107 Political morality, as Dworkin has argued, is a distinct department of value, which is captured by the two principles of dignity and studies how people best manage their responsibility to live well. Personal morality, on the other hand, includes our duties to aid others and not to harm them, and the special duties we have in virtue of performative acts like promising or relationships like friendship. See R. Dworkin, Justice for Hedgehogs (Harvard University Press, 2011) 327-328.
110 Eisgruber and Sager, Religious Freedom and the Constitution, 103.
112 McConnell, ‘The origins and historical understanding of the free exercise of religion’, 1497.
113 Eisgruber and Sager, Religious Freedom and the Constitution, 103.
115 Ahdar and Leigh, Religious Freedom in the Liberal State, 63.
116 See e.g. R v Hodkin, UK Court of Appeal, December 2013. See also the reversal in R v Hodkin, UK Supreme Court 2014.
plurality and fluidity of theological interpretations. Moreover, at the moment we lack psychological evidence of higher intensity of religious commitments for religious people in comparison to important secular commitments for both religious and non-religious people. On the contrary, certain secular commitments seem capable of being equally compelling. Many people are prepared to do everything, even to sacrifice their lives, to secure their family’s wellbeing. Secular needs may be so intractable that little space is left for other courses of action. An individual whose disability is not accommodated is prevented from accessing her employment as much as someone who is left without any room for compliance with her religious duties. Again, I am not suggesting that the availability (or unavailability) of those comparable cases shows anything morally important about the scope of our right to freedom of religion. What they suggest however is that religious obligations, albeit distinctive, are not unique to our life experience so as to justify qua religious special treatment from legislatures and courts.

Another point is that religion should enjoy special protection because of its important role in our society. Durkheim has famously argued that religion is a source of stability and cohesion, where shared beliefs create collective conscience and a cohesive moral community. Ceremonies and rituals are important tools of social identification and cohesion. That social role has been particularly valuable politically: religious homogeneity is believed to foster a homogeneous cultural community that leads to political stability and loyalty. For a long time those were considered essential conditions of a well-functioning state and were linked to the construction of cohesive constitutional identities. As Sajó and Uitz note, until the nineteenth century ‘the (unitary) Christian religion was the fundamental power that provided coherence in public life insider the state.’ Historically, with the emancipation of the individual it was first the nation-state that was to grant such religious and cultural coherence, whereas after 1945 it was common moral values that could offer such unity. But post-UDHR developments, along with increasing heterogeneity in modern Europe, have undermined the claim that religion still forms the basis for social coherence.

Even so, religious groups and associations remain crucial for the development of our identities. According to Raz, the existence of religious communities is a public good without which the right to freedom of religion makes little practical sense. More specifically, Raz argues that although religious toleration has been defended in the name of individual conscience, it actually serves communal peace. Religion is a social institution that encompasses a community and its practices, and the right to freedom of religious manifestation is practically ‘a right of communities to pursue

119 Ibid.
their style of life or aspects of it, as well as a right of individuals to belong to respected communities.\textsuperscript{122} So while freedom of religion is usually understood as grounded on individual interests, the ability to serve that interest practically depends on the existence of ‘religious communities within which people pursued the freedom that the right guaranteed them’.\textsuperscript{123}

Despite their emphasis on the importance of the collective dimension of the right to freedom of religion or belief, liberal theories of rights are commonly criticised for embracing an individualistic conception of the person that under-emphasises the deep identity-constituting connections we experience with our gender, race and religion – among other elements.\textsuperscript{124} As Trigg argues, liberal theories of rights mainly protect individuals and their beliefs by treating communities, whether in the majority or in the minority, as mere collections of individuals.\textsuperscript{125} Yet, he contends that the thrust of a liberal stress on individual human rights is to ignore the role of such institutions.\textsuperscript{126} Furthermore, communitarian theorists, who share the argument that our individual identities are shaped hand-in-hand with cultural communities and associations, support a similar line of criticism. By virtue of their importance for the development of our identities, in communitarian theories religious communities seem to have some sort of independent claim to continue to exist. Both Taylor and Sandel discuss the importance of communities and cultural attachments – our ‘encumbrances’ in Sandel’s famous expression – for our development.\textsuperscript{127} According to Sandel, religious freedom addresses ‘the problem of encumbered selves, claimed by duties they cannot renounce, even in the face of civil obligations that may conflict.’\textsuperscript{128} Kymlicka’s theory of multiculturalism is also grounded on the importance of culture in determining the context of our choices\textsuperscript{129} through creating narratives about how to live our lives and enabling us to be part of those narratives by freely adopting roles we consider worthwhile.\textsuperscript{130} But multiculturalism can only emphasise the importance of the availability (and, potentially, selectability) of a variety of roles and stories, not of membership in a culture. As Waldron argues, meaningful options may come to us as ‘items or fragments from a variety of cultural sources’ and communitarian arguments

\textsuperscript{122} ibid
\textsuperscript{123} ibid
\textsuperscript{125} Trigg, \textit{Equality, Freedom, and Religion}, 49.
\textsuperscript{126} ibid 52.
\textsuperscript{129} W. Kymlicka, \textit{Liberalism, Community, and Culture} (Oxford University Press, 1989) 178.
\textsuperscript{130} ibid 165.
show that people need cultural materials and not that they need is a certain ‘multicultural’ type of political structure. 131

In any event, robust protection of the collective dimension of the right to freedom of religion does not entail that religious groups and associations ought to enjoy stronger protection compared to other secular groups and association. Neither clichéd critiques of liberalism for conceptually suffering from ‘an extremely thin and reductive notion of the nature of culture’, 132 nor the communitarian arguments briefly discussed above endorse the unique importance of religious groups amongst the plurality of cultural and social associations. Whether their ‘special’ constitutional protection is normatively required remains therefore unanswered based on those theories. Skepticism about ‘special’ constitutional protection of religious groups and associations should not be understood in tension with political progressiveness, either. Critical feminism has long ago argued that elevated protection of the rights of religious groups may ‘privilege conservative interpretations of culture over reformatory and innovative ones’ as well as insulate religious communities from modernity and change, 133 and ultimately prove harmful for vulnerable members, such as women. 134 As Scolnicov argues, individual rights should be given priority when religious communities create separate cultures not supportive of individual autonomy. 135 Finally, well-established case law from the ECtHR confirms that public authorities are under a ‘positive obligation’ to protect or defend individual members whose fundamental rights are jeopardised by a religious group. 136 However, for reasons that cannot be fully developed here, this is not to suggest that assimilation of illiberal religious communities into a dominant liberal one is uncomplicated, or indeed desirable. 137

2.3.3. Choice v Identity

For others, religion’s uniqueness and its ensuing ‘special’ protection, stems from the fact that it amounts to an ‘immutable’ characteristic of our identity. As Bedi argues, unless religion is an immutable characteristic then there is no basis to differentiate between a Jew and a Rotarian, or between a Sikh from a simple hat-wearer. 138 But if

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religion is not immutable, in the way that race, disability, or ethnic identity are, ‘there is no overriding reason to provide religious exemptions as a general rule’. Whether religion is a matter of choice or of identity is a central question to more general political debates on identity and discrimination. More specifically, it is often argued that gender, race and sexual orientation are ‘given’ or ‘naturalised’ forms of identity, whereas religion is not. This debate has proved influential in law and religion mainly because those who believe that religion is a matter of choice are not inclined to justify more favourable treatment of religion compared to other lifestyle choices. Exemptions from general laws when they conflict with deeply held religious beliefs cannot be considered on a different basis if religion is seen as an identity that people choose to assume, contrary to identities that people ‘discover’ about themselves.

According to Plant, there is a fundamental difference between religious identity, which is ‘self-chosen and self-assumed’ and other forms of identity which are ‘given matters of fact’ such as ethnic origin, gender and sexual orientation. But even if religion is an immutable characteristic of our identity, the scope of its immutability remains unclear. For instance, as Shiffrin argues, even though we disagree about whether religion constitutes a choice, are the ways that we select to manifest it, and the extent to which we follow its tenets, not choices themselves? I think that the contrast between choice and identity (or between ‘given’ and ‘naturalised’ identities, or between ‘invention’ and ‘discovery’ is too stark. The normative aspects of identities, namely how we should treat people with particular identities and what types of claims we can make on grounds of our identities, are not matters of empirical enquiry into the type of our identity. Rather, the scope of the permissible manifestation of our identities – religious or secular, ‘given’ or ‘naturalised’ – comes from a normative argument about what rights we have in a liberal state. For instance, a perfectionist liberal theory, such as Raz’s, would argue that the liberal ideal of autonomous life may be fulfilled through a series of choices between valuable choices from an adequate range of options. In the case of religion individual autonomy may be fulfilled through being able to live in accordance with divine laws cherishing one’s religious traditions and manifesting one’s beliefs – or being able to attach oneself to nothing divine. Individual autonomy does not rule out the possibility that some valuable choices will be sometimes unavailable since successive choices may leave other valuable options out.

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142 Ibid
145 Ibid
148 Ibid.
theories would argue that our common culture should be formed organically through securing personal independence for every citizen in order to make deep ethical choices independently and authentically.\textsuperscript{149} The common idea in both cases is that the selection should be mainly based on individual choices, not on the choices of others.

Thus, although due to space constraints the present analysis cannot further discuss whether religion constitutes a choice or an immutable status, it is doubtful that the classification of religion, if at all possible, would make \textit{any} difference to questions about the scope and role of the moral right to freedom of religion or belief. Religion is valuable for so many people that its free enjoyment should be a possibility for all who can (in principle) choose it. If choosing should be a possibility, it should not be effectively ruled out as an option by prohibitive costs.\textsuperscript{150} As Scanlon argues, people do not value choice only for instrumental reasons, e.g. because they think that a religion X suits their tastes better.\textsuperscript{151} They value choice also for reasons of symbolic value, that is, because having the government choose their conscience would be demeaning and would suggest that they are incompetent and dependent. This is not to suggest that instrumental and symbolic value reasons for valuing choice are mutually exclusive, or always easily distinguishable.\textsuperscript{152} It shows however that choice can be important in a plurality of ways and that its value is not always merely instrumental.

As Chapter Five will discuss more thoroughly, discriminatory laws and policies impose prohibitive costs to people who wish to live according to the tenets of their religion, or far from any religious commands. The aim of my arguments in this thesis is to sketch an interpretation of the right to freedom of religion that encompasses protection of individuals and groups from discrimination on the basis of their spiritual affiliations in different settings, and also protection of people without any sort of such affiliations. But despite its phraseology nothing in this argument suggests that religion is always a choice.\textsuperscript{153} Many people treat the religious attachments of their ancestors or communities as a natural continuation of their own existence, without questioning the value of these religious or cultural traditions. That does not mean that they should not enjoy freedom of religion equally to others. The fact that religion is not always a choice does not have any implications for the claim that it should be one.\textsuperscript{154}

\section*{2.4. Equality, Asymmetry, and Harm}

\subsection*{2.4.1. A general right to conscientious objection: A bizarre asymmetry?}

Thus far, I have argued that the distinctiveness of religion and its nature as a choice or as an immutable status cannot by themselves determine the level of protection that the right to freedom of religion or belief ought to enjoy in a liberal democracy.

\begin{thebibliography}{154}
\bibitem{149} R. Dworkin, \textit{Religion without God} (Harvard University Press, 2013) 105-147.
\bibitem{151} T. Scanlon, \textit{What We Owe to Each Other} (Harvard University Press, 2000) 251-254.
\bibitem{152} Ibid 253.
\bibitem{153} J. Gardner, ‘On the ground of her sex(uality)’ (1998) 18 OJLS 167, 171.
\bibitem{154} Ibid
\end{thebibliography}
Difficulties, however, in justifying ‘special’ protection of religion compared to other non-religious forms of conscience are not necessarily fatal for liberty-based accounts of freedom of religion. For liberty-based theories of freedom of religion or belief can also be framed in more general terms so as to justify elevated protection to all forms of conscience, including religion. The idea has specific human rights implications. More precisely, it has been argued that the right to freedom of religion or belief should be interpreted to reflect (or more simply complement) a general political right to conscientious objection to general and neutral rules, which could then support accommodation of conscientious claims unless those are harmful.

It would be useful to examine that general right to conscientious objection through the lens of a bizarre asymmetry. Churches and other public or private organisations ‘the ethos of which is based on religion or belief’ are often allowed exemptions from anti-discrimination legislation. More specifically, the EU Employment Equality Directive specifically provides for exemptions from equal treatment provided that a protected characteristic constitutes ‘a genuine and determining occupational requirement’ and provided that the objective is legitimate and the requirement proportionate. However, parts of the literature have argued that religious organisations seldom ask for exemptions from other fields of law, such as torts or criminal law, and it seems unlikely that, even if they did, such exemptions would be granted. According to Sunstein, that creates an asymmetry between the application of torts or criminal law and the application of anti-discrimination laws. Since no exemptions from laws prohibiting kidnapping or sexual assault are likely, regardless of the grounds of that request, are there any reasons why we should treat religious exemptions from legislation prohibiting sex discrimination in employment differently?

Sunstein argues that any difficulties in resolving the asymmetry would demonstrate that there should be no barriers to the application of anti-discrimination legislation and that religious institutions have to yield to generally applicable laws. Furthermore, according to McColgan, ‘there are very good reasons not to provide exemptions even and above concerns about the equality and other rights of outsiders’ (emphasis in the original). This objection apparently springs from the widely shared concern that certain religious groups are not particularly committed to the idea of

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155 See e.g. Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ 303 L 02/12/2000. Article 4§2 provides that churches and other public or private organisations ‘the ethos of which is based on religion or belief, acting in conformity with the national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos’.
156 ibid
159 Sunstein, ‘On the tension’, 139.
equality, particularly with regards to sex and sexual orientation, and disability. More generally, as Raday notes, the conflict between equality rights and religion is common because most religions and traditional cultures ‘rely on norms and social practices formulated or interpreted in a patriarchal context’ which is incompatible with the grounds of individual rights. But does the fact that certain religious groups are not committed to the principle of equality automatically exempt them from the application of equality laws?

The asymmetry has not been universally accepted. For instance, Barry argues that religious groups do sometimes ask for exemptions from civil and criminal laws, and their claims are then subjected to a ‘pincer movement.’ The ‘pincer movement’ means that in most cases one of two things can be said: either that the end pursued by the law was sufficiently important to underwrite the conclusion that there should be no exemptions, or that the argument from exemptions was so powerful that it overthrows the case for enacting a legal prohibition in the first place. According to Barry, the only justifiable exceptions for religious groups concern legislation protecting from employment discrimination, in the sense that they should be able to hire in priesthood or similar positions people sharing their religious ethos.

Even though the asymmetry does not fully capture the theoretical and practical implications of conscientious exemptions, it alludes to an intuitively strong proposition. A moral right to freedom of religion or belief is often interpreted to encompass a presumption that people ought to be free to act on their conscience, but that that freedom may be outweighed when the public interest behind the enactment of certain laws is particularly strong, as it is, for example, in certain parts of criminal law. This is not of course a novel idea. Questions relating to religious exemptions from general laws have concerned the American constitutional jurisprudence at least since the 1960s, when the United States Supreme Court decided Sherbert v Verner, a case about a mill worker who quit her job because she had to work on Saturday. In Sherbert, the US Supreme Court scrutinised the law of South Carolina, which accommodated individuals who had to worship on Sunday, but not those who had to worship on Saturday or on Friday, and found a violation of the claimant’s

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165 ibid 167.

166 ibid


168 374 U.S. 398 (1963)
constitutional right to Free Exercise of her religion under the First Amendment of the US constitution.\footnote{ibid}

\textit{Sherbert} is best known for the \textit{strict scrutiny} test it established, according to which general laws should not ‘substantially burden’ religion unless they are narrowly tailored and the government can demonstrate a ‘compelling interest’.\footnote{ibid. According to American constitutional law, ‘compelling interest’ is an interest in protecting certain aspects of the common good so important that limitations on fundamental rights may be justified.} Almost three decades later, the US Supreme Court decided \textit{Employment Division v Smith}, a case that examined the constitutionality of general legislation regulating drug use, which burdened certain members of the Native American Church who wanted to ingest peyote as part of their religious ceremonies. The US Supreme Court found that the \textit{Sherbert} test was too broad and that when general laws ‘incidentally’ burden the Free Exercise of religion, exemptions were not constitutionally required.\footnote{494 U.S. 872 (1990).} In response to \textit{Smith}, Congress passed the Religious Freedom Restoration Act (RFRA) in order to reinstate the \textit{Sherbert} test as a statutory right.\footnote{RFRA.} The RFRA was ruled unconstitutional some years later in \textit{City of Boerne v Flores}\footnote{521 U.S. 507 (1997).} and its application is now limited to federal statutes.\footnote{See also \textit{Burwell v Hobby Lobby}, 134 S. Ct. 2751 (2014) and \textit{Gonzales v O Centro Espírita Beneficente União do Vegetal}, 546 U.S. 418 (2006), where the US Supreme Court has based its judgments on its statutory \textit{Sherbert} test, without addressing the constitutionality of the RFRA at federal level.} However, the \textit{Sherbert} test, which supports religious exemptions unless the government has a ‘compelling interest’ to limit the right to freedom of religion, remains until today a constitutional point of reference for liberty-based theories. It is based on the idea that the right to freedom of religion or belief should enjoy ‘special’ constitutional protection in the sense that its limitation may be justified only by applying stricter standards compared to those applying to the justification of state interference with other rights and liberties.

It would be useful to return to the asymmetry for a moment and discuss two possible ways that have been suggested to explain it.\footnote{Sunstein, ‘On the tension between sex equality and religious freedom’, 134-139.} First, it might be argued that exemptions from civil and criminal laws are unlikely because those laws are not fit to encroach on the core of the right to freedom of religion. But that would be misleading. On the one hand, certain civil and criminal laws do encroach on religious freedom, as cases such as \textit{Employment v Smith}, on the regulation of drugs, and \textit{Mann Singh v France}, on the general requirement of bareheaded photographs on driving licenses, demonstrate. On the other, not all forms of anti-discrimination legislation strike at the heart of the right. There is limited scope for tension between freedom of religion and

A second way to resolve the asymmetry is to argue that torts and criminal law are supported by especially strong reasons – or, in the American constitutional formulation, by a ‘compelling interest’ – and that such reasons do not necessarily support anti-discrimination legislation. On that account, exemptions from criminal provisions prohibiting murder would be unjustifiable, regardless of the reasons supporting them, because they would risk subjecting people to extremely serious harms. The same could be said about provisions protecting against sexual assault, safeguarding bodily autonomy, or prohibiting cruelty to animals: given the seriousness of the harms protected by such laws there are strong reasons for states to extend their application to everyone without exception.

That strategy, which uses harm to outline the boundaries of the right to freedom of manifestation of religion or belief, is also known as \textit{threshold} strategy. Once particular practices reach a certain threshold, which is defined in terms of harm, they cannot be accommodated. In these cases, refusal to accommodate does not constitute an unjustifiable limitation of the right to freedom of religion or belief. In other words, liberty-based theories do not claim that restrictions on harmful religious practices constitute an unjustifiable limitation of individual rights, as if the right to freedom of religion mirrors religion as dogma. Rather, as Ahdar and Leigh argue, exemptions on grounds of religion have to be granted unless it would be repugnant to the peace and safety of the state.\footnote{L. Vickers, \textit{Religious Discrimination and Religious Freedom at Work} (Hart Publishing, 2008) 9.} Of course peace and safety require more precise delineation. How urgent must the threat to peace and security be, and what sort of safety is pertinent? What type of evidence should be required to determine that a danger is grave enough to justify limitations on freedom of religion or belief?

So, an emerging question is how to define harm. Although various conceptions of harm exist, there is a widely shared benchmark that focuses on the link between harm and the basic goods of agency, such as bodily integrity, individual autonomy, or,
more generally, what Nussbaum describes as ‘basic capabilities.’ The practice of Female Genital Mutilation (FGM) is a commonly cited example. According to the threshold strategy, FGM cannot be accommodated because it is extremely harmful for women. Note that no reference is made here to how central FGM, as a practice, might be for certain religious communities. A state committed to equal respect and concern for everyone could not include those practices within the protective scope of the right to freedom of religion or belief because an interpretation of the right that includes practices that threaten the basic human rights to life and bodily integrity runs counter to the very purpose of human rights. The right to freedom of religion or belief cannot include practices endangering life and bodily integrity because without those secure, any discussion about rights becomes redundant. The threshold strategy helps us therefore explain why our common legal practice includes laws that limit, for instance, parental rights in cases of refusal of lifesaving health treatment to children on religious grounds or corporal punishment.

The harm principle, as the limit to a hypothetical general right to conscientious objection to general laws, provides us with an attractively clear-cut standard. As Plant argues, ‘if a form of religious expression can be shown in a court to pose a threat or do potential or actual harm to others who also have the same rights to the same goods, then that is a good basis for constraining the forms of expression in question.’ It has also been argued that placing emphasis on harm and the threat of harm could benefit public discourse about toleration of the various ways of religious manifestation, which is impossible when we focus on ‘identity, the normative requirements of identity and the authoritative articulation of these requirements by religious authorities.’ Wintemute contends that direct harm provides the strongest case for non-accommodation of religion as it has the advantage of identifying cases ‘where the manifestation obviously causes no harm of any kind to others, and cases where the manifestation causes clear physical harm of a degree that precludes accommodation’.

Apart from clear, a threshold strategy based on harm could also be helpful to unravel the claim that limitations on manifestation of religion or belief constitute prima facie cases of indirect discrimination. The claim is that if accommodation of religion or belief does not cause ‘significant harm’ to others, or cost, disruption or inconvenience to the accommodating party, then non-accommodation is unjustifiable simply because a fair state ought not to force individuals to choose between their religion and employment or education. This is a particularly troubling claim, given that the historical influence of Christianity in Europe entails that apparently neutral

184 See R v Secretary of State, ex p Williamson [2005] UKHL 15.
186 Ibid
188 Ibid 231.
arrangements may often be less challenging to forms of Christianity than to other kinds of faith. As McCrea notes, ‘if any kind of distinctive collective values and arrangements are to be maintained by European states, such values will inevitably be more accommodating towards those religious traditions that have disproportionately contributed to their development.’ Some groups, perhaps those more recent in the European landscape, could find it more difficult to overcome religious differences in the public sphere. Does the existence of such difficulties mean that arrangements reflecting a particular cultural heritage constitute prima facie cases of indirect discrimination as a result? A harm analysis helps us argue in these cases that the goals served by certain limitations on the right to manifest religion are capable of outweighing the claim of indirect discrimination. But does it go far enough?

Meanwhile, the paradigm of harmful treatment is causing physical harm. That does not capture, however, cases involving environmental or aesthetic harms. It does not capture cases of indirect harm, either. Indirect harm might be caused in cases where individuals are allowed exemptions from anti-discrimination laws on grounds of their religion, as it happened in the Ladele case. On that account, indirect harm resembles the concept of ‘expressive harm’, which is another concept derived from constitutional theory. Expressive harm is concerned with messages of racial, gender, or religious inferiority expressed by governmental actions and has played an important role in furthering the application of anti-discrimination law in the United States. Broader and more flexible definitions of harm, however, have to be sophisticated enough to avoid interpretations that include distress or annoyance. As Nussbaum rightly notes, one of the most difficult conundrums of civil and political life is that people easily feel threatened by unfamiliar clothes, practices, or types of people. This is precisely where the importance of human rights lies: to protect lifestyles and expression even when the majority deems them offensive.

It is true that ambiguities in the definition of harm may be overcome through broader and more complex accounts of the concept. However, the main question remains unanswered. If harm does outline the boundaries of a liberty-based general right to conscientious objection, does this mean that refusal to exempt non-harmful religious practices constitutes prima facie indirect discrimination on grounds of

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191 Schilder v the Netherlands, Application no. 2158/12, 16 October 2012 (inadmissible).
192 An example from the jurisprudence of the UK courts is Syndicat Northcrest v Amselem [2004] 2 SCR 551.
194 Ibid 506-507.
religion? The asymmetry earlier discussed is again useful here. For it shows that the argument that torts and criminal law protect us from grave harms and, as a result, no exceptions can be justified is under-inclusive. Indeed, there are many cases where accommodating individual conscience would not be harmful at all, but exemptions are unlikely. Exemptions from state regulations of urban planning, car parking, and noise pollution do not necessarily involve ‘compelling interests’, or protection from harm. As Eisgruber and Sager argue, urban planning regulations illustrate that point quite well.197 These forms of regulation serve important government interests including public order and public health. But, arguably, they do not rise to the level of importance demanded by a constitutional test based on ‘compelling interest’ or harm.198 Breaching intellectual property rules, inflicting emotional distress or engaging in low-level libel do not usually inflict great harm, but still, no exemptions are likely, regardless of the underlying reasons, from such offenses. Does this mean, following a transposition of the Sherbert test in discrimination law, that religious exemptions would be required as a matter of prohibition of indirect discrimination? This is not necessary. Rather, as the next chapter will further discuss, the question turns to the independent issue of the justifiability of the limitation in the first place. Harm would definitely play some role, but it cannot be the only factor, as instances of general laws that justifiably allow no exceptions, despite that those exceptions would cause no harm, demonstrate.

It might be argued that examples from urban planning or car parking are irrelevant because they are not central to any coherent system of beliefs; that they are mere interests, rather than integral parts of conscience. But as above discussed, whether a particular form of manifestation is compulsory, or central indeed, to a specific religion or set of beliefs plays little role in the protection that that practice enjoys as a matter of human rights. Consider an example. In 2012, Kopimism, a group believing in the holiness of file sharing, kopy-acting and open Internet, was officially recognised in Sweden as a religion. Its founders applied for religious status in order to secure better protection for their beliefs.199 Intellectual property regulations, which do not necessarily protect us from grave harms, arguably limit the right to freedom of religion of the members of this group. Could we say that refusing to include an exemption from national IP regulations in order to accommodate Kopimism constitutes indirect discrimination on grounds of religion? You may think that the example is far-reaching and that Kopimism is not in fact a religion. But as we saw above, if we adopt the hybrid approach to the definition of religion that the ECtHR follows, then any set of beliefs that reaches a certain level of coherence, seriousness, cogency and importance is protected under Article 9 ECHR. There is no reason why Kopimism would fail to meet those conditions any less than Mouvement Raëlien,

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197 Eisgruber and Sager, Religious Freedom and the Constitution, 84.
198 Ibid 83.
which believes in friendship with extraterrestrials and ‘geniocracy’, and is already protected as a religion by the ECtHR. This is not to suggest that general laws cannot constitute indirect religious discrimination on grounds of religion or belief. But what we have to figure out is under which circumstances they do so. An approach based on harm merely postpones the answer to that question.

To recap, thus far I have argued that the harm principle does not in itself recommend any approach, permissive or restrictive, to religious exemptions, except in a form which is too strong to be accepted. Thus, harm is insufficient by itself to systemise issues arising from the relationship between freedom of religion and equal treatment. However, further examination of this relationship and of the justifiability of indirect discrimination has to be postponed until Chapters Three and Four. Now the analysis has to return to the antagonism between liberty and equality-based theories of freedom of religion that started this chapter.

2.4.2. Equal respect

If we look closely at the formulation of individual complaints before the ECtHR, we can discern a shared, morally important, component. The applicants ask for accommodation of their conscience based on an idea that is conceptually distinct from the ‘specialness’ of religion and from liberty-based accounts in support of a wide-ranging right to conscientious objection. The applicants in Eweida, Ladele and McFarlane, among others, challenge the disparate effects of generally applicable laws through emphasising that their religious commitments should be equally respected to other non-religious collective commitments, such as prohibition of discrimination on grounds of sexual orientation. They do not claim ‘an entitlement to a particular amount of respect for their religious freedom’, which might exceed the minimum required to practise their religion. Instead, they are asking for equal respect to others, ‘either directly as the result of non-neutral rules, or indirectly because of the disproportionate effects of neutral rules.’ So an interpretation of their complaints based on equal respect seems to fit the legal formulation of their claims better than interpretations based on the uniqueness of religion or on harm. The applicants compare their disadvantage to the treatment of members of other groups – regardless of whether those other groups are religious or whether they belong to the majority – and ask for equal access to specific benefits.

I think that this interpretation of liberty-based theories is sound, and that it provides an adequate basis for judicial review of cases of refusal to accommodate manifestations of conscience. It is, moreover, in one sense, an egalitarian justification for accommodation. It holds that a theory of interpretation of the right to freedom of religion or belief has to capture a seminal idea, latent in virtually all complaints about lack of accommodation. That is, the applicants do not ground their complaints on respect for freedom of conscience in the abstract; they claim equal respect to others.

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202 Ibid
Their complaints demand that the government, through its rules and policies, offers equal protection to their conscience as it does to the conscience of others, and that no limitations are imposed just because the government or the majority believes that some people’s beliefs are less valuable than the beliefs of others.

This implicit recognition dimension is embedded in a morality of rights based on human dignity. Dignity lies at the heart of our humanity and is philosophically based on two principles: first that each human life has intrinsic value, and second that everyone should be responsible to make the choices that make his or her life best.

Yet dignity does not carry only this philosophical sense of immeasurable worth. It is also a matter of status as a member of a society ‘in good standing.’ As a social and legal status dignity is normative, in the sense that it generates claims of recognition and treatment according to its two conditions, i.e. the political principles of liberty and equality. So, as status, dignity commands respect from others and from the state, which should treat everyone with equal respect and equal concern. Such treatment could be secured through a theory of justice based on certain moral and political principles, which culminate in various legal guarantees and institutional arrangements aiming to ensure everyone’s status as a full and equal member of a society.

But what does respect entail? Should a just state be able to fine-tune each one’s behaviour in order to shut interpersonal contempt out of public space? Could such extreme regulation of our expressive conduct be compatible with individual autonomy and human dignity? To discover what respect actually entails we might have to be mindful of two rather different ways in which persons may be the object of respect: it is the distinction between what Darwall calls recognition and appraisal respect.

Recognition respect consists in taking into consideration in one’s deliberations certain features of the object of respect. When we say, for example, that we owe respect to all humans, we mean recognition respect, i.e. that someone should seriously consider certain elementary principles stemming from humanity, such as human dignity, when deciding. Yet recognition respect does not by itself command any specific behavior towards the object of respect. Rather, it is our agreement on certain moral or legal principles stemming from a certain feature of the object of respect that connotes the appropriate behaviour. In that sense, recognition respect says nothing about how we should treat our fellow citizens, but stipulates that in our deliberations we should accommodate certain values stemming from humanity. It is these moral principles that will then guide our behaviour.

Unlike recognition, appraisal respect is comparable to high esteem or admiration of someone either as a person or as someone engaged in some particular activity. It is best described as a positive appraisal of certain attributes of someone’s

character, or as admiration that the object of respect well deserves according to our views. Appraisal respect does not command any specific behaviour towards its object. It consists in the appraisal itself.\textsuperscript{208} This is not to suggest that respect only makes sense as a feeling. As Raz argues, respect is a matter of actions, it is not an emotion ‘nor a belief, though it may be based on a belief and be accompanied (at least occasionally) by certain feelings.’\textsuperscript{209} Of course, as Leslie Green notes, there is nothing odd in speaking of respect as a feeling or attitude.\textsuperscript{210} Rather, respect through action means that ‘if we think of an object which is of value, we should think of it in ways consistent with its value.’\textsuperscript{211} A more complex philosophical issue is whether respect should be understood in terms of duty, rather than inclination, with regard to preservation of value. Although this question cannot be fully discussed here, if we agree that human dignity as status confers certain duties in our behaviour towards others, e.g. prohibition of torture or degrading treatment, then behaving inconsistently with those duties is disrespectful. If people are of value in themselves, respect for them does generate duties to behave in accordance with their value. Thus, for the purposes of our discussion, neither recognition nor appraisal respect should be understood as mere inclinations. The dimension of action that Raz introduces cuts across both those senses of respect.

The argument that dignity as social status includes a duty to respect others should not be understood to engage the notion of appraisal respect. It is implausible to expect people appraising others’ activities and qualities which, among others, include their religion or beliefs. It is implausible not only because such regulations would be practically hopeless, but also because they would nullify basic individual freedoms, such as freedom of thought and opinion, which are central to human dignity. Appraising someone’s attributes or character or accomplishments or lifestyle or attitude and so on is not something that could be enforced or would be desirable, at least not in a just democratic state committed to equal respect and concern for everyone.

But through the recognition respect prism the results are different. Even if our estimation of certain people might vary, that should be independent of recognising them as people. Recall that we do not have to agree on the behavioural standards that recognition respect entails. The behaviour towards the object of respect will be determined from our prior (and independent) agreement on the moral duties stemming from everyone’s humanity. Thus, if we agree – as I believe we do – that there are certain values each of us carries by virtue of being human, i.e. the intrinsic value of every human life and the personal responsibility of each of us to lead his life which correspond to the political principles of equality and liberty respectively, then it follows that recognising someone as human entails certain behavioural standards that should echo those moral and political principles. In other words, if we agree that

\textsuperscript{208} Darwall, ‘Two kinds of respect’, 39.
\textsuperscript{210} L. Green, ‘Two worries about respect for persons’ (2010) 120 \textit{Ethics} 212.
\textsuperscript{211} Raz, \textit{Value, Respect, And Attachment}, 161.
dignity lies at the heart of our humanity, we should behave towards others respecting the moral and political requirements of human dignity.

For our present discussion that principle means that although certain people may dislike others on grounds of their religion or beliefs, in their deliberations they should weigh appropriately the moral duties stemming from human dignity and not kill their opponents or torture or subordinate or negate them their political rights or discriminate against them and so on. Note that that is irrespective of how much they may detest them and/or their beliefs. The distinction between the two kinds of respect tackles that very confusion: recognition respect does not mean that we might have to subscribe to lifestyles we dislike, or that we are barred from expressing contempt for the beliefs of others, or that protesting against certain practices is prohibited. Rather, it means that we should not question the full and equal social membership of certain people because we find them or their beliefs repellent.

So, recognition respect is a plausible way to interpret mutual respect in a general social context, but it cannot be untangled from equality simply because it is normatively based on the principle that every life bears equal worth. It follows that if respect lies at the core of individual claims informed by liberty-based theories of religious freedom, those claims cannot be construed independent from equality either. The relationship between the right to freedom of religion and the values of liberty and equality is therefore more multifaceted than it is often assumed, and certainly not conflicting. That possibility alters some of the questions under examination. If the right to freedom of religion has to be interpreted in light of a recurrent appeal to equal respect, then the question that should concern us is not whether freedom of religion or belief should enjoy elevated protection but whether equal respect and concern for everyone could justify such an elevated protection – and under what circumstances.

This point draws on a version of Dworkin’s argument about the relationship between liberty and equality.\(^{212}\) Dworkin has argued that governments should treat those whom they govern with equal respect and concern and has used this principle to unify the values of liberty and equality in the domain of political morality. He has argued that the best conception of liberty in a liberal democracy should be consistent with the principle that the state should treat everyone with equal respect and concern. This suggests that different conceptions of liberty have to be framed as interpretations of the value of equality, which is broadly captured by the principle of treating people with equal respect and concern. Of course my claim is less ambitious than his, but is analogous to it: whatever a liberty-based theory of freedom of religion claims, it has to be intelligible as a plausible interpretation of the principle that the state should treat its citizens as equals. It is misleading, both according to that principle and according to the previous pages, to construct liberty-based theories as though they are somehow independent, or even antagonistic, to the value of equality.

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\(^{212}\) R. Dworkin, *Justice for Hedgehogs*, 327-351.
2.5. Conclusion

This chapter examined, and questioned, the familiar antagonism between liberty and equality-based theories of freedom of religion. Of all the plausible interpretations of liberty-based theories, I argued that an interpretation anchoring the right to freedom of religion to the idea of equal respect on behalf of the state, regardless of the religious or secular nature of our conscience, fits our shared legal practice under the ECHR and seems more promising to address challenges related to exemptions from general rules or practices. The next chapter will elaborate on this normative point and will knit it together with a more thorough analysis of the practice of the ECtHR in cases involving state limitations on the right to freedom of religion or belief. Chapter Three will also flesh out the principles and political implications of consolidating the right to freedom of religion into a more general theory of rights. Whether those forthcoming theoretical and practical considerations have further implications for the normative relationship between the rights to freedom of religion and freedom from religious discrimination is a separate question whose examination has to be postponed until Chapters Four and Five of the thesis.
3

Theories of Rights: Reasons, Influence and Subordination

If one religion only were allowed in England, the Government would very possibly become arbitrary; if there were but two, the people would cut one another’s throats; but as there are such a multitude, they all live happy and in peace.

Voltaire

Our civil rights have no dependence upon our religious opinions more than our opinions in physics or geometry.

Thomas Jefferson

3.1. Introduction

The previous chapter introduced an interpretation of liberty-based theories of freedom of religion that is central to the normative claim that the right embeds, rather than rivals, a specific conception of equality that corresponds to equal respect. This chapter will develop the relationship between freedom of religion and equal respect further. I will argue that a reason-blocking account of the right to freedom of religion or belief makes better moral sense of the practice of the ECtHR compared to interest-based views. Under a reason-blocking account, the right functions as a limit on the acceptable range of our collective decisions by blocking certain kinds of reason for official action. Thus, the justifiability of limitations on the right to freedom of religion does not depend on weighing the interests of believers against the interests of others or against considerations of the common good, but on whether the reasons that the right is supposed to block are really present in the particular political conflict. Impermissible reasons, moreover, are those that express contempt for certain members of the community through coercive interference with our equal personal responsibility to make deep ethical choices independently and authentically.

2 Statute for Religious Freedom (1779).
Part of the argument of this chapter springs from a crucial theoretical distinction between teleological interest-based and non-teleological reason-blocking accounts of rights. A systematic distinction between the two is notably absent from the existing European literature on law and religion, where most books either do not engage with theoretical questions of justification and conflicts of rights, or they indistinctly cluster interest-based and reason-blocking accounts under ‘liberal’ or ‘deontological’ theories of rights. The much-criticised lack of a coherent substantive theory of freedom of religion in the ECHR is partly symptomatic of that very confusion over teleological and non-teleological accounts of rights, which have distinct political and moral implications for our understanding of the right to freedom of religion or belief. The first part of this chapter will examine interest-based and reason-blocking theories of freedom of religion or belief and will highlight their main differences. After that, the next section will focus on the reasons that an interpretation of freedom of religion based on ethical responsibility and authenticity excludes from political action. The last part will argue that a reason-blocking conception of the right advances a tidy and methodical account of the judicial resolution of conflicts between rights, and explains important parts of the jurisprudence of the ECtHR better than interest-based accounts of the right.

3.2. Interest-based and Reason-blocking Accounts of the Right to Freedom of Religion or Belief

3.2.1. Interest-based accounts

Why people have rights to specific liberties, such as religion and speech, in a liberal democracy? We should reject certain answers from the outset. It would be misguided, for instance, to argue that they have those rights because otherwise our community would fare worse in the long run. For the idea that individual rights may (or may not) conduce to overall utility is irrelevant to the defense of rights as such. When we claim that everyone has a right to fair trial, we mean among others that everyone should have access to a court and basic legal aid, even if that would not be in the general interest. If we want to defend individual rights in the sense in which we claim them, then we must discover something other than utility that imbues rights with their normative force.

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More generally, utilitarian theories cannot account for the popular idea discussed in Chapter Two, namely that the right to freedom of religion conflicts with the rights of others or with other collective goals. For utilitarian theories judge whether an action is morally right by virtue of its contribution to overall utility, viz. by the goodness or desirability of its consequences. Under a utilitarian calculation interests protected by rights count as much as other non-rights based interests, and their protection depends on which combination brings about the maximum overall satisfaction. Rights themselves enjoy no priority. It is therefore unsurprising that classical utilitarianism is considered an enemy of rights and that some of the most influential works on political philosophy have been composed as responses to utilitarianism.

Still, more sophisticated versions of utilitarianism, such as rule-utilitarianism, give relative priority to rights over other collective interests, that is, protection of rights proceeds unless they conflict with too many non-rights based aggregated preferences. At first blush, rule-utilitarianism does not seem to run counter to Article 9(2) ECHR, according to which

> [F]reedom 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.

The reason is that the Convention and the ECtHR seem to justify certain limitations on the right to freedom of religious manifestation for reasons based on non-rights based aggregated preferences, such as life in a community that safeguards a dominant morality. In fact, the idea that a political majority has a right to shape and collectively sustain a particular moral culture has played some role in cases involving limitations on religiously offensive forms of art, and Chapter Six will discuss those in further detail. Moreover, the ECtHR often employs proportionality in forms congenial to rule-utilitarianism through the frequently applied principle that ‘collective goals may restrict individual rights, but only if it is absolutely necessary for the promotion of a collective goal.’ Again, on that account of proportionality, rights enjoy relative priority over non-rights based aggregated preferences because it is only in the absence of other alternatives that a government may justifiably limit rights in virtue of conflicting collective interests. It is beyond the scope of this chapter to examine in detail the ‘least restrictive’ doctrine that the ECtHR often follows, but a recent example comes from *S.A.S. v France*, where the majority concluded that a blanket ban on full-face covers from all public places was a justifiable limitation on the right to freedom of

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8 Article 9(2) ECHR.
11 ibid
12 *S.A.S. v France*, Application no. 43835/11, 1 July 2014 (Grand Chamber).
religion given that full-face covers are ‘fundamentally’ incompatible ‘with the ground rules of social communication and more broadly the requirements of “living together”’ in French society.\footnote{ibid §122 and §153.}

Despite appearances, however, rule-utilitarianism provides an unsatisfactory account of the grounds and political role of human rights. Consider an example. Under rule-utilitarian accounts of rights, nothing could prevent criminalisation of blasphemy, given that in a number of European countries the majority despises artworks ridiculing religion so much that their criminalisation seems to be the only way to protect public morals and freedom from offense.\footnote{On the distinctive characteristics of offense to religious feelings see M. Pinto, ‘What are offences to feelings really about? A new regulative principle for the multicultural era’ (2010) 30(4) OJLS 695; R. C. Post, ‘Cultural heterogeneity and law: pornography, blasphemy and the First Amendment’ (1988) 76 California Law Review 297; J. Feinberg, Offense To Others: The Moral Limits Of The Criminal Law (Oxford University Press, 1984) 192-198; P. Jones, ‘Blasphemy, offensiveness and Law’ (1980) 10 British Journal of Political Science 129, 135-139.} Yet the Council of Europe has repeatedly held the opposite. In 2006, it adopted Resolution 1510 on freedom of expression and respect for religious beliefs, which stressed that freedom of expression covers ideas that may shock, offend or disturb the state or any sector of the population. In 2008, the Venice Commission issued a Report on the relationship between freedom of expression and freedom of religion,\footnote{European Commission for Democracy through Law (‘Venice Commission’), The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Study no. 406/2006 (2008).} which found that criminal sanctions against religious insults require ‘incitement to hatred as an essential component’ and are unjustified in cases of blasphemous speech insulting religious feelings.\footnote{ibid. See also Venice Commission, Blasphemy, Insult And Hatred: Finding Answers in a Democratic Society (Council of Europe Publishing, 2010) 27.} In Recommendation 1805, the Council of Europe\footnote{Parliamentary Assembly Council of Europe, Recommendation 1805: Blasphemy, religious insults and hate speech against persons on grounds of their religion, 29 June 2007 (27th Sitting), at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1805.htm>.} urged its member states to amend national legislation in order to ensure that limitations on religiously offensive expression are enacted only in cases of incitement to violence.\footnote{ibid §15.} Those initiatives mirror more general developments in international human rights law. From 1999 to 2010, the UN General Assembly adopted a series of controversial non-binding Resolutions condemning ‘defamation of religions.’\footnote{See e.g. United Nations General Assembly, Combating Defamation of Religions, 10th Session, Agenda Item no. 1, 12 May 2009, §§78-83, at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.L.11.pdf>. See also F. Stjernfelt, ‘Pressure on press freedom: The current religious war on freedom of expression’, in A. Kierulf and H. Ronning (eds.) Freedom of Speech Abridged? Cultural, Legal & Philosophical Challenges (Nordicom, 2009) 130-132.} But in July 2011 the UN Human Rights Committee released General Comment 34 on freedom of expression and opinion, which for the first time stressed that ‘prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the International Covenant on Civil
and Political Rights’ save for cases of incitement to discrimination, hostility or violence. According to the General Comment 34, restrictive measures discriminating against certain religious groups, or against religion in general or aiming to prevent or punish criticism of religious leaders or commentary on religious doctrine are impermissible.

The idea, therefore, that human rights enjoy only relative priority over other collective interests fails to fit a strong European constitutional and statutory tradition, which makes moral sense only through the principle that the government should not be free to restrict human rights in order to promote other non-rights based aggregated preferences, even if the majority would be better off as a result. I think that that principle explains most parts of our human rights legal landscape and determines the morally justifiable use of community force. Non-utilitarian theories of rights may be broadly clustered around interest-based (called also immunity theories) and reason-blocking theories of rights. We have to examine them thoroughly to determine which explains the right to freedom of religion or belief more successfully.

As their name suggests, interest-based theories of rights protect fundamental individual interests. In their most typical form, interest-based theories protect individual interests that are important enough to generate duties on others. More specifically, according to Raz’s formulation, X has a right if and only if ‘an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.’ As Tasioulas notes, an interest-based theory of rights suggests that there are some fundamental interests that are shared by all individuals in virtue of their humanity and which should be protected before other interests are taken into account. Yet not all interests are sufficient to ground rights. To ground a right, the interest should both be important and justify through sound arguments that a certain right exists in virtue of that interest. But even in case an interest fulfills those necessary requirements that is not sufficient. Something more is required. That is, a right exists as long as there are no conflicting considerations that override the interest grounding the right. A general right is then a pro tanto right, which means that all things being equal, it grounds for the existence of a particular right in the circumstances to which it applies. If it exists, a right is then a reason for holding other persons under a duty. More importantly, having a pro tanto right means that if, under certain circumstances,

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there are conflicting pro tanto considerations whose importance is so strong that they override the interest justifying the right, then in those very circumstances one does not have the right – although he may enjoy it in the rest of the cases. Importantly, the fact that most people feel that they ought to respect others (i.e. serve their interests) by avoiding lies, offensive speech, or loud music while travelling on the Tube does not mean that they are under a duty (which would imply a right) to behave in those way. Having good reasons to behave in a certain way does not entail that someone is under a duty to behave in a certain way. Feeling that we ought to turn our iPod’s volume down while on a bus or that we ought to be punctual in our appointments or that we ought not to lie to our friends does not mean that we could not behave the other way. We might then be rude or untrustworthy or bad friends, but we are free to do so.28

So, as a pro tanto right, the right to freedom of religion or belief provides weighty reasons for others not to interfere with the liberty of the right-holder in certain ways. But pro tanto means that the weight of those reasons can be outweighed by other legitimate (and weightier) reasons in the circumstances. If that happens one can act unjustifiably insofar as the right in question is concerned, yet justifiably all things considered, i.e. on the balance of reasons. Nevertheless, when pro tanto rights are justifiably restricted they leave duties to apologise, and possible make amends because one has acted against a pro tanto reason.29

Thus, one of the essential components of an interest-based account of rights is the determination of the interests grounding the right. This is challenging, however, in cases involving the right to freedom of religion or belief. As Chapter One discussed, there is widespread disagreement concerning the interest grounding the right, with some theorists locating it on the unique importance of religion for human psychology and existential uncertainty, and others on its immutable status for our identities. But we discussed that none of those interests can fully capture the importance and complexity of the right. Others, including Raz, argue that the right to freedom of religion is grounded on the important individual interest to belong to religious communities, whose preservation serves toleration and communal peace. But that argument fails to capture that many religious individuals do not identify with any religious communities, whereas it also leaves unexplained the need to protect non-religious forms of conscience that lack a group dimension. Communitarian arguments, according to which the right to freedom of religion protects our important interest to belong to collective structures to form and develop our identities, seem to suffer from similar limitations.

It is possible to overcome those difficulties if we accept, as Tasioulas argues, that human rights are grounded on a plurality of interests.30 But still, under an interest-

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based account of rights we have to engage in some sort of weighing of different interests in cases of tension. That weighing procedure is often associated with the idea that human rights, and freedom of religion or belief in particular, must be decided by striking the right ‘balance’ between individual interests and the interests of the community as a whole. But ‘balancing’, as the previous chapter briefly discussed, simply restates the problem. In fact, it is even more confusing than mere restatement, given that the existing legal provisions have already balanced individual interests against the interests of the community as a whole and ‘the idea of a further balance, between their separate interests and the results of the first balance, is itself mysterious.’

‘Balancing’ is often defended because of its alleged sensitivity, as a technique, to the distinctive facts of each case, which is key to ensure ‘pragmatic’ accommodations of religion. For instance, Stychin argues that ‘only a factual analysis’ can resolve the competition between different interests in cases of religious accommodation, involving values such as ‘civility, solidarity and tolerance.’ In Ladele, Stychin argues that the Islington Council should accommodate the applicant only if her accommodation was ‘in fact’ possible. But a contextual ‘pragmatic’ analysis fails to explain which ‘facts’ really matter and overlooks questions about the legitimacy and political implications of values such as civility and solidarity, despite resorting to those in its proposed ‘balancing’ exercise. Perhaps more importantly, ‘pragmatic’ balancing emphasises that a specific legislation is unjustifiable because it offends the individual interest to manifest one’s religion, which is so important that it should not be left to a utilitarian calculation, but should take priority instead. Hence, the analysis appeals to the consequences of the legislation in question as distinct from the reasons of the legislators or the grounds for enacting it.

However, we need a theory that will reveal not only which individual interest is offended, but also why this particular interest is fundamental. Many important interests we share may be compromised for reasons of collective welfare. People in some economic sectors prosper while others do not because of political decisions backed up by the claim that the community will be better off overall. Why, if at all, are the interests compromised by legislation that limits freedom of manifestation of religion or belief different? We cannot claim that they are more fundamental because people care more about these interests or because they suffer more when those interests are overridden by claims of general welfare. It is far from clear that people care more about religious interests compared to other important interests, such as their financial welfare or their children’s happiness, and in any case even a classic utilitarian analysis

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would take into account suffering or strong preference in its calculations. If the interests are nevertheless overridden, why do they deserve the protection human rights offer?

To be clear, some interpretations of ‘balancing’ confuse teleological interest-based theories of rights with utilitarianism. Interest-based theories of rights are not committed to maximisation of interest satisfaction however. According to Raz, the conditions of when an interest grounds a right depend on an inquiry that should focus on whether the claim relates to an objective interest of well-being, that is, to an interest that furthers individual autonomy and as such imposes duties on others, including the government. If we embrace the mild form of perfectionism that Raz defends, that formulation is more promising compared to ‘pragmatic’ balancing. It requires balancing through a form of cost-benefit analysis distinct from utilitarianism in the sense that from the objective standpoint of ‘the importance of difference interests for our wellbeing’ costs and benefits are ‘moralised notions’ that do not commit interest-based theories to maximisation of satisfaction of our interests.

Consider, for instance, *Pichon and Sajous v France*. In June 1995, three women entered the only pharmacy in Salleboeuf, a small town in southwestern France, to buy contraceptives prescribed to each of them by their doctors. The pharmacy’s owners refused to serve them based on their religious beliefs. The customers filed a complaint against the pharmacists arguing before the French courts that religious principles were not legitimate reasons to refuse selling prescribed contraceptives and that the two pharmacists were thus in violation of the Consumer Code. The French courts agreed with the complainants and held that whereas there was legislation in place authorising doctors, midwives and nurses to refuse to take part in proceedings leading to termination of pregnancy, the provision did not include any exceptions for other professions.

The pharmacists complained before the ECtHR that their conviction constitutes an unjustifiable limitation of their right to freedom of religious manifestation in violation of Article 9 ECHR. However, the majority of the ECtHR dismissed their complaint and held that

‘[a]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell products, since they can manifest those beliefs in many ways outside the professional sphere.’

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39 According to Article L 122-1 of the French Consumer Code, it is prohibited to refuse to sell a product for no legitimate reason.
41 ibid
Importantly, the ECtHR in *Pichon and Sajous* did not balance the interest of the pharmacists in refraining from selling contraceptives (which is one dimension of their right to freedom of religion) against the interests of others to have access to prescribed medication or against the collective general interest in public health. There was no argument, for instance, about whether women would be harmed if they had to take a short drive to the next village to buy their prescribed contraceptives. An interest-based theory of freedom of religion would require the proportionality test to answer whether the individual interest to live in accordance with one’s religion (translated, in the instant case, in the refusal to sell contraceptives) is important enough to impose a duty on the government to exempt religious pharmacists from the general provisions of the Consumer Code. It is, however, at this exact point that we need a theory explaining why those interests are fundamental. Raz’s suggestion that important interests are those related to an objective interest of well-being, that is, to an interest that furthers individual autonomy, provides limited guidance with regard to why interests associated with conscience, such as the pharmacists’ interests in *Pichon and Sajous*, are often considered more important compared to other interests so as to lead individual applicants, and parts of political and human rights theory, to insist on ‘special’ protection of conscience through exemptions from general and neutral laws.

Shortcomings in the application of interest-based theories to the right of freedom of religion or belief furnish the additional criticism that they are reductivist. For instance, Laborde takes the ‘Equal Liberty’ theory of Eisgruber and Sager as a paradigm of an egalitarian theory of freedom of religion and criticises it for reducing freedom of religion to the protection of certain individual interests, which the authors label as ‘deep’ or ‘serious’ without, however, explaining why they are so. Eisgruber and Sager then analogise religion with other ‘comparably serious’ interests, such as various medical predicaments, and argue that religion should enjoy equivalent protection to those. However, as Laborde rightly notes, a strategy seeking coherence between equally ‘deep’ interests is problematic because we lack guidance as to what depth requires. And if we water down the ‘depth criterion’, as Eisgruber and Sager do when they replace ‘deep’ interests with ‘nontrivial’ or ‘comparably important’ interests, then their approach turns question-begging because whereas the point of hypothetical analogies is ‘to inquire whether deep, serious, moral commitments are sufficiently similar to religion’ in order to ground a claim for accommodation, the theory merely assumes importance making the whole analogy strategy redundant. However, this is not to suggest, as Laborde seems to imply, that equality-based theories of freedom of religion are implausible as a result. For equality-based theories of freedom of religion or belief are not necessarily interest-based. Rather, as the next part of this chapter will argue, equality-based theories of freedom of religion make better sense through reason-blocking theories of rights.

44 ibid 65.
45 ibid 69.
Finally, another difficulty comes from one of the central assumptions of interest-based theories of rights, namely that limitations on our rights run counter to certain important interests. But this is not always the case. For an unjustifiable restriction of a pro tanto right loss or setback to the right-holder’s interests is not necessary. If someone enters my flat without my permission, and without any chance of myself finding out, my right to respect for private life remains infringed despite that I suffered no loss or setback to my interests. Again, this is not to suggest that interest-based theories of rights aim to maximise satisfaction of our interests. However, I think that reason-blocking theories better capture the intuition that the point of rights is not to protect our various interests, no matter how fundamental those are, but to protect us from preferences that deny our equal status as autonomous persons. They flow from the non-teleological idea that in a liberal democracy it is illegitimate for religious beliefs to limit individual choices no matter how many people uphold such beliefs. This restraint springs from our ‘special moral relation to fellow members of our society – a collectivity that can coerce each of its members, but only if it claims to act in the name of all of them.’\(^46\) Our defense against an oppressive majority ‘is an appeal to the form of moral equality that accords each person a limited sovereignty over the core of his personal and expressive life.’\(^47\) As Nagel argues, this sovereignty is ‘in itself, and not just for its consequences, the most distinctive value expressed by a morality of human rights.’\(^48\)

### 3.2.2. Reason-blocking accounts

It is beyond the scope of this chapter to provide a general moral defense of reason-blocking theories of rights. Even so, in the remainder of this chapter, I wish to argue that difficulties with interest-based accounts of freedom of religion could be overcome by resorting to reason-blocking theories of rights. As the following pages will demonstrate, reason-blocking accounts of rights capture better than their rival morally significant parts of the practice of the ECtHR in cases of freedom of religion. But which are the differences between interest-based and reason-blocking accounts of rights? Reason-blocking accounts understand rights as constraints on the kinds of reasons that a government may legitimately act upon,\(^49\) rather than as ways to immunise particular interests for their own sake. The reason-blocking label suggests that rights exclude certain sorts of reasons for official action.\(^50\) From the perspective of correlative duties, under an interest-based account of rights duties are framed as duties not to limit or interfere with the interest for certain reasons. The language of interests remains under both accounts, but it would be a

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48 ibid
mistake to argue that, as a result, the aim of rights under a reason-blocking account is to protect certain important interests (grounding the rights in question) regardless of the reasons that justify a given form of state interference.\textsuperscript{51}

To be clear, with respect to the right to freedom of religion or belief, a reason-blocking account does not mean that the right is not grounded on important individual interests, such as the interest in making deep ethical choices independently and authentically. However, the political implications of the two accounts of rights are different. A reason-blocking model does not advocate balancing rights against public goods, general utility or other interests in the way that an interest-based model would suggest. Rather, our rights are safeguards against constraints that are based on collective preferences that we know, from our general knowledge of the society, that are likely to contain large components of illegitimate preferences that the political process cannot track and eliminate.\textsuperscript{52}

The difference between the two theories becomes clearer with reference to limitations of rights. Limitations on rights are sensible under interest-based theories. Recall the formulation discussed above. Limitations on rights could take place in either of two possibilities: either an individual interest is not important enough to generate duties or conflicting considerations are so important that they can outweigh the interest grounding the right. Perfectionist political theories would also add that a right might have to be restricted for the promotion of valuable public goods, such as those that contribute to the ideal of personal autonomy.\textsuperscript{53} Under interest-based theories of rights a limitation would therefore be proportionate ‘either because the freedom that is restricted in a particular case is not conducive to the promotion of an important interest or because promotion of the interest must be balanced against the promotion of other interests or public goods.’\textsuperscript{54}

However, under reason-blocking theories, limitations on rights work differently. Individuals do not have a right to freedom of religion or belief because certain interests require ‘special’ protection against majorities or because they are immune to considerations of the common good. Rather, individuals have a right to an egalitarian scheme of rights which does not justify limitations on their freedom of religion for certain reasons, or according to Leader, for certain commitments.\textsuperscript{55} As Dworkin puts it, the government ‘must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal

\textsuperscript{51} Waldron, ‘Pildes on Dworkin’s theory of rights’, 305.
\textsuperscript{52} The same conclusion may be reached if we look at rights through the lens of their correlative duties. Under an interest-based theory of rights, duties are most often framed as duties not to limit or interfere with an important interest. But under a reason-blocking theory of rights, duties will be formed as duties not to interfere with the interest for certain reasons. In both cases the language of interests is there, but it would be an analytical error to suppose that for that reason the aim is to protect the important interests (grounding the right) regardless of the reasons that motivate or justify that interference. See Waldron, ‘Pildes on Dworkin’s theory of rights’, 305.
\textsuperscript{53} Raz, The Morality of Freedom, 246.
\textsuperscript{54} Letsas, A Theory of Interpretation of the European Convention on Human Rights, 103.
\textsuperscript{55} S. Leader, ‘Freedom and futures: Personal priorities, institutional demands and freedom of religion’ (2007) 70 MLR 713, 724-725.
worth. Thus, reason-blocking accounts of rights focus on a particular way in which a fair democracy must treat its members, rather than on how fully certain fundamental interests are satisfied. Of course, when the interpretation of a limitation on rights shows that the impermissible reasons that rights are supposed to exclude are not really present, then the limitation in question may be justified all things considered. But when impermissible reasons are present, our right to freedom of religion gets activated and blocks the enforcement of those limitations. Under a reason-blocking account of rights, courts do not focus their investigation about the justifiability of a limitation on ‘pragmatic’ balancing, but on whether there are impermissible reasons underlying the state interference in question.

Before further discussion about which type of reasons are excluded by human rights, a final important point has to be added. Reason-blocking accounts of rights are sometimes misinterpreted as theories about the motivation of the acting agent. The resulting objection is that certain actions violate rights irrespective of the motivation of the agent. Consider an example. Some limitations on the right to freedom of religion, such as limitations on the right to change one’s religion, may be in place not because the state treats some people as less worthy than others but, by contrast, because it equally cares about everyone’s salvation from sin. But even though the reason behind the limitation is not impermissible, that is, it does not fail to recognise everyone’s equal worth, the limitation still constitutes an unjustifiable restriction on the individual right to freedom of religion. It follows that the reasons behind limitations on rights play little role in determining what the morally justifiable use of community force would be. The objection, however, is misleading. As Letsas argues, the problem of that type of objection is that it misunderstands the use of the word ‘reason’. A reason-blocking theory of rights uses the concept of reason not in the motivating, but in the normative sense. By reason we mean reasons for action by virtue of the value of equal respect and concern and the status of individuals as beings with inherent dignity, not the underlying motivation of that particular action.

3.3. Reasons, Influence and Subordination

What kind of reasons should be excluded from motivating governmental action? Can we identify ex ante areas of political concern where the wrong sets of reasons are likely to be present in order to set up rights as safeguards in those areas? And if we can, is freedom of religion or belief one of those areas? The history of religious persecution in Europe, most notably from the late Middle Ages to early Reformation, and the reasons why the right to freedom of religion evolved into ‘a feature of liberal

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56 Dworkin, A Matter of Principle, 205.
modernity"\(^{59}\) and a sine qua non of international human rights law,\(^{60}\) reflect the concern that the moralistic preferences of the majority are likely to interfere with our personal responsibility to define value in our lives.\(^{61}\) But this kind of concern is not raised only due to the historically vicious conflicts between different religions. It is also due to what Hegel describes as ‘the conflict between faith and reason’ that arises as soon as ‘thought touches on religious convictions and practices.’\(^{62}\) And it is also due to the ‘new religious wars’ between believers and nonbelievers\(^{63}\) about, for instance, the permeability of religion in public schools or the wearing of symbols on the streets that currently divide several European nations. The aim of a coherent theory of interpretation of the moral right to freedom of religion or belief should be to address all these heated controversies of confidence, faith and allegiance. I think that the best way is through an account of the right that blocks certain impermissible moral preferences about how others should live – which the political process cannot discriminate and eliminate – from any model of distribution of resources. It is important to further explain this hypothesis, first through the lens of morality.

The previous chapter ended with an examination of the principles stemming from human dignity as status. Now, a reason-blocking account of freedom of religion requires us to turn back to human dignity to examine some of its ethical implications. Human dignity hinges on self-respect, which entails that everyone should be personally responsible to define value in his own life and live in the way and style he wants. This personal responsibility to define value is two-fold. We should be responsible both in the virtue sense and accept relational responsibility whenever we have to.\(^{64}\) We cannot treat an action or decision as our personal choice unless we regard our own judgment responsible for it. Of course it is a more complex question how far human dignity requires that we accept moral responsibility for our actions,\(^{65}\) but the focus, at this point, is on our personal independence in making certain deep ethical choices and on the important role this independence plays in enabling us to live well with self-respect.


\(^{63}\) R. Dworkin, Religion without God (Harvard University Press, 2013) 137.


Understood this way, our personal substantive responsibility to define value is perfectly compatible with someone’s decision to live his life in conformity with the values of his family or religion. Self-respect only requires that those choices are personal and authentic, rather than imposed out of fear or out of state coercion.

But what does authenticity mean? Bernard Williams captures authenticity as ‘the idea that some things are in some sense really you, or express what you are, and others aren’t.’ This definition is congenial to how we describe someone authentic in our common parlance as someone who acts according to desires, motives or beliefs that are not only hers, but also express who she really is. Apart from philosophically intriguing, authenticity is a distinctive ideal exerting such influence on recent intellectual developments that Taylor has described our times as the ‘age of authenticity.’ But authenticity is also connected to dignity, and more specifically to the demands of dignity in our relations with others. It is connected to how we exercise our personal responsibility for the governance of our own lives.

Personal responsibility to define value does not deny the effects that a particular ethical environment could have in the available choices. It does not mean that we should be free from influence or persuasion, either. An ethical culture includes a wide range of values, which enable different life choices. Meanwhile, our collective decisions shape our common culture. Our personalities are influenced and, at least in part, formed by the choices of others and by popular choices in our culture. This cross-fertilisation is an integral aspect of our social experience: we learn from each other and we define ourselves through our ability to socially identify with various groups, choices and lifestyles. The expectations of our friends and their entertainment choices influence the music we listen, the clothes we wear, the sports we play and the way we express our emotional attachments to them. Who knows how many choices we would not have made, had our friends not have made a start. Certain lifestyles also become less attractive and less feasible in a shifting environment. No one can foresee whether working as a movie translator or as a postman will be possible in the future. Some of us that possess no great physical strength cannot become stars in American rugby, and the existing tax system makes collecting classic roadsters tricky. That might prevent

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66 This form of responsibility is substantive because it expresses claims about what people are required to do for each other and for themselves. Another way to understand responsibility is through the concept of attributability, namely that a specific action can be the basis of moral appraisal of the ‘responsible’ person. This analysis will use responsibility in the first, substantive sense. See Scanlon, What We Owe to Each Other, 248-296.

67 Dworkin, Justice for Hedgehogs, 212.


70 Although this point cannot be analysed further here, the importance to make ethical choices with authenticity does not suggest that we ought to decide for ourselves anything that concerns us, free from external influences, in the culture of self-absorption and self-indulgence that Taylor rightly criticises. See C. Taylor, Sources of the Self: The Making of the Modern Identity (Cambridge University Press, 1989) 456-495; C. Taylor, The Ethics of Authenticity (Harvard University Press, 1991) 13-71.


some people from living the life they would rather live. But even if they may have less ability, compared to other people, to design the life they prefer, their design can still be fully authentic; just the life that they would like to live and not one that someone else has reserved for them. According to Dworkin, authenticity is ‘narrowly relational’ in the sense that it is not compromised by limitations of nature or of circumstance.\textsuperscript{73} Someone does not live authentically, regardless of the plurality of choices he might be capable of enjoying, if others prevent him from accessing otherwise available options simply because they consider those options unworthy.

Authenticity is thus different from certain interpretations of autonomy. It is often argued that safeguarding autonomy depends on the openness and selectability of a range of valuable choices.\textsuperscript{74} But if this is the only requirement, then our autonomy is not violated when a government manipulates the community’s culture so as to eradicate or make less attractive certain disapproved choices of lifestyle, provided that an adequate range of choices remains selectable so that everyone can exercise her power of choice.\textsuperscript{75} However, authenticity, as defined by dignity, is concerned both with the character and with the fact of obstacles to choice. Living well does not just mean ability to design a life, but being able to design it in response to a personal and independent judgment of ethical value.\textsuperscript{76} Taking into account the character of the obstacles to our choices, apart from the existence of the obstacles themselves, stems from the principle that authenticity is damaged whenever someone is made to accept someone else’s judgment in place of her own about the values or goals that her life should pursue.\textsuperscript{77}

I think that the main advantage of a reason-blocking account of rights is that it captures that very idea, namely that our ethical environment has to be formed organically through individual choices one by one, rather than by collective action. For a reason-blocking account is based on a conception of the limits on the kinds of reason that a state may justifiably invoke to justify its coercive action. Thus, if the aim of the right to freedom of religion or belief is to prohibit subordination of our personal ethical responsibility to the moralistic preferences of the majority, it is important to distinguish instances where our social culture may influence our individual choices from instances of subordination. Recall that reason-blocking theories of rights are based on the non-teleological idea of a special moral relation to the fellow members of our society who the society as a collectivity can coerce ‘only if it claims to act in the name of all of

\begin{itemize}
\item \textsuperscript{73} Dworkin, \textit{Justice for Hedgehogs}, 212.
\item \textsuperscript{74} See e.g. B. Barry, \textit{Culture and Equality: An Egalitarian Critique of Multiculturalism} (Polity Press, 2001) 32-40. Those interpretations of autonomy have also been criticised for failing to sufficiently distinguish autonomy from freedom; see I. Berlin, ‘Two concepts of liberty’, in I. Berlin, \textit{Four Essays on Liberty} (Oxford University Press, 1969) 131-134.
\item \textsuperscript{75} This is not to suggest, however, that autonomy requires that individuals be in a position to abstain themselves from their ‘thick’ identities and values, including religion, and critically appraise them. Rather, according to Kymlicka, ‘no particular task is set for us by society, and no particular cultural practice has authority that is beyond individual judgment and possible rejection’; W. Kymlicka, \textit{Liberalism, Community and Culture} (Oxford University Press, 1989) 50.
\item \textsuperscript{76} Taylor, \textit{The Ethics of Authenticity}, 41.
\item \textsuperscript{77} Dworkin, \textit{Justice for Hedgehogs}, 212.
\end{itemize}
As Dworkin puts it, coercive state measures may be adopted as long as they are justified on distributive or impersonal grounds of justice and not on how others should live (personally judgmental grounds). Redistributive taxation, environmental regulations, human rights legislation, among several other sources of obligation, may have an impact on our common culture that affects our sense of how we can and should live. Despite their strong impact though, they can be justified entirely apart from any assumption that that impact will be ethically beneficial, viz. that people will lead better as well as fairer lives in a culture so transformed. Those (coercive) policies are therefore compatible with our personal responsibility to decide for ourselves the ethical values that our lives should reflect.

Subordination is relatively easy to identify when states enforce moral norms through criminal law or through other forms of overt interference sanctioning those deviating from the norm. When a government decides that the state should express religious values and uses its coercive power to criminalise blasphemy or, in the diametrically opposite case, when a state prohibits the expression of any attachment to religious values through criminalising different forms of religious manifestation in public, our right to freedom of religion is violated. We claim that our right is violated not because those limitations prevent us from full enjoyment of important interests, but because the right protects our personal responsibility from exactly those forms of subordination. A government cannot justifiably restrict our freedom of conscience when the justification behind the restriction assumes the superiority or popularity of any ethical values that are controversial in the community. Censorship of blasphemous art or journalism, restrictions on the expression of offensive views or mandated religious oaths in a state’s courts or parliament constitute unjustifiable limitations on the right to freedom of religion or belief because they depend, directly or indirectly, on a choice about the values that a good life has to reflect. Legal prohibitions on same-sex intercourse is another common example of a constraint on

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79 Dworkin, Is Democracy Possible Here?, 76-77.
80 Interestingly, Dworkin uses ethical responsibility and ethical independence as if they are synonymous in his work on the moral right to freedom of conscience. See Dworkin, Is Democracy Possible Here? 76-77; Dworkin, Justice for Hedgehogs, 368-371; Dworkin, Religion Without God, 128-137. Ethical independence attractively highlights the need to be independent in our ethical choices from certain impermissible kinds of reason. But I think that ethical responsibility highlights more successfully both the distinction between influence and subordination and the reason-blocking quality of the right. Moreover, the notion of ethical responsibility includes a more dynamic dimension, associated both with choosing and with our relationship with others in the public space. This more dynamic dimension will be further discussed in Chapter Six.
81 See e.g. Ahmet Arslan v Turkey Application no. 41135/98, 23 February 2010 (only in French).
83 See e.g. Otto-Preminger-Institut v Austria, Application no. 13470/97, 20 September 1994; Wingrove v United Kingdom, Application no. 17419/90, 25 November 1996.
85 Mouvement Raelien Suisse v Switzerland, Application no. 16354/06, 13 July 2012 (Grand Chamber).
our liberty, which is motivated by a desire to protect some conceptions of living well and blot out others.\textsuperscript{87} It violates our right to respect for private life for exactly the same reasons.

A reason-blocking account of the right to freedom of religion or belief shows more clearly why in a liberal democracy it is illegitimate for state officials to try and control how others should live through deliberately shaping an ethical culture more suited to the moral preferences of the majority.\textsuperscript{88} We can tell which limitations on the right to freedom of religion or belief are unjustifiable not based on the idea that religion is more ‘special’ than other foundational ethical convictions, but based on an interpretation of the limitations in question in order to ensure that their justification does not lie on grounds of personal morality. Note, moreover, that it makes no difference that a large majority, and not a small powerful minority, might hope for the coercive establishment of a religious or an areligious culture. Freedom of religion or belief, morally justified on personal responsibility to define value in our lives, is as much frustrated by allowing a majority of citizens to impose their values on everyone through legislation as it would be by allowing some minority to do that. Freedom from subordination forbids any manipulation of my culture ‘that is both collective and deliberate – that deploys the collective power and treasure of the community as a whole and that aims to affect the ethical choices and values of its members.’\textsuperscript{89} Whether or not it would benefit the manipulators – i.e. the purpose of this manipulation – makes no difference. And, indeed, dignity requires that we have to reject manipulation even if it reflects our own values because our dignity is as much violated from trying to impose them to others as it is if we have them manipulated by others.

To be clear, there is no violation of our personal ethical responsibility when limitations on our freedom of conscience do not rely on personal morality. A state relies on political morality, rather than on personal morality, when it enacts environmental protection legislation, when it imposes taxes, or lowers the motorway speed limit. Those laws significantly influence the way we live. Low speed limits may impose a small burden on some people because they will need more time to reach their destinations and no burden to others who commute by train or drive slowly anyway. Still, Jenson, a professional racing driver and avid sports car enthusiast, will be substantially affected by that traffic policy. His circumstance is really unfortunate but, without more, we have no good reason to claim that speed limit regulations deny his responsibility to define value by himself. Environmental regulations, tax laws and speed limits do not aim to usurp our personal responsibility to identify a successful life.

\textsuperscript{87} ibid
\textsuperscript{88} Nothing is implied about whether the principle of ethical responsibility finds expression in other moral rights, apart from the right to freedom of conscience. This discussion recognises, but unfortunately cannot explore further, the connections between the right to freedom of religion or belief and the right to respect for private life, the right to freedom of expression and the right to freedom of assembly. All these rights may be partly or wholly supported by similar egalitarian principles of independence and authenticity. The aim of the present argument is limited to tracking a normative justification of the right to freedom of religion or belief that captures the distinction between influence and subordination.
\textsuperscript{89} Dworkin, \textit{Is Democracy possible here?}, 76.
Rather, those laws inevitably share burdens among all life plans. They form the background against which we may make our ethical choices and our own responsibility for making them is not diminished by the existence of that background.

Finally, a reason-blocking account of the right to freedom of religion or belief constitutes a more principled response to the argument that a political majority should enjoy a right to maintain the value culture that it deems best given its moral convictions. Consider cases of blasphemous art, such as Wingrove v United Kingdom and Otto-Preminger v Austria. In all those cases the respondent states have argued before the ECtHR that banning blasphemous artworks was essential to secure the right of their Christian majorities to enjoy their religion without being offended in their beliefs. In I.A., the Turkish government argued that its domestic legislation that criminalised blasphemy against the Prophet is compatible with the Convention, given that the country’s majority follows Islam. Those are just some examples of cases which are directly or indirectly based on the argument that bans on freedom of expression are justified because the majority of a state prefers to live and educate their children in an environment that protects religious principles that they deem sacred. Since the majority can secure its aesthetic culture, so the argument goes, through urban planning regulations and its cultural traditions and history through museums or national days, why not have the same power with regard to its religious culture? An analysis based on ethical responsibility helps us answer that museums and urban planning regulations are different because they do not touch on personal morality; they do not coerce citizens to adopt one opinion about what counts as a good life over another. Recall that the argument is not grounded on the uniqueness of religion compared to other foundational ethical convictions, or on its immutability for our identities. It lies on the moral principle that there are some kinds of preferences that a state committed to equal respect and concern may not coercively pursue.

It is true that in all these cases, the right to freedom of religion or belief can be presented as a right protecting an interest – an important interest in making our ethical choices independently and authentically. But that does not make the underlying view of the right to freedom of religion an interest-based view. Rather, the analysis depends on whether our understanding of the right is that a certain interest, understood in itself, is to be insulated from any compromise or derogation in the name of the general good, or whether ‘our understanding is that the interest in question is just an individual interest in not being at the mercy of certain sorts of reasons and considerations.’ A reason-blocking theory understands the right to freedom of religion in the second way. It is therefore a mistake to suppose that common references to interests show, by themselves, that the aim is to protect the interest in question, regardless of the motivation or justification behind an interference with the interest.

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91 Wingrove v United Kingdom (cited above).
92 Otto-Preminger v Austria (cited above).
93 I.A. v Turkey (cited above).
94 Waldron, ‘Pildes on Dworkin’s theory of rights’, 305.
Of course, no substantive account of the right to freedom of religion can categorically resolve all the important questions of political morality about how far, for instance, a government committed to equal respect and equal concern can influence (but not subordinate) its citizens. But the principles set out above remain the skeleton. A government does not violate its duty to treat its citizens with equal respect and concern when its policies aim to influence them in order to strengthen their sense of personal responsibility. Through compulsory education or the display of a range of important and profound responses to that personal responsibility, e.g. policies promoting respect for diversity or for family, a state does not violate our personal responsibility. Indeed, the distinction between subordination and those other types of morally permissible influence requires difficult boundary judgments that may sometimes prove controversial. Even though we may disagree on the particulars, we have to try and draw them as well as we can. Dignity requires that even if we decide to conform to the lifestyles or expectations of others, we must do that out of conviction and not out of fear of sanctions. For instance, many religions include sacred texts and authorities that are responsible to report which actions are morally permissible. In a liberal democracy those who subject themselves to the ethical authority of religious sources do so voluntarily, so even if some of their life choices end up being limited, their authenticity is not compromised. On the contrary, a theocracy introducing an ethical regime that coercively subjects the fate of all citizens to religious authority flouts authenticity.\(^{95}\) The analysis will return to a more specific discussion of the distinction between influence and subordination in Chapters Six and Seven, which discuss religious symbols and blasphemous speech regulations respectively.

### 3.4. A Reason-Blocking Interpretation of the Right to Freedom of Religion in the Jurisprudence of the ECtHR

The following section will argue that a reason-blocking interpretation of the right to freedom of religion or belief, based on the more abstract principle of ethical responsibility, makes better moral sense of the relevant practice of the ECtHR compared to interest-based accounts of rights. The ECtHR often uses language that seems congenial to interest-based theories of rights. Indeed, in the examination of complaints under Article 9 ECHR, the Court often focuses on the various interests underlying the right and on the need to strike the right ‘balance’ between those and the rights of others or other important collective interests (i.e. public order or public health). However, an interest-based approach does not capture a significant number of cases where interests play limited or no role and no ‘balancing’ takes place, without any clear reasons for that. This is because, I will argue, the ECtHR excludes certain sorts of reason for official action and does not let those (excluded) reasons back in its ‘balancing’ analysis. The examination of the complaints pays attention to whether reasons that human rights are supposed to exclude, such as those that deploy the

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\(^{95}\) See e.g. *Refah Partisi (The Welfare Party) and Others v Turkey*, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 (Grand Chamber).
collective power of a community in order to affect the ethical choices and values of its members, are present in a particular political conflict between freedom of religion and other individual rights or collective interests.

3.4.1. Proselytism cases

The etymological origins of proselytism are not linked to religion. In Greek, the word proselytise derives from the prefix προς (toward) and the verb ἔρχομαι (come) and its meaning is ‘to attract others as new comers’, that is, to convert others to a different viewpoint, religious or not. It is the use of proselytism in the New Testament and other writings of the Early Christianity period, as well as the practice of the Christian missionaries of the 17th, 18th and 19th centuries, that dressed the word with predominantly religious connotations such as the attempt to convince others, often coercively, to adopt new religious beliefs and affiliations. The genealogy of that conception of proselytism cannot be further examined here, but it suffices to note that the prevalence of an interpretation of proselytism as coercion into abandoning one’s religious beliefs explains the survival of criminal bans on proselytism in several countries until today. Likewise, it explains the provisions of Greek legislation that gave rise to a series of interesting cases on prohibition of proselytism before the ECtHR. Proselytism cases are particularly interesting because the distinction between proper and improper forms of proselytism that the ECtHR has introduced hinges on the distinction between influence and subordination that we discussed earlier.

On 2 March 1986, Mr. and Mrs. Kokkinakis, a married couple of Jehovah’s Witnesses from Crete, called at the house of a woman to evangelise their religious beliefs. They were unlucky in that the woman who opened the door was the wife of an Orthodox Church cantor. She accused them for ‘improper’ proselytism, which was a criminal offense under Greek law, and the couple was arrested and convicted by the Greek courts. In due course they filed a complaint to the ECtHR claiming that their conviction violated their right to freedom of religious manifestation through teaching, secured under Article 9(1) ECHR. The ECtHR stressed the vitality of religious freedom, not only for the identities of believers and non-believers, but also for pluralism. Furthermore, since Article 9(1) stipulates that teaching is a way to manifest one’s religion, the ECtHR held that without the right to ‘convince one’s neighbor’ through teaching, the right to ‘change one’s religion’ would become a dead letter. With regards to the compatibility of

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99 ibid §31.

proselytism with freedom of religion, the majority distinguished between proper and improper proselytism. Proper proselytism amounts to ‘true evangelism’, which was defined as ‘a responsibility’ for every Christian, whereas improper proselytism includes ‘improper pressure on people in distress or in need’, violence and brainwashing. According to the ECtHR, improper proselytism is incompatible with the principle of respect for individual freedom of conscience. The failure of the Greek courts to specifically indicate the improper means that Mr. Kokkinakis used to proselytise led the majority to the conclusion that the limitation in question was not necessary in a democratic society and in violation of Article 9 ECHR.

The separate opinions of the case are particularly interesting because they furnish two completely different understandings of the interests grounding the right to freedom of religion. On the one hand, Judge Martens argued that states should abstain from entering the conflict between those whose faith urges them to evangelise and win as many adherents as possible, and those who wish to maintain their faith without disturbance. According to his concurring opinion, human dignity requires that individuals are the authors of their lives and pursue what they think best for themselves. States should not interfere with individual choices of conscience because intervention would possibly amount to selection and partiality, and would thus be illegitimate. Criminalisation of proselytism violates the Convention because the State effectively prefers the religion of the proselytised and defies its obligation to remain impartial in religious matters.

On the other hand, Judge Valticos argued that whereas individuals should be free to manifest their religion, ‘systematic attempts at conversion’ amount to ‘attacking’ the beliefs of others. In his dissenting opinion, he held that proselytism falls outside the ambit of the right to freedom of religious manifestation because, by definition, it implies a malevolent intention to use all means possible, even deception or brainwashing, in order to win adherents for one’s faith. On that account, proselytism is an intrusion, ‘a rape of the beliefs of others’ unworthy of ECHR protection.

The distinction between influence and subordination and its importance for the justification of limitations on the right to freedom of religion emerges more clearly in Larissis v Greece. The applicants were officers in the Greek Air Force and members of the Pentecostal Church. They applied to the ECtHR after having been convicted by the Greek courts for improper proselytism of their inferior airmen. The ECtHR held that the subordinate relationship between the proselytisers and the proselytised played an important role because ‘the hierarchical structures which are a feature of life in the armed forces…[make] it difficult for a subordinate to rebuff the approaches of an

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101 Kokkinakis, §48.
102 ibid.
103 In his dissenting opinion Judge Valticos was influenced from a definition of proselytism, which he borrowed from the Petit Robert dictionary. It provides that proselytism is “zeal in spreading the faith, and by extension in making converts, winning adherents.” ibid at 430. According to the Judge, it was no coincidence that the dictionary cited next to the term the following quotation from Paul Valery: “I consider it unworthy to want others to be of one’s opinion. Proselytism astonishes me.” Id.
104 ibid.
105 Larissis, §51.
individual of superior rank or to withdraw from a conversation initiated by him.’ The ECtHR focused on the hierarchical and claustrophobic military context of the case, which under certain circumstances could render even a simple exchange of ideas into harassment against low-rank servicemen. As a result religious conversations could give rise to forms of improper proselytism. In that context, the ECtHR held that states ‘may be justified to take measures to protect the rights and freedoms of subordinate members of the armed forces.’ However, ‘not every discussion on religion or other sensitive matters between individuals of unequal rank would fall into this category’. That matter had to be judged ad hoc.

Although the distinction between proper and improper forms of proselytism is not entirely clear, the fact that improper forms of proselytism violate the Convention regardless of the importance or the pervasiveness of the interests potentially supporting them, demonstrates that the ECtHR is alert to the need to channel the kinds of reasons that the government can act on in different domains. Neither Kokkinakis nor Larissis engaged in ‘balancing’ in order to conclude that limitations on the right to freedom of religion may be justified insofar as they do not interfere with the equal right to make choices and enjoy one’s conscience free from subordination. Ethical independence makes good moral sense of the main principle underlying the jurisprudence of the ECtHR on proselytism, namely that freedom from subordination to the religious preferences of others is an integral part of the right to freedom of religion. Coercive or violent forms of proselytism rob individuals from their abstract right to ethical independence and their restriction is therefore morally justified. Moreover if, as the ECtHR claims, the right to freedom of religion is indeed important to secure fair democracy and toleration, then restrictions on improper proselytism are not only compatible with, but also required by these values. That holds regardless of the religious preferences of the majority of the respondent state in question which, in the cases discussed, quite tellingly did not play any role for the ECtHR.

### 3.4.2. Cases on regulation of conduct outside employment

The distinction between influence and subordination also emerges in ECHR cases involving employers wishing to regulate out-of-work conduct. In Smith and Grady, the ECtHR held that a ban on gays and lesbians in the armed forces violates the Convention. According to the Court, the negative attitudes of heterosexual personnel were associated with ‘stereotypical expressions of hostility’ to homosexuals and represent a ‘predisposed bias on the part of a heterosexual majority against a homosexual minority’. Those negative attitudes could not therefore justify interference with the right of the applicants to respect for private life any more than ‘similar negative attitudes towards those of a different race, origin or colour.’

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106 ibid
107 ibid
109 ibid §97.
110 ibid
According to a reason-blocking account, the right to private life blocks exactly that sort of preferences. The ECtHR applied a similarly strict scrutiny of the employer’s interests in *Schüth v Germany*, where it found that the dismissal of a church organist for fathering an extra-marital child violated his right to respect for private life. According to the Court, having a right to respect for private life means that – despite the requirements of the Catholic Church’s Code of Canon Law – the applicant’s signature on the contract ‘cannot be interpreted as a personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce.’ Rather, the right to respect for private life requires the implementation of strong safeguards, including judicial scrutiny, in order to ensure that the interests of the Church do not generate duties exceeding the expected loyalty on behalf of the employees to the applicable religious principles and that the employer does not take advantage of its ‘predominant position’ in that sector of activity.

Furthermore, in *Pay v UK*, the ECtHR held that involvement with consensual sadomasochistic sexual practices might justify dismissal of an employee only when ‘public knowledge’ of those sexual activities could impair individual ability to carry out his job duties. In the case under examination the dismissed employee was a probation officer involved in the treatment of sex offenders. The nature of his work, along with his failure to curb ‘those aspects of his private life most likely to enter into the public domain’, led the Court to hold that his dismissal was compatible with the Convention. In *Redfearn v UK*, the ECtHR found a violation of the individual right to freedom of association in case of an applicant who was dismissed from his employment in Bradford City Council because of his membership of the British National Party. Again, the ECtHR held that the right to freedom of association entails that states have to take positive measures to protect employees from dismissal on grounds of political opinion, including on grounds of membership of associations ‘whose views offend, shock or disturb.’ That does not mean that employees may not be dismissed for reasons related to their political activities, but the offensiveness of those political activities cannot justify dismissal by itself.

Nevertheless, the ECtHR found no violation of the right to private life in *Fernandez Martinez v Spain*, a case about a married priest who was dismissed from his job as a teacher of Catholic religion and ethics in a public secondary school because of publicly advocating celibacy. In a nine to eight split decision, the Grand Chamber dismissed the complaint but held that ‘a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any

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111 Application no. 1620/03, 23 September 2010.
112 ibid §71.
113 ibid §73.
114 Application no. 32792/05, 16 September 2008 (inadmissible).
115 ibid.
116 Application no. 47335/06, 6 November 2012.
117 ibid §§55-57.
118 See e.g. *Ahmed and Others v United Kingdom*, 2 September 1998, §63.
120 Application no. 56030/07, 12 June 2014.
interference with its members’ rights to respect for their private or family life.’

Rather, the national secular authorities must thoroughly investigate the reasons behind the interference in question, even if, as the dissenting opinion stressed, the dismissal decision is itself religious in nature. It is important that in all the above-discussed cases on dismissal because of out-of-work conduct the ECtHR consistently maintains that the role of human rights is to protect individuals from subordination to the moral, political, or religious preferences of the employers in question, and has strictly scrutinised those preferences to exclude from the balancing test those that are based on personal, rather than impersonal, moral grounds.

Cases on out-of-work conduct seem to involve distinct issues from cases, such as Eweida v UK, where the applicants, based on their right to freedom of religion among others, ask for specific exemptions from general rules that would enable them to behave in particular ways while on the job. But the moral question is similar, with the exception that it is more probable that the interests of the employers in regulating on-the-job behaviour stretch beyond personal morality in comparison with cases on out-of-work conduct. In fact, European legislation separating one’s working life from one’s non-work life is an important guarantor of autonomy for employees. Of course, the difficulty to fence our political or religious identities off the workplace often results in claims of accommodation, which may be more common on behalf of those belonging to minority groups that have had less impact on particular national cultures. Again, the distinction between subordination and other types of morally permissible influence requires difficult boundary judgments. But the principles so far discussed provide a good explanation of the practice of the ECtHR, which places great weight on some interests of the employers, such as the proper delivery of one’s job duties in Pay, and no weight on others, such as the offensiveness of far-right political positions in Redfearn or the stereotypical fears about recruiting homosexual personnel in the army in Smith and Grady, despite the fact that those interests might be religious in nature (as in Schüth). The advantages of this interpretation become especially clear when compared to an interest-based approach that leads to ‘balancing’ between the right to respect for private life of the employees in question and the right to freedom of religion or belief of the employers.
3.4.3. Group registration cases

Finally, a reason-blocking theory of freedom of religion or belief can morally explain the approach of the ECtHR in cases of state interference with the legal registration rights of religious groups.\(^\text{125}\) It is important that in those cases, the ECtHR integrates a moral principle of fair distribution of burdens and benefits into its interpretation of the right to freedom of religion. But before starting our discussion of those cases, I have to add an important clarification. I shall assume without argument that if some religious groups are to be treated differently from others, this cannot be in virtue of their doctrinal content. If any difference in the treatment of atheists, Christians, Jews, Muslims and so on can be justified, this will have to arise only from some feature of their practice or mode of organisation that puts them into a different relationship with the egalitarian principles laid down so far.

According to Article 9 ECHR, freedom of religion includes both an individual and a collective dimension,\(^\text{126}\) which the ECtHR systematically links with the right to freedom of association.\(^\text{127}\) The main underlying principle in group registration cases is that religious entities ought to be protected in their right to associate freely without undue interference from the state.\(^\text{128}\) According to the ECtHR, free association is indispensable for pluralism in a democratic society. States are bound by a duty of neutrality, understood as impartiality, which is incompatible with any attempts to assess the legitimacy of religious beliefs. Moreover, autonomy of religious communities is especially important as an aspect of the right to freedom of association. That is because the right to form a legal entity in order to act collectively in a field of mutual interest is central to the right to freedom of association. Thus, a refusal by the domestic authorities to grant legal status to a religious group amounts to interference with the individual right to freedom of association. Given that freedom of religion encompasses an important collective aspect, state refusal to recognise a religious group constitutes interference with the right of freedom of religion as well.

In *Hasan and Chaush v Bulgaria*, the Grand Chamber found unanimously that participation in the life of religious communities is a form of religious manifestation


fully protected by the Convention. Furthermore, religious communities ‘traditionally and universally’ exist in the form of organised structures; therefore, their personality and legal rights are very important to their followers. Hasan and Chaush arose after the emergence of democracy in Bulgaria, when some Muslim believers and activists sought to replace the established leadership of their religion in the country because they believed that it had collaborated with the communist regime. In response to those allegations, the new Bulgarian government, through the Directorate of Religious Denominations, discharged the elected leadership of the Muslim community and registered a new religious leader in his place.

The ECtHR held that the intervention to the internal structures of the religious group violated the right to freedom of religious manifestation. According to the Grand Chamber, where the organisation of religious communities is at issue, Article 9 should be interpreted in light of Article 11 ECHR, which protects freedom of assembly and safeguards associative life from unjustifiable State interference. That reading of freedom of religion entails that the right encompasses the expectation that religious communities will be allowed to function peacefully, free from arbitrary State intervention. Autonomous existence of religious communities is ‘indispensable for pluralism in a democratic society’ and is thus an issue at the epicentre of the protection of religious freedom.

Thus, strong protection of freedom of religion depends on autonomy of religious groups, which is closely linked to the effective enjoyment of the right to religious manifestation enjoyed by their followers. State neutrality in the exercise of their powers vis-à-vis religious groups entails that, but for very exceptional cases, states have no discretion to determine whether religious beliefs or the means used to manifest them are legitimate.

In two later cases sharing similar factual background, a unanimous Chamber of the ECtHR offered further insights on the specific implications of the duty of state neutrality in religious group leadership cases. In Supreme Holy Council of the Muslim Community v Bulgaria and in Holy Synod of the Bulgarian Orthodox Church v Bulgaria, the ECtHR found that compelling a divided religious community to have a single leadership against the will of one of the two rival leaderships constituted a violation of its followers’ freedom of religion. Although ‘neutral mediation’ between groups of believers would not in principle amount to state interference with the right to religious manifestation, the authorities should be particularly cautious in this sensitive area. For instance, they should not take measures to bring all religious groups under

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130 ibid §62.
131 ibid
132 Hasan and Chaush v Bulgaria, §78.
134 Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria, Application nos. 412/03 and 35677/04, 22 January 2009.
135 Supreme Holy Council v Bulgaria, §80.
a unified leadership, even when tensions between groups could lead to tensions between believers.\textsuperscript{136} For what is at stake is the preservation of pluralism and the right function of democracy, one of the principal characteristics of which is the possibility it offers for resolving problems through dialogue, without recourse to violence, even when they are irksome.\textsuperscript{137} Accordingly, the role of the authorities in a situation of conflict between or within religious groups is not to remove the ‘cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.'\textsuperscript{138}

The ECtHR has elaborated on the value of autonomy of religious groups in another group of cases on the right of minority religious groups to legal recognition. Notwithstanding the factual diversity, most of these cases have arisen from complaints about state failure to extend legal recognition on equal terms. In \textit{Metropolitan Church of Bessarabia v Moldova}, the applicants claimed that the refusal of the Moldovan authorities to register the Metropolitan Church of Bessarabia infringed their right to freedom of religion, since only recognised religions could be practiced legally.\textsuperscript{139} At a later time similar complaints against Moldova reached the ECtHR in \textit{Biserica Adevărat Ortodoxă Din Moldova (True Orthodox Church) v Moldova}.\textsuperscript{140} In both cases, although the Court acknowledged the existence of certain historical particularities that guided the state’s negative decisions, it upheld the applicants’ claim that Moldovan authorities have unjustifiably interfered with their collective right to religious freedom given that Article 9 must be interpreted in light of Article 11.\textsuperscript{141} According to the Court, securing autonomy of religious groups is key to protect the right to freedom of religion. Despite the distinctive socio-historical context of these cases, state authorities remain bound by a duty of impartiality and they should ensure that the competing groups tolerate each other without eliminating pluralism.\textsuperscript{142} It is important to note that both cases against Moldova involve minority religious groups which for historical reasons are in tension with majority groups. But no matter how wounding local history has been, majoritarian interests in denying legal registration to certain groups cannot ground legitimate

\textsuperscript{136} Serif v Greece, Application no. 38178/97, 14 December 1999, §52.

\textsuperscript{137} That principle has been developed in freedom of association cases, with particular reference to the importance of the autonomy of political parties in ensuring a proper functioning democracy. Only convincing and compelling reasons can justify restrictions on such parties’ freedom of association. See e.g. \textit{United Communist Part of Turkey and Others v Turkey}, Application no. 133/1996/752/951, 30 January 1998 (Grand Chamber), §§42-43; \textit{Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania}, Application no. 46626/99, 3 February 2005, §27; \textit{Tsonev v Bulgaria}, Application no 45963/99, 13 April 2006, §48; \textit{Christian Democratic People’s Party v Moldova (No. 2)}, Application no. 25196/04, 2 February 2010, §24. Such compelling reasons have included safeguarding constitutional democracy and protecting the electoral system of a country. See e.g. \textit{Refah Partisi (The Welfare Party) and Others v Turkey}, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 (Grand Chamber), §100; \textit{Gorzelić and Others v Poland}, Application no. 44158/98 17 February 2004 (Grand Chamber), §§88-106.

\textsuperscript{138} ibid, §53. Also Serif, §49 and §§52-53; Hasan and Chaush, §78; \textit{Supreme Holy Council v Bulgaria}, §96.

\textsuperscript{139} Metropolitan Church of Bessarabia and Others v Moldova, Application no. 45701/99, 13 December 2001. Also J. Montgomery, ‘Life can be difficult of you are Bessarabian Orthodox’ (2003) 151 Law & Justice 137.

\textsuperscript{140} Biserica Adevărat Ortodoxă Din Moldova (True Orthodox Church) and Others v Moldova, Application no. 952/03, 27 February 2007.

\textsuperscript{141} ibid §34.

\textsuperscript{142} Metropolitan Church of Bessarabia, §116.
reasons for limitations on human rights. It is indicative that those interests have not played any role in the justification of the limitations in question by the ECtHR.

Moreover, in *97 Members of the Gldani Congregation of Jehovah’s Witnesses v Georgia*, the ECtHR extended the (negative) state duty to refrain from interventions in the internal affairs of groups and associations by holding that state authorities may also have to undertake positive measures to ensure respect for religious freedom. In the complaint under examination, 97 members of a Jehovah’s Witnesses group were subjected to serious physical assaults, including beatings with crosses, belts and sticks, and having their religious literature confiscated and burned, by a group of Orthodox extremists. The applicants claimed that police officers were aware of the attack but failed to intervene whilst it was taking place. It took several years for criminal proceedings to be brought against the assailants, notwithstanding that their identities were allegedly known. The ECtHR held that the Georgian authorities failed to take the necessary measures to respect the right to freedom of religion of the members of the attacked minority group. However, the Court clarified that those positive duties to safeguard religious harmony cannot be extended ‘to diminish the role of a faith or a church with which the population of a specific country had historically and culturally been associated.’ It means that the state, in its relations with religions, must not draw distinctions and treat differentially for the wrong reasons.

Furthermore, in a series of unanimous judgments the ECtHR has established that the duty of neutrality requires that if a state sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner. In *Moscow Branch of the Salvation Army* and in *Church of Scientology Moscow*, the Russian authorities refused to register the applicant religious groups, in the first case because national courts classified the Salvation Army as a paramilitary group, and in the second because the group failed to submit the complete set of documents required for registration. Similarly, in *Jehovah’s Witnesses of Moscow v Russia*, the state authorities refused to register the applicant religious community to prevent it from breaching the rights of others, harming its members, damaging their health and jeopardising the well-being of children. The ECtHR found a violation of Article 9 in respect of the members of the religious groups in all three cases. The ECtHR stressed that the state’s power to protect its institutions and citizens from dangerous associations must be used sparingly, as ‘exceptions to the rule of freedom of association are to be construed strictly and only

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143 *97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v Georgia*, Application no. 71156/01, 3 May 2007.
145 *96 Members of the Gldani Congregation*, §134.
146 Ibid §132. Also *Refah Partisi v Turkey*, §91.
147 *Moscow Branch of the Salvation Army v Russia*, Application no. 72881/01, 5 October 2006.
148 *Church of Scientology Moscow v Russia*, Application no. 18147/02, 5 April 2007.
149 *Jehovah’s Witnesses of Moscow and Others v Russia*, Application no. 302/02, 10 June 2010.
convincing and compelling reasons can justify restrictions on that freedom.' Any interference must correspond to a ‘pressing social need’ and the notion of necessity does not have the flexibility of expressions such as ‘useful’ or ‘desirable.’

Furthermore, in *Religionsgemeinschaft der Zeugen Jehovas v Austria*, the ECtHR held that an unreasonably long waiting time for legal registration of a religious community is unjustifiable in cases of groups with long-standing international presence which are also established in the country in question. In the instant case, the Austrian authorities conferred legal recognition on Jehovah’s Witnesses 20 years after the original application of the group. Because of that excessive delay the state authorities were found in violation of prohibition of religious discrimination, secured under Article 14 read in conjunction with Article 9 ECHR, because the members of the group had been treated disadvantages in comparison with other religious communities.

Evans argues that the jurisprudence of the ECtHR on cases of religious registration is consistent because those cases are less challenging compared to cases touching on public morals, since they only involve minorities seeking equal treatment to traditional religious groups. But I think that an interpretation of the right to freedom of religion based on ethical responsibility makes better moral sense of the practice of the ECtHR. The principle that the government should not distribute the benefits of legal recognition unequally just because the majority considers certain people less worthy of concern due to their membership in a religious group is a profound dimension of the more general right to equal respect for our personal ethical responsibility. As this chapter discussed, the right blocks certain reasons as grounds for coercive official action; majoritarian preferences that some people should enjoy less because of their religious affiliation are the quintessence of that type of impermissible reasons. That interpretation explains why in registration rights cases the ECtHR does not engage in any meaningful balancing of interests: the Court refrains from balancing not because of some kind of normative confusion, but precisely because letting those impermissible interests into the balancing test would be inappropriate.

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150 *Salvation Army v Russia*, §62. Also *Church of Scientology v Russia*, §75; *Jehovah’s Witnesses v Russia*, §§170-175.

151 *ibid*


3.5. Conclusion

This chapter elaborated on the relationship between the right to freedom of religion and the value of equality by defending a particular conception of this value, which I described as equal respect for our personal responsibility to make ethical choices authentically, and by describing how this value justifies the socio-historical importance as well as the legal practice surrounding the right. The chapter also developed a reason-blocking theory of the right to freedom of religion, as a more compatible with and a more convincing account of our equal entitlement to ethical responsibility. Moreover, I distinguished that account from interest-based theories of the right to freedom of religion and argued that a reason-blocking interpretation is more suitable to explain important parts of the jurisprudence of the ECtHR, such as cases where the Court blocks impermissible reasons for limitations on our rights without, or instead of, ‘balancing’ between conflicting interests.

The normative account of the right to freedom of religion that this and the previous chapter have been discussing places significant emphasis on equality of respect, which it infuses into the core of the right. Given the significance of equality of respect, it is important to enrich our normative theory of the scope of the right to freedom of religion (and its relationship with other rights) with an account of the relationship between freedom of religion and freedom from religious discrimination. The next chapter (Chapter Four) will focus on the jurisprudence of the ECtHR and will discuss certain important doctrinal reasons why we have to carefully examine the normative connections between the two rights. After that, Chapter Five will explore those normative connections in further detail, and will argue that the notion of equal respect that the present chapter has been discussing has specific implications for the relationship between freedom of religion and freedom from religious discrimination.
4

Freedom from Religious Discrimination in the European Convention on Human Rights

Where a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case […] In the circumstances of the present case the Court considers that the inequality of treatment, of which the applicant claimed to be a victim, has been sufficiently taken into account in the above assessment that led to the finding of a violation of a substantive Convention provision.

*Jakóbski v Poland*¹

Once we stop giving preference to a State religion, and accord equal respect and protection to all religions and beliefs, all sorts of difficult questions begin to arise.

Lady Hale²

4.1. Introduction

What is the relationship between freedom of religion and freedom from religious discrimination? The previous chapters defended a reason-blocking account of the right to freedom of religion that interprets it in light of equal respect for our ethical responsibility. Does that interpretation have any implications for the relationship between freedom of religion and freedom from religious discrimination? Recall the contradictions encountered in Chapter Two. It is often argued that general rules that burden the exercise of religion not only violate the right to freedom of religion, but also wrongfully discriminate against

¹ *Jakóbski v Poland*, Application no. 18429/06, 7 December 2010.
members of certain groups through subjecting them to disadvantageous treatment on grounds of their religion. States may not burden the exercise of religion, but at the same time they must not discriminate in favour of any religion. Those are important issues (doctrinally and normatively) that a theory of interpretation for the right to religious freedom must examine, not least because equality and discrimination are closely connected. As Bielefeldt has noted, ‘in practical terms’ equality means non-discrimination,3 whereas according to Guest conceptions of discrimination ‘as used in political, particularly liberal, contexts mirror conceptions of equality.’ 4 There is an additional, more practical point. This enquiry can cast light upon the main question that national authorities have to answer in cases involving religious discrimination, namely under which circumstances general rules or practices inflict indirect (or, under other views, direct) discrimination whenever people suffer disadvantageous treatment on grounds of their religion.

This and the next chapter focus on the relationship between freedom of religion and freedom from religious discrimination. They take different perspectives though. This chapter focuses on doctrinal questions, organises the relevant typologies, and highlights just some important issues relating to direct and indirect discrimination. It also tracks the implementation of the provisions protecting from religious discrimination through a parallel examination of Articles 9 and 14 (read in conjunction with Article 9) of the Convention. Through the analysis I will argue that the ECtHR, in its relevant jurisprudence, makes no principled distinction in the application of the two relevant provisions to the extent that the relationship between freedom of religion and freedom from religious discrimination ends up being doctrinally confusing. In order to untangle that doctrinal confusion I will argue that a normative enquiry into the moral wrong of religious discrimination is essential. This normative discussion will take place in Chapter Five.

4.2. General Features of Discrimination

4.2.1. Legal protection

The doctrinal bases of prohibition of religious discrimination lie in Article 14 and in Protocol 12 of the Convention. This chapter will focus on Article 14, not least because the moment I am writing these lines there is only one complaint of religious discrimination under Protocol 12,5 which came into force in 2005 and binds only the 18 (out of 47) member states of the Council of Europe (which have ratified it). Article 14 provides that

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

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5 Savez Crkava “Riječ Života” and Others v. Croatia, Application no. 7798/08, 9 December 2010. The moment I am writing these lines only four cases have been decided by the ECtHR under Protocol 12 ECHR.
of the right to freedom of religion that covers ‘freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.’ I will accept without further argument that this wide interpretation of the right to freedom of religion informs the content of the right to freedom from religious discrimination as well.

In European discrimination law it is typically argued that Article 14 ECHR has no independent existence because it may be invoked only in conjunction with other substantive provisions of the Convention or of its Protocols. Thus, its role is to supplement other substantive provisions by fixing the requirement that they should be implemented without discrimination. Nevertheless, its application is autonomous in the sense that it does not presuppose breach of any other right of the Convention. A violation of the article may be found even if, considered independently from that clause, the substantive right involved is not violated. The only requirement is that the complaint about discrimination falls ‘within the ambit’ of one or more other rights secured under the Convention. Hence, unless an alleged discrimination occurs in the enjoyment or exercise of a right protected under the Convention, Article 14 will be inapplicable.

That feature of Article 14 has raised concerns about a significant number of discrimination cases such as, for instance, those relating to access to employment, which could be considered to fall outside the scope of Article 14 because the Convention does not secure a right to work. Nevertheless, the ECtHR has proved quite generous in its interpretation of the ambit of rights, allowing Article 14 to ‘bite’ even in cases of social and economic rights that are not included in the Convention. Regarding employment discrimination for instance, as Sidabras and Džiautas v Lithuania has established, when extreme measures prohibiting specific individuals from accessing employment are imposed, the Court may find an interference with the right to respect for private life.

16 Vallianatos v Greece, Application nos. 29381/09 and 32684/09, 7 November 2013 (Grand Chamber) §72.
17 See e.g. Abdulaziz, Cabales and Balkandali v United Kingdom, Application nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, §71. Also Haas v the Netherlands, Application no. 36983/97, 13 January 2004, §41.
18 Unless we embrace a broader interpretation of the ‘within the ambit’ criterion in order to include not only opportunities but also the grounds on which a decision to deny an opportunity is made; that strategy would include every case where, for instance, a job opportunity is refused on grounds of someone’s religion regardless of the fact that the Convention does not include a right to work. See Wintemute, ‘Within the ambit’, 371.
22 Sidabras and Džiautas, Application nos. 55480/00 and 59330/00, 27 July 2004, §48.
The present analysis will focus on *wrongful* discrimination understood as involving disadvantageous treatment (rather than mere difference in treatment) on grounds of some particular and protected characteristic that someone bears, or is believed to bear. That definition of discrimination is broad, but focusing on disadvantage is an important first step to delimit it. The problem with an interpretation of discrimination focusing on difference in treatment may be elucidated with a famous example. In *Brown v Board of Education*, a landmark United States Supreme Court case establishing that separate schools for black and white students violate the equality and due process clauses of the United States constitution, the problem was not that black students have been treated differently from white students. Differential treatment is ‘symmetrical’ in the sense that if blacks have been treated differently from whites, then whites must also have been treated differently from blacks. But if the basis of the wrong of discrimination were mere difference, then *both* blacks and whites would have been victims of discrimination, which is of course implausible because it suggests that the policies in question discriminated against everyone. That conclusion would also contradict the track record of racial segregation in the American south at the time of the judgment. The distinction between difference, disadvantage, and harm requires further refinement, which has to be postponed until the next chapter. For our present purposes though it suffices to note that disadvantageous treatment is not tantamount to harmful treatment.

### 4.2.2. Direct discrimination

Although the same terms about discrimination may dress up with different meanings and practices in different legal systems, it may be argued that in European human rights law a complaint about discrimination should normally fall under either of two broad categories. The first is *direct discrimination*. Direct discrimination occurs when the members of a socially salient group, understood as a group that is important to the ‘structure of social interactions’ of its members across a wide range of social contexts, are treated disadvantageously based on one or more protected characteristics (such as gender, race, ethnic origin, religion, sexual orientation and disability, among others) without an objective and reasonable justification. In the ECtHR’s terminology there must be a ‘difference in the treatment of persons in analogous, or relevantly similar situations’ that is based ‘on an identifiable characteristic’. Common to all forms of discrimination is that the objective and reasonable justification criterion usually translates in two different

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24 The ECtHR often uses differential treatment in its definition of discrimination. Nonetheless, as the next chapter will discuss, differential treatment means nothing more than disadvantageous treatment of individuals or groups sharing protected characteristics such as religion, sexual orientation, or race.  
28 Apart from direct discrimination, a complaint about discrimination could be about indirect discrimination, which we will examine in the following section.  
29 *Carson and Others v United Kingdom*, Application no. 42184/05, 16 March 2010, §61; *D.H. and Others v the Czech Republic*, Application no. 57325/00, 13 November 2007, §175; *Burden v United Kingdom*, Application no. 13378/05, 29 April 2008, §60.
scenarios: *either* the difference in treatment does not pursue a legitimate aim, such as, for example, protection of public safety or protection of the rights of others, or the difference in treatment is disproportionate to the legitimate aim sought (and hence, according to the ECtHR’s usual terms, the measure is not necessary in a democratic society). The examination of discrimination complaints requires therefore a two-tiered analysis, focusing first on the aim pursued, and second on the relationship between the impugned difference in treatment (or the lack thereof) and the realisation of that aim.\(^\text{30}\)

Direct discrimination is often identifiable by its explicitness and intention,\(^\text{31}\) but it is usually its across-the-board exclusionary effects that clearly distinguish it from indirect forms of discrimination. More precisely, direct discrimination usually entails that a rule or practice expressly or implicitly refers to one group and *everyone* who is excluded by that specific rule belongs to that group, whereas *no one* of those excluded by that specific rule belongs to another group (e.g. a rule reading ‘Women need not apply’ that excludes *all* women and *no* men is directly discriminatory).\(^\text{32}\) An example of direct discrimination arises in *Luczak v Poland*.\(^\text{33}\) A French farmer who lives and farms in Poland has been refused access into a social security regime for farmers because he was not Polish. The ECtHR held that the applicant was in a comparable situation to Polish farmers as he was a permanent resident in Poland and a taxpayer whose contribution actually supported the social security regime that he was not entitled to access. According to the Court, given the circumstances of the case, the applicant has been subjected to direct discrimination based on his ethnic origin.\(^\text{34}\) The rule was directly discriminatory as it excluded in effect *everyone* not Polish.\(^\text{35}\)

Another typical instance of direct discrimination took place in 2002 in a Romanian bar. The bartender refused to serve a number of Roma customers pointing a sign reading ‘We do not serve Roma.’\(^\text{36}\) The domestic courts found that the complainants suffered direct discrimination as the bar’s policy explicitly and intentionally had picked Roma for less favourable treatment.\(^\text{37}\) Similarly, in the *European Roma Rights Centre* case, the UK House of Lords held that the fact that the UK immigration officers at Prague airport treated Roma with such caution that their visa applications were 400 times more likely to be rejected compared to non-Roma people constituted discrimination.\(^\text{38}\) According to Lady Hale, instead of succumbing to the danger of stereotyping and assuming that all Roma people present false information in their applications, prohibition of discrimination requires that ‘each person is treated as an individual and not assumed to be like other


\(^{31}\) Altman, ‘Discrimination’.


\(^{33}\) *Luczak v Poland*, Application no. 77782/01, 27 November 2007.

\(^{34}\) ibid


\(^{37}\) ibid

\(^{38}\) *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1.
members of the group.'\textsuperscript{39} By the same token, Fredman rightly notes that central to the legal prohibition of direct discrimination is a ‘recognition’ dimension, that is to address ‘stigma, stereotyping, and humiliation because of a protected characteristic.’\textsuperscript{40}

Focusing on the across-the-board exclusionary effects of directly discriminatory policies is helpful in cases where direct discrimination is implicit, rather than explicit.\textsuperscript{41} For instance, as Altman notes about the pre-	extit{Brown} segregation period in the American south, states used to implement literacy tests in order to exclude African-Americans from the franchise and ‘because African-Americans were denied adequate educational opportunities and… the tests were applied in a racially-biased manner, virtually all of the persons disqualified by the tests were African-Americans, and, in any given jurisdiction, the vast majority of African-American adults seeking to vote were disqualified.’\textsuperscript{42} Arguably the literacy tests that culminated in the exclusion of all African-Americans constituted direct racial discrimination, despite the fact that they made no explicit reference to race.

Even when direct discrimination is implicit, it has been argued that it is always intentional in the sense that the reason why certain rules are formulated in specific ways is to achieve the exclusion of specific groups of people such as, in our previous example, African-Americans.\textsuperscript{43} However, that argument is disputable given that ‘unconscious’ stereotyping and inadvertent discrimination underlie significant areas of our social practices without people actually ‘intending’ to exclude others.\textsuperscript{44} Due to space constraints this analysis will not engage in the lively debate about conscious and unconscious discrimination. It is noteworthy though that, as Wax has argued, the intentional-unintentional distinction is quite distinct from the conscious-unconscious distinction.\textsuperscript{45} Intentions may well be unconscious when, for instance, someone engages in direct discrimination without being aware that he treats other people less favourably based on their group membership. Whether or not someone wrongfully disadvantages others on the basis of characteristics bearing significant demeaning potential (such as race, gender or sexual orientation) is independent of his intentions. Rather, someone may wrongfully

\textsuperscript{39} ibid §82.
\textsuperscript{40} Fredman, \textit{Discrimination Law}, 176. Fredman notes that the ‘symmetrical’ character of direct discrimination makes it difficult to advance the re-distributive, participative, and transformational dimensions of equality. See Fredman, \textit{Discrimination Law}, 177.
\textsuperscript{41} Of course that does not mean that focusing solely on tackling discrimination is sufficient to tackle exclusion. See Schiek, Waddington and Bell, \textit{Non-Discrimination Law}, 147. The present analysis takes that point, but insists that tackling discrimination is a necessary (albeit not sufficient) step to combat social exclusion of certain groups, including religious minorities.
\textsuperscript{42} Altman, ‘Discrimination’.
\textsuperscript{43} ibid
discriminate without intending to do so, whereas he may also fail to refrain from discrimination despite his intentions. I shall therefore accept that intentional direct discrimination can be unconscious and leave a more detailed discussion of the issue aside for now.

4.2.3. Indirect discrimination

Second, an individual or group may suffer indirect discrimination. As Barnard and Hepple note, ‘in direct discrimination, similar situations are treated differently; in indirect discrimination different situations are treated in the same way but with a significant disparate impact on the protected group.’ Under a common definition used by the ECtHR, indirect racial or sex discrimination occurs ‘when someone applies unjustifiable standards which people of one sex or race find it harder to comply with than people of another, to the detriment of someone who is a member of the former sex or race.’ According to Altman, indirect discrimination is different to direct discrimination in that the purpose of the discriminators is not to disadvantage persons for being members of a certain social group. Rather, indirect discrimination involves acts or policies that have the effect of disproportionately disadvantaging the members of a particular group. Defining indirect discrimination on the basis of its disproportionately adverse effects on the members of a group and not on the aim of the policy in question is congenial to the case law of the ECtHR. For instance, in Shanaghan v United Kingdom, a case about lack of adequate investigation after an alleged unlawful killing by state agents, the Court held that ‘where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group’. Nevertheless, how can we distinguish a policy that has disproportionately adverse effects on the members of a group and is indirectly discriminatory from a policy that is not? There is probably no certain answer to that question. Analogously to its case law on direct discrimination, the ECtHR has held that a policy with disproportionate adverse effects may constitute indirect discrimination if it does not pursue a legitimate aim or if there is no reasonable relation of proportionality between the means employed and the (legitimate) aim sought. By the same token, the UN Human Rights Committee (‘HRC’)

46 D. Hellman, When is Discrimination Wrong? (Harvard University Press, 2008) 166. Hellman also argues that differentiating between people on the basis of a protected trait (such as race, religion, sex and so on) for benign reasons does not necessarily entail that the action is morally permissible. By the same token, if the differentiation under the circumstances is permissible, bad intent, understood as intention to demean or to harm, will not change the action’s ‘moral valence’. See ibid 167. We will explore in further detail which kinds of differentiation based on a protected trait, and more specifically on religion, may be permissible in the next chapter. 47 C. Barnard and B. Hepple, ‘Substantive equality’ (2000) 59 Cambridge Law Journal 562, 570. 48 J. Gardner, ‘Discrimination as Injustice’, (1996) 14(3) OJLS 353-368, at 355. 49 Altman, ‘Discrimination’. 50 Shanaghan v United Kingdom, Application no. 37715/97, 4 May 2001. 51 ibid §129. 52 Abdulaziz, Cabales and Balkandali v United Kingdom, Application nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, §721.
has held that a violation of prohibition of discrimination can result from the effects of a rule that is facially neutral or does not intend to discriminate. According to the HRC, ‘such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.’ All those approaches to indirect discrimination have a common characteristic, which is the unjustifiable ‘disproportionate disadvantage’ imposed on members of certain socially salient groups.

The role and necessity of the ‘disproportionateness condition’ in indirect discrimination, given that ‘disproportionateness’ is not necessary to establish direct discrimination, have both been debated. Moreover, the type of policies that may ground wrongful indirect discrimination remains contestable too. For instance, De Schutter has argued that indirect discrimination comes in three different forms. First, there are cases where facially neutral regulations of practices prove particularly burdensome to the members of a certain group without any objective and reasonable justification for that. Second, ‘disparate impact’ discrimination includes cases where a general measure affects a disproportionately high number of members of a particular category without (again) objective and reasonable justification. Third, indirect discrimination may involve cases about measures or practices that fail to treat differently specific individuals or groups through, most usually, exceptions to their general application. Failure to provide accommodation as a form of discrimination is linked to Canadian law; and a number of American and European scholars have likewise argued that there is no significant difference between failure to provide accommodation and (indirect) discrimination. It is that third sub-category of indirect discrimination (i.e. failure to accommodate) that people with special claims due to their religion or beliefs often put forward in their applications to the ECtHR. Indirect discrimination as failure to accommodate is therefore not grounded on general measures as such, which may still be perfectly justified, but on the failure to show special consideration for the specific situations of those to whom the general measure is applied.

53 Article 26, International Covenant on Civil and Political Rights.
55 Altman, ‘Discrimination’.
56 Lippert-Rasmussen, Born Free and Equal?, 65.
Part of discrimination theory has also argued that indirect discrimination confuses the wrongfulness of discrimination with its effects on certain social groups. The wrongfulness (that is how the critique goes) does not lie in the effects but in the unfairness or injustice that generates them. More specifically, focusing on the effects of unlawful discrimination can blur the picture as those effects could be brought about by other causes as well.\(^{59}\) Whether direct and indirect discrimination are just the two sides of the same coin or ‘two subcategories of one and the same concept’\(^{60}\) is a valuable question that deserves separate examination; it will partly be revisited in the next chapter. Note that this part of the chapter highlights just some issues that will prove useful in the course of the analysis.

### 4.2.4. Structural discrimination

It is often argued that some of the most egregious and pervasive forms of discrimination are structural. Structural discrimination cuts across the distinction between direct and indirect discrimination, in the sense that there can be both direct and indirect structural discrimination. Generally, structural discrimination occurs when social structures governing major sectors of life, such as family, property, political power, civic responsibility and so on, embed and perpetuate disadvantage against members of certain socially salient groups.\(^{61}\) As Altman notes, although such rules are often directly discriminatory, as the intentional product of collective or individual agents, ‘the idea of structural discrimination is an effort to capture a wrong distinct from direct discrimination.’\(^{62}\) That is, the effect of systematically subordinating certain minority groups through rules that produce – or, more often, reproduce – unjust and disproportionately disadvantageous outcomes for the members of certain salient social groups, such as women, homosexuals, or religious minorities. From an empirical perspective, the roots of structural discrimination usually lie in the systematic perpetration of direct discrimination against certain groups in the past, which has left its historical stamp in the form of rules or practices that perpetuate, consciously or unconsciously for the current perpetrators,\(^{63}\) exclusion and disadvantage against the same groups.\(^{64}\) Thus, although direct discrimination is always part of the story, conceptually most of the times structural discrimination is indirect. In Europe, as Timmer has argued, since legally mandated overt discrimination has largely disappeared, ‘exposing and contesting the patterns that lead to structural discrimination’ is particularly important.\(^{65}\) It requires a

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60 Altman, ‘Discrimination’.
62 Altman, ‘Discrimination’.
63 Recall the distinction we drew from the outset in our discussion between conscious/unconscious discrimination and intentional/unintentional.
64 Of course that description should not preclude that certain agents might still be engaged in direct discrimination against those groups.
critical ‘anti-stereotyping’ approach from the ECtHR that will treat state justifications for disadvantageous treatment based on culture or tradition as suspect.\(^{56}\)

It is unclear however why justifications specifically from culture or tradition should be treated as suspect. Is structural discrimination always related to culture or tradition? The intuition behind the anti-stereotyping approach seems congenial to what I have argued thus far. As we discussed in Chapter Three, the political function of our rights is reason-blocking in the sense that rights exclude certain reasons, such as the moralistic preferences of the majority about which life is best. However, that happens regardless of whether those moralistic preferences are dressed up as traditions or culture or something else. Moreover, the fact that certain rules produce disproportionately disadvantageous effects for the members of certain socially salient groups, such as women or religious minorities, does not necessarily mean that structural discrimination is at play. Rather, that pattern should also be unjust in itself, viz. it has to violate ‘sound principles of distributive justice’, which poses substantive moral questions distinct from the disproportionate outcome condition.\(^{67}\) Perhaps now it starts to become clearer why we need a moral account of discrimination in order to further illustrate its connection with equality and the right to freedom of religion but, before that, we have to return to our doctrinal investigation of the practice of the ECtHR in complaints about discrimination.

### 4.2.5. Legal effects of the distinction between direct and indirect discrimination

The legal effects of the distinction between direct and indirect discrimination are crucial for certain legal orders, such as the United Kingdom, where domestic equality legislation prescribes that direct discrimination is always unjustifiable,\(^{68}\) whereas indirect discrimination may be justified provided that through treating others disadvantageously an agent pursues a legitimate aim and that the disadvantage in question is proportionate to the aim sought.\(^{69}\) By contrast, it might be argued that the legal effects of the distinction are less critical in the context of the ECHR because both direct and indirect discrimination may be justified under Article 14 of the Convention, provided that there is an objective and reasonable justification.

Even so, it is arguably harder to justify a directly discriminatory policy (e.g. ‘no women applicants’) compared to an indirectly discriminatory one.\(^{70}\) Moreover, although the ECtHR has moved beyond the prohibition of direct discrimination under Article 14 ECHR, it has been argued that its case law on indirect discrimination remains relatively under-developed.\(^{71}\) Even so, the Court has recognised that failure to treat differently may constitute discrimination under certain circumstances.\(^{72}\) Nevertheless, it has been argued that the Court has been slower to recognise that disproportionate adverse effects on the

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\(^{56}\) ibid

\(^{57}\) Altman, ‘Discrimination’.

\(^{58}\) With the exception of cases of differential treatment whenever there exists a genuine and determining occupational requirement, see UK Equality Act 2010, Sch. 9, Part 1.

\(^{59}\) UK Equality Act 2010.

\(^{60}\) Wintemute, ‘Smug marrieds?’.


\(^{62}\) See e.g. *Thlimmenos v Greece*, discussed under 4.3.1.1. below.
members of particular socially salient groups might constitute indirect discrimination and has remained attached to the notion that wrongful discrimination must be intentional or at least sufficiently explicit. The ECtHR has recently made some progress in evidentiary issues of discrimination, following developments in the United Nations and the Council of Europe. More precisely, it has recognised the difficulties of proving to be a victim of discrimination and has therefore agreed to facilitate such proof, at least where the national authorities have failed to adequately investigate instances of alleged discrimination.

With regard to positive measures aiming to correct inequalities, the EU Racial Equality and Employment Equality Directives refer to positive measures in order to ensure ‘full equality’ in practice. Such measures prescribe differential treatment on grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation, in order to remedy past inequalities or to compensate for existing inequalities. They substitute a requirement of substantive equality for a requirement of formal equality.

The ECtHR, apart from certain remarks regarding the design of the electoral system in order to ensure fair representation of all ethnic groups, or about the organisation of education in order to account for the specific needs of Roma children, does not include at the moment any cases on the compatibility of positive measures with Article 14. It is likely, however, that positive measures are compatible with the Convention provided that the difference in treatment is proportionate to the aim sought. An indication is that failure to correct inequalities through differential treatment may itself give rise to a breach of Article 14 ECHR, as the provision ‘does not prohibit Contracting Parties from treating groups differently in order to correct “factual” inequalities between them.’ By the same token, the Preamble to Protocol 12 ECHR establishes that ‘the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.’

The distinction is also important because it elucidates an alleged hierarchy within discrimination, according to which direct discrimination ‘trumps’ indirect discrimination given that it is capable of causing greater harms. This hierarchy practically entails that whenever freedom from direct discrimination conflicts with freedom from indirect discrimination, prohibition of direct discrimination has to prevail. Recall, for instance, the

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75 Fredman, Discrimination Law, 1-38.
76 Sejidic and Finci v Bosnia-Herzegovina, Application nos. 27996/06 and 34836/06, 22 Dec. 2009, ¶44.
77 Oršuš and Others v Croatia, Application no. 15766/03, 16 March 2010, ¶157.
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Ladele case, which was briefly discussed in Chapter Two and involves an applicant dismissed from her job as a registrar of births, deaths and marriages because she insisted on refusing to be designated as a registrar of same-sex civil partnerships based on her religion.  

A number of scholars have interpreted the case as a conflict between different grounds of discrimination, i.e. between religious and sexual orientation discrimination, whose resolution hints at an implicitly existing – or emerging – hierarchy of discrimination grounds. However, another way to examine the case is as a conflict between direct discrimination on grounds of sexual orientation (realised through the applicant’s refusal to register) and indirect religious discrimination, given that the anti-discrimination policy in question disadvantages the applicant compared to other non-religious colleagues. If we examine the case through the direct/indirect discrimination hierarchy, then equality legislation should prevail not because sexual orientation trumps religion, but because the greater harm of potential direct discrimination trumps the less harm of indirect discrimination.

4.2.6. A hierarchy of grounds?

Whether disadvantageous treatment will ultimately be justifiable depends heavily on the nature of the criterion of difference. On that account, if disadvantageous treatment is based on a suspect ground, then ‘very weighty’ reasons will be required to justify the difference in treatment. Also, regarding the margin of appreciation that is often granted to the respondent states, the ECtHR has held that where a difference in treatment is based on a suspect ground, the margin of appreciation ‘is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.’ Thus, in those cases the difference in treatment should be both suitable to realise the legitimate aim, and necessary.

A systematic typology of the ‘suspect’ and ‘non-suspect’ grounds of differential treatment is hindered by the shifting boundary between the two categories both over time and according to the subject matter under consideration. More precisely, as De Schutter notes, ‘since the 1980s sex and sexual orientation have been treated differently to how they were in the 1960s; the view on birth out of wedlock has also changed since the late 1970s; in the 1990s, nationality lost the appearance of legitimacy it once they may have seemed to have; and transsexualism may now be considered a suspect ground’ after

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81 Eweida v the United Kingdom, Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.
84 Kozak v Poland, Application no. 13102/01, 2 March 2010, §92.
85 Vallianatos v Greece, Application nos. 29381/09 and 32684/09, 7 November 2013 (Grand Chamber), §85.
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Christine Goodwin v United Kingdom\(^{87}\) and Grant v United Kingdom,\(^{88}\) where the ECtHR held that the refusal to recognise the new gender identity of a transsexual amounts to a violation of the right to private life under Article 8 ECHR. Moreover, there is little doubt that EU law will have an important impact over that evolution.

The subject matter under consideration also plays a significant role. For instance, in areas relating to economic and social policies of the contracting states, the ECtHR allows a broad margin of appreciation, and normally finds a violation only where the differences in treatment are manifestly unreasonable, as for instance in Carson v United Kingdom\(^{89}\) and Stec v United Kingdom.\(^{90}\) Those cases illustrate the broad margin of appreciation that is left to the states in areas that relate to taxation or macro-economic policies, and the willingness of the ECtHR to allow for differential treatment where ‘factual differences’ have to be taken into account. Property is another example of a non-suspect protected ground that is included in the text of Article 14 ECHR but where the Court usually allows a wide margin of appreciation to national authorities as it is related to taxation and social security.\(^{91}\) On the contrary, although not mentioned in Article 14 ECHR, birth out of wedlock is considered in principle a suspect ground that requires particularly weighty reasons to justify differential treatment.\(^{92}\) All in all, the relatively fluid boundaries between suspect and non-suspect grounds of discrimination have led part of the legal scholarship to argue for a more coherent approach to anti-discrimination, based on clearly delineated variations of the strictness of scrutiny.\(^{93}\) Even so certain grounds of differential treatment such as race and ethnic origin,\(^{94}\) sex,\(^{95}\) and sexual orientation\(^ {96}\) always require particularly strong justifications from the state.

After a series of ambiguous cases,\(^ {97}\) the ECtHR has recently confirmed that religion is another suspect ground of differential treatment. In Hoffmann v Austria, the Austrian Supreme Court denied parental rights to a mother who was a Jehovah’s Witness, based on the assumption that her children would be at risk of becoming social outcasts were they educated according to the applicant’s religious convictions. Their well-being could also

\(^{87}\) Christine Goodwin v United Kingdom, Application no. 28957/95, 11 July 2002.

\(^{88}\) Grant v United Kingdom, Application no. 32570/03, 23 May 2006.

\(^{89}\) Carson and Others v United Kingdom, Application no. 42184/05, 16 March 2010, §61.

\(^{90}\) Application nos. 65731/01 and 65900/01, 12 April 2006 (Grand Chamber).


\(^{92}\) Inze v Austria, Application no. 8695/79, 28 October 1987, §41; Mazurek v France, Application no. 34406/97, 1 February 2000, §49; Sommerfeld v Germany, Application no. 31871/96, 8 July 2003, §93.


\(^{94}\) Jersild v Denmark, 23 September 1994, §30; Gaygusuz v Austria, Application no. 17371/90, 16 September 1996, §42; Orsús and Others v Croatia, Application no. 15766/03, 16 March 2010, §156.

\(^{95}\) Abdulaziz, Cabales and Balkandali v the United Kingdom, 28 May 1985, §78; Burghartz v Switzerland, 22 February 1994, §27; Kartheinz Schmidt v Germany, 18 July 1994, §24; Petrovic v Austria, 27 March 1998, §37.

\(^{96}\) L. and V. v Austria, Application nos. 39392/98 and 39829/98, 9 January 2003, §50; Villianatos v Greece, Application nos. 29381/09 and 32684/09, 7 November 2013 (Grand Chamber), §85.

be endangered because their mother would not consent to blood transfusions. The ECtHR found a violation of prohibition of discrimination on the ground of religion and held that ‘a distinction based essential on a difference in religion alone is not acceptable.’ That expression of strict judicial scrutiny could indicate that religion was a suspect ground of discrimination. Ten years later, in Palau-Martinez v France, a case with almost identical factual background to Hoffmann, the Court’s judgment was much more ambiguous though. The ECtHR found a violation of prohibition of religious discrimination, but instead of its strict approach in Hoffmann, it held that ‘the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.’ Applying its routine test based on the legitimacy of the reasons for differentiating on the basis of religion and on the proportionality between the difference and the legitimate aim sought, the ECtHR seems to be placing religion not on the same level as grounds such as race, gender and sexual orientation. Nonetheless, more recently, in Vojnity v Hungary, the Court unanimously and clearly held that religion constitutes a ‘suspect ground’ of differential treatment that requires strict scrutiny and no more than a limited margin of appreciation for the respondent states. More specifically, after a divorce the applicant’s son was placed with his mother and the applicant was granted access rights. Subsequently, the domestic courts removed the applicant’s access rights altogether because his religious convictions ‘triggered anxiety and fear in the boy and endangered his development’ and they made the applicant ‘incapable of bringing up his child.’ The ECtHR found a violation of prohibition of discrimination on grounds of religion read in conjunction with the applicant’s right to private and family life. It returned to its judgment in Hoffmann and added that

[In the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual’s self-fulfilment, such a treatment will only be compatible with the Convention if only very weighty reasons exist. The Court has applied a similar approach in the context of differences in treatment on the basis of sex… birth status… sexual orientation… and nationality.]

It is noteworthy though that even in cases where disadvantageous treatment is based on a suspect ground of discrimination, heightened scrutiny is not necessarily fatal to the impugned differentiation. The presumption that no objective and reasonable justification will support the difference in treatment remains rebuttable. It would require, however, ‘very weighty’ reasons. In general terms, the ECtHR has classified as ‘very weighty reasons’ those that can come close to simply annulling the special guarantee afforded to

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98 Hoffmann v Austria, Application no. 12875/87, 23 June 1993.
99 ibid §36.
100 Palau-Martinez v France, Application no. 64927/01, 16 December 2003.
101 ibid §31.
102 Vojnity v Hungary, Application no. 29617/07, 12 February 2013.
103 ibid §14.
104 Article 14 read in conjunction with Article 8 of the Convention.
105 ibid §36.
groups defined by their sex, their sexuality, their birth, or their nationality.\textsuperscript{106} For instance, the ECtHR has accepted that protection of the family constitutes such a ‘weighty reason’ that can justify differential treatment between same-sex and different-sex couples, provided that such difference in treatment is necessary for the protection of family.\textsuperscript{107}

There is a last point – not directly relevant to suspect grounds – that has not been addressed so far. Some of the cases that will be discussed later in this chapter involve applicants who belong to religious minorities. It might be argued that had those individuals been followers of majority groups (religious or non-religious) they would not have to incur any cost for their choices. They would not have to choose, for instance, between professional and religious commitments, and they would have had their dietary preferences accommodated. There is a subtle distinction in discrimination complaints between particular laws or policies that pursue impermissible ends (e.g. burdening minority religious groups) and laws or policies that employ disproportionate means to achieve a permissible end. The distinction, however, will not be further analysed in this chapter, not least because the ECtHR uses the same proportionality test both when the wrongness of the government’s action lies in the ends and when it lies in the means selected. And from a philosophical point of view, as Letsas argues, it is of little practical significance whether the action in question is best described as ‘wrongful in its ends rather than disproportionate in its means… what matters is that courts carry our this investigation as a fundamental part of their task of upholding rights.’\textsuperscript{108}

### 4.3. Religious Discrimination Under the ECHR

Turning to religious discrimination in more detail, it is notable that the ECtHR does not pay much attention to the distinction between direct and indirect discrimination, or to the fact that religion is a suspect ground of differential treatment requiring heightened judicial scrutiny. It has been suggested that one of the reasons is that some of the relevant cases, which will be shortly discussed, are concerned with the recognition of new legal concepts ‘which may have distracted the Court’s attention from the question of suspectness of the ground in question.’\textsuperscript{109} However, are there any normatively deeper reasons than mere distraction? As mentioned at the beginning of this chapter, complaints of religious discrimination concern the conditions under which general rules inflict wrongful direct or indirect discrimination on individuals or groups that, but for their religion, would not have to suffer disadvantageous treatment.\textsuperscript{110} Complaints of religious discrimination can be doctrinally puzzling because they are commonly framed either as complaints under Article 9 ECHR, or as more typical discrimination complaints engaging Article 14 in conjunction with Article 9, or, most often, they take both forms, i.e. in applications


\textsuperscript{107} Karner v Austria, 24 July 2003, §40.


\textsuperscript{109} Schiek, Waddington and Bell, \textit{National, Supranational and International Non-Discrimination Law}, 125. The authors argue that an example of such a case is \textit{Thlimmenos v Greece}, discussed below.

\textsuperscript{110} That applies also to the implementation of EU legislation protecting Equality, such as the Employment Equality Directive.
combining both Article 9 and Article 14 (read in conjunction with Article 9) complaints. The following section will demonstrate that in cases of religious discrimination the ECtHR interprets the Convention in a way that amalgamates freedom of religion and freedom from religious discrimination by employing Articles 9 and 14 without a discernible pattern. Moreover, in various cases the ECtHR dilutes the discrimination analysis in its examination of the Article 9 complaint, whereas in other factually similar cases it does not do so.

4.3.1. Cases examining Article 14 in conjunction with Article 9 ECHR

4.3.1.1. Conscientious objection to military service

In 1988, Iakovos Thlimmenos, a Jehovah’s Witness, came second among sixty candidates in public exams for the appointment of twelve chartered accountants in Greece. Nevertheless, eight months later, the Executive Board of the Greek Institute of Chartered Accountants refused to appoint him on the ground that he had been convicted of insubordination for refusing to wear military uniform based on his religious convictions. Notably, Mr. Thlimmenos had already served his conviction, which was four years imprisonment. After unsuccessful proceedings before national courts, the applicant complained to the ECtHR that the refusal of the Greek authorities to appoint him as a chartered accountant violates his right not to be discriminated in the enjoyment of his right to freedom of religion, as secured by Article 14 read in conjunction with Article 9 ECHR. The Greek government argued that the law in question was not discriminatory since all persons convicted of a serious crime were excluded from the profession of chartered accountants, regardless of their religion. Furthermore, the legislation pursued a legitimate aim, whereas it was also impossible to make case-by-case distinctions between different criminal offences. So even if the law in question constituted indirect discrimination on grounds of religion, failure to distinguish between the applicant and other persons convicted for a serious crime was justified.

The ECtHR emphasised that the applicant’s argument was that he suffered discrimination because ‘he was treated like any other person convicted of a serious crime although his own conviction resulted from the very exercise of this freedom.’ Although typical cases of discrimination involve instances where states treat differently persons in analogous situations without an objective and reasonable justification, in Thlimmenos,

112 Thlimmenos v Greece, §8. At the time, only members of the Greek Institute of Chartered Accountants could provide chartered accountants’ services in Greece.
113 Thlimmenos, §§34-38. The applicant also complained of a violation of his rights under Article 6§1 and Article 1 of Protocol No. 1 of the Convention. The Court found a violation of Article 6§1 and declared inadmissible his complaint under Article 1 of Protocol No. 1 on the ground that it had not been submitted within the six-month time-limit provided by the Convention. Our present discussion will focus on his claim under Article 14 read in conjunction with Article 9 ECHR.
114 Ibid §37.
115 Ibid §42.
116 Ibid §44.
the ECtHR held for the first time that this is not the only ‘facet’ of discrimination.\textsuperscript{117} Rather, the right not to be discriminated against is also violated ‘when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.’\textsuperscript{118} Although a state may have legitimate reasons to exclude some offenders from the profession of chartered accountant,\textsuperscript{119} a conviction for refusing on religious grounds to wear the military uniform could not be justified by any ‘dishonesty or moral turpitude’ that is likely to affect the ability to exercise the particular profession.\textsuperscript{120} Furthermore, although the ECtHR did not question the government’s argument that persons who do not serve their military duties may have to be punished, the applicant had already served a prison sentence for his refusal and further sanctions were therefore disproportionate.\textsuperscript{121} Hence, there was no objective and reasonable justification for not treating the applicant differently from other people who have been convicted of a serious crime.\textsuperscript{122} By failing to introduce appropriate exceptions to the general rule, the Greek legislation was unanimously found in violation of the right to freedom from religious discrimination, secured under Article 14 read in conjunction with Article 9 ECHR.\textsuperscript{123}

The ECtHR affirmed those principles in \textit{Lang v Austria,}\textsuperscript{124} \textit{Löffelmann v Austria,}\textsuperscript{125} and \textit{Gütl v Austria,}\textsuperscript{126} which assume a similar factual background. The applicants, two Jehovah’s Witness deacons\textsuperscript{127} and one preacher,\textsuperscript{128} complained that the fact that they were not exempt from military service, at the time when members of recognised religious groups assuming comparable functions (preachers and deacons) were exempt from military or alternative civilian service, amounted to religious discrimination.\textsuperscript{129} At the time, Jehovah’s Witnesses were registered, but not recognised as a religious society in Austria.\textsuperscript{130} The Austrian government denied that membership of a recognised religious group was only one of the criteria applying in exemptions from military service. The applicants did not fulfill other relevant conditions, since they had not completed a course


\textsuperscript{118} Thlimmenos, §44.

\textsuperscript{119} In \textit{Glor v Switzerland}, the ECtHR has extended the reasoning of Thlimmenos in the area of disability. The Court held that the Swiss government had violated the applicant’s rights under Article 14 ECHR in conjunction with Article 8 (right to private life). The applicant suffered from diabetes and because of that he could not carry out his military service, as he was deemed medically unfit. Nevertheless, the Swiss authorities decided that diabetes was not severe enough to relieve him from paying a military service exemption tax on his annual year for several years to come: they thus levied a tax for exemption from military service. The Court found Switzerland in violation of the Convention as it could provide ‘reasonable accommodation’ by filling the applicant in a military post requiring less physical effort. It furthermore pointed to comparable legislation in other countries that ensures the recruitment of persons with disabilities adapted both to the person’s disability and to the person’s professional skill. See \textit{Glor v Switzerland}, Application no. 13444/04 (only in French).

\textsuperscript{120} ibid §47.

\textsuperscript{121} ibid

\textsuperscript{122} ibid

\textsuperscript{123} ibid §48.

\textsuperscript{124} Lang v Austria, Application no. 28648/03, 19 March 2009.

\textsuperscript{125} Löffelmann v Austria, Application no. 42967, 12 March 2009.

\textsuperscript{126} Gütl v Austria, Application no. 49686/99, 12 March 2009.

\textsuperscript{127} In Löffelmann and Gütl.

\textsuperscript{128} Lang v Austria (cited above).

\textsuperscript{129} ibid §§11-20.

\textsuperscript{130} Löffelmann, §§31-38.
of theological studies at university or a comparable level of education. However, the ECtHR found the argument unconvincing, given that domestic courts based their judgments on the fact that the applicants have not been members to a recognised religious society (and not on the rest of the relevant conditions about religious exemptions from compulsory military or civilian service).

The question was whether the difference in treatment between the applicants, who did not belong to a recognised religious group, and other similarly situated individuals, who belonged to recognised religious groups, had been based on an objective and reasonable justification. The ECtHR held that given the importance of the privileges enjoyed by recognised religious communities under Austrian law, the state duty to remain neutral under Article 9 should be interpreted to include a further duty to establish a fair and non-discriminatory framework for conferring legal personality. In Lang, Löffelmann, and Gütl, the ECtHR connected the refusal to grant exemptions from military service with previous cases that denounced the arbitrary criteria applying to registration of Jehovah’s Witnesses in Austria. It was finally held that the applicants have been unjustifiably discriminated on grounds of religion because of the discriminatory criteria applying to the legal recognition of their religious communities.

It is noteworthy that the ECtHR has distinguished Lang, Löffelmann, and Gütl from Koppi v Austria, another case on exemptions from military service. The main difference was that the applicant in Koppi was member of a religious community which has been registered but had not yet applied for recognition as a religious society under Austrian law. The ECtHR clarified that differences in treatment between religious groups, which may result in different legal status and privileges, are compatible with prohibition of religious discrimination provided that all religious groups have had a fair opportunity to obtain legal recognition and that the relevant criteria apply in a non-discriminatory manner. In Koppi, since the religious community of the applicant was registered but had not applied for legal recognition, the ECtHR unanimously held that the applicant has not been in an analogous situation to members of recognised religious societies.

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131 Gütl, §§26-27 and §36; Löffelmann, §51; Lang, §28.
132 ibid
133 Gütl, §37; Löffelmann, §52; Lang, §29.
134 Gütl, §38; Löffelmann, §53; Lang, §30.
135 ibid
137 Gütl, §§39-40.
138 Koppi v Austria, Application no. 33001/03, 10 December 2009.
139 ibid §7.
140 Koppi, §33.
141 ibid
4.3.1.2. Slaughterhouses

In *Cha'are Shalom ve Tsedek v France*, the applicant association alleged a violation of Article 9 ECHR because the French authorities did not grant it permission to launch its own slaughterhouses to perform ritual slaughter according to the ultra-orthodox religious prescriptions of its members. The organisation also complained about a violation of Article 14 read in conjunction with Article 9 because only the Jewish Consistorial Association of Paris (‘ACIP’), to which the large majority of Jews in France belong, had received the approval in question. The members of the organisation, since they were refused state approval to launch their own slaughterhouses, had to either slaughter illegally or to import supplies of ‘glatt’ meat from Belgium.

The majority of the ECtHR agreed that having access to meat from animals slaughtered in accordance with religious prescriptions is an essential aspect of the Jewish tradition and falls within the protective scope of Article 9 ECHR. Nonetheless, the majority found no violation of the right to freedom of religion. The French system of authorisations for ritual slaughtering pursued the legitimate interest of safeguarding public health. Moreover, the limitation was not disproportionate as the applicant association could obtain ‘glatt’ meat from Belgium or, alternatively, they could reach an agreement with the ACIP under which the applicant organisation could perform ritual slaughter under the approval already granted to the ACIP. With regard to the complaint of religious discrimination, given that the limitation had a limited effect on the association’s freedom of religious manifestation, the difference in treatment found limited in scope.

By contrast, the dissenting opinion applied stricter scrutiny – in accordance with the earlier discussed principle that religion is a ‘suspect’ ground of differential treatment – requiring very weighty reasons to justify the difference in treatment between the two Jewish associations. The dissenting judges held that it is not necessary to ascertain whether the application for approval made by the applicant constitutes a form of religious manifestation. Granting permission to one religious body does not ‘absolve the State authorities from the obligation to give careful consideration to any later application made by other religious bodies professing the same religion.’ This is a case involving disagreement in a religious community about what kind of meat could qualify as ‘glatt’ according to the orthodox Jewish tradition. In cases of tension and disagreement the role of public authorities is not to ‘eliminate pluralism’, but to take all necessary measures

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142 *Cha’are Shalom ve Tsedek v France*, Application no. 27417/95, 27 June 2000.
143 ibid §2. The association expresses a significant number of Orthodox Jews that wish to eat meat from animals slaughtered according to the most stringent requirements of the Shulchan Aruch. See ibid §31.
144 ibid §2.
145 ibid §33.
146 ibid §73.
147 ibid §81.
148 ibid §82.
149 ibid §87.
150 *Cha’are Shalom ve Tsedek v France*, Joint dissenting opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Pantiru, Levits and Traja, at 26.
151 ibid
152 See e.g. *Serif v Greece*, Application no. 38178/97, 14 December 1999, §53.
to ensure toleration between different groups.\textsuperscript{153} According to the dissenting opinion, this is why it would be ‘inappropriate’ to push the applicant organisation to reach an agreement with the much larger ACIP, which could not act as an ‘arbiter’ on the question of what qualifies as ‘glatt’ meat.\textsuperscript{154} More importantly, the possibility of having access to ‘glatt’ meat by other means is irrelevant for the purpose of assessing the scope of the act or omission on the right to freedom of religion.\textsuperscript{155} Rather, according to the dissenting opinion, the main problem in \textit{Cha’are Shalom ve Tsedek} is the discrimination of which the applicant association complained. The applicant association was in an analogous\textsuperscript{156} position to the already exempted ACIP and there was no objective and reasonable justification for treating them differently.\textsuperscript{157} The argument of the majority that the interference was of limited effect is irrelevant, as it is not for the Court to substitute its assessment of the seriousness of the interference for that of the persons concerned, because ‘the essential object of Article 9 of the Convention is to protect individuals’ most private convictions.’\textsuperscript{158} All in all, as the dissenting judges put it

[w]ithholding approval from the applicant association, while granting such approval to the ACIP and thereby conferring on the latter the exclusive right to authorise ritual slaughterers, amounted to a failure to secure religious pluralism or to ensure a reasonable relationship of proportionality between the mean employed and the aim to be achieved.\textsuperscript{159}

In light of those considerations, the dissenting opinion found that the difference in treatment was in violation of Article 14 taken in conjunction with Article 9 ECHR.

\textbf{4.3.1.3. Reasonable accommodation of religion in employment}

Cases involving claims for reasonable accommodation of religion in employment are well-documented instances of religious discrimination. They usually involve general rules or practices that burden individual forms of manifestation of religion or belief, and similarly to the cases discussed above the discussion again revolves around the perennial question of whether the unavailability of exemptions constitutes indirect discrimination on grounds of religion. Chapter Two briefly touched on \textit{Ladele v United Kingdom}, which is factually similar to \textit{McFarlane v United Kingdom}. Ms. Ladele was Registrar of births, deaths and marriages in London and a devout Christian. She started her employment with the local public authority at a time when no legal provision for same-sex civil partnerships

\begin{itemize}
\item \textsuperscript{154} \textit{Cha’are Shalom ve Tsedek}, Joint dissenting opinion, at 27.
\item \textsuperscript{155} ibid
\item \textsuperscript{156} To arrive to that conclusion, the dissenting opinion noted that the applicant association was a religious body and being a minority was irrelevant; and that it is not contested that its slaughterers would use the same method to the ACIP’s. See \textit{Cha’are Shalom ve Tsedek}, Joint dissenting opinion, 28.
\item \textsuperscript{157} ibid 27.
\item \textsuperscript{158} ibid 28.
\item \textsuperscript{159} ibid 30.
\end{itemize}
Due to her refusal to register same-sex partnerships, she had to face disciplinary action and ultimately lose her job. Her orthodox Christian views regarded marriage as the union of one man and one woman, and precluded her participation in the creation of a same-sex institution equivalent to marriage. Before the ECtHR she complained under Article 14 ECHR read in conjunction with Article 9 that she had been discriminated against on grounds of her religion. More specifically, she claimed that the failure of the local authority to treat her differently from staff that did not have conscientious objections to registering civil partnerships constituted (wrongful) indirect discrimination on grounds of her religion.

The ECtHR agreed that the applicant’s refusal to provide the services in question was directly motivated by her Christian beliefs and used as a relevant comparator a registrar with no religious objection to same-sex unions in order to determine whether the applicant has suffered discrimination on grounds of her religion. According to the majority, the refusal of the local authority to make an exception for the applicant amounted to indirect discrimination against her, since the general requirement that all registrars would also register civil partnerships had a particularly detrimental effect on Ms. Ladele. However, the policy of the local authority pursued the legitimate goal of non-discrimination on grounds of sexual orientation, which the ECtHR considers very important. Therefore, by a majority of five votes to two, the Court dismissed the applicant’s complaint about discrimination compared to registrars with no religious objections to same-sex unions. The ECtHR reached the same conclusion, albeit unanimously, for similar reasons in McFarlane, a case arising from a complaint of a Christian counselor who also argued that his employer’s insistence that he provide relationship and sexual therapy to same-sex couples subjected him to unlawful religious discrimination. All in all, in both Ladele and McFarlane it has been clear that the
principle of equal treatment has played a central role to the reasoning of the court in justifying the restrictions applied.\textsuperscript{171}

The results in those cases have been interpreted to denote that the principle of equal treatment, at least as exemplified in anti-discrimination laws, may sketch the scope of the right to hold religious beliefs and live according to them.\textsuperscript{172} For instance, judgments on accommodation of religion in employment have been connected with broader principles of fairness and it has been argued that the role of the courts in diverse societies should not be to stand guard over public morality, but to ensure that the majorities will not impose their opinions ‘on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority’.\textsuperscript{173} I think that the examination of whether particular cases of disadvantageous treatment constitute wrongful discrimination has to track the moral wrong underlying religious discrimination and not ‘weigh’ equality on grounds of religion against other equality claims, such as equality on grounds of sexual orientation, as if those different ‘equalities’ are antagonistic. Nevertheless, a moral analysis of discrimination deserves separate discussion, which will be take place in Chapter Four. For now note that in cases on accommodation of religion in employment, such as \textit{Ladele} and \textit{MacFarlane}, the distinction between direct and indirect discrimination seems to play limited role in the jurisprudence of the ECtHR. The Court applies the same tri-partite test, i.e. legality, legitimacy and proportionality, in the examination of all complaints about religious discrimination, regardless of whether they involve direct or indirect discrimination.

\subsection*{4.3.2. \textit{Cases with no separate examination of complaints under Article 14 ECHR}}

It would be interesting now to turn to a significant number of cases where\textit{ either} the applicants complained about a violation of their right to freedom of religion without submitting a separate complaint under Article 14 (read in conjunction with Article 9) or the ECtHR held that the discrimination complaint has been \textit{sufficiently addressed} under its assessment of individual complaints submitted under Article 9 ECHR.\textsuperscript{174} The next pages will demonstrate that skipping an analysis under Article 14 has not barred the ECtHR from following a methodologically similar approach to the more mainstream anti-discrimination complaints thus far discussed, and from ultimately reaching important judgments on religious discrimination solely through an interpretation of the principles underlying the right to freedom of religion.


\textsuperscript{174} The number of cases where the Court has eschewed a separate analysis of Article 14 read in conjunction with Article 9 is significant as, the moment I am writing these lines, from the 64 cases where the applicants have complained of a violation of their right to non-discrimination in the enjoyment of their right to freedom of religion (i.e. complaint about a violation of Article 14 read in conjunction with Article 9 of the Convention) the Court has examined the claim only in 23 cases, with 7 of them finding no violation of Article 14 in conjunction with Article 9, and only 9 finding a violation.
4.3.2.1. Conscientious objection to military service

Bayatyan v Armenia involved the application of a Jehovah’s Witness, who was convicted by the Armenian courts for refusing to comply with military duties due to his religious convictions.\textsuperscript{175} The applicant was willing to perform alternative civilian service, but no such option was available at the time. Before the ECtHR he complained of a violation of his right to freedom of religion. Notably his application was based on the argument that the right to freedom of religion should be interpreted to include a right to conscientious objection to military service\textsuperscript{176} without including an additional complaint about religious discrimination. On that account, Bayatyan should be distinguished from Thlimmenos, whose complaint was legally based on the right to freedom from discrimination.\textsuperscript{177} Notwithstanding their different legal bases, however, both cases involve essentially the same question, viz. whether general rules that disadvantage individuals who refuse to comply with their military obligations on grounds of religion are compatible with equal enjoyment of the right to freedom of religion.

The majority of the Grand Chamber held that although Article 9 ECHR does not expressly protect a right to conscientious objection,\textsuperscript{178} opposition to military service when motivated by deeply held religious beliefs falls within the protective scope of the right.\textsuperscript{179} Moreover, there was no doubt that the applicant’s objection to military service was motivated by his genuinely held religious beliefs, which conflicted with the obligation to join military service. As the majority held

\[\text{[I]}\text{In this sense, and contrary to the Government’s claim, the applicant’s situation must be distinguished from a situation that concerns an obligation which has not specific conscientious implications in itself, such as a general tax obligation.}\textsuperscript{180}\]

It is notable that drawing distinctions between laws that inevitably share burdens among all life plans, and laws that ‘negligibly or maliciously’ impose burdens only on members of particular religious groups resembles to the typical judicial methodology of exposing wrongful discrimination,\textsuperscript{181} which the majority of the ECtHR, very naturally, integrated \textit{into} the right to freedom of religion under Article 9. Again, an investigation of the reasons for that requires deeper examination of the wrong of religious discrimination and the moral relationship between the right to freedom of religion and the right to freedom from religious discrimination. This investigation has to be postponed until the next chapter.

\textsuperscript{175} Bayatyan v Armenia, Application no. 23459/03, 7 July 2011 (Grand Chamber).
\textsuperscript{176} ibid §§73-77.
\textsuperscript{177} Thlimmenos, §§34-38.
\textsuperscript{178} Bayatyan, §§46-49. Notably though the right to conscientious objection was first mentioned by the Parliamentary Assembly of the Council of Europe as early as 1967 in its Resolution 337, ‘On the right of conscientious objection’, adopted by the Assembly on 26th January 1967 (22nd Sitting), available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta67/ERES337.htm. Perhaps the fact that the overwhelming majority of the member states of the Council of Europe recognised and implemented the right to conscientious objection at the time of the judgment played some role for the Court.
\textsuperscript{179} Bayatyan, §110.
\textsuperscript{180} ibid §111.
Furthermore, since no alternative civilian service was available at the time, the applicant had no choice but refuse to comply with his military duties in order to act in accordance with his religion. However, according to the Grand Chamber, ‘such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant’\(^{182}\) which is necessary in a democratic society.\(^{183}\) The applicant was prepared to share the relevant social burdens equally to his compatriots by joining alternative civilian service.\(^{184}\) The Grand Chamber held that respect for ‘pluralism, tolerance and broadmindedness’\(^{185}\) requires that the majority does not abuse its dominant position\(^{186}\) and that it provides opportunities to religious minorities to serve society in accordance to their conscience. Such opportunities, far from creating ‘unjust inequalities or discrimination’, could ensure ‘cohesive and stable pluralism and promote religious harmony and tolerance in society.’\(^{187}\)

The *Bayatyan* case is important not least because the ECtHR infused an analysis of the importance of fair distribution of burdens into its interpretation of the moral principles underlying the right to freedom of religion. On that account, *Bayatyan* and *Thlimmenos* seem to be normatively related given that similar equality considerations (and methodologies) proved crucial in the judgments of the ECtHR, despite the different legal bases of the two complaints. *Bayatyan* is therefore an important indication that the relationship between freedom of religion and freedom from religious discrimination may be deeper than often assumed, in the sense that the right to freedom of religion requires, by itself, treatment as equals in the distribution of burdens and benefits regardless of religion or belief.

4.3.2.2. Reasonable accommodation of religion in employment

In June 2005, Francesco Sessa, a Jewish lawyer in Naples, appeared before court in his capacity as representative of one of the two complainants in criminal proceedings against several banks. The investigating judge invited the parties to choose between two dates for the adjourned hearing, but both dates coincided with the official Jewish religious holidays of Yom Kippur and Sukkot. Mr. Sessa complained that he would be unable to attend the adjourned hearing because of his religious duties, but the judge rejected his application for an adjournment. The Italian courts dismissed Sessa’s subsequent appeals noting that the judge who rejected the adjournment application had no intention to offend the dignity or freedom of religion of the applicant.

Before the ECtHR, Mr. Sessa alleged that the refusal of the judicial authority to adjourn the hearing amounted to an unjustifiable limitation on his right to freedom to manifest his religion under Article 9 ECHR\(^{188}\) and his right to freedom from religious

\(^{182}\) *Bayatyan*, §124.
\(^{183}\) ibid
\(^{184}\) ibid \(§125\).
\(^{185}\) ibid \(§126\).
\(^{186}\) ibid
\(^{187}\) ibid
\(^{188}\) Francesco Sessa v Italy, Application no. 28790/08, 3 April 2012.
discrimination under Article 14 read in conjunction with Article 9. He also argued that the request for an adjournment was filed four months in advance, leaving ample time to the judicial authorities to re-organise the timetable of hearings without adversely affecting the proceedings or the rights of other litigants. By contrast, the Italian government argued that there was no interference with the applicant’s right to manifest his religion, as he had not been prevented from attending Jewish religious holidays. Even if there has been an interference with his right, it was justified on the rights of others to proper administration of justice, which had to take precedence in the circumstances of the case.

By a tight majority of four to three, the ECtHR found no violation of Article 9. More specifically, the majority was not convinced that ‘setting the case down for hearing on a date which coincided with a Jewish holiday and refusing to adjourn it to a later date amounted to a restriction of the applicant’s right to practice his religion freely.’ The applicant was not under pressure to change his religious beliefs or to refrain from manifesting his religion. Rather, in certain cases ‘the specific contractual obligations between the persons concerned and their respective employers’ may justify restrictive measures. Even if there was interference with the applicant’s rights under Article 9, the majority held that the interference would be proportionate to the legitimate aim sought, viz. the rights of others to proper administration of justice. Finally, the majority also dismissed the complaint about religious discrimination because the applicant failed to demonstrate that he was subjected to differential treatment compared to other similarly situated individuals.

In their dissenting opinion, Judges Tulkens, Popović and Keller held that the refusal to adjourn the hearing violated Article 9 ECHR. The dissenting opinion held that refusal to adjourn for a different date was disproportionate because when various possible means to achieve a legitimate aim are available the state authorities should pick those that are least restrictive of individual rights. As the dissenting judges put it

[I]n the present case we believe that the conditions were met for attempting to reach a reasonable accommodation of the situation, that is to say, one that did not impose a disproportionate burden on the judicial authorities. By dint of a few concessions, this would have made it possible to avoid interfering with the applicant’s religious

189 ibid §40.
190 Francesco Sessa, §37.
191 See e.g. Knudsen v Norway, Application no. 11045/84, 8 March 1985. Also Kontinen v Finland, Application no. 24949/94, 3 December 1996.
192 ibid §35. It is noteworthy that with regard to ‘contractual obligations’ the majority in Francesco Sessa v Italy followed a rigid line of reasoning employed by the former European Commission of Human Rights in various religious accommodation cases such as Stedman v the United Kingdom, a case about a Christian woman who was fired after refusing to work on Sundays, and Kontinen v Finland, a case about a Seventh Day Adventist who was fired after refusing to work on Sabbath. In all those cases, the Commission has held that restrictions on religious freedom resulted from the contractual obligations of the applicants and had no relevance to their right to freedom of religion. Rather, their freedom to resign has been considered an adequate safeguard for their right to freedom of religion. See Stedman v the United Kingdom, Application No. 29107/95, 9 April 1997, European Commission of Human Rights (inadmissible) and Kontinen v Finland, Application No. 24949/94, 3 December 1996, European Commission of Human Rights (inadmissible).
193 Sessa, §42.
freedom without compromising the achievement of the clearly legitimate aim of ensuring the proper administration of justice\textsuperscript{194} (emphasis on the original)

It is notable that the dissenting judges grounded the state duty to take steps towards reasonable accommodation of religion on Article 9, rather than on the applicant’s complaint under Article 14 ECHR.\textsuperscript{195} Recall that failure to try reasonable accommodation is a paradigmatic case of indirect discrimination, which the dissenting opinion reads into the right to freedom of religion under Article 9.

Moreover, the dissenting judges highlighted that the applicant notified the authorities well in advance so as to allow them enough time to re-organise the timetable of the hearings and ensure that the rights of others were respected. To that end, the dissenting opinion distinguished the case from \textit{S.H. and H.V. v Austria},\textsuperscript{196} a case with similar facts to \textit{Sessa}. The applicants in \textit{S.H. and H.V.} informed the judicial authorities that the hearing of their case coincided with Jewish holidays only some days in advance of the scheduled hearing. In the circumstances of the case, as the EComHR held, the complexity of re-arranging a hearing entailed that the refusal to adjourn was proportionate to the legitimate aim of securing proper administration of justice. But, as it became clear from the Commission’s reasoning in \textit{S.H. and H.V.}, had the applicants duly informed the court that their scheduled hearing coincided with an important Jewish holiday, the Austrian court would have had to adjourn it. Furthermore, the dissenting judges in \textit{Sessa} held that the Italian government failed to demonstrate that granting a potential adjournment would have caused such disruption to proper administration of justice that no it was possible. Interestingly, the dissenting judges referred to that argument as the \textit{public-service disturbance test}.\textsuperscript{197} Although the ground for the refusal to adjourn was legitimate ‘in the absence of any further explanation, appears in this case to be more in the nature of an excuse.’\textsuperscript{198} The adjournment might have caused some administrative inconvenience but given the facts before the ECtHR (duly notice and non-urgent case) the dissenting opinion found such inconvenience minimal and a small price to be paid ‘in order to ensure respect for freedom of religion in a multicultural society.’\textsuperscript{199}

There is an additional point to be added in connection with the distinction between interest-based and reason-blocking theories of rights discussed in Chapter Three. The ECtHR has examined the individual complaints in \textit{Bayatyan} and \textit{Sessa}, among other cases, as questions concerning the allocation of burdens in a liberal democracy. The examination of the Court focused on the reasons behind the limitations in question and not on whether the interests underlying different instantiations of the right to freedom of religion were strong enough in the circumstances to outweigh other legitimate \textit{pro tanto} collective interests, such as public order or the proper administration of justice. More specifically, the Court examined how others have been treated in comparable, actual or

\textsuperscript{194} \textit{Sessa}, Dissenting opinion of Judges Tulkens, Popović and Keller, §10.
\textsuperscript{195} The complaint of the applicant was declared manifestly ill-founded.
\textsuperscript{196} \textit{S.H. and H.V. v Austria}, Application no. 18960/91, 13 January 1991.
\textsuperscript{197} \textit{Sessa}, Dissenting opinion, §13.
\textsuperscript{198} ibid
\textsuperscript{199} ibid
hypothetical, cases such as the majority Jewish community in France in *Cha’are Shalom*, and other requests for adjournment through the juxtaposition of *Sessa* and *S.H. and H.V.* When disadvantageous treatment becomes established, then the Court closely investigates the reasons behind the disadvantage in question. I think that, again, a reason-blocking account of the right to freedom of religion clearly captures that approach. For a reason-blocking interpretation explains that an enquiry about whether the distribution of burdens has been fair is shaped, and required, by more abstract moral principles, such as equal respect for ethical responsibility. That is, that inquiry must take place regardless of whether or not the applicant has submitted an additional complaint under the Article 14 ECHR. For under a reason-blocking account of the right, all the applicants had a right to was an egalitarian scheme of religious freedom that excludes certain kinds of reason as motivations for collective action, not to any specific object of that scheme. An interpretation of a government’s overall behaviour seeks to unveil exactly those impermissible kinds of reason, which might have corrupted otherwise legitimate majoritarian arguments, such as those concerning public holidays or those about catering in custodial institutions.

4.3.2.3. Accommodation of religion in the provision of services

One of the first ECHR cases involving the argument that lack of accommodation of religion violates the right to freedom of religion is *Jakóbski v Poland*. Mr. Jakóbski, a Buddhist detainee in a Polish prison, complained to the ECtHR about a violation of his right to freedom of religion due to the fact that the prison authorities refused to provide him with vegetarian meals in accordance to his religious dietary rules.\(^{200}\) The ECtHR held that although the freedom of religious manifestation does not protect every act motivated or inspired by religion or belief, observing dietary rules constitutes a direct expression of beliefs in practice.\(^{201}\) Refusal to provide meat-free meals amounted therefore to an interference with the applicant’s freedom of religion. Interestingly, the ECtHR stated that ‘the circumstances of the applicant’s case and in particular the nature of his complaint are more appropriately examined from the standpoint of the respondent State’s positive obligations.’\(^{202}\) On that account, the Court analysed the case through the lens of a positive duty on the state to take ‘reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 9 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar.’\(^{203}\) More specifically, in both contexts regard must be had to the fair balance between the competing interests of the individual and of the community as a whole.

In the context of the case, the ECtHR noted that while a decision to accommodate one prisoner may have financial implications for the custodial institution, the Court should still find out whether the balance between the interests of the institution and the interests of the applicant had been struck in a fair way. In the instant case, the applicant’s

\(^{200}\) *Jakóbski v Poland*, Application no. 18429/06, 7 December 2010.
\(^{201}\) Ibid §45.
\(^{202}\) Ibid §46.
\(^{203}\) Ibid §47.
religion required a simple meat-free diet without any special products. Thus, the E CtHR was not convinced that his request would have any serious consequences for the prison. The Polish authorities failed to strike a *fair* balance between the interests of the prison authorities and those of the applicant and therefore Article 9 ECHR was violated.

The similarities between the reasoning of the ECtHR in *Jakóbski* and the *public-service disturbance test* of the dissenting opinion in *Sessa* are striking. Both held that ‘minimal’ administrative inconvenience is not a sufficient reason to curtail the right to freedom of religious manifestation, even if the grounds for the inconvenience are totally legitimate (i.e. proper administration of justice in *Sessa*, smooth operation of custodial institutions in *Jakóbski*). Moreover, the ECtHR has offered some further insights on the meaning of ‘minimal’ administrative inconvenience in *Gatis Kovalkovs v Latvia*. The applicant in *Gatis Kovalkovs*, a follower of the Hare Krishna movement, submitted an application to the ECtHR complaining among others that his right to freedom of religion was violated because the Latvian prison authorities prevented him from reading religious literature and from undisturbed meditation, whereas they also took away his incense sticks from his cell. The ECtHR held that the *degree* of interference with the right to freedom of religious manifestation was proportionate to the legitimate aim sought because the applicant had been offered access to alternative premises for performing religious rituals but had the offer turned down. Moreover, some inconvenience in enjoying religious freedom is ‘almost inescapable in prisons’. For instance, burning incense sticks creates a powerful odour that is disturbing for other prisoners. All in all, the limitations under scrutiny were found proportionate and therefore not in violation of Article 9.

Turning back to *Jakóbski*, the applicant also complained about discrimination on grounds of religion, given that other religious groups in prison had their special dietary requirements accommodated. But the Court, similarly to *Sessa*, found that it was not necessary to examine separately the discrimination complaint holding that

[W]here a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case […]. In the circumstances of the present case the Court considers that the inequality of treatment, of which the applicant claimed to be a victim, has been sufficiently taken into account in the above assessment that led to the finding of a violation of a substantive Convention provision. (emphasis added)

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204 Interestingly, the *public-service disturbance test* strongly resembles the *de minimis* test that the US Supreme Court has introduced in *TWA v Harrison* case with regards to religious accommodation.
205 *Gatis Kovalkovs v Latvia*, Application no. 35021/05, 31 January 2012 (inadmissible).
206 ibid §60.
207 ibid §67.
208 ibid §67.
209 ibid §68.
210 *Jakóbski*, §49.
Cases such as *Jakóbski*, where the Court finds it unnecessary to engage into an analysis falling under Article 14 of the Convention because parts of an anti-discrimination analysis have already taken place in the examination under Article 9, along with cases where the ECtHR uses Articles 9 and 14 interchangeably and without a particular pattern, such as *Thlimmenos* and *Bayatyan* (both on conscientious objection to military service) and *Ladele* and *Sessa* (both on reasonable accommodation of religion in employment) show that there is a deeper connection between freedom of religion and freedom of religious discrimination. The two provisions seem to involve similar questions, which is further highlighted by the fact that the methodology followed by the ECtHR is similar in its examination of individual complaints under Article 9 and individual complaints under Article 14 in conjunction with Article 9 ECHR. But do both rights protect us from the same moral wrong? If yes, what does this mean about the right to freedom from religious discrimination? Is there anything morally distinctive about it? If not, why individual complaints about violations of the right to freedom of religion seem interlaced with complaints about violations of the right to freedom from religious discrimination? Is the interchangeable use of those provisions simply a symptom of an analytical confusion on behalf of the ECtHR? If not, then why does it happen? Those questions are important because obscurities in the relationship between freedom of religion and freedom from religious discrimination add fuel to arguments that equate all limitations on freedom of religious manifestation, such as those arising from refusal to grant exemptions from general laws on religious grounds, with religious discrimination. Those arguments are challenging on a strategic level too, since they cultivate the impression that freedom of religion complaints may be framed *either* as complaints under the right to freedom of religion or *as* complaints under freedom from religious discrimination, with the latter solution being considered more promising to secure accommodation.211

### 4.4. Conclusion

This chapter highlighted a doctrinal confusion regarding the relationship between the right to freedom of religion and the right to freedom from religious discrimination under the ECHR. The chapter highlighted that in various similar cases raising questions of religious freedom and accommodation, such as conscientious objection to military service, accommodation of religion in employment and accommodation of religion in the provision of services, the ECtHR employs Articles 9 and 14 of the Convention interchangeably and without a consistent pattern. Moreover, the jurisprudence of the Court seems to be drawing no meaningful distinctions between direct and indirect forms of discrimination in cases involving complaints about religious discrimination. As a result, both the methodological commonalities and the outcomes of the cases discussed show signs of a potentially deeper relationship between the rights to freedom of religion and freedom from discrimination. It is important to investigate that potentially deeper relationship further, not least because this thesis has already suggested an interpretation of freedom of religion that gives prominence to equality. The next chapter will engage in a

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211 See e.g. Evans, *Freedom of Religion Under the European Convention on Human Rights*, 168-211.
more thorough investigation of the normative relationship between freedom of religion and freedom from religious discrimination.
Two Birds with One Stone: The Relationship Between Freedom of Religion and Freedom from Religious Discrimination Under the ECHR

The authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.

Nachova v Bulgaria¹

A good hostess needs good imagination.

Martha Nussbaum²

5.1. Introduction

What is the relationship between freedom of religion and freedom from religious discrimination? When do limitations on the right to freedom of religion or belief constitute discrimination against individuals on grounds of conscience? Or else, when do those limitations wrongfully disadvantage individuals in the particular sense that grounds unjustifiable forms of discrimination? Those questions are intertwined with pressing issues of accommodation of religious beliefs in liberal multicultural democracies and have proved challenging for European human rights law. One of the reasons is that, as Chapter Two and Chapter Four discussed, the ECtHR is experiencing a surge in individual complaints about lack of accommodation, which are legally based both on the right to freedom of religion and on the right to freedom from religious discrimination.³ So far the analysis has already suggested that the dual legal basis of those complaints emanates from the idea that failure to accommodate individual conscience not only limits the applicants’ right to freedom of religion or belief, but also betrays state failure to treat them with equal

¹ Nachova and Others v Bulgaria, Application nos. 43577/98 and 43579/98, 6 July 2005.
³ See e.g. Eweida and Others v United Kingdom, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.
respect to other citizens, who find their spiritual commitments more easily (or more likely to be) accommodated.

Chapter Four emphasised that, on a doctrinal level, the ECtHR has dealt with such cases through employing Articles 9 and 14 of the Convention (read in conjunction with Article 9) interchangeably and without a consistent pattern. It is noteworthy that the ensuing uncertainty has been repeatedly criticised, among others, in the latest report of the UK Equality and Human Rights Commission on freedom of religion and religious discrimination, which stresses the ‘widespread confusion’ over which laws protect religious freedom in the UK. The fusion of freedom of religion and equal treatment is fueled by an enduring confusion over crucial doctrinal questions. But it raises important normative questions as well.

Seeking to make sense of that relationship, a rapidly emerging literature – both on European human rights and on UK equality law – explores the increasing role of equality norms in the judicial examination of complaints under the right to freedom of religion or belief. Some scholars argue that framing freedom of religion claims as equality claims promises better chances of success before the courts. For instance, Wintemute notes that the ‘very limited success’ of a ‘liberty’ approach based on Article 9 ECHR is a good reason to consider an alternative ‘equality approach’, which is based on indirect discrimination and engages Article 14 in conjunction with Article 9 ECHR. The assumption is that theoretically and practically more robust anti-discrimination norms can lead to stronger protection of the right to freedom of religion for majority and minority groups alike. Other scholars disagree. Leigh and Hambler argue, for instance, that an approach based on freedom of conscience, rather than on freedom from discrimination, can offer more robust protection to believers. In cases such as Ladele v United Kingdom, involving the complaint of a religious registrar who eventually lost her job

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10 Eweida and Others, n. 1 above.
because of her refusal to register same-sex civil partnerships, an approach based on liberty of conscience can also fit the principle that public bodies should not be allowed to ‘pick and choose’ which ‘human rights they prefer by prioritising one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance.’

As Chapter Two discussed, at the moment both those approaches are influential in European human rights law as well as in legal theory and law and religion. Their shared premise is an implicit assumption, namely that the relationship between a ‘liberty’ approach (grounded on the right to freedom of religion) and an ‘equality’ approach (grounded on the right to freedom from discrimination) is antagonistic, and that courts should only pick one out of the two. This Chapter unravels and challenges that prevalent assumption, and develops a new theoretical approach to freedom of religion and discrimination under the ECHR. I will pursue two separate yet interwoven arguments. First, the seeming confusion about the relationship between freedom of religion and freedom from religious discrimination can be unraveled through an in-depth analysis of the moral wrongfulness of religious discrimination. I argue that discrimination and disadvantage may be used in descriptive and moralised senses, and that distinguishing between the two has significant theoretical and practical implications for a substantive theory of religious discrimination. The aim of this Chapter is not to articulate or defend a general theory of justification of discrimination law, but to track the most convincing normative justification for laws protecting against religious discrimination. Second, the rights to freedom of religion and freedom from religious discrimination share their normative foundations in the exclusion of certain reasons, such as prejudice, as grounds for coercive prohibitions or disadvantageous treatment. I argue that an account unifying the two rights can explain morally important dimensions of the jurisprudence of the ECtHR in cases involving complaints about lack of accommodation of religious beliefs. It does so more successfully than arguments insisting that certain individual interests, protected as rights or as grounds of discrimination, are simply to be privileged over others.

5.2. Discrimination and Arbitrariness

Discrimination is a morally laden term. In its prevailing sense in our public discourse and litigation, to say that a person has been discriminated against is tantamount to saying that she has been morally wronged. But is discrimination always morally wrong? If not, when is it wrong, and why? Consider a first, semantic attempt to answer the question. Discrimination is wrongful, it has been argued, only when it is accompanied by the word ‘against’, as in discrimination against women or discrimination against homosexuals. By contrast, as Lippert-Rasmussen argues, discrimination between people, for instance through designating different shower rooms for men and women, raises no interesting

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moral questions. But that semantic distinction overlooks an important moral dimension. The policy of separate shower rooms does not constitute wrongful discrimination on grounds of sex, not because it discriminates \textit{between} sexes rather than \textit{against}, but because it does not depend on the reasons for action that ground the wrong in discrimination. Consider another example. Could we tell the difference between an employer who discriminates between men and women in his hiring procedure, from one who discriminates against women or against men? There is no clear difference between the two expressions – none that can be semantically explained. Depending on the circumstances of the case, in both instances we may argue that the employer treats people disadvantageously on grounds of sex and that it is morally wrong to pick one’s employees on grounds of sex. But we use moral arguments, rather than semantics, to reach that conclusion.

Despite the fact that the social meaning of discrimination is laden with negative connotations, societies routinely discriminate. Sometimes this may be done for public safety reasons. For instance, in most European states individuals under the age of 17 cannot obtain a driving licence. However, it would be far-reaching to claim that teenagers under 17 therefore suffer from age discrimination. In this case it is widely shared that public safety reasons are enough to justify their exclusion. Lack of adequate resources is another often employed basis to justify certain forms of discrimination. The Faculty of Laws at University College London does not admit every applicant to its graduate programmes mainly because it would be impossible to maintain any sense of rigorous academic quality if the student body consisted of hundreds (if not thousands) of people. The admissions officers must discriminate therefore between applicants on grounds of their academic credentials and they typically select only those with stronger qualifications than others. That policy may disadvantage applicants with weaker qualifications, but does it subject them to wrongful disadvantageous treatment? Consider another possibility. What if most of the rejected applicants were women, or what if they belonged to racial or religious minorities? Could we then claim that the admissions policy is indirectly discriminatory and (possibly) wrongful as a result? If yes, which would be the reasons behind that claim?

Let’s accept \textit{arguendo} that the admissions officers do not privilege any candidate because of his race, sex or religion. Rather, they believe that each individual bears equal worth and that each application deserves equal consideration. But this year, amidst adverse economic conditions and a huge number of applications, the admissions officers realise that a radically different system of admissions is essential. The university’s budget cannot sustain the extra resources required by the admissions team to compare the full number of applications through weighing different qualifications and achievements. Upon reflection the admissions officers decide to radically reduce the number of applications by


\[15\] Some of the most influential accounts of discrimination have been conducted around university admissions. They may seem irrelevant to religious discrimination but they are a helpful starting point to explore the different grounds of the wrongfulness of discrimination because they show that it is not always wrong to discriminate against others.
simply rejecting all applicants whose surname starts with a vowel. That criterion, they think, is not discriminatory since it is neither based on group membership nor on cultural references to disadvantage. Clearly some people, including myself, would unfairly benefit from that capricious criterion. But is an admissions policy excluding people on the basis of surname discriminatory? Is discrimination synonymous to arbitrariness?

5.3. Two Senses of Discrimination

We could think of numerous examples of rules or state policies that treat some people more advantageously than others based on certain protected characteristics, but which of those distinctions are benign and which are morally wrong? Although the line between legitimate and illegitimate discrimination is fine, there must be principles that distinguish the action of the admission officers, who exclude applicants with surnames starting with a vowel, from the moral wrong that another hypothetical admissions policy excluding applicants on grounds of their race or religion would induce. To discover that difference, we first have to expose and untangle an important distinction. That is, we have to distinguish between a moralised and a descriptive (also called generic\(^{16}\)) concept of discrimination. The moralised concept ‘picks out acts, practices or policies insofar as they wrongfully impose a relative disadvantage on persons based on their membership in a salient social group of a suitable sort.’\(^{17}\) Discrimination in the moralised sense is always wrongful. By contrast, the descriptive concept dispenses with the word ‘wrongful’. In its descriptive conception discrimination is indistinguishable from words that are not as morally laden, such as distinction or classification.\(^{18}\)

When a complaint about discrimination is made under its moralised sense, then the expression ‘discrimination is wrong’ ends up as nothing more than a tautology. In other words, the moralised sense of discrimination includes a substantive, negative moral judgment about specific types of disadvantageous treatment. In European human rights law, whenever the justifiability of specific restrictive rules or practices is under investigation, the ECtHR employs discrimination not in the descriptive, but in the moralised sense, meaning wrongful discrimination. At first blush, this practice is signified textually by the construction of Article 14 of the Convention: the article refers to ‘prohibition of discrimination’, not to prohibition of ‘wrongful’ discrimination. Moreover, cases on religious discrimination, such as those discussed in the previous chapter, confirm the use of the moralised sense of discrimination. In *Thlimmenos v Greece*,\(^{19}\) where the applicant complained of religious discrimination based on the refusal of the state to appoint him to a post of chartered accountant due to his criminal conviction for military disobedience, the ECtHR focused not on whether the discrimination in question has been wrongful, but on whether the moralised concept of discrimination applied to the facts of

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\(^{16}\) Lippert-Rasmussen, *Born Free and Equal?*, 22.


\(^{19}\) *Thlimmenos v Greece*, Application no. 34369/97, 6 April 2000 (Grand Chamber).
the case. The Convention therefore prohibits wrongful discrimination and not any distinction between people, even if that is based on protected characteristics.

The rest of this chapter will use discrimination in its moralised sense to denote wrongful discrimination. If the term has to be employed in a descriptive form, this will be linguistically signified by words such as classification or distinction in lieu of discrimination.

5.4. Deciphering Disadvantage

5.4.1. Disadvantage in a comparative sense

Under the moralised sense of discrimination, its wrongfulness springs from different forms of disadvantageous treatment inflicted upon members of socially salient groups due to their membership of those groups. But what do we mean by disadvantageous treatment? Could we describe it in the abstract? Recall Jakóbski v Poland, which was discussed in the previous chapter. The applicant argues that failure to accommodate his request for vegetarian meals constitutes wrongful disadvantageous treatment on grounds of his religion. The Polish government argues that not accommodating his request does not impose any disadvantage on him. And even if non-accommodation constitutes disadvantageous treatment, it is not wrongful because smooth functioning of prisons requires a uniform no-exception meal policy. How can we tell if the applicant has indeed been subject to disadvantageous treatment? Could we answer that question in the abstract? Or else, is a comparable, yet more favourably treated case, always required as a reference point for our examination of the claim? What if there are no such comparable cases? What if no one has ever asked for accommodation of his dietary requirements in the prison’s meal programme before? Note that that last possibility is particularly troubling for establishing religious discrimination. For religious discrimination, primarily in the indirect form of lack of accommodation, often involves claims that are unavailable to non-religious people and therefore difficult to analogue with other individual claims for accommodation.

Deciphering disadvantage is central to discrimination theory. Perhaps the dominant approach, as expressed by Altman, is that disadvantage is ‘inherently comparative’ and typically understood in ways defined by reference to how others are treated. Lippert-Rasmussen interprets disadvantage along the lines of discrimination itself, which is ‘essentially comparative’ because what matters is how someone treats certain people compared to others. He argues that unlike other morally wrong acts, such as breaking promises or lying, we cannot discriminate unless we treat some people better than others. Likewise, Fredman notes that direct discrimination ‘is primarily a relative concept’ that relies ‘heavily on the possibility of finding an appropriate comparator.’ In

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20 Jakóbski v Poland, Application no. 18429/06, 7 December 2010.
21 Altman, ‘Discrimination’.
22 Lippert-Rasmussen, Born Free and Equal?, 16.
23 Ibid
her view, direct discrimination is therefore ‘highly restricted’ because, as a relative concept, equality ‘is achieved if both parties have been equally well treated; but it is also achieved if they have been equally badly treated.’25 By the same token, arguing that we would have treated anyone else in the same disadvantageous way may rebut any complaint of discrimination. In fact, before the UK courts, this is exactly what the owners of a small hotel in Cornwall did when they were accused of discriminating against an unmarried same-sex couple by refusing to accommodate them in a double room: they claimed that their refusal did not amount to discrimination as they would treat any unmarried couple in the same way.26

But disadvantage is conceptually distinct from discrimination, for not all forms of disadvantageous treatment can ground discrimination in the moralised sense described above. The problem is not just evidentiary, namely about how to establish that a particular rule or policy disadvantages the members of a given socially salient group in order to activate their legal protection from discrimination. It is primarily normative because any plausible moral interpretation of discrimination rights has to account for the distinct forms of disadvantage that discrimination, in the sense that our existing European legal practice employs it, ought to protect us from.

I think that the predominance of comparative approaches to disadvantage emanates from the well-known idea that equality is essentially comparative and derives its moral power and limits from how others are treated.27 As Westen has famously argued, equality is concerned with ‘relative deprivation’ and its endurance is due to the fact that it is empty of content.28 That criticism of equality springs from an interpretation of the concept along Aristotelian lines, or else, ‘treating likes alike’. If the prime moral entailment of equality is consistency in treatment, then indeed we have to find out how ‘alike’ cases are treated and we do face serious complications of ‘leveling down’, of assimilation and diversity, and of establishing who to compare to. But that conception of equality is unattractive and now discredited in political philosophy, which has long ago moved towards more complex, multi-dimensional accounts such as, among others, equal liberty and equality in the distribution of primary goods;29 substantive equality,30 equal chances to develop our capability to achieve valuable functionings and freedoms,31 equality of opportunity,32 equality of resources,33 equality of outcome,34 democratic equality,35 equality as social

25 ibid 167.
26 Still, the UK Supreme Court found that their refusal amounted to discrimination in violation of the UK Equality Act (Sexual Orientation) 2007. See Bull v Hall UKSC.
inclusion and equality as parity in political participation. I will further explore the relationship between equality and prohibition of discrimination later in this chapter, but it is important, for now, to note that under a political theory of equality where consistency in treatment is the main desideratum, seeking comparators is indeed essential to expose disadvantage.

Meanwhile, as Chapters Three and Four discussed, the ECtHR investigates whether the anti-discrimination principle has been violated by seeking actual (or hypothetical) people in analogous situations that have been treated more favourably than the applicants in the case under investigation. What matters in those comparisons is not how favourably or unfavourably specific individuals or groups have been treated, but how they have been treated relatively to other similarly situated individuals or groups. Typically the comparison group is part of the same society as the disadvantaged group, or at least subject to the same overarching political structure. For instance, in Ladele, the ECtHR had to seek a hypothetical comparator in order to decide whether or not a registrar who objects to same-sex partnerships, but based on non-religious reasons, would have been treated differently under the circumstances of the case. Of course seeking comparators is not restricted to freedom of religion cases. Rather, it is one of the common interpretative mechanisms of the Convention as, for example, cases involving complaints of discrimination on grounds of sexual orientation and indirect discrimination through the ‘disparate impact’ of certain general regulations on equal access to education illustrate.

And more generally, discrimination law is an area of increasing cross-fertilisation between the ECHR and EU law, where comparative constitutional law also plays significant role. Moreover, discrimination as imposition of a relative disadvantage is congenial to how international human rights law has framed anti-discrimination protection. For instance, Article 2(2) of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief, provides that

[F]or the purposes of the present Declaration, the expression ‘intolerance and discrimination based on religion or belief’ means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

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38 Altman, ‘Discrimination’.
39 Eweida and Others v United Kingdom, §104.
41 DH v Czech Republic, Application no. 57325/00, 13 November 2007.
42 In DH (ibid) the ECtHR cited Griggs v Duke Power, 401 US 424 (1971), a landmark judgment of the US Supreme Court, in order to extend indirect discrimination to cases of rules having a ‘disparate impact’.
Seeking comparators is therefore a ubiquitous judicial mechanism for establishing wrongful discrimination. Meanwhile, despite skepticism, locating comparable cases is not always hard. Consider the common example of a state that grants its mainstream religious groups various forms of accommodation, whereas it also accommodates, through exceptions from the generally applicable work schedule, certain important secular interests. However, it refuses analogous forms of accommodation to the members of a minority religious group despite that they are similarly situated. It might be relatively easy to argue then that the members of the minority group suffer indirect discrimination because, but for their religion, they would not have had to endure the disadvantage in question. In these cases, as Leader notes, the degree of ‘loss of freedom’ depends on its link with broader sets of options in an ever-changing network of time and choice patterns.\textsuperscript{44} Moreover, according to Wintemute, this comparative exercise is an attractively clear proposition since disadvantaged individuals need only to ‘demand a particular amount of religious liberty under Articles 14 and 9… rather than demand this amount in the abstract (with no comparator) under Article 9.’\textsuperscript{45}

However, as was briefly discussed in Chapter Two, an interpretation of discrimination that explains its aim and applicability through the availability and selection of comparators exposes the entire concept to serious weaknesses. Standard patterns of selection of comparators may buttress conformist pressures to dominant interpretations of a culture or religion as a precondition of equal treatment and invite value judgments about which aspects of a comparator are valuable and which are not.\textsuperscript{46} Moreover, there are many cases where no comparators are available. Thus, a worrying potential is that the equality principle might not be able to gain sufficient traction in cases, such as those involving the wearing of religious symbols, where it is contestable whether there are other commitments matching religious duties in categoricity or importance so as to enable courts to draw accurate analogies. For many people it is absurd to analogise the importance of a cross for a Christian to the importance of a designer bag to someone fashion-conscious or to the importance of a football hat to a sports fan. Time and again, analogising non-religious commitments with categorical needs of conscience emerges as a significant challenge for an interpretation of religious discrimination that aims to capture both freedom and equality. But, on the other hand, it has also been argued that the categoricity of religious commitments can be met through health-related analogies.\textsuperscript{47}

States are usually sensitive to health concerns and, according to Eisgruber and Sager, accommodation of health and accommodation of religion have something in common: like refusal to accommodate in cases of health concerns, refusal to accommodate the need to wear religious symbols is likely to arise from neglect, rather than from an effort to equally share social burdens.\textsuperscript{48} Other analogies may spring from family commitments. As Shiffrin notes, states often provide exemptions from general rules to accommodate

\textsuperscript{44} S. Leader, ‘Freedom and futures: Personal priorities, institutional demands and freedom of religion’, (2007) 70 MLR 713, 729.
\textsuperscript{45} R. Wintemute, ‘Accommodating religious beliefs: Harm, clothing or symbols, and refusals to serve others’, (2014) 77(2) MLR 223, 227.
\textsuperscript{46} Fredman, \textit{Discrimination Law}, 168.
\textsuperscript{48} ibid 97.
parents or people who have to undertake spousal care.\textsuperscript{49} Health-related analogies and family commitments may help circumvent problems with analogising religion to other commitments without, however, changing the main idea, namely that we have to track down comparators in order to establish disadvantage.

Overall, instances of accommodation of special needs are unexceptional in the European legal landscape. They are rather ubiquitous. Even hardline secular models of constitutional arrangements, which perceive religion as ‘a threat to secularism’ to be distanced from the state,\textsuperscript{50} support certain ‘pragmatic’ accommodations of religion.\textsuperscript{51} In France, for instance, there is accommodation of religion in terms of holidays, prayers, food regulations, support for private religious education, and indirect financial support, whereas similar examples of religious accommodation have emerged in Turkey too.\textsuperscript{52} Other contracting parties to the Council of Europe, such as the United Kingdom, Denmark, and the Netherlands, have embraced an even more open and accommodating stance towards religion.\textsuperscript{53}

5.4.2. Problems with drawing analogies between religious and secular commitments

Even so, how should we deal with cases where actual comparators are for some reason unavailable and potential analogies to other similar hypothetical cases are implausible? One suggestion to overcome those difficulties is to replace the ‘less favourable treatment’ requirement of discrimination with ‘unfavourable’ treatment.\textsuperscript{54} That approach has proved successful in contexts such as pregnancy discrimination, disability discrimination, and victimisation, where proving ‘unfavourable’ rather than ‘less favourable’ treatment has proved more practical. As Fredman argues, in the context of harassment ‘the principle that likes should be treated alike has expressly been replaced by a reliance on breach of dignity as the basis of the harm… sensitivity to the underlying value of dignity has led to protection against discrimination by association and discrimination by perception.’\textsuperscript{55} Pregnancy discrimination cases, where no male comparators exist for pregnant women,


\textsuperscript{54} Fredman, Discrimination Law, 169.

\textsuperscript{55} ibid
are particularly useful here. A pregnant woman is ‘no longer just a woman’ but a woman with a child with no masculine equivalent. That has led both American and English courts to be dismissive in early cases discussing complaints of sex discrimination on grounds of pregnancy. Progressively, judicial tests involving comparisons between pregnant women and ill men improved protection of their rights under legislation prohibiting sex discrimination, but the downside was that drawing analogies between pregnancy and illness gave rise to stigmatisation of pregnant women. Moreover, focusing on the women’s capability to work brushes aside crucial positive aspects of pregnancy, such as the need of a mother to breastfeed her children and to build up her relationship with them. Nevertheless, in a series of important cases the CJEU has held that establishing disadvantage does not require comparators of any sort. Since only women could become pregnant, discrimination on grounds of pregnancy falls within the protective scope of sex discrimination. Some years later, the UK followed a similar approach in the Equality Act 2010, which provides in s. 4 that ‘unfavourable’ treatment – instead of ‘less favourable’ treatment – falls within its protective scope. Various safeguards to protect pregnant women have progressively complemented that approach, including employment protection legislation, maternity leave and pay, and social security schemes in various EU countries.

Cases of disability discrimination furnish another example of the difficulties that a comparative approach to disadvantage involves. Notably, the choice of comparators in cases of disability discrimination depends on the model of disability that informs our discussion. Two prominent models include the ‘medical’, which focuses on functional limitations that the disability poses on an individual, and the ‘social’, which focuses on the effects of the existing built and social environment to certain individuals. Thus, far from just a comparison, the choice of comparators in cases of disability depends on a value judgment about which similarities matter and which do not. The effectiveness of discrimination law heavily depends on whether we compare a disabled person to an ill person (that would be under the ‘medical model’) or we compare a disabled person to an able-bodied person whose access to workforce or a restaurant is just not impeded (under

56 Turley v Allders Stores Ltd [1980] ICR 66 (EAT) at 70D (per Bristow J).
58 Fredman, Discrimination Law, 170.
60 Equality Act 2010, s. 4.
the ‘social model’).\(^{65}\) In any event, the value judgment, namely the social meaning of the difference in the context of the case,\(^ {66}\) pre-exists the comparison and illustrates that comparators themselves do not tell much about what rights we have under a fair scheme of distribution. Rather, problems with accommodation of disability are ‘problems of justice’\(^ {67}\) that require drawing on political principles on fair distribution of resources and human dignity to be resolved.

Although religious discrimination poses different challenges from both pregnancy and disability discrimination, the above concerns apply here too. Similarly to pregnancy discrimination, treating individuals or groups less favourably on grounds of religion or belief cannot always be established due to unavailability of suitable comparators. Comparisons with individuals who due to their health conditions have been granted some form of accommodation in the workplace or elsewhere may be stigmatising for religious people, for whom religion is incomparable to illness and all its negative connotations. Meanwhile, as in pregnancy discrimination, focusing on the capability to function as fully as other non-religious individuals cannot capture various positive dimensions of enjoying freedom of religion, such as praying or identification with religious communities. For similar reasons to pregnancy and disability discrimination, it follows that unfavourable or disadvantageous, rather than ‘less favourable’, treatment on grounds of religion should be enough to ground religious discrimination complaints.

However, we have to specifically address another interpretative challenge, which is associated with broader critiques of egalitarian theories of freedom of religion. According to Laborde, egalitarian theories of freedom of religion are unsuccessful in their main ambition, namely ‘to demonstrate that (what we traditionally mean by) religion can be unproblematically analogised with, or extended to, other kinds of practices and beliefs.’\(^ {68}\) In her view, analogising religion with a vague category of ‘conceptions of the good’ and not providing satisfying criteria of what kinds of commitments are comparable to religion doom egalitarian theories to failure to ground a coherent normative theory of freedom of religion.\(^ {69}\) In similar vein, McConnell argues that comparisons between religious and non-religious interests are unsystematic and incoherent,\(^ {70}\) and Koppelman notes that the only way to systemise those comparisons is through a theory on secular interests, which currently lacks from egalitarian theories of religion.\(^ {71}\) Their criticism is arguably fueled by the failure of the existing egalitarian theories of freedom of religion to adequately explain the role and value of those comparisons. For instance, although Eisgruber and Sager insist

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\(^{67}\) M. Nussbaum, \textit{Frontiers of Justice: Disability, Nationality, Species Membership} (Harvard University Press, 2006) 178.


\(^{69}\) C. Laborde, ‘Equal Liberty, non-establishment and, religious freedom’ (2014) 20(1) \textit{Legal Theory} 52.


that ‘Equal Liberty does not depend on the possibility of close comparisons of religious and secular interests or of a theory by which such close comparisons could be guided’\textsuperscript{72} they do not clearly explain whether the role of those comparisons is just evidentiary or can also be constitutive of a violation of the moral right to freedom of religion under certain circumstances.

In any event, an analysis of egalitarian theories of freedom of religion that starts from the assumption that their main ambition is to draw analogies between religion and other beliefs and then criticises them for failing to do so, does not spring from the evidentiary problems of establishing disadvantage. Rather, this is a normative claim based on the idea that seeking comparators through analogies betrays a poor conception of religious freedom. We have to examine that claim as part of our discussion about the role of comparators for establishing disadvantage, not least because the success or failure of that critique is crucial to unveil the normative connections between a particular interpretation of our moral right to freedom of religion and an interpretation of our moral right to freedom from discrimination based on certain characteristics.

5.4.3. Comparators, equality, and diagnosis

Let’s return to one of the main questions that started the previous section: is disadvantage relative to how others are treated? Recall that our question is whether disadvantageous treatment, on grounds of religion – or race or sexual orientation or on any other protected ground – can exist in the abstract or its demarcation can only be relative to the treatment of others. I think that we have to draw again a distinction between a descriptive and a moralised sense of disadvantage. Disadvantageous treatment may be wrongful for a number of reasons, for instance when it flows from violating a promise we made to another agent.\textsuperscript{73} In this descriptive sense disadvantage can, indeed, be suffered only in relative terms. For we have to look at how other people have been treated in comparable situations in order to establish that someone has been treated disadvantageously. In a descriptive sense, someone could complain of disadvantageous treatment by virtue of his race or religion every time he has been treated less favourably compared to others. So every time someone enjoys more goods, better services, or easier access to health or education by virtue of his membership in a socially salient group, such as an ethnic or a religious group, other people who do not enjoy those benefits can complain for being treated disadvantageously on grounds of their ethnic origin or religion.

However, when we use discrimination in the moralised sense described earlier, meaning wrongful discrimination, disadvantage cannot be used in the descriptive sense because not all forms of disadvantage are wrongful. Not all forms of disadvantageous treatment can ground discrimination. Consider the example of positive measures. It is widely believed that positive measures, such as quotas in education or in political


\textsuperscript{73} Altman, ‘Discrimination’.
representation, are necessary to correct past injustices against certain social groups. The CJEU, for instance, has accepted that positive measures, such as quotas in employment, do not violate anti-discrimination protection, whereas the EU Employment Equality and Race Equality Directives expressly provide for positive measures in order to rectify injustices and achieve ‘full equality in practice.’ Under a descriptive model that defines disadvantage relatively to how others have been treated, members of majority or powerful groups may therefore claim disadvantageous treatment on grounds of their race or sex.

But this form of disadvantage that men, for instance, might suffer by virtue of positive measures is not the kind of disadvantage that informs wrongful discrimination. Discrimination, in the moralised sense used by the ECtHR, is grounded on wrongful disadvantageous treatment. In the context of discrimination disadvantageous treatment is wrongful if someone’s properties, including race, or someone’s membership in a certain socially salient group, including a religious group, form the basis of legal distinctions. Thus, only wrongful disadvantage, that is, disadvantage in a moralised sense, can ground wrongful discrimination. But if that is the case, then disadvantage occurs independently of how other people have been treated. Disadvantage, in the moralised sense, is wrongful every time the government treats certain people with less respect and concern. That is, every time that the calculation of what makes the community better off as a whole is likely to have been corrupted by the wrong sort of reasons, such as reasons that disparage or express contempt for certain members or sections of the community.

This is not to suggest that the circumstances under which people are treated differently based on certain traits are irrelevant. Nevertheless, how others have been treated plays an evidentiary, rather than a constitutive role. More specifically, if our interpretation of a particular practice shows that an individual has been disadvantaged (in a moralised sense) because he has been refused a place in higher education based on his sex, race or religion, the moral wrong he suffers holds irrespective of whether or not others have been treated more favourably. More favourable treatment of individuals of other races or religions may serve as an indicator, or even as prima facie evidence of wrongful disadvantage. But the wrong of discrimination exists independently of that.

Furthermore, this argument does not suggest that the fundamental state duty to treat citizens as equals is not comparative. There is a comparative element in the idea that a state should treat everyone with equal respect and concern. But the principle of treating as equals is comparative in a much broader sense than seeking comparators through drawing analogies between religious and secular interests. Although what treatment with equal respect and concern would require in more concrete cases will depend on the particular circumstances, according to Dworkin defining what treating as equals requires is ‘the same question as the question of what it means for the government to treat all its citizens

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75 See Kalanke v Freie Hansestadt Bremen, Case 450/93 (CJEU 1995); Marschall v Land Nordrhein-Westfalen, Case 609/95 (CJEU 1997).
as free, or as independent, or with equal dignity.\textsuperscript{77} The question requires interpretation of the practice in question based on the principles of freedom and equality that justify the institutions of democracy and law, and treatment as equals \textit{may} require equal treatment, but this is not always the case. As people vary in their capabilities, aspirations and circumstances, the state may end up treating people differently while showing equal regard for them as individuals given their characteristics and social situations.\textsuperscript{78}

So, what are the courts looking for when they seek actual or hypothetical comparators? I think that the criticism against egalitarian theories of freedom of religion for engaging in arbitrary comparisons between religion and other kinds of beliefs overstates the purpose and ambition of their often comparative methodologies. Seeking comparators is just a prominent judicial test through which courts wish to \textit{diagnose} a violation of non-discrimination and not \textit{explain} which practices constitute wrongful discrimination or whether we have a right to accommodation and under which circumstances. This is part of a more general distinction between \textit{diagnostic} and \textit{constitutive} questions that is important to track in human rights theory.\textsuperscript{79} In fundamental rights discourse, constitutive questions include, for instance, what rights we have or how broad the scope of the right to freedom of religion is. By contrast, diagnostic questions focus on \textit{how} to decide constitutive questions about the grounds of rights. A diagnostic question would look at how we can decide about the scope of the right to freedom of religion, or at how we can find out whether a general rule violates the state duty to treat everyone with equal respect and concern regardless of religious affiliation.

The task of human rights institutions and courts is to discover whether a right has been violated. To do so they employ various diagnostic tools, whose purpose is to diagnose a human rights violation and their success is judged upon their accuracy rate, namely upon the number of false positive (i.e. when they find a violation of human rights when there was none) and false negative (i.e. when they find no violation of human rights when there was one) decisions they reach. As Letsas argues, ‘we want to make sure that the way courts go about deciding about someone’s rights have been violated maximises correct results and minimises false ones (positives or negatives).\textsuperscript{80} The diagnostic nature of the courts’ decisions entails that their decisions, whether positive or negative, do not mean that a right has \textit{in fact} been violated. For their reasoning is part of a diagnosis and not a normative theory about what rights should people have. Think of a thermometre, which does not tell us what temperature is or what factors influence its increase. It just indicates a specific temperature at a specific time. Likewise, judicial tests about human rights do not provide insights on what rights we have. They merely indicate violations of rights.\textsuperscript{81} Just like medical diagnosis, they may be indirectly diagnostic as well: doctors (or human rights courts) may be looking at proxies that do not constitute themselves a disease (or a violation of rights) but are proxies for a violation.

\textsuperscript{77} R. Dworkin, \textit{A Matter of Principle}, 191. See also S. Guest, \textit{Ronald Dworkin}, at 182, 205 and 223.

\textsuperscript{78} N. Bamforth, ‘Conceptions of antidiscrimination law’ (2004) 24(4) OJLS 693, 712.


\textsuperscript{80} ibid

\textsuperscript{81} ibid 43.
The distinction between diagnostic and constitutive questions is important, albeit often overlooked, in human rights theory. Examples of conflation between constitutive and diagnostic questions are arguments implying that judicial tests reflect the structure of human rights themselves. It is often suggested, for instance, that the use of the proportionality test by the ECtHR betrays a particular constitutive theory of human rights, that is, a theory about what human rights are. Rivers argues that proportionality weakens human rights and Tsakyrakis that it contravenes the anti-utilitarian nature of rights. In law and religion, Leigh and Hambler and Carolyn Evans both hint at something similar when they argue that the ECtHR misunderstands human rights because its proportionality test does not pay much attention to the scope and amplitude of the right to freedom of religion. The criticism against egalitarian theories of freedom of religion that was discussed above, namely that analogies between the treatment of religious and secular interests in order to establish disadvantage or to assess a complaint of a violation of the right to freedom of religion offer a poor theory of freedom of religion, is another example of amalgamating constitutive and diagnostic questions about rights.

As Vickers notes, in complaints of indirect discrimination arising out of limitations on the right to freedom of religious manifestation at the workplace, the courts focus ‘on the interpretation of justification and proportionality, such that their meaning becomes the all-important test of whether restrictions of religious freedom at work are lawful.’ Indeed, if the prime focus of our analysis is on ‘all-important’ judicial tests, such as proportionality, it is logical to assume that those tests do all the work in determining when limitations on freedom of religion are justifiable. But if proportionality mirrors the scope of our rights, then whenever a particular measure is found proportionate, namely whenever there is no serious interference with the liberty in question and the legitimate aim pursued is important, that would mean that there is no right. Individuals would indeed have had their rights protected, albeit only in cases of serious interferences for minor gains for the collective good. But, as I argued in Chapter Three, this rule-utilitarian model that gives relative priority to rights is both morally unattractive and incapable of capturing significant parts of our common legal practice under the Convention.

The same problems hold, perhaps even more crudely, if the availability of comparators is taken to reflect morally important elements of a normative theory of freedom of religion. Under that assumption, whenever no comparable cases are available, an applicant could not have suffered disadvantage on grounds of religion. But this is implausible as examples from pregnancy and disability discrimination, where no direct comparators exist, demonstrate. Our right to freedom from discrimination on grounds of

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82 Letsas, ‘The scope and balancing of rights’, 44.
88 ibid
religion is not conditional upon how others are treated. The fact that the ECtHR employs such comparisons does not entail that our rights are in fact conditioned by how others or their beliefs are treated, any more that it follows that the symptoms which indicate the presence of a disease, consist the disease itself. Judicial tests such as proportionality and locating comparable cases are regularly criticised for being vague, uncertain, context-dependent and subjective. Those shortcomings are substantively worrying for human rights theory only if we err in considering those tests constitutive of a substantive account of rights.

The structure of the ‘seeking comparators’ test is roughly outlined in certain anti-discrimination provisions that require ‘less favourable’ treatment to ground discrimination, and therefore insinuate the need to investigate how (similarly placed) others have been treated under comparable circumstances. However, seeking comparators is just one of the various possible ways to find out whether certain rules or practices wrongfully disadvantage certain people in violation of our right to be treated as equals by the state. There may well be other diagnostic tests capable of exposing the relevant facts and assigning the appropriate weight to them, and they may well be equally or even more accurate compared to seeking comparators. Examples from cases on pregnancy and disability discrimination are useful because they show that courts should be flexible and attendant to the fact that a method of review is not a theory of what rights we have. The argument, therefore, that the reason why claims under the right to freedom of religion often take the shape of equality claims is the framing of anti-discrimination provisions which requires comparators merely overstates the role of those tests.

This is not, of course, to underestimate the importance of diagnostic tests. Diagnostic tests, such as seeking comparators, are crucial in the real world bewildered by resource and time constraints. The ECtHR cannot ask all the moral questions that are relevant to rights, but it can, and should, look for the right indicators of a human rights violation. Recall that the success or failure of a particular diagnostic test is indeed results-oriented, based on how accurate the test has proven with regard to violations of human rights. Yet it is important that judges have good philosophical understanding of human rights because the accuracy of adjudication is connected to questions about the nature and grounds of rights. Just like doctors, judges look at some and not all symptoms of a human rights violation, so their understanding of the right in question is important to decide which symptoms are relevant in a given case. The closer a diagnostic test about rights is to their nature, the more accurate it can prove to be in practice.

All in all, establishing disadvantage, in the moralised sense defended above, does not depend on the availability of comparable cases. Deciphering disadvantage requires distinctions between its descriptive and moralised senses as well as distinctions between constitutive and diagnostic questions of rights. But disadvantageous treatment is not the only symptom of wrongful discrimination. There may well be no symptoms at all, as it happens, for instance, in cases of indirect systemic discrimination that sometimes can only be exposed through statistical evidence substantiating social exclusion of certain groups. Thus, to what extent a particular state practice constitutes wrongful discrimination on grounds of religion will depend on a moral interpretation of the practice in question. It depends on a theory of the moral wrong of discrimination, where the analysis now turns.
5.5. Theories of Discrimination

Turning back to one of our initial questions, could an admissions policy that selects students according to their achievements and qualifications be discriminatory? We cannot reject that possibility on the basis that the policy in question is now ubiquitous in academic admissions – after all, most English universities were admitting only men during the 19th century and, however ubiquitous back then, that practice was and remains morally unjustifiable. Rather, in order to figure out whether discriminating on academic credentials is wrongful, our intuitions would probably contrast it with other, more straightforward, instances of discrimination. A possible answer could then be that the selection process is not discriminatory because it treats applicants on merit, rather than on some other arbitrary criteria. Closely related would be another response, namely that the admissions policy is justifiable since it does not reject applicants based on ‘immutable’ characteristics. Others could defend the admissions policy based on the fact that the rejected students do not form a socially salient group discriminating against which is pro tanto morally wrong ‘given the social world in which we live.’ Or, finally, some might argue that academic rejections do not wrongfully disadvantage applicants with weaker credentials (who are treated less favourably than others) because strong academic credentials (who are treated less favourably than others) because strong academic credentials are morally relevant to the high academic quality that every good university seeks to maintain. Those responses sketch some of the most influential theories about the moral wrong of discrimination. They share the sense that the wrong of discrimination concerns the morally impermissible kinds of reason guiding the action of the discriminating party. But they are based on different principles and we have to closely examine them to find out which is the most attractive – if anyone is.

5.5.1. Merit, immutability, freedom and moral relevance

The first theory that I wish to examine grounds the wrong of discrimination on failure to treat people on merit. For instance, Hook argues that if X and Y are competing for a post and my decision to hire X ‘is based on X’s sex or race, and not on merit, then it is a case of racial or sexual discrimination against Y, which is morally wrong.’ Moreover, according to Goldman, discriminatory practices are wrong because competent individuals stay out of the jobs they deserve. The merit justification is intuitively attractive. But an important question is which individual properties count as merit. As McCrudden argues, there are many different conceptions of merit pointing to different and sometimes incompatible policy directions. Merit also depends heavily on context. For instance, according to Dworkin, merit cannot be defined in the abstract and ‘if quick hands count as

89 On that account, it is unjust to treat people less favourably by virtue of their race or religion since they cannot change those characteristics. See discussion below under 5.5.2.
82 A. Goldman, Justice and Reverse Discrimination (Princeton University Press, 1979) 34.
“merit” in the case of a prospective surgeon, this is because quick hands will enable him to serve the public better and for no other reason. If a black skin will, as a matter of regrettable fact, enable another doctor to do a different medical job better, then that black skin is by the same token “merit” as well. Dworkin’s argument that the colour of one’s skin may be considered ‘merit’ under certain social circumstances demonstrates that merit should not be confused with the very different and dangerous idea that one race is inherently more worthy than another. The two ideas are different.

Additionally, grounding the wrong of discrimination on (lack of) merit blurs the distinction between anti-discrimination and meritocracy. Meritocracy, contrary to the intuitions we have about the wrong of discrimination, is not necessarily grounded on fairness. In fact, sometimes, as Cavanagh argues, ‘hiring on merit has more to do with efficiency than fairness.’ More importantly though, fixing merit as the normative justification for anti-discrimination fails to account for cases of racial, sex or religious discrimination that occur when someone (e.g. an employer) believes that black people, women, or Muslims are morally or intellectually inferior. In these cases merit makes this behaviour look tantamount to non-meritocratic treatment. Finally, and specifically with regard to religious discrimination, although treating everyone on merit is important in the realm of employment or academic admissions, the merit justification cannot explain how prohibition of discrimination can complement protection of the right to freedom of religion, especially in cases involving conscientious objection to military service or bans on religious symbols in public spaces. This shortcoming is important because, as the previous chapters discussed, those claims commonly involve complaints under both religious discrimination and freedom of religion.

Another theory of discrimination grounds its unfairness on the wrongfulness of disadvantaging others based on immutable characteristics that they cannot control. This is why, according to Kahlenberg, racial discrimination and disability discrimination are wrong. However, there are instances in which it is justifiable to exclude people from certain activities, such as higher education or sports teams, based on features beyond their control, such as their intelligence, height or bodily strength. It follows that we need something more than immutability to explain moral wrongness. At this point, however, it is important to discuss another challenge to immutability, namely that certain protected grounds of discrimination, including conscience, are not immutable in the way race, disability and ethnic identity are. According to Plant, there is a fundamental difference between religious identity, which is ‘self-chosen and self-assumed’ and other forms of identity which are ‘given matters of fact’ such as ethnic origin, gender and sexual orientation. Shiffrin adds that even though we may disagree about the immutability of

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96 ibid 24-25.
religion, the ways we manifest our beliefs, and the extent to which we follow its tenets, constitute choices. 99

However, for our present purposes the classification of religion, if at all possible, would make no difference to the moral wrong that treating people disadvantageously based on their conscience induces. As was briefly discussed in Chapter Two, religion is valuable for so many people that its free enjoyment should be a possibility for all who can (in principle) choose it. If choosing should be a possibility, it should not be effectively ruled out as an option by prohibitive costs.100 Discriminatory laws and policies impose exactly that kind of costs to people who wish to live according to the tenets of their religion, or far from any religious commands. This argument aims to protect individuals and groups from discrimination on the basis of their religious affiliation in different settings, as well as to protect people or groups without any religious affiliation. Nothing in this argument assumes that religion is always a choice.101 Many people treat the religious attachments of their ancestors or communities as a natural continuation of their own existence, without questioning the value of these religious or cultural traditions. But in a liberal democracy committed to freedom of conscience authenticity in making important life choices requires that even uncritical choices are (other things being equal) free choices with which a democracy should not interfere.

Instead of merit and immutability, Moreau favours a liberty-based account of discrimination.102 More specifically, she argues that antidiscrimination legislation protects our deliberative freedoms, that is, our freedoms to have our ‘decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin colour or gender.’103 Under her account, extraneous features, such as the beliefs of our employers, service providers and landlords among others, should not figure in our deliberations as ‘costs’ when we decide where we want to work or where we wish to live.104 Thus, we are entitled to those ‘deliberative freedoms’ independently of whether others enjoy those freedoms. On a liberty-based account of the wrong of discrimination ‘the conclusion that an act or policy is discriminatory is based upon at least two kinds of normative judgments: first, that the trait in question is normatively extraneous, and secondly, that the deliberative freedom is one that, in this context, considering the interests of others that are also at stake, this person or group of people are entitled to.’105

Moreau’s focus on deliberative freedoms needs, however, further explication. For not all instances of discrimination necessarily involve restrictions on our deliberative freedoms. Consider an example. Sam, a shop owner, rejects a job application sent by Roger, who is gay, because Sam believes that homosexuality is sinful and wants to fight

100 ibid. Also J. Raz, ‘When we are ourselves’, in J. Raz, Engaging Reason (Oxford University Press, 2002) 5-22.
103 ibid 155.
104 ibid 149.
sexual sins by all means. Following the rejection Roger continues applying and he ends up in a much better job. Sam has wrongfully discriminated against Roger by treating him disadvantageously on grounds of sexual orientation. However, if we accept *arguendo* that Roger is unaware of the reasons behind the rejection of his application, his disadvantageous treatment has not restricted his deliberative freedoms. But under-inclusiveness is not the only challenge to a deliberative freedoms account of discrimination. The account does not fit the phenomenology of discrimination, either. Racial discrimination is a hideous form of discrimination not because people should not have to take their race into account as a cost in their deliberations. It is wrong irrespective of its consequences for peoples’ deliberative freedoms and irrespective of whether or not they cherish or exercise those freedoms. It is wrong, in other words, based on non-teleological reasons – because when some people are treated disadvantageously based on their race they are treated as if they bear an inferior moral status compared to others.

Thus, the wrong of discrimination is better captured by the idea of degraded moral status, rather than by its damaging consequences for our deliberative freedoms. There are some similar concerns, however, underlying Moreau’s focus on extraneous features and theories of discrimination that ground its wrong not on liberty, but on moral relevance. According to those theories, discrimination is wrongful because the act that produced the result can only be understood if morally irrelevant considerations have been taken into account at least at some stage, which might be in the distant past. For instance, Bell and Waddington argue that certain characteristics, such as sex, race, or sexual orientation are prohibited grounds of differential treatment in employment because they are irrelevant to an individual’s ability to undertake certain duties. Moreover, I think that an account based on moral irrelevance makes better sense of the prevailing political sense of discrimination, namely that it constitutes a form of departure from equality in need of moral justification. Prohibition of translating morally irrelevant differences into disadvantage is intertwined with an interpretation of the value of equality in opposition to oppression through hierarchies of social status, caste, class privileges and the undemocratic distribution of power. By the same token, Sunstein argues that there is a strong ‘anticaste principle’ underlying prohibition of discrimination, which forbids ‘social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so.’

Thus, certain forms of expressive conduct may be particularly harmful due to the conception of unfairness generated by its cultural associations with oppression,

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106 If Roger knew the reasons for his rejection then probably the less favourable treatment would also be harmful as a form of domination in contravention of his equal moral worth; see I. M. Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) 39-65. Even in that case though the distinction between less favourable and harmful treatment remains stable.
subordination and disadvantage.\textsuperscript{112} Oppression, as Anderson argues, means ‘domination, exploitation, marginalisation, demeaning and infliction of violence by some groups of people upon others’,\textsuperscript{113} which prohibition of discrimination should aim to challenge.\textsuperscript{114} Despite their differences, all above accounts share the seminal idea that discrimination is wrong because it perpetrates an unfair situation brought about by individual or collective judgments influencing the lives of others based upon morally irrelevant considerations.

I think that that approach accords with our human rights practice and explains the partly expressive and symbolic character of discrimination rights. However, it requires further explication because determining which considerations are morally relevant (and which are not) in the distribution of resources, burdens or opportunities brings forward a host of interesting questions. For instance, Wasserstrom notes that ‘the principle that persons ought not to be treated on the basis of morally arbitrary features cannot grasp the fundamental wrong of direct racial discrimination,’ because it is too isolated from the actual features of a society in which many people have racist attitudes.\textsuperscript{115} Lippert-Rasmussen argues that irrelevance discrimination is inadequate to capture the wrong in discrimination because if a shop owner refuses to employ black women because his most loyal customers are racists, the race of his employees becomes a relevant factor that an account of discrimination based on the relevance theory cannot capture.\textsuperscript{116}

But justifying the wrong of discrimination on moral irrelevance is distinct from theories grounding its wrong on behavioural irrationality. As Gardner argues, if a restaurant’s customers are white racists, the owner’s decision not to serve blacks is not irrational, but would still be wrong.\textsuperscript{117} Still, the criticism put forward by Lippert-Rasmussen may not be based on a normative confusion over relevance and rationality. It may be based on a descriptive interpretation of the idea of relevance. In a descriptive sense, the race of someone’s employees is relevant indeed when his clientele is racist. But we do not use relevance descriptively here. Theories of moral relevance use it in a normative, rather than a descriptive, sense to connote which factors should never be relevant according to our principles of political morality.\textsuperscript{118} In a descriptive sense someone’s race may well be relevant to a shop-owner who wants to please his racist customers by employing only white assistants. In the normative sense, race can never be morally relevant in the context of the case.\textsuperscript{119} Still, it could be argued that similar objections to those discussed against merit theories of discrimination, namely that moral

\textsuperscript{112} J. Gardner, ‘Liberals and unlawful discrimination’ (1989) 9 OJLS 1, 6-8.
\textsuperscript{116} Lippert-Rasmussen, Born Free and Equal?, 24.
\textsuperscript{117} Gardner, ‘On the ground of her (Sex)uality’, 168 and 182.
\textsuperscript{118} Sophia Moreau uses a similar account when she describes factors that are ‘normative extraneous’, in the sense that they may indeed be factually relevant indeed, but they should not constrain people’s ability and willingness to make important decisions about their lives. See S. Moreau, ‘What is Discrimination?’ (2010) 38(2) Philosophy & Public Affairs 143-179, 149.
\textsuperscript{119} Lippert-Rasmussen further argues that irrelevance discrimination rests on a prior account of which aims it is morally objectionable to pursue, in which case, he argues, ‘clarity is better served by formulating the necessary extra clause in terms of what is morally objectionable.’ See Lippert-Rasmussen, Born Free and Equal?, 24.
relevance confuses anti-discrimination with meritocracy, can apply here too. If an employer hires his son over someone better qualified, his decision is based on morally irrelevant factors to the employee’s ability to satisfy the job requirements. But that would be a case of nepotism rather than discrimination. Yet recall that our enquiry focuses on the moral wrong that that behaviour inflicts, and not on the separate taxonomic question of how such behaviour should be classified. It might well be that the decision of the father to hire his son is better understood as nepotism rather than discrimination. But that does not deny the possibility that nepotism and discrimination may put us at risk of the very same moral wrong.

5.5.2. Discrimination, equality and prejudice

An account grounding the wrong of discrimination on moral irrelevance has to be complemented by the reasons why those characteristics are irrelevant and why they ought not to be taken into account. Focusing on the wrong of religious discrimination, I think that its wrongfulness is morally justified by the principle that in a fair society no one should suffer because she is a member of a socially salient group thought less worthy of respect, as a group, than others. That principle suggests that religious discrimination affects its victims in a fundamental way, namely ‘it distorts their ability to feel pride in membership in groups, identification with which is an important element in their life.’

Different theories of discrimination embrace different dimensions of that principle when they claim that individuals should be judged on merit; that they should not suffer disadvantage due to their immutable characteristics; and that they should be free to make choices regardless of ‘extraneous’ features. Human dignity rules out disadvantaging others in ways that would be suitable only if the victims had ‘diminished or degraded’ moral status. As Hellman argues, discrimination is wrong when it demeans others, namely when it debases or degrades them, or else treats someone ‘as not fully human or not of equal moral worth’. Clearly a certain degree of power or status is necessary to demean others because one should be in a position such that this expression of disrespect for the ‘equal humanity of others’ can subordinate the other.

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122 The argument that part of the wrongfulness of religious discrimination lies in the ways that it can distort feelings of pride in group membership does not contradict the claim that sometimes members of religious groups may feel proud of their groups despite, or even because, they might have to pay significant costs for their devotion and observance. But pride is not used here in a descriptive or a phenomenological sense, i.e. the feeling of pride that someone being discriminated against on grounds of religion might still have because his suffered disadvantage showcases and concretises his devotion to the group. Pride is employed here in a normative sense that is closely related to authenticity, which we discussed in Chapter Three. Authenticity requires respect, on behalf of the State, for our ethical choices, and making those choices independently allows us to identify with and feel proud of those choices, even if we decide to follow choices made by others, including our ancestors or communities. Discriminating against individual members of socially salient groups robs them of that sense of pride because it breaks the links between authenticity and pride.
123 Altman, ‘Discrimination’.
125 ibid
Hellman’s account is representative of equality-based theories of discrimination. According to equality-based theories, discrimination is wrong because it is founded on prejudice and stereotypes, which are interwoven with the idea that certain people are not entitled to equal respect and concern because of their membership in certain social groups. Stereotypes are wrong precisely because they entrap people in certain identities and justify treatment according to those.126 Social exclusion of racial and religious groups systematically violates the fundamental right to be treated as an equal by the state. Equality, understood not as a ‘flat’ commitment to treat others consistently (‘treating likes alike’), but as a commitment to treat others as equals, incorporates a ‘redistributive dimension’, which aims ‘to correct disadvantage as well as prejudice within one concept.’127 This interpretation of the moral wrong of discrimination ties the concept to the equal and objective value of human life, which culminates to the idea that the government should treat everyone with equal respect and concern, that is, as equals. I think that this account makes moral sense of the use of discrimination by the European courts. For instance, as the Advocate General of the European Court of Justice has noted in Coleman v Attridge Law


to protect the dignity and autonomy of persons belonging to those suspect classifications… treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human.128

Moreover, that principle explains why it is inadequate to justify the moral wrong of discrimination based on the idea that people should not suffer disadvantage based on certain immutable characteristics. People do not choose their race or, often, their religion. But they do not choose their levels of intelligence or their bodily strength, either. We do not say, however, that admission tests based on intelligence or sports tests based on bodily strength, such as those that universities and football teams commonly carry out, are discriminatory as a result. Race, religion, gender, sexual orientation and disability, among others, are different from intelligence or bodily strength not because they are not selected – they are as unselected as intelligence, strength and beauty. Rather, exclusions based on race or religion are different because historically129 they have been instituted and

127 Fredman, Discrimination Law, 26.
129 There are various theories about why or how the history and current social status of particular groups matters. The first is associated with Owen Fiss and his anti-caste understanding of equality laws, according to which discrimination laws prohibit certain states of affairs that allow caste-like distinctions between people; O. Fiss, ‘Groups and the equal protection clause’ (1976) 5 Philosophy & Public Affairs 107-177. See also C. Sunstein, ‘The anticastrate principle’ (1994) 92 Michigan Law Review 2410-2455, 2411. Another theory has been associated with the work of John Hart Ely who has argued that systemic disadvantage matters when we assess a policy that differentiates on grounds of protected characteristics because women, for instance, are likely to be either entirely excluded from the processes through which the policy has been adopted or to have had their voices or interests discounted in that process; see J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press, 1980). See also M. Risse and R. Zeckhauser, ‘Racial profiling’ (2004) 32 Philosophy & Public Affairs 131, 157-159. There is however a
reproduced not as a matter of some instrumental calculation, as in the case of intelligence or athletic ability, but because of contempt for the excluded race or religion as such.\textsuperscript{130} Recall that under the moralised conceptions of discrimination and disadvantage that holds regardless of how others are treated. Someone who complains that he has been discriminated against on ground of race does not have his claim discounted by the fact that people of all races are equally likely to turn their applications down on racial grounds because racists of different colours sit occasionally, and with the same frequency, on a university’s admissions committee.\textsuperscript{131}

The debate is ultimately one about moral principle. It can also be framed as an inquiry into the attitude that the government must have in order for its actions to have a certain kind of meaning – namely, to express an important kind of respect for others. Understood in this way, whether an action involves treating a person discriminatorily depends on what the agent saw as reasons. It involves an inquiry into the reasons why a government disadvantages certain people by denying them, for instance, certain rights, powers, or exemptions. The concept of discrimination cannot by itself, however, specify whether it is wrongful to impose disadvantages on people based on their religion, and when this is so. Substantive moral reasoning is essential to answer that. Moral arguments such as those discussed above would entail that, if we revisit one of the examples earlier discussed, the admissions officers that consider applications only from students whose surnames start with a vowel act unfairly, and in violation of the university’s code of ethics, but their actions do not constitute discrimination because their actions are too isolated to gain social traction\textsuperscript{132} and amount to prejudice.\textsuperscript{133} The same holds for separate lavatories for men and women. They do not constitute sex discrimination because that form of separation does not, as a practice, express prejudice or contempt for certain members of the community.\textsuperscript{134} For exactly the same reasons, the opposite holds in cases where an employer requires his female employees to wear cosmetics at work. As Hellman notes, that practice is demeaning for women because ‘it conveys the idea that a woman’s body is for adornment and the enjoyment by others.’\textsuperscript{135}

At this point, I would like to return to equality because questions about which conception of the value of equality informs discrimination law regularly concern political and legal theory. It has been argued, among others, that there are different definitions of the content and requirements of equality, that equality can be both ‘justification for legal third interpretation of why the history of maltreatment and the current status of certain socially salient groups do matter: they matter because certain differences in treatment can be justified only on the basis of prejudice and not on any other rational calculation about the distribution of limited resources. The social significance of certain classifications matters because the purpose of certain classifications is to demean some (or all) of those affected. If so, then the difference in treatment is wrong. See discussion \textit{infra}.\textsuperscript{130} Gardner, ‘Liberals and unlawful discrimination’, 6-8. Also Dworkin, ‘Why Bakke has no case’ (cited above).\textsuperscript{131} Rassmusen, \textit{Born Free and Equal?}, 17.\textsuperscript{132} Ibid\textsuperscript{133} Ely, \textit{Democracy and Distrust}, 153-159.\textsuperscript{134} Note, however, that although the fact that a given interaction has a certain meaning can be part of what makes it wrong, the two ideas are independent of each other. A particular action can be wrong for reasons that are independent of its meaning. See T. Scanlon, \textit{Moral Dimensions: Permissibility, Meaning, Blame} (Harvard University Press, 2008) 118.\textsuperscript{135} Hellman, \textit{Why is Discrimination Wrong?}, 42.
intervention’ and a ‘social goal’ of that intervention, and that equality is limited in terms of the range of anti-discrimination protections that is capable of justifying as it is tied to ‘the reproduction of existing social norms rather than the generation of new and more liberal norms.’ As we briefly discussed above, our fundamental entitlement to be treated with equal respect and concern by the state entails treating people as equals. In some cases treating people as equals will entail distribution of resources or privileges so that some people’s shares will end up bigger or smaller than others’, that is, they will have been treated unequally. But treating as equals does not necessarily require equality of treatment. In a state where the government has no more than limited resources for emergency relief, treating as equals will require giving more resources to the areas of the country or the groups of people that have suffered more damage. That might not be consistent treatment but it shows equal concern for the people in the affected areas.

A reason-blocking account of our right to freedom from discrimination suggests that not every limitation of our right necessarily breaches the moral requirement to be treated as equals by the state. Rather, treatment as equals is violated only when the constraint on someone’s liberty is justified based on the fact that others condemn his convictions or values. Recall that if the justification for the limitation on our right can succeed without counting the moralistic preferences of the majority in the balance, then the message of the limitation in question would be that it is impossible that everyone’s interests will be equally protected, and that the interests of minority groups might at times have to succumb to the legitimate concerns of the majority. There is no denial of treatment as an equal in that case though – not according to the reason-blocking theory of rights we discussed in detail in Chapter Three. However, if the justification for the restriction cannot succeed without relying on majoritarian preferences about personal morality, that is, about how we should live, and the state nevertheless resorts to that justification, then the message of the limitation is different. It is exactly that some people must have less because others dislike the lives they propose to lead, which seems no more justifiable in a society committed to treating people as equals, than the proposition that some people must suffer disadvantage under law because others dislike them. The question therefore is not whether any deviation from equal treatment should be allowed but whether the reasons for deviation are consistent with the fundamental principle of legitimacy, namely that the state should treat everyone with equal respect and concern.

Equal treatment, in the form of ‘consistent’ treatment or formal equality, is therefore derivative from, not antagonistic to, treating as equals. Sometimes consistent treatment

137 ibid 710.
138 That often happens in order to correct so far as possible pre-existing differences between people that have to do with bad luck. An example here is positive measures in favour of people with disabilities; the treating as equals principle would entail a larger and unequal share of resources to them.
140 Dworkin, A Matter of Principle, 190.
141 Dworkin, ‘Rights as trumps’, 161.
142 ibid
143 Contrary to what is often argued in discrimination theory. Sandra Fredman, for instance, presents formal equality and treating as equals, as if they are antagonistic to each other. See e.g. Fredman, Discrimination Law, 4-37.
will be required, but in other cases it will be not. Discriminatory rules are distinct from other forms of arbitrariness, not because they inflict disadvantage to some and not to others, in the thin descriptive sense earlier discussed, but because it is unacceptable to count prejudice ‘among the interests or preferences government should seek to satisfy.’\textsuperscript{144} It is the absence of a ‘prejudice-free’ justification for coercive action that makes laws or policies discriminatory. As it happens with the right to freedom of religion itself, limitations on our right to freedom from religious discrimination are justifiable provided that they are motivated not by prejudice, but because of a rational calculation about the socially most beneficial use of limited resources for education or healthcare or any other domain of the common good.\textsuperscript{145}

I think that this reason-blocking interpretation of the normative justification underlying the right to freedom from discrimination, and the right to freedom from religious discrimination in particular, is better suited than other accounts of the wrong of discrimination earlier discussed to explain certain morally important parts of the judicial practice under the Convention that were examined in Chapter Three. Consider some examples. In \textit{European Roma Rights Centre}, the UK House of Lords found that the fact that the UK immigration officers were far more likely to reject visa applications from Roma people constitutes discrimination because, as Lady Hale argued, each person should be ‘treated as an individual and not assumed to be like other members of a group.’\textsuperscript{146} Moreover, in the employment realm, in cases such as \textit{Eweida} and \textit{Ladele} the fact that some religious groups may need to exercise their ‘right to resign’ more often than others indicates that a ‘parallel right to equality’ may have been infringed.\textsuperscript{147} The account of religious discrimination defended in this chapter explains what that ‘right to equality’ means on a practical level too. The ECtHR seeks for comparators not because their availability is constitutive of the scope or structure of our right to freedom from religious discrimination, but because inconsistent treatment of similarly situated individuals is a \textit{symptom} of perseverance of impermissible kinds of reason, such as prejudice. The right to freedom from religious discrimination precludes governmental actions motivated by those very kinds of reason.

But if the absence of a prejudice-free justification is what makes a rule or practice discriminatory, could this mean that discrimination is wrongful only against minorities? Or else, can members of socially prominent groups, such as members of religious majorities such as Christians in the UK, be victims of discrimination, as it has been argued in the wake of the \textit{Eweida} and \textit{Ladele} cases?\textsuperscript{148} In racial discrimination, it has been argued that dominant social groups, such as white people in the United States, cannot be victims of discrimination because they systematically enjoy various advantages for being white. As Scanlon has argued, white people can discriminate against blacks but

\begin{enumerate}
\item Dworkin, \textit{A Matter of Principle}, 66.
\item Dworkin, ‘Why Bakke has no case’.
\item \textit{R (European Roma Rights Centre) v Immigration Officer at Prague Airport} [2004] UKHL 55, §82.
\end{enumerate}
not the opposite because discrimination is ‘unidirectional’, in the sense that it applies only to actions that disadvantage members of groups ‘that have been subject to widespread denigrations and exclusion.’ Unidirectionality of discrimination is grounded on the idea that prejudice involves attitudes associated not with one particular agent but ‘widely shared in the society in question and commonly expressed and acted on in ways that have serious consequences.’ Owen Fiss has famously described discrimination as the ‘perpetual subordination’ of already disadvantaged groups, whose political power remains severely circumscribed.

However, notwithstanding various potentially unfair advantages of dominant social groups, it is too rigid to suppose that people belonging to dominant groups may not be victims of discrimination. Even if the disadvantages on grounds of their group membership might be too small given the advantages they enjoy, it still does not follow that they cannot be victims of discrimination. Unfortunately this chapter cannot discuss this important point further but, in a moralised sense, discrimination against Christians in a Christian-dominated country is plausible provided that the moral interpretation of the limitations on their rights indicates that they are likely to have been polluted by the impermissible reasons earlier discussed.

That point brings the discussion back to another important question. Thus far the analysis of the wrong in discrimination did not distinguish between direct and indirect forms of discrimination. Do they inflict the same kind of wrong? As Chapter Four discussed, there are two types of indirect discrimination: structural and non-structural. Recall that some of the most egregious forms of indirect discrimination are commonly referred to as structural because they depend on legal rules and social norms that systematically disadvantage the members of certain socially salient groups. The account of religious discrimination favoured here shows that direct and structural indirect discrimination are morally wrong for the very same reason. They are morally wrong because legitimate governmental action can never be motivated by reasons that express contempt for certain members or sections of the community because of their beliefs or group membership. No one should be denied employment and equal opportunities to flourish because others think that she should have less because of who she is or what she believes.

On the other hand, non-structural indirect discrimination is often intertwined with structural indirect discrimination or with direct discrimination. For instance, a given company’s promotion practice that favours men over women is linked to structural sex discrimination that pre-exists the policy. Furthermore, it is often argued that one of the main differences between direct and indirect discrimination is that the former is process-oriented, whereas the latter is result-oriented. On that account, direct discrimination involves flaws in procedures, which lead to unfair outcomes. Such flaws might be conscious or unconscious, albeit intentional. Indirect discrimination, by contrast, involves problematic outcomes. Nevertheless, that distinction between process and outcomes is too

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150. Ibid
152. Altman, ‘Discrimination’. 
crude. Indirect discrimination does involve process wrongs, albeit on a different level to direct discrimination. More specifically, in cases of structural indirect discrimination, disadvantageous treatment of certain socially salient groups is not sufficient by itself to ground structural discrimination. Rather, it is the link between group membership and disadvantageous outcome that highlights who is disproportionately affected and how. Focusing on outcomes, rather than procedures, does not detract from the fact that the moral wrong is the same here too: procedures that turn certain forms of difference into disadvantage are morally wrong when they are motivated by reasons that disparage or demean certain sections of the community. The added value of indirect discrimination is its ability to challenge reigning social norms that reproduce various forms of inequity,153 but its normative justification is philosophically indistinguishable from the normative justification of prohibition of direct discrimination.

5.6. Two Birds with One Stone: Freedom of Religion and Freedom from Religious Discrimination

5.6.1. Freedom of religion and freedom from religious discrimination

The preceding analysis promotes an interpretation of the right to freedom of religion and the right to freedom from religious discrimination in light of each other. Limitations on the right to freedom of religion, either in the form of direct prohibitions or in the form of lack of accommodation, which cannot be justified on prejudice-free reasons, violate both the right to freedom of religion and the right to freedom from religious discrimination. Respect for human dignity requires that each one of us is personally responsible to make important ethical decisions independently and authentically, including religion, belief and membership in any communities of faith. Any form of subordination to the moral preferences of the majority about the fact that some should enjoy less as a matter of prejudice violates the fundamental right to be treated with equal respect and concern by the state. That moral principle unifies the right to freedom of religion and the right to freedom from religious discrimination, regardless of whether comparators are available. The two rights are intertwined. Each one presupposes the other.

That interpretation is attractive because it makes moral sense of the practice of the ECtHR, which uses the two provisions interchangeably and without a discernible pattern. Time and again, in cases examining similar complaints about conscientious objection to military service, such as *Thlimmenos v Greece* (decided under Article 14 in conjunction with Article 9 ECHR) and *Bayatyan v Armenia* (decided only under Article 9), about lack of accommodation of religion in employment, such as *Ladele* and *McFarlane* (decided under Article 14 in conjunction with Article 9 ECHR) and *Sessa* and *S.H. and H.V.* (decided only under Article 9) and about lack of accommodation of religion in the provision of services, such as *Cha’are Shalom* (decided under Article 14 in conjunction with Article 9 ECHR) and *Jakóbski* and *Gatis Kovalkovs* (decided only under Article 9)

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the ECtHR grounds its judgments on the very same correlative moral principles of equality and fairness despite using different legal bases. Certainly, under both provisions the task of the ECtHR remains the same, namely to determine whether state measures that treat differently people on grounds of their religion interfere with people’s rights, are prescribed by law and pursue a legitimate aim in ways proportionate to the aim sought.154 But unifying the two rights also helps to explain that the ECtHR intervenes only whenever the reasons that our rights are supposed to exclude are present in the particular political conflict, namely whenever the interpretation of specific limitations shows that they denigrate certain members or sections of the community on the basis of their spiritual commitments. This reason-blocking interpretation explains the partly symbolic and expressive character of the moral rights to freedom of religion and freedom from religious discrimination and provides for a more cohesive interpretation of the two compared to interest-based accounts that insist that certain individual interests, protected as rights or as grounds of discrimination, are simply to be privileged over others.

It also explains what the ECtHR decides when it dismisses Article 14 claims of religious discrimination because they were sufficiently addressed under Article 9 ECHR. An egalitarian analysis of the right to freedom of religion takes place under the discussion of Article 9 of the Convention regardless of whether or not the applicant has complained under the Article 14 ECHR as well. This is what the Court means when it holds that ‘the inequality of treatment has been sufficiently taken into account’ in its assessment of the right to freedom of religion.155 It is not essential therefore to rule on both complaints. The argument that the two rights share their normative foundations on the need to protect our ethical responsibility from certain impermissible kinds of reason explains why ruling on only one violation out of the two is enough. It follows that arguments building on the distinction between freedom of religion and freedom from religious discrimination and claiming that individual complaints under Article 9 would fare better if framed as anti-discrimination claims based on Article 14 in conjunction with Article 9 have value only as suggestions for litigation strategy, and do not offer a convincing substantive account of the right to freedom from religious discrimination.156

A possible objection could be the following. If both rights protect us from the very same moral wrong and provide for similar right-based politics, then why the Convention includes two distinct provisions? What is the role of Article 14 if an investigation of the inequality of treatment takes place within the examination of Article 9 ECHR regardless? This is an important, albeit not too worrying, objection. The objection disregards that the existence of distinct provisions for different rights does not entail that those rights spring from different normative foundations. Consider S.A.S. v France, a case on the prohibition of the full-face veil from the public space in France that will be more thoroughly discussed in the next chapter. The applicant based her complaint, among others, on

154 Manoussakis and Others v Greece, §44; Metropolitan Church of Bessarabia and Others v Moldova, §119; Leyla Şahin v Turkey, §110; Bayatyan v Armenia, §121.
155 Jaksński, §59.
various individual rights, including respect for private life, freedom of religion and freedom from religious discrimination. Both her application and the ECtHR in the examination of her complaint employed and analysed the rights to respect for private life and freedom of religion in parallel and interchangeably without drawing any meaningful normative distinction between them. In fact, the same has happened in several cases involving the wearing of religious symbols in public, such as *Dogru and Kervanci v France*,157 *Jasvir Singh v France*,158 and *Ranjit Singh v France*.159 It is impossible to discuss this point further here, but it might well be that apart from Article 9 and Article 14 in conjunction with 9, other rights, such as respect for private life and freedom of expression, draw their normative power from similar sources. And in any event the inclusion of additional provisions is not necessarily morally important. It may be justified on reasons of legal certainty, or on facilitating litigation and the structure of judicial tests. A particular taxonomy of rights does not mean that something valuable hangs from it, or from the construction of the Convention. Recall that in this chapter we already examined – and dismissed – the idea that judicial tests play a constitutive role about what rights we have. Some of those arguments apply here as well.

5.6.2. Freedom from religious discrimination and freedom from sexual orientation discrimination

If an appeal to our rights to freedom of religion and freedom from discrimination is just a way of excluding certain kinds of reason from politics, then how can we resolve conflicts between rights? What does an analysis of discrimination based on prejudice entail in cases where accommodation of religious claims might conflict with the right to freedom from discrimination on ground of sexual orientation? As Chapter Three argued, reliance upon religious beliefs, regardless of whether those beliefs form part of traditional and respected or minority and unpopular religions, cannot immunise believers from the reach of certain secular laws. But can a moral analysis of the wrong in religious discrimination help us locate clear answers in cases where different grounds of discrimination find themselves in tension?

The ECtHR has addressed that sort of intra-discrimination conflict in *Macfarlane v United Kingdom* and *Ladele v United Kingdom*, which were jointly decided in 2013.160 The *Ladele* case examined the complaint of a Christian registrar, who faced disciplinary action and ultimately lost her job because she refused to register same-sex partnerships.161 Her orthodox Christian views regarded marriage as the union of one man and one woman, and thus precluded her participation in the creation of a same-sex institution equivalent to

157 Application nos. 31645/04 and 27058/05, 4 December 2008.
158 Application no. 25463/08, 30 June 2009 (only in French; inadmissible).
159 Application no. 27561/08, 30 June 2009 (only in French; inadmissible).
160 They were decided along with *Eweida v United Kingdom* and *Chaplin v United Kingdom*. See *Eweida and others v United Kingdom*, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.
161 Ms. Ladele submitted a complaint to the ECtHR after having her claim dismissed by the UK courts. See *Islington London Borough Council v Ladele* (Liberty intervening) [2010] 1 WLR 955.
marriage. The ECHR agreed that her refusal was directly motivated by her Christian beliefs and used as a relevant comparator a registrar with no religious objection to same-sex unions in order to determine whether the applicant has been discriminated against based on her religion. The refusal of the local authority to accommodate the applicant did amount to indirect discrimination against her, since the general requirement that all registrars would also register civil partnerships had a particularly detrimental effect on Ms. Ladele due to her religious beliefs. However, given that the policy of the local authority pursued the legitimate goal of non-discrimination on grounds of sexual orientation, which the court considers very important, the indirect discrimination in question was found justified. Therefore, the Strasbourg court held unanimously that dismissing the applicant was not a disproportionate measure. The Court reached a similar result in Mcfarlane, a case arising from a complaint of a Christian counselor who also argued that his employer’s insistence that he provide relationship and sexual therapy to same-sex couples subjected him to unlawful religious discrimination. All in all, in both Ladele and McFarlane it has been clear that the principle of equal treatment has played a central role to the reasoning of the ECHR in justifying the restrictions applied.

Those cases denote that the principle of equal treatment, at least as exemplified in anti-discrimination laws, may sketch the scope of the right to hold religious beliefs and live according to them. It has also been argued that the role of the courts in a diverse and largely secular society should not be to stand guard over public morality but to ensure that the majorities will not impose their opinions ‘on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority’. A just multi-cultural community of people requires judges who accept that, within limits, the law might tolerate lifestyles that society as a whole deems undesirable.

Be that as it may, are Ladele and McFarlane examples of cases where a traditionalist majority wishes to impose its opinion with regard to the rights of same-sex partnerships on an unpopular minority, namely, homosexuals? If it is true that ‘conservative views on sexuality have moved rapidly from majority to minority

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162 Eweida v United Kingdom, §102.
163 ibid §105.
164 Other jurisdictions, such as Canada, resolve disputes like Ladele v UK not through the indirect discrimination provisions but through the lens of the doctrine of ‘reasonable accommodation’ of religious practices in the workplace. See M. Gibson, ‘The God “dilution”: Religion, discrimination and the case for reasonable accommodation’ (2013) 72(3) Cambridge Law Journal 578-616. Although a useful concept to include within the balancing test, the idea of reasonable accommodation is unhelpful with regard to the most contentious question, namely, how to distinguish religious practices that should be accommodated from religious practices that should not.
165 ibid §104.
166 See the discussion about the ECHR judgments on sexual orientation discrimination above.
167 Eweida and others v United Kingdom, §§107-110.
171 ibid 9-10.
position', then the roles may also be the other way round: it might indeed be that a progressive majority wants to impose its liberal views about same-sex partnerships on an increasingly less popular minority group of Christian people that embrace traditional family values. In fact, that is precisely what the applicants have argued before the ECtHR. They believe that marriage is the union between one man and one woman. Why should they not have the right to behave according to their beliefs? Should the majority opinion prevail because it is more liberal, or because it is just right?

The reason-blocking theory of rights defended so far does not deny that sometimes it might be necessary to balance rights against one another. It suggests, however, that the way that this should be done is by focusing on whether the reasons that one or the other right is supposed to block are really present in a given political conflict, on one side or the other. This is where an analysis of the reasons for the limitations on freedom in question, which is no other than an analysis of the reasons for having laws protecting against sexual orientation discrimination, proves valuable. Prohibition of discrimination on grounds of sexual orientation aims to secure our sexuality as a matter of self-respect, which we have to be able to fulfill through relationships with others as a matter of human dignity. In Bull v Hall, where the UK Supreme Court held that refusing to accommodate a same-sex couple in a double bedroom constitutes unlawful discrimination on grounds of sexual orientation, Lady Hale argued that denying to homosexuals the possibility of fulfilling themselves through relationships with others for a long time is ‘an affront to their dignity as human beings which our law has now (some would say belatedly) recognised.’ Her analysis is congenial to theories locating the harm of discrimination in the relationship between ‘stigma, denial of opportunities and the historical facts of disadvantage.’ Rights and liberties do not depend on sexual orientation. Rather, each human being embodies equal moral status by virtue of her humanity; equal moral status is then the basis of certain moral entitlements in the form of rights that everyone should enjoy regardless of gender or social position or sexuality.

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173 If that is indeed the case, it has been argued that a liberal democracy might also have to examine non-legal strategies, involving the media and civil society among others, to ensure that religious voices will not be silenced or marginalised. See M. Malik, ‘Religious freedom, free speech and equality: Conflict or cohesion?’ (2011) 17 Res Publica 21, 39.
175 Bull v Hall §52.
176 Hall v Bull [2013] UKSC 73; [2013] 1 W.L.R. 3741. The owners’ refusal to accommodate the couple in a double bedroom was found in violation of the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), reg.3(1).
178 Bull v Hall §53.
179 Particular notions of harmful unfairness have become part of the European cultural sensibilities and are embedded in social education. In that sense, certain forms of expressive conduct may be particularly harmful due to the conception of unfairness generated by its cultural associations with subordination and disadvantage. See J. Gardner, ‘Liberals and unlawful discrimination’ (1989) 9 Oxford Journal of Legal Studies 1, 6-8.
The right not to be discriminated against on ground of sexual orientation is one of those rights.

A useful and minimalistic snapshot of our moral duties towards others is embedded in what Jeremy Waldron calls assurance. Assurance means that everyone should feel secure in that she has ‘an elementary entitlement to justice, and [that] all deserve protection from the most egregious forms of violence, exclusion, indignity and subordination.’ In that sense the legislation and courts should secure those fundamentals in people’s minds, even if we are unable to agree on the more detailed principles of a theory of justice. Abstract though it might sound, assurance is tremendously important especially for vulnerable members of our community. Criminal law, anti-discrimination legislation, and human rights laws secure equal respect for some of the most elementary entitlements to justice that everyone should be assured about. But assurance means more than placing and enforcing legal rules: just like dignity, which is silently carried by everyone, assurance is mainly conveyed in an implicit way via everyday unnoticeable marks that lead everyone in a well-ordered society take for granted that the fundamental principles of dignity are widely shared and state guaranteed.

The gist of that interpretation corresponds to the Rawlsian depiction of a well-ordered society as ‘a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice.’ Open to all public places, equal access to education and employment, public services and goods available to everyone, are all hints that everyone is accepted as full member of a community. Sometimes assurance is conveyed explicitly as well, for example through spots or leaflets informing customers about their rights, but it is mostly its implicit aura that alludes to a community committed to the fundamentals of justice. In that sense it constitutes a silent public good that ‘depends on and arises out of what hundreds or thousands of ordinary citizens do singly and together.’ Moreover, assurance relies heavily on self-application, just like anti-discrimination legislation: its efficiency cannot depend only on state enforcement measures, but clings to the application of such laws on an every-day basis in every-day social and financial relations by everyone. The point is that assurance – just like anti-discrimination laws – would simply be fallacious if a policeman was required every time someone is refused access to a hotel or a bus or employment because of his race or religious membership or sexual orientation. Rather, its realisation entails everyone to play her part.

I think that an interpretation of the right to freedom from sexual orientation based on the need to assure homosexual people that they and their partnerships ‘are worthy of equal respect and esteem’ explains why the ECtHR requires very weighty reasons to

183 ibid 83.
186 Waldron, The Harm in Hate Speech, 87-89.
187 Bull v Hall, §36.
justifies exceptions to prohibition of discrimination on grounds of sexual orientation. \textsuperscript{188} By the same token, when same-sex couples enter into a mutual commitment equivalent to marriage, it is substantively and symbolically important that the suppliers of goods, facilities and services treat them equally to different-sex couples. The legacy of discrimination and persecution against homosexuality \textsuperscript{189} explains why we should hesitate ‘to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.’ \textsuperscript{190} This is not to suggest that the limitations on the right to freedom of religion under investigation are justified because religion is less important than equal treatment regardless of sexual orientation. There is nothing indicating that the results in these cases would be different were the refusal to provide the service grounded in a protected characteristic other than sexual orientation. Rather, in the hypothetical case that the applicants refused services based on the customers’ race, age, or religion, limitations on their right to freedom of religion would be equally justifiable. Recall that the interpretation that this chapter defends associates rights to freedom from discrimination with the exclusion of other people’s dislikes and prejudices as grounds for coercive prohibitions. The argument of the applicants in \textit{Ladele} and \textit{McFarlane} that the ECtHR should leave space for the lifestyles of devout people, who wish to live honouring their most important commitments in life, is based on an ultimately inadequate theory of rights. Strong protection for anti-discrimination is not meant to constrict religious lifestyles, but to achieve the exact opposite: to allow different, unconventional lifestyles to arise and flourish.

\section*{5.7. Conclusion}

This chapter developed and defended an interpretation of the right to freedom from religious discrimination that trails the normative connections between that right and the right to freedom of religion or belief. I argued that the two rights share parts of their normative foundations on the reason-blocking quality of the more general right to equal respect for our ethical independence, which excludes certain reasons, such as prejudice, from justifying state action. This interpretation explains the interchangeable deployment of freedom of religion and freedom from religious discrimination in recent complaints about lack of accommodation of religious beliefs before the ECtHR, and unravels the doctrinal confusion surrounding their relationship. What follows is that arguments building on the distinction between the rights to freedom of religion and freedom from religious discrimination and claiming that individual complaints under Article 9 of the Convention would fare better if framed as anti-discrimination claims may be valuable.

\textsuperscript{189} On that matter Lady Hale also referred to \textit{National Coalition for Gay and Lesbian Equality v Minister of Justice}, 1999 (1) SA 6, §117, where the South African Constitutional Court held that ‘while recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined.’
\textsuperscript{190} \textit{Bull v Hall}, §53.
suggestions for litigation strategy. But they ultimately do not offer an attractive account of the wrong of religious discrimination and of its profound interconnections with the very sorts of reasons and considerations that the right to freedom of religion itself aims to protect us from.

At this point, it would be useful to enquire whether the normative account of the right to freedom of religion that the present Chapter, along with Chapters Two and Three, developed is reflected in other distinctive areas of law and religion under the ECHR. The next two chapters play that role. They will examine and evaluate the jurisprudence of the ECtHR based on the normative account of the right thus far defended. Chapter Five will examine cases on the wearing of religious symbols in public. Chapter Six will then focus on state regulations of blasphemy and on their justifiability.
Religious Symbols, Blanket Prohibitions and Public Space

[T]he question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society. In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.

*S.A.S. v France*¹

How do you liberate women by criminalising their clothing?

Shami Chakrabarti²

6.1. Introduction

Chapters Two, Three and Five have so far developed and defended an interpretation of the right to freedom of religion that embeds equal respect and reinforces the relationship of the right with other rights, including the right to freedom from religious discrimination. Discriminatory measures that fail to show equal respect regardless of conscience and affiliation are incompatible with the right to freedom of religion or belief. This chapter will examine the application of this normative framework in European cases of ‘blanket’ prohibitions on the wearing of religious symbols in public. As Chapter Two briefly discussed, individual conscience gives rise to countless practices with varying effects on our communal space. Nevertheless, due to space constraints, the analysis of this chapter will be confined to cases involving the right to religious manifestation through the wearing of religious symbols in public and will not pursue any detailed examination of cases on places of worship,³ and cases on religious symbol prohibitions in schools and

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¹ Application no. 43835/11, 1 July 2014 (Grand Chamber), §§153-154.
universities, despite that those sets of cases embody key principles on the expressive dimensions of the right. This is not to suggest that the following analysis will bracket off those principles. The principles developed in cases involving religious symbols in classrooms and the wearing of headscarves by teachers and students are central to the European jurisprudence of law and religion and the analysis will refer to them, even if in passing. It is important, however, to note from the outset that drawing analogies between cases of symbols in education and cases of symbols in the ‘general’ public space requires care to ensure accuracy. For the reasons behind limitations vary significantly in different sets of cases. For instance, cases on religion in education involve distinct interests, such as the role of teachers in the hierarchical school environment and the right of parents to educate their children in accordance with their religious or philosophical convictions. Those distinctive considerations, which can prove decisive in our interpretation of the reasons behind limitations, are unavailable in cases on symbols in the general public space.

This chapter will start with a discussion of cases on blanket prohibitions of religious symbols in public, with a focus on the recent S.A.S. v France. I will then turn to cases where limitations on manifestation of religion or belief have been more clearly associated with security concerns, such as in airport checks or photo IDs. In line with the arguments thus far discussed, I will argue that in cases involving tensions between rights, or between rights and legitimate collective interests such as public safety, the ECtHR has to carefully interpret the reasons behind the limitations in order to highlight whether reasons that our right to freedom of religion is supposed to exclude are present in particular political conflicts. Although the UN Human Rights Committee has engaged in that kind of scrutiny, this is not always the case with the ECtHR.

5 Perhaps the most important case is Lautsi v Italy, Application no. 30814/06, 18 March 2011 (Grand Chamber). See also I. Trispiotis, ‘Lights, camera, action: The Grand Chamber of the European Court of Human Rights on Lautsi v Italy’ (2011) 12(3) Education Law Journal 41-46.
7 For schools see Köse and 93 Others v Turkey, Application no. 26625/02, 24 January 2006 (inadmissible); Dogru v France, Application no. 27058/05, 4 December 2008, and Kervanci v France, Application no. 31645/04, 4 December 2008 (only in French); Aktaş v France, Application no. 43563/08, 30 June 2009 (inadmissible). For university students see Leyla Sahin v Turkey, Application no. 44774/98, 10 November 2005 (Grand Chamber).
9 See right to education, Article 2, Protocol 1 ECHR.
Chapter 6 | Religious Symbols, Blanket Prohibitions and Public Space

6.2. The Full-face Veil in General Public Space

6.2.1. Full-face veil regulations in Europe

In July 2013, an officer in Trappes, a western suburb of Paris, asked a woman to remove her Islamic full-face veil in order to conduct a routine identity check. After an angry wrangle her husband tried to strangle the officer, but he was promptly arrested. A few hours later hundreds of people attacked the suburb’s police station with stones and set fire to bus shelters and cars demanding the immediate release of the man.\(^{10}\) The rioting lasted for two days. The French government reacted via the minister for interior affairs, who issued a statement defending the ban on full-face veils in order to protect women ‘from those who try to impose other values’\(^{11}\). In April 2011, France enacted a law prohibiting full-face covers in public, which the next section will discuss in more detail.

Before that discussion, it is worth considering, even briefly, our shared European legal practice on the matter, namely whether full-face veils are banned elsewhere in Europe. According to a recent report,\(^{12}\) we could distinguish between three different forms of regulation regarding the full-face veil in Europe. The first includes national laws prohibiting any form of clothing designed to conceal the face in public.\(^{13}\) The moment I am writing these lines such laws exist at national level only in France and Belgium.\(^{14}\) Human rights organisations, among others, have questioned the necessity of such legislation given that in Belgium, for instance, it is estimated that only ‘several dozen out of the country’s 375,000 Muslims wear the burqa.’\(^{15}\) Others though have argued for a European-wide ban on full-face covers in public.\(^{16}\) This area of law has arguably resulted in heated political debates in Europe,\(^{17}\) if not in actual political manipulation by populist, xenophobic parties.\(^{18}\) Good understanding of the values underlying protection of human

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\(^{14}\) The moment I am writing these lines the ECtHR is examining an application by two Muslim applicants who complain about the ban in Belgian law on the wearing of the full-face veil. See **Belkacemi and Oussar v Belgium**, Application no. 37798/13 (communicated to the Belgian Government on 9 June 2015).


\(^{17}\) See H. Elver, **The Headscarf Controversy: Secularism and Freedom of Religion** (Oxford University Press, 2014) 41-72.

\(^{18}\) See e.g. the debate on the possibility of introducing a ‘local’ ban on the burqa in Frankfurt; ‘Should Germany ban the burqa?’, **The Local de**, 14 July 2014, at <http://www.thelocal.de/20140715/should-germany-ban-the-burqa-too-opinion>.
rights as well as of the meaning and importance of their equal protection becomes therefore all the more important.

A second form of regulation of full-face covers does not involve bans applying throughout a state’s territory, but limitations ‘introduced by mayor or other local authorities by means of administrative provisions.’ At the moment, Italy and Spain follow this form of regulation. As might be expected, local bans on full-face covers have steered constitutional controversy at the domestic level. In February 2013, the Spanish Supreme Court held that the ban on full-face covers in the municipality of Lleida, which was introduced in 2010 to protect public order, social peace and women’s rights, violated the right to freedom of religion because it was not shown to be necessary to protect women from discrimination and violence. According to the Spanish Supreme Court the most important factor is whether a woman ‘freely chooses to wear a full face veil.’

Finally, a number of European states, including the United Kingdom, abstain from general (legislative or administrative) prohibitions on full-face covers at national or local level. An example of a common approach comes from Denmark, where religious and political symbols are prohibited in court, but there are neither general laws forbidding the wearing of the full-face veils nor any local administrative provisions outlawing them. Instead there are court judgments, guidelines issued by professional bodies and government directives that provide some guidance on how to deal with the most controversial cases, such as for instance the wearing of full-face covers on means of public transport. Specifically with regard to the wearing of religious symbols in courtrooms, it is noteworthy that at the moment there is an individual application pending before the ECtHR from a lawyer who complains about her expulsion from a courtroom in Spain because she was wearing her hijab. The wearing of religious symbols in courtrooms – especially the wearing of the full-face veil – has recently sparked public debate in a number of European countries, including the United Kingdom, which is all the more reason for expecting the upcoming judgment of the ECtHR with keen interest.

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21 One of these local bans, issued in the municipality of Lleida, has been declared unconstitutional by the Spanish Supreme Court on 28 February 2013. See Foblets and Alidadi (eds.), *Summary Report on the Religare Project*, 24.
23 The Supreme Court held that ‘the ban may have the effect of confining women wearing such a dress to the home.’ See Amnesty International, ‘Spain: Supreme Court overturns ban on full-face veils’ (cited above).
24 ibid.

6.2.2. S.A.S. v France

In July 2014 the Grand Chamber of the ECtHR published its much-awaited judgment on S.A.S. v France. The case is important because it is the first time that the ECtHR examines a complaint that challenges a national ban on full-face veils in public. The applicant of the case, a young French lady, is a devout practicing Muslim. According to her submission to the Court, she wears the burqa or the niqab in virtue of her religious and cultural convictions. Before the ECtHR the applicant stressed that neither her husband nor any other members of her family have pressurised her to wear the face-veil. She further noted that she wears her niqab ‘non-systematically’, namely that she does not wear it when she visits a doctor, when meeting friends in public, when she wants to socialise, or when she has to pass security checks in banks, airports or other public places where those are required. Despite accepting those limitations, she wishes to have the choice to publicly manifest her religion through wearing the niqab depending ‘on her spiritual feelings’ and especially during religious events such as the Ramadan. She argued that she does not want to divide, but to ‘feel at inner peace with herself.’

The applicant complained that the Law no. 2010-1192 (hereinafter ‘the Law’), which prohibits individuals from wearing clothing that is designed to conceal the face in public places, violates, among others, her right to respect for private life, freedom of religion and freedom of expression taken separately and together with freedom from religious discrimination. Amnesty International, Article 19, the Human Rights Centre of Ghent University, Liberty, and the Open Society Justice Initiative intervened with supportive of the applicant’s complaint statements.

The Grand Chamber accepted that the ban on the full-face veil constitutes a form of interference with the applicant’s rights and embarked on an ‘in-depth’ examination of the legitimacy of its aim. The French government argued that the Law pursued two aims: public safety and protection of the rights and freedoms of others through securing the ‘minimum set of values of an open and democratic society.’ The ECtHR held that the public safety justification was disproportionate, but accepted the second legitimate aim behind the ban, namely the French argument that protection of the rights and freedoms of others entails securing a minimum set of values that are fundamental in a democratic society. Those included respect for equality between men and women, respect for human dignity, and respect for the minimum requirements of life in society. The ECtHR swiftly dismissed the argument about gender equality because, as the majority held, states cannot ‘invoke gender equality in order to ban a practice that is defended by women, such as the

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29 Application no. 43835/11, 1 July 2014 (Grand Chamber).
30 ibid §11.
31 ibid §§12-13.
32 ibid
33 ibid §12.
34 Law no 2010-1192 of 11 October 2010 ‘prohibiting the concealment of one’s face in public places’ (in force since 11 April 2011), at s. 1.
35 S.A.S. §§69-74.
36 ibid §§102-105.
37 ibid §114.
38 ibid §116.
This part of the judgment is noteworthy because it marks a significant shift in the Court’s approach to gender equality, compared to previous cases such as *Dahlab v Switzerland* and *Leyla Sahin v Turkey*, where the ECtHR held that the Islamic headscarf is hard to square with tolerance, respect for others, and equality and non-discrimination.

Similarly to the argument about gender equality, the ECtHR swiftly dismissed the French argument on respect for human dignity because, as the majority held, human dignity could not justify the general ban in question. The full-face veil expresses a cultural identity relating to a different notion of decency about the human body and, moreover, there is no evidence that women who wear it show contempt for others. With regard to respect for the minimum requirements of life in a democratic society, the French government argued that the ban responded to an incompatible practice ‘with the ground rules of social communication and more broadly the requirements of “living together”’. The ban aimed to protect social interaction, which is essential to pluralism, tolerance and broadmindedness. The ECtHR conceded that the face is important to engage in open interpersonal relationships, and noted that the explanatory memorandum accompanying the Law recognised that voluntary concealment of the face contravenes the ideal of fraternity and the minimum requirements of civility that are necessary for social interaction. On that account, the Court accepted that the full-face veil raises a barrier in breach of ‘the right of others to live in a space of socialisation which makes living together easier’. Although the majority expressed its concerns about the ‘flexibility’ and ‘the resulting risk of abuse’ of securing ‘living together’, it accepted that in principle ‘it falls within the power of the State to secure the conditions whereby individuals can live together in their diversity’.

For reasons that, due to space constraints, cannot be fully examined in this chapter, the majority of the ECtHR concluded, by fifteen votes to two, that the ban was necessary in a democratic society and therefore compatible with the Convention. The ban was found proportionate to the legitimate aim of preserving the conditions of ‘living together’ as required by the rights and freedoms of others. The ECtHR was partly aided to reach that conclusion by allowing a wide margin of appreciation to France on the basis that ‘the

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39 ibid §119.
41 Application no. 42393/98, 15 February 2001 (inadmissible).
42 Application no. 44774/98, 10 November 2005 (Grand Chamber).
43 S.A.S. §120.
44 ibid
45 ibid §153.
46 ibid
47 ibid §25 and §141.
48 ibid §§121-122.
49 ibid §141.
50 ibid §158.
51 ibid §157.
question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society’.52

6.2.3. Two interpretations of ‘living together’

Do the Convention and the ECtHR allow states to decide not only what rights people have, but also whether ‘living together’ is inherently valuable, why it is so, and to what extent this can be enforced? We cannot resolve that question as quickly as a libertarian approach might suggest: we cannot simply contend that people should be free to engage in any kind of conduct in public, including wearing any kind of clothing they might wish. That would be at odds with the familiar idea that we share certain social duties towards others, which translates in common prohibitions of certain forms of individual conduct in public,53 such as nudity.54 As the applicant herself accepted in S.A.S., sometimes protecting ‘living together’ may involve coercion, especially when security reasons are implicated. For instance, the applicant maintained that she is happy to remove her full-face veil whenever she has to undergo identity checks in airports or banks without arguing that those instances of state coercion violate her right to private life or freedom of religion.55

The idea of ‘living together’ may well be over-broad and unclear, as the dissenting judges argued.56 However, a careful reading of the arguments of the parties shows that the French government understands protecting ‘living together’ more dynamically than mere conservation of the current state of affairs. It means that the government has an interest in protecting our common social life through requiring its members to acknowledge certain values, such as fraternity and the minimum requirements of civility that are necessary for social interaction, in their individual decisions.57 But if that interpretation of ‘living together’ is accurate, then the idea is uncontroversial, even in the context of the case. Throughout the consultation procedure preceding the enactment of the Law there was no disagreement on the value of fraternity, or on the importance of open interpersonal relationships. Neither the applicant nor the third-party interveners argued or implied before the Court that the ‘minimum requirements of life in society’58 are not worthy of protection.59 The disagreement did not concern therefore the values underlying ‘living together’. But if the parties do not dispute that sometimes securing ‘living together’ may justify coercive action, and do not doubt the values underlying ‘living together’, then what was the disagreement about?

52 ibid
53 See Arrowsmith v the United Kingdom, Application no. 7050/75, 12 October 1978, §19; Kalaç v Turkey, Application no. 20704/92, 1 July 1997, §27; Leyla Şahin v Turkey, §§105 and 121.
56 S.A.S., Dissenting opinion of Judges Nussberger and Jäderblom, §§5-7.
57 S.A.S. §153.
58 In the words of the French government; see ibid §121.
59 The third-party interveners focused on the fact that prohibition is linked to fear and feelings of uneasiness associated not with the full-face veil per se but with the philosophy associated with it, that questions the value of ‘living together’; see S.A.S. §§89-105.
The statement that the French government has an interest in securing ‘living together’ is ambiguous because it alludes to two different and antagonistic goals. The first is the goal of responsibility. A state may aim that its citizens treat social interaction as a matter of moral importance, that they recognise that a democratic state is founded on certain values, including solidarity and fraternity, and that they decide reflectively whether particular ways of conduct are respectful towards others or not. The second is the goal of conformity or homogeneity. A state may compel its citizens to embrace forms of social interaction that the majority believes best capture certain values, such as fraternity and civility, and that they manifest their religion in public only in ways that the majority considers appropriate in virtue of the ‘right of others to live in a space of socialisation which makes living together easier.’ I think that the disagreement that the Court had to resolve in S.A.S. concerns which of the two state goals, responsibility or conformity, is compatible with our equal entitlements to respect for private life and freedom of religion in a liberal democracy.

As Dworkin has noted, the goals of responsibility and conformity are not only different, but also antagonistic in the following way. The state goal of responsibility entails that citizens should be left free to decide how they may behave because this is what a society committed to personal liberty is expected to do. Conversely, conformity denies citizens that decision. Through the conformity conception of ‘living together’ a state may often demand that its citizens act in violation of their conscience and they are discouraged from developing their own account of ‘living together’ in as much compliance as possible with their religious beliefs.

The legislative history of the ban echoes those two different goals. Before the French Parliamentary Commission and the Conseil d’État there was a contrast between ‘soft’ approaches (e.g. raising awareness, strengthening education for both genders, a declaration against oppression of women) and ‘hard’ ones that included criminalisation of the wearing of full-face veils in public. That contrast foregrounds the antagonism between responsibility and conformity. Likewise, the applicant’s submission interprets ‘living together’ through the lens of responsibility. Through a series of carefully framed qualifications (i.e. no systematic wearing of the full-face veil in public, willingness to remove it for security checks) the applicant attempted to convince the ECtHR that she takes social interaction as a matter of moral importance. However, according to her submission, reconciling her religious commitments with the prevailing social norms of the French society should be part of her own personal responsibility.

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61 Dworkin, Freedom’s Law, 95.
63 S.A.S. §122.
64 ibid.
So, does a government that aims to secure our common social life through demanding conformity to the majority’s interpretation of the values underlying ‘living together’ violate our rights to freedom of religion, respect for private life, and freedom from discrimination? An important point has to be clarified here. ‘Living together’ is a portmanteau term that covers numerous values bearing on our social practices. Various laws are designed to secure conformity in certain domains of our social practice, but they are not always wrong. Demanding conformity in urban planning, environmental protection or prohibition of violence is right – and expectable in a just and caring political community – because those constraints do not rely on personal morality. A political community that requires us to pay taxes, to respect scarce environmental resources, and to drink no more than a small glass of wine if we are to drive home afterwards does not deny our personal responsibility to define ethical value for ourselves. As Chapter Three discussed, none of these rules aims to usurp our responsibility to define success in our lives, despite having serious consequences on how we design our lives. But is demanding conformity in religious manifestation in public for reasons of fraternity and civility morally the same? Or else, could such conformity be grounded on reasons that do not reflect the moralistic preferences of the majority about how others should live?

There are serious doubts about that. Despite its neutral formulation, the ban on full-face covers is suspect, to use a familiar term from discrimination theory, because of its disparate impact on Muslim women, who have to choose between their faith and facing criminal sanctions. But, perhaps more importantly, the argument that concealing our face in public is so inescapably incompatible with civility that its criminal prohibition is imperative is questionable. As the dissenting judges argued, it is a mystery how we can distinguish between ‘other accepted practices of concealing the face, such as excessive hairstyles or the wearing of dark glasses or hats’ and the wearing of the full-face veil. In fact, familiar activities such as skiing, driving a motorcycle with a helmet, or wearing costumes in carnivals pose no problems for social interaction. As Nussbaum notes, during the freezing Chicago winters people are used to cover their faces with scarves and hats but that is not considered troubling for transparency, solidarity or security. But if the notion of civility cannot be extended to cover those practices, why wearing the full-face veil is different?

Those difficulties are complemented by the fact that, as the ECtHR has recognised, social values such as pluralism and tolerance underlying ‘living together’ are amenable and at variance with conformity. In cases regarding respect for private life the ECtHR has held that there is no individual right to interact with other people. On the contrary, respect for private life entails a right not to interact with others in public. In cases concerning the rights and independence of religious groups, moreover, the ECtHR has held that pluralism and tolerance command an integrationist approach that does not restrict

67 ibid §9.
69 S.A.S., Dissenting opinion, §8.
pluralism by eliminating the cause of the tension\textsuperscript{70} but ensures tolerance ‘between the vast majority and the small minority.’\textsuperscript{71}

To be clear, a political community must somehow decide collectively, through courts or legislatures, whether wearing the full-face veil violates the personal responsibility of women to make their choices of ethical values independently and authentically. If the full-face veil does upset women’s dignity by denying them independence and authenticity, its ban does not violate respect for private life or religious freedom because no plausible interpretation of those rights could justify protection of practices that destroy their very point.\textsuperscript{72} But that is not the case in S.A.S. Recall that the ECtHR accepted that the interpretations of the niqab and the burqa as symbols of hostility\textsuperscript{73} and subservience\textsuperscript{74} were not the only available,\textsuperscript{75} and rejected the argument that the full-face veil harms gender equality and violates human dignity.\textsuperscript{76} However, banning the full-face veil because that would satisfy the majority’s conception of what constitutes a good life is at odds with respect for our ethical independence. It also contradicts previous case law on freedom of expression, where the ECtHR established the principle that free expression protects also opinions that offend, shock or disturb because otherwise pluralism, tolerance and broadmindedness would be meaningless.\textsuperscript{77}

But there is another problem still. The interpretation of ‘living together’ pursued by the French government in order to justify the blanket ban sits uneasily with core political dimensions of secularism. That is particularly problematic because ‘living together’ springs conceptually from the constitutional implications of the principle of laïcité. However, according to its best interpretation in political theory, secularism (or laïcité) aims at reinforcement of civic equality and social inclusion,\textsuperscript{78} rather than at the exclusion of certain people (i.e. Muslim women) from the public sphere on grounds of their religious conduct.\textsuperscript{79} More than just an institutional principle of church-state separation, secularism thus understood encompasses the state duty to treat religious and nonreligious people with equal respect\textsuperscript{80} including a strong anti-discrimination principle that covers

\textsuperscript{70} Serif v Greece, Application no. 38178/97, §53.
\textsuperscript{71} S.A.S., Dissenting opinion, §14.
\textsuperscript{72} The ECHR prohibits abuse of rights in Article 17, according to which ‘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.’
\textsuperscript{73} S.A.S. §25.
\textsuperscript{74} ibid §17.
\textsuperscript{75} The full-face veil carries a plurality of meanings for the women concerned, as research from Liberty and the Open Society Justice Initiative demonstrates in S.A.S. at §101 and §104 respectively.
\textsuperscript{76} S.A.S. §§119-120.
\textsuperscript{77} Mouvement Raëlien Suisse v Switzerland, Application no. 16354/06, §48; Stoll v Switzerland, Application no. 69698/01, §101.
believers of all faiths. Inclusive state neutrality and even-handed justice require seeking non-confrontational ways to tackle those issues by carefully assessing the different problems that public concealment of faces may pose to an orderly enjoyment of our common space.

So, if we reconceptualise ‘living together’ in light of secularism – given its key constitutional role in a number of European states including France – then the wearing of the full-face veil does not infringe the principle of ‘living together’ correctly understood. Just like laïcité, ‘living together’ is intended as a guarantee, not a limit, to freedom of religion. If solidarity and fraternity are indeed the underpinnings of ‘living together’, as the French government argues, then the idea is intertwined with promotion of social inclusion in a way that it is hard to see how excluding veiled women from the public space can be compatible with its very essence. Ensuring that citizens treat social interaction as a matter of moral importance and decide reflectively without coercion seems the best way to promote solidarity and fraternity in our social communication and interaction. Grounding our normative commitment to religious pluralism on the fundamental moral principle that our common culture should be formed organically through individual ethical choices and not through collective action leads to the conclusion that, at least with regard to the case in question, it is a responsibility, rather than a conformity, conception of ‘living together’ that has to be preferred.

Of course the state has an interest in fostering solidarity and fraternity, along with a plurality of other values underlying ‘living together’, but that has to be in accordance with the political duty to treat everyone as an equal. Raising awareness, strengthening education for all sexes, and advancing our collective commitment against oppression of women – the ‘softer’ measures that parts of the French Parliamentary Committee recommended over a criminal ban – do not usurp our personal responsibility to develop our public religious conduct in as much compliance with the civic values of a society as possible. Recall that if we agree that the normative justification of the right to freedom of religion or belief rests on the need to protect our ethical independence from coercive manipulation motivated by the moral preferences of the majority about how everybody should live, any answers on what the right to freedom of religion requires in more specific cases have to be fixed and defended by asking what that abstract right requires. Any contrary argument about the scope of the right to freedom of religion and its interaction with equality and discrimination has to fit that principle.

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84 Laborde, ‘Secular philosophy and Muslim headscarves in schools’, 328.

85 S.A.S. §§17 and 22.
6.3. State Regulation of Religious Symbols for Reasons of Public Safety

The analysis will now turn to cases involving bans on religious symbols, albeit for security reasons and only for a limited amount of time and in specific parts of the public space. Naturally, under certain particular circumstances ability to see someone’s face is necessary. Checking in a flight or entering a bank are common examples, but other activities, such as driving, may also be impeded by the wearing of particular types of full-face covers. Would that mean that limitations on our right to freedom of manifestation of religion are always justifiable when security reasons come into play? If not, then how do we know which bans on the wearing of religious symbols in public space can be justified, and under what circumstances?

6.3.1. Security checks

In October 2003, Sukh Phull was supposed to board on the morning flight from Strasbourg to London for a business trip. Phull was a practising Sikh, whose faith required him to always wear a turban. Shortly before reaching the departure gate he was asked by the airport’s security staff to remove his turban for inspection. His complaint about a violation of his right to freedom of religious manifestation eventually reached the ECtHR, where he argued that the fact that the airport authorities obliged him to remove his turban as part of a security check constituted an unjustifiable limitation on his right. More specifically, he argued that there was no need to have his turban removed, given that he agreed to be checked through the scanner or by the hand-held detector.

The ECtHR held that the disputed security measure constituted an interference with the applicant’s freedom of religious manifestation, but it was prescribed by law and pursued the legitimate aim of guaranteeing public safety. What was left to be determined was whether the interference was also necessary in a democratic society in the interests of public safety. To that end, the ECtHR reminded a landmark judgment of the European Commission on Human Rights (‘EComHR’). More specifically, in X v United Kingdom, the EComHR has held that fining a practicing Sikh for not wearing a motorcycle helmet, despite the fact that his religious duty to wear a turban made it impossible, did not violate Article 9 ECHR. The obligation to wear a helmet was a necessary safety measure justified by the need to protect public health by virtue of Article 9(2). In Phull, the ECtHR reached a similar conclusion based on the same considerations. The applicant’s right to freedom of religious manifestation was not violated because security checks in airports are necessary in the interests of public safety and the specific measures to implement them fall within the national margin of appreciation.

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87 Phull v France, Application no. 35753/03, 11 January 2005 (inadmissible).
89 ibid
90 ibid
The ECtHR reached a similar conclusion in *El Morsli v France*. The applicant was a Moroccan national married to a French citizen. Her application for an entry visa to France was declined because she refused to remove her headscarf for an identity check by male personnel at the French Consulate General in Marrakech. The ECtHR declared the application inadmissible, reiterating that identity checks are necessary in a democratic society for reasons of public safety and that, in any event, the interference with the applicant’s right to freedom of religion was too limited in time to be disproportionate.

### 6.3.2. Identity cards

Similar considerations have informed the approach of the ECtHR in cases on religious symbols in various types of identity cards, including university certificates and driving licences. In *Karaduman*, the applicant upon completion of her university studies, applied to the university’s registry for a provisional certificate stating that she obtained a bachelor’s degree. However, the photo attached to the application depicted her wearing a headscarf. The Dean of the faculty subsequently informed the applicant that the certificate in question could not be issued, as the identity photograph did not comply with the university’s regulations. Ms. Karaduman appealed to the Ankara Administrative Court seeking annulment of the administrative decision due to an unjustifiable limitation on her right to freedom of religion. Both the Ankara Administrative Court and the Council of State upheld the decision of the university based on the specific provisions of the university’s regulations and their compatibility with the constitutional principle of secularism. Ms. Karaduman filed a complaint to the EComHR under Article 9 and Article 14 read in conjunction with Article 9 ECHR. Her non-discrimination claim was based on the fact that female foreign nationals enjoy total freedom as to how to dress in Turkish universities, whereas Turkish female students are subject to the above-mentioned restrictions.

The Turkish government argued that asking for bareheaded identity photographs, as part of the university’s regulations, does not constitute an interference with the student’s right to freedom of religion and that, in any event, the university’s regulations derive from the constitutional principle of secularism, which prohibits the wearing of headscarves in higher education institutions. The EComHR reminded the principles of the *Arrowsmith* case, which held that the right to freedom of religion does not always guarantee the right to behave in public in any way dictated by a religious belief. Moreover, the EComHR held that the applicant chose to pursue her studies in a secular university, whose rules limited her right to freedom of religious manifestation in order to secure peaceful coexistence in a religiously diverse student body. Those restrictions aimed to secure public order and the rights of others, and at the same time a university degree photograph was not a suitable forum to manifest her religious beliefs. All in all, regulating students’ dress and qualifying the available administrative services do not, as such, constitute an

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91 *El Morsli v France*, Application no. 15585/06, 4 March 2008 (inadmissible).
92 *Karaduman v Turkey*, Application no. 16278/90, 3 May 1993.
interference with the applicant’s right to freedom of religion and do not therefore violate the Convention.

Some years later, the ECtHR partly confirmed those findings in Mann Singh v France. 94 The applicant was a practicing Sikh, who complained that the general requirement of a bareheaded photograph on his driving licence, which made no provision for separate treatment for members of the Sikh community, amounted to an interference with his right to freedom of religion in violation of the Convention. 95 The ECtHR declared his application manifestly ill-founded on grounds that bareheaded identity photographs for use on driving licences were necessary to pursue the legitimate interests of public safety, especially to facilitate driver identification in checks carried out under traffic regulations. Moreover, the detailed arrangements for implementing such checks fell ‘within the respondent State’s margin of appreciation, especially since the requirement for persons to remove their turbans for that purpose or for the initial issuance of the licence was a sporadic one.’ 96 The impugned interference was again found legitimate and proportionate to the aim pursued.

More recently, in Ahmet Arslan v Turkey, 97 127 members of a religious group were criminally convicted for wandering around the streets of Ankara in religious attire including turbans, distinctive trousers and tunics on occasion of a ceremony held at a mosque. The legal basis of their conviction lies on domestic legislation prohibiting religious attire from the public space, with the exception of places of worship and religious ceremonies. 98 Contrary to previous cases justifying limitations on religious symbols for public safety reasons, the ECtHR found a violation of Article 9 ECHR as the interference with the right of the applicants to freedom of religious manifestation was not justified in the instant case. More specifically, the ECtHR accepted that, in the circumstances of the case and given the importance of secularism for the Turkish constitutional system, the interference may be taken to serve the legitimate aims of protection of public order and the rights of others. 99 However, the ECtHR stressed that the aim of the provisions under examination was to avert provocation, proselytism and religious propaganda in a secular democratic state. 100 Since the applicants were not state representatives and were not exercising any public function, they were divested of any state authority. 101

95 ibid
96 ibid
97 Application no. 41135/98, 23 February 2010 (only in French).
98 They were convicted for violating Act 671 of 28 November 1925, which abolishes the use of religious headgear (except for religious officials who are authorized) and Act 2596 of 3 December 1934, which imposes a ban on wearing religious attire other than in places of worship or at religious ceremonies.
99 See also Sahin v Turkey, §99. Also Refah Partisi v Turkey, §67.
100 The ECtHR did not decide on the wearing of religious symbols in court, despite the fact that some of the applicants in Ahmet Arslan v Turkey were ordered to remove their turbans before the national courts. For more details on this see L. Peroni, ‘Religion and the public space’, Strasbourg Observers blog, 13 April 2010, at <http://strasbourgobservers.com/2010/04/13/religion-and-the-public-space/>.
101 The result would be different were the applicants state employees. See mutatis mutandis, Vogt v Germany, Application no. 17851/91, 26 September 1995, §53; and Rekvényi v Hungary, Application no. 25390/94, 20 May 1999, §43; Dahlab v Switzerland (cited above); and Kurtuluş v Turkey (cited above).
Furthermore, the majority was unconvinced by the argument that the applicants posed a threat to public order. Rather, according to the facts before the ECtHR, the applicants just gathered outside a mosque with the sole aim of participating in a religious ceremony. Their purpose was not to inflict undue pressure on other people or to promote their beliefs. As a result, the ECtHR held that in the instant case the restriction was disproportionate, in violation of Article 9 of the Convention. It is noteworthy that the ECtHR did not weigh the interests of the applicants to wear their religious symbols in public against the interests of the state to adhere to constitutional secularism through securing a religion-free public space. Rather, the judgment undertook an interpretation of the reasons behind the ban, which were found inadequately supported by public order considerations. By contrast, the state limitation in question was motivated by impermissible reasons that express dislike, if not contempt, for the applicants’ lifestyle.

As Judge Sajó argued in his concurring opinion, in cases such as _Ahmet Arslan_ it is important to interpret secularism as a set of principles imposing obligations on the state, not on individuals. This is not to suggest that individuals are not expected to behave according to the requirements of public order. But Judge Sajó’s interpretation matches what parts of political theory describe as egalitarian accounts of secularism. Every government should enjoy discretion in the design and enforcement of rules and policies safeguarding public order. Moreover, specifically in the Turkish context, there are distinctive socio-historical reasons that, as the ECtHR itself has recognised, require vigilance for religious extremism and might justify more intrusive limitations on the individual and group rights to freedom of religion or belief. The interpretation of the moral right to freedom of religion or belief defended here is congenial to an egalitarian interpretation of secularism, which according to Judge Sajó requires that the government always demonstrates, on the basis of concrete evidence, that the restriction of the applicants’ conduct served a pressing social need or was necessary to safeguard public order. In _Ahmet Arslan_ the domestic courts did not take into account the right to freedom of religious manifestation in their interpretation of the domestic criminal code and the government failed to show how considerations of public order necessitated the criminal convictions under scrutiny. It was this very lack of consideration that led to the violation of the right to freedom of religion on behalf of the applicants in the instant case.

6.3.3. The UN Approach

Just one month after the ECtHR reached its decision about the inadmissibility of the complaint in _Mann Singh v France_, the applicant submitted an almost identical complaint to the UN Human Rights Committee (‘HRC’) under the individual communications

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104 See _Karaduman v Turkey_, _Refaah Partisi v Turkey_ and _Şahin v Turkey_ (all cited above).
105 Concurring opinion of Judge Sajó, _Ahmet Arslan v Turkey_, Application no. 41135/98, 23 February 2010 (only in French).
mechanism. Slightly twisting the facts, he claimed that the prohibition to wear a turban on his passport photograph – instead of his driving license – was in violation of his right to freedom of religious manifestation under Article 18 ICCPR. It is noteworthy that submission of the same individual complaint to two different human rights bodies is quite exceptional in international human rights legal practice. It would be useful therefore to contrast the two decisions and examine any potential differences in the interpretative approach followed by the two mechanisms.

The HRC based its reasoning on a previous case, Ranjit Singh v France, which was decided in 2011 and is factually similar to Mann Singh v France. Contrary to the ECtHR, the HRC found a violation of the applicant’s right to freedom of religion under Article 18 ICCPR. The applicant in Ranjit Singh v France was an Indian national residing under refugee status in France. When his permanent residence permit was due for renewal, Mr. Singh had to provide the French authorities with two full-face bareheaded photographs. His application for an exemption from the requirement that in the relevant photos he should appear bareheaded, based on his religion, was rejected. Before the HRC, Mr. Singh complained about a violation of his right to freedom of religion under Article 18 ICCPR, arguing that the photo requirement could not be justified on public order and public safety, and constituted an unnecessary and disproportionate interference with his right. The applicant added that it is deeply humiliating for Sikhs to appear bareheaded in public and that ‘an identity photograph showing him bareheaded would produce feelings of shame and degradation every time it was viewed.’ The French state, in his case, did not take into account that he would be repeatedly humiliated ‘whenever proof of his identity is requested.’ Furthermore, since he always wears a turban, he would not be more readily identifiable if his identify photograph depicted him bareheaded. Other European countries, such as Belgium, Germany, Italy, Norway, Portugal and Sweden use to issue residence cards with photographs of Sikhs wearing turbans.

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106 (Mann) Singh v France, 26 September 2013, CCPR/C/108/D/1928/2010 (only in French).
107 Because according to Article 5(2)(a) of the Optional Protocol to the ICCPR about communications from individuals claiming to be victims of violations of the Covenant, the HRC shall not consider any communications in case the same matter has been examined ‘under another procedure of international investigation or settlement.’
108 This is what he claimed before the ECtHR in Mann Singh v. France (discussed above).
113 ibid §3.1.
114 ibid
115 ibid §3.5.
believe that someone wearing a turban would be harder to identify in France compared to those countries.\footnote{ibid §3.4.}

The HRC turned to the principles of the General Comment 22 on Article 18 ICCPR, according to which freedom of religious manifestation includes the right to wear distinctive clothing or head coverings.\footnote{General Comment No. 22, CCPR/C/21/Rev.1/Add.4 (1993), §4.} The conditions for renewal of permanent residence in France constituted therefore interference with the exercise of the individual right to freedom of religion.\footnote{Ranjit Singh, §8.3.} The HRC examined then whether that interference was necessary and proportionate to the legitimate aim of public safety and public order.\footnote{ibid §8.4.} On that account, it held that

> [t]he State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the State party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residence permits.\footnote{ibid §8.4.}

As a result, the HRC concluded that the French authorities failed to demonstrate that the limitation was necessary within the meaning of Article 18 ICCPR. Moreover, the HRC agreed with the applicant that the interference would also be continuing because appearing without a turban in his identity photograph could compel him to remove it in every future identity check.\footnote{ibid}

In Mann Singh v France, the HRC employed the above principles and, contrary to the ECtHR, decided again that limitations on the wearing of religious symbols that do not cover the whole face, such as the turban, on ID photographs require convincing explanation of why the particular limitation is necessary to guarantee public safety, otherwise they violate Article 18 ICCPR. The two different outcomes in Mann Singh v France can be traceable to the fact that the HRC applied stricter scrutiny of the public safety justification. By contrast, at least until Ahmet Arslan, the ECtHR used to allow a generous margin of appreciation to the respondent states in cases involving limitations on the right to wear religious symbols for reasons of public order or public safety, leaving the relevant state arguments practically unscrutinised.

### 6.3.4. Differences between the UN and the ECtHR

Similar discrepancies between the approaches of the two international human rights mechanisms also arise in cases on religious symbols in schools. In a well-documented\footnote{See M. Hunter-Henin, ‘Law, religion and the school’, in S. Ferrari (ed.), Routledge Handbook of Law and Religion (Routledge, 2015) 259-271; N. Doe, Law and Religion in Europe: A Comparative Introduction}
series of cases against France, including *Dogru and Kervanci v France*, *Jasvir Singh v France*, and *Aktas, Bayrak, Gamaleddyn, Ghazal and Singh v France* – all applications concerning cases of expulsion of students from public schools for wearing conspicuous religious symbols – the ECtHR has held that the expulsions in question were proportionate to the legitimate aim of protecting the rights and freedoms of others as well as public order, through safeguarding *laïcité* in public schools. The approach of the ECtHR has attracted plenty of criticism for applying its familiar proportionality test without scrutinising the legitimacy of the claim that the manifestation of religion on behalf of the individual applicants interferes with the rights and freedoms of others. One explanation of this lack of scrutiny is that measures taken by virtue of the constitutional principle of *laïcité* fall within the respondent state’s margin of appreciation.

By contrast, in factually similar cases on prohibition of religious symbols in public schools, such as *Bikramjit Singh v France*, the HRC follows a strict scrutiny test vis-à-vis the public order arguments of the state and, contrary to the ECtHR, it has found violations of the right to freedom of religion under the ICCPR. In similar fashion to the ECtHR, the HRC accepts that secularism is a valuable means to safeguard equal enjoyment of freedom of religion in schools. However, the HRC has held that secularism is insufficient by itself to justify limitations on the individual freedom to manifest religion. More specifically, in *Bikramjit Singh*, France failed to provide ‘compelling evidence’ to support the claim that the wearing of a small turban (called *keski*) by the applicant would jeopardise the rights and freedoms of other pupils or the school order in general. According to the HRC his expulsion was therefore disproportionate in the instant case. All in all, the HRC focused on the legitimacy of the reasons behind the limitations on the wearing of symbols. Instead of yielding to mere worries or fears, a more thorough investigation of the state claim that the individual applicant posed a threat enabled the HRC to pursue a more robust analysis of the reasons behind the limitation in question.


123 In France the wearing of religious symbols in public schools and colleges is prohibited by Law no. 2004-228, 15 May 2004, Article L. 141-5-1.
124 Application nos. 31645/04 and 27058/05, 4 December 2008.
125 Application no. 25463/08, 30 June 2009 (only in French; inadmissible).
126 Application no. 27561/08, 30 June 2009 (only in French; inadmissible).
127 ibid §1. Other cases discussing limitations based on secularism include Köse and 93 Others v Turkey, Application no. 26625/02, 24 January 2006 (inadmissible).
130 ibid §8.6.
132 *Bikramjit Singh*, §8.7.
133 ibid
134 See Judge Tulkens dissenting opinion in *Sahin v Turkey*, §5.
The cautiousness of the ECtHR in cases of religious symbols has been critically received on various grounds. It has been argued, for instance, that the commonly used proportionality analysis shifts the burden of proof away from the state and onto the applicants, who should then prove that the restrictions against their right to freedom of religion are disproportionate. That line of criticism is grounded on concerns about the procedural justice of the approach of the ECtHR. Furthermore, the permissible limitations on the right to freedom of religion have often been construed in a manner that permits restrictions against the right to freedom of religion of minority groups because of the worries, fears, and ideologies of the majority. By contrast, the HRC has been praised for following an interpretation that looks more suitable to protect unpopular minorities, who are clearly more vulnerable to unjustified limitations of their rights. Its stricter scrutiny along with the fact that the HRC, contrary to the ECtHR, does not allow margin of appreciation to the respondent states, entail that if states wish to introduce limitations on freedom of religion in compliance with Article 18 ICCPR, they should ensure that those should be absolutely necessary to achieve the legitimate aim sought, even in cases of limitations supported by arguments of public order and public safety.

The contrast between the two approaches provides valuable insights on some practical implications of a reason-blocking account of the right to freedom of religion. At least in cases of religious symbols, the approach of the HRC seems closer to a reason-blocking account. The HRC focuses not on whether the applicant’s interest to cover his head according to his religion is more ‘weighty’ compared to the state interest to protect public order or public safety. Rather, the investigation focuses on whether the state distribution of burdens shows equal respect for the religious commitments of the applicant in the circumstances of the case. I think that that explains why the HRC has placed emphasis on the questionable efficacy of certain measures highlighting, for instance, that bareheaded identity photographs have often failed to avert the risk of fraud or falsification of residence permits. A rigorous examination of the reasons behind state limitations on rights, even if those reasons cite public order and public safety, is better suited to smoke out impermissible motives such as majoritarian preferences about how others should live, what they should wear, and how they should behave in public. Recall that, as Chapter Five discussed, the availability or unavailability of comparable cases is not constitutive of a violation of the right to freedom of religion. Rather, in the cases on the wearing of religious symbols above discussed comparators proved diagnostically useful as indicators

140 Ranjit Singh, §8.4.
capable of pointing the courts towards possible violations of the fundamental right to be treated with equal concern and respect. Contrary to the HRC, the ECtHR has evaded strict scrutiny of public order justifications despite that as Marx, not least, claimed long ago, states can manipulate security to legitimise almost all actions taken in its name, simply by citing a need for the action to protect national security.¹⁴¹ Refraining from meaningful scrutiny of public order reasons incurs the risk to miss significant opportunities to track and block impermissible reasons from grounding state limitations on the right to freedom of religion or belief.

6.4. Conclusion

This chapter offered an interpretation of the ban on the wearing of full-face covers in public and argued that a responsibility, rather than conformity, conception of ‘living together’ is compatible with ethical independence. It also developed a bit further some of the practical implications of the reason-blocking account of freedom of religion defended so far, especially with reference to cases involving limitations on the wearing of symbols for reasons of public order. That context is theoretically and practically challenging, but it is also a distinctive theme of law and religion that any substantive theory of the right should address. Again, the aim of such a substantive account is not to resolve every issue relevant to religious manifestation, but to channel further thought about the principles that should guide our interpretation of Article 9 ECHR. The next, final chapter will discuss another distinctive theme of law and religion, namely state limitations on blasphemous expression.

¹⁴¹ K. Marx, ‘On the Jewish question’ (1843).
For the citizen who is ‘unmusical’ in religious matters, (tolerance) entails the demand – which is not in the least trivial – that he identify self-critically the relationship between faith and knowledge, on the basis of what all the world knows. This is because the expectation that there will be continuing disagreement between faith and knowledge deserves to be called ‘rational’ only when secular knowledge, too, grants that religious convictions have an epistemological status that is not purely and simply irrational.

J. Habermas¹

The very purpose of Article 10 of the Convention is to preclude the State from assuming the role of watchman for truth and from prescribing what is orthodox in matters of opinion.

*Mouvement Raëlien Suisse v Switzerland*, Dissenting opinion²

### 7.1. Introduction

Why should our community tolerate people’s freedom to express offensive speech, especially when it attacks or ridicules figures and beliefs that many consider sacred? This, last chapter of the thesis will examine state regulations of blasphemy and their compatibility with our rights to freedom of expression and freedom of religion. Given that the jurisprudence of the ECtHR on blasphemous speech does not seem to conform with the principles thus far defended, this chapter, similarly to the approach followed in Chapter 6, will criticise the approach followed because the more general duty to treat

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² Dissenting opinion of Judge Pinto de Albuquerque, *Mouvement Raëlien Suisse v Switzerland*, Application no. 16354/06, 13 July 2012 (Grand Chamber), at 67.
everyone’s ethical responsibility with equal respect\textsuperscript{3} is incompatible with a right not to be offended in one’s religious beliefs. This chapter will also argue that a reason-blocking approach would improve consistency both internally, given that the ECtHR has repeatedly held that freedom of expression protects speech that ‘offends, shocks or disturbs’,\textsuperscript{4} and externally with international human rights law, where the latest soft law developments support criminalisation of expression inciting to violence and not bans on merely offensive forms of expression. According to a reason-blocking approach limitations on offensive forms of expression are unjustifiable neither because we think that we can secure more individual rights by rejecting such limitations, nor because the interests of the artists are more important than the interests of the affected religious believers. They are unjustifiable simply because the values and considerations supporting the putative right not to be offended in one’s religion are incompatible with the very idea of equal respect for our personal ethical responsibility that the moral right to freedom of religion asserts. If this interpretation is true, then the right not to be offended is a \textit{prima facie} right that does not ground duties on others not to interfere with that particular liberty, and there is no reason to balance freedom of expression against it. What seemed to be a brute confrontation between two individual interests, that is, between free artistic expression and freedom from offense independently understood, ends up being resolved by focusing on the internal substantive relation that applies in our interpretation of the respective right-claims.

The argument will deploy in two main parts. The first will discuss various judgments of the ECtHR on offensive speech and will highlight some key challenges for the Court. The second will examine the conflict between freedom of religion and freedom of expression and will argue that its resolution requires a systemic approach highlighting the internal connections between different moral considerations, such as those underlying freedom of expression and freedom from offense in the enjoyment of our conscience.

\subsection*{7.2. The ECtHR on Religiously Offensive Speech Cases}

In May 1985, the Otto-Preminger Für audiovisuelle Mediengestaltung (OPI), an Austrian organisation that runs an art-house cinema in Innsbruck, announced a series of six showings of a film called \textit{Das Liebeskonzil} (Council in Heaven). The film was a 1982 reproduction of the homonymous movie originally written by Oskar Panizza in late 19\textsuperscript{th} century. In the words of the Austrian government, the film presented ‘God the Father… as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression.’\textsuperscript{5} God is also portrayed as ‘swearing by the devil’\textsuperscript{6} and ‘other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of erotic tension between the Virgin Mary and the devil.’\textsuperscript{7} Back in 1895, those obscenities led the German authorities to ban the film and convict Panizza for

\begin{itemize}
\item \textsuperscript{3} See pp. 82-102 above.
\item \textsuperscript{4} See e.g. \textit{Handyside v United Kingdom}, Application no. 5493/72, 7 December 1976, at §49.
\item \textsuperscript{5} \textit{Otto-Preminger}, §38-39.
\item \textsuperscript{6} ibid §22.
\item \textsuperscript{7} ibid
\end{itemize}
crimes against religion. But as the film was still considered provocative in 1985, the Otto-Preminger Institute made sure to circulate an information bulletin presenting the plot in advance of the screening. In due time the bulletin was mailed to its 2,700 members, whereas it was also placed in various display windows in Innsbruck including the windows of the cinema itself. Finally, the film was classified as suitable only for viewers of 17 years and older.

Despite those preventive measures, the Church Authorities of Innsbruck called for the pre-emptive seizure and forfeiture of the film asking the Public Prosecutor to initiate criminal proceedings against the cinema. The case was legally based on Section 188 of the Austrian Penal Code that criminalises disparagement of religious doctrines. Both at first instance and on appeal, the Austrian courts dismissed the Institute’s arguments because under Section 188 its right to freedom of expression was limited by the rights of others not to be offended in their religious beliefs, as well as by the State duty to foster a well-ordered and tolerant society. In October 1987, the Otto-Preminger Institute applied to the ECtHR claiming a violation of its right to freedom of expression.

The ECtHR held that the restriction served the legitimate aim of protecting public order and the rights of others. Regarding the rights of others, the majority found that whereas believers should be ready to tolerate criticism, or even offense against their faith, ‘the manner in which religious beliefs and doctrines are opposed or denied…may engage the responsibility of the state’ because certain forms of expression nullify freedom of belief and manifestation. According to the majority, blasphemous speech violates the right of believers ‘not to be insulted in their religious feelings by the public expression of views of other persons’. More specifically, although offensive artworks are protected under freedom of expression, ‘gratuitously’ offensive forms of expression violate the rights of others and could therefore be legitimately restricted. Moreover, the assessment of whether a particular form of expression is gratuitously offensive falls within the margin of appreciation of the national authorities, who are better placed to decide on the necessity of restrictive measures against it on an ad hoc basis. Finally, in the case under discussion, the fact that the majority in Tyrol were Roman Catholics exacerbated the danger of a widespread violation of the rights of the believers which might in turn jeopardise religious peace and public order. That evidence was deemed sufficient to render the preemptive seizure and forfeiture of the film a necessary and proportionate state limitation on Article 10 ECHR.

One of reasons that the judgment on Otto-Preminger has been criticised is that the distinction between offensive and gratuitously offensive speech is obscure. Which kinds

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9 *Otto-Preminger*, §56.
10 ibid §57.
11 *Handyside v United Kingdom*, §49.
12 *Otto-Preminger*, §57.
13 *Otto-Preminger*, §50.
of expression should be classified as gratuitously offensive, and why? If the majority of a state is to decide which forms of expression are gratuitously offensive to its religious beliefs, the distinction is vulnerable to exactly the kind of state arbitrariness that human rights protect us from. But even if we agree — which, I will later argue, we should not — on the criteria that distinguish between speech consistent with the decencies of controversy and speech that is unacceptably offensive and damaging for the public order and debate, those criteria should follow ‘social norms of dialogue that are endorsed by a democratic state, in part because they are deemed compatible with the function of democratic legitimation.’ The distinction between gratuitous (unprotected) and non-gratuitous (protected) offensive forms of expression should be based on principles that show equal respect for our individual responsibility for our own lives and reflect, for instance, universally applicable standards of civility. As Chapter Three discussed, human rights, including freedom of expression, cannot be restricted merely because their free enjoyment might be inconsistent with the religious beliefs of others, even if those form a state’s majority.

Those difficulties notwithstanding, two years later the ECtHR applied the same distinction in Wingrove v United Kingdom. Nigel Wingrove was the director of a video work entitled Visions of Ecstasy. During the video, a Carmelite nun, intended to represent St. Teresa of Avila, had ecstatic raptures ‘of overtly sexual nature’ with Jesus Christ on the crucifix. Both the British Board of Film Classification (BBFC) and the Video Appeals Committee (VAC) refused to issue a classification certificate on the basis that the video was blasphemous. It is noteworthy that in the British context refusal of a classification certificate amounts to total preclusion of the circulation of the film. Soon after those decisions, Wingrove applied to the ECtHR and complained about a violation of his right to freedom of expression. Unsurprisingly, the UK Government based its submissions on the principles of Otto-Preminger and claimed that it should be able to discretionally restrict blasphemous art in cases of disparagement of religious beliefs. The majority of the

17 Wingrove v United Kingdom, Application no. 17419/90, 25 November 1996.
18 ibid §61.
19 Possibly influenced by the UK cases in R v Lemon [1978] 3 W.L.R. 404 and Whitehouse v Gay News Ltd. [1979] 2 W.L.R. 281. In that case the publishers of a magazine were found guilty of blasphemy because of an article, which included a poem and a drawing describing sexual acts upon the body of Jesus Christ. Thereafter the House of Lords defined blasphemy as ‘any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible… It is not blasphemous to speak or publish opinions hostile to the Christian religion’ if the publication is ‘decent and temperate.’ Thus, according to House of Lords, blasphemy is not a question of matter but a question of manner. The publishers subsequently applied to the ECtHR, which affirmed that reading and declared the application inadmissible; see Gay News Ltd. and Lemon v. United Kingdom, Gay News Ltd. and Lemon v United Kingdom, Application no. 8710/79, 7 May 1982. According to the matter vs. manner distinction – which resembles the style considerations that cut across the jurisprudence of the ECtHR on blasphemy – intention to blaspheme is not required to ground the offense. Rather, proving that the publication has been intentional and that its content has been blasphemous is sufficient. See P. W. Edge, Legal Responses to Religious Difference (Brill, 2001) 209-210.
ECtHR, following the *Otto-Preminger* doctrine, agreed with the UK government, whereas it also added an important parameter to the existing principles. Unlike cases of limitations on political speech,\(^21\) states enjoy a *wide* margin of appreciation under Article 10(2) ECHR 'when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.'\(^22\) Notably, the evolution of the state margin of appreciation from *certain* (in *Otto-Preminger*) to *wide* (in *Wingrove*) meant that the UK restrictive measures were found, almost automatically, compatible with the individual right to freedom of expression under the Convention.\(^23\)

The wide national margin of appreciation applying in cases of state limitations on blasphemous speech was reaffirmed in later cases. In *Murphy v Ireland*,\(^24\) the ECtHR found unanimously that domestic laws prohibiting religious advertising did not violate Article 10 ECHR, given the ‘religious sensitivities’ of the predominantly Christian Irish society.\(^25\) In *I.A. v Turkey*,\(^26\) the ECtHR held that the criminal conviction of a Turkish author for blaspheming against the Prophet did not violate his right to freedom of expression. Before the ECtHR, the Turkish government highlighted that the majority’s religious beliefs are sufficient to justify restrictions on profane speech and added, more specifically, that ‘the criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslims.’\(^27\) By a small margin – four to three – the ECtHR maintained that the book was not just provocative or shocking, but constituted an abusive attack on the Prophet.\(^28\) The punishment of the author under scrutiny served therefore a reasonably pressing social need.\(^29\) The restrictive measures were deemed proportionate also because the book was not seized and the fine imposed on the author was ‘insignificant’ (16

\(\text{21}^\) According to the test followed in political speech cases, there must be a ‘pressing social need’ for the restriction of freedom of press, which should be ‘convincingly established’ through ‘relevant and sufficient’ reasons, whereas the ECtHR should decide only after looking at the ‘interference complained of in the light of the case as a whole.’ See Goodwin v. United Kingdom, Application no. 17488/90, 27 March 1996, §40; Fressoz and Roire v. France, Application no. 29183/95, 21 January 1999, §45. For a more recent application of the test see Financial Times Ltd. v. United Kingdom, Application no. 821/03, 15 December 2009 §§60-62.
\(\text{22}^\) Wingrove, §58.
\(\text{23}^\) It is remarkable that the ECtHR did not consider that the UK anti-blasphemy legislation ruled out solely attacks against Christianity. See Wingrove, §50, and the dissenting opinion of Judge Lohmus at §§3-4. See also R. v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury [1990] 3 W.L.R. 986; and C. Unsworth, ‘Blasphemy, cultural divergence and legal relativism’ (1995) 58(5) MLR 658. On 8 May 2008 the Criminal Justice and Immigration Act 2008 abolished the common law offences of blasphemy and blasphemous libel in England and Wales, with effect from 8 July 2008.
\(\text{24}^\) Murphy v Ireland, Application no. 44179/98, 10 July 2003, §67.
\(\text{25}^\) ibid §76. See also A. Geddis, ‘You can’t say “God” on the radio: Freedom of expression, religious advertising and the broadcast media after Murphy v Ireland’ (2004) 2 European Human Rights Law Review 181.
\(\text{26}^\) I.A. v Turkey, Application no. 42571/98, 13 September 2005, §§32-33.
\(\text{27}^\) ibid §35.
\(\text{28}^\) ibid §44.
\(\text{29}^\) ibid §45. Contrary to other freedom of expression cases, the majority did not take into account in the proportionality test that ‘audio-visual media have often a much more immediate and powerful effect than the print media.’ See e.g. Jersild v Denmark, Application no. 15890/89, 23 September 1994, §31; Murphy v Ireland, §69; Joint dissenting opinion of Judges Costa, Cabral-Barreto and Jungwiert, I.A. v Turkey, §6.
In their joint dissenting opinion Judges Costa, Cabral-Barreto and Jungwiert vigorously criticised the reasoning of the majority because the fundamental quality of freedom of expression, namely to protect not only inoffensive but also shocking and disturbing types of speech, was consistently defied by the principles set out in *Otto-Preminger* and *Wingrove*. According to the dissenting judges, the ECtHR had to revisit its jurisprudence on blasphemous speech, since it places ‘too much emphasis on conformism or uniformity of thought’ and reflects ‘an overcautious and timid conception of freedom of the press.’

Although the ECtHR has yet to fully address those concerns, its approach in more recent cases has been more protective of religiously offensive speech. For instance, in *Giniewski v France*, the ECtHR examined a complaint of a journalist, who was fined for defaming Christian beliefs through an article heavily criticising a Papal encyclical. In the article in question the journalist attacked the encyclical for promoting a particular theological doctrine, which he associated with anti-Semitism and the Holocaust. The ECtHR held unanimously that the conviction was disproportionate, given that the article sought to develop an argument and contribute to a ‘wide-ranging and ongoing debate’ with a content neither ‘gratuitously offensive’, nor inciting to ‘disrespect or hatred’.

A similar result was reached in *Klein v Slovakia*. Similarly to *Giniewski* the applicant, a journalist, had published an article criticising the Archbishop of the Slovakian Roman Catholic Church for his protest against the showing of a film. In due course he was arrested and convicted for defaming the Archbishop and for offending the members of the Roman Catholic Church. Again, the ECtHR found unanimously that the applicant’s conviction violated his right to freedom of expression under Article 10 ECHR since his publication ‘neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith.’ By the same token, in *Vereinigung Bildender Künstler v Austria*, the ECtHR held that the decision of the Austrian authorities to cease the exhibition of a large collage in a public gallery, which depicted public and religious figures in sexual activity, was in violation of the right to freedom of artistic expression secured under Article 10 of the Convention.

Nevertheless, in July 2012, a divided (9 to 8) Grand Chamber of the ECtHR found in *Mouvement Raëlien Suisse v Switzerland* no violation of the right to freedom of expression in a case where state denial of authorisation to a poster campaign of a religious...
group was based on the fact that its message contravened public morals. The applicant association, the ‘Raëlian movement’, is a religious group founded in 1976 with the aim to communicate and connect with extraterrestrials. In March 2001, its Swiss branch requested authorisation from the municipal authorities in order to conduct a poster campaign in the city of Neuchâtel. The poster featured a title reading ‘The Message from Extraterrestrials’ while further down on it was the web address of the Raëlian movement. Although the poster contained nothing unlawful or shocking, the advertised website included ideas and links associated with ‘geniocracy’ (a political model based on individual’s intelligence), human cloning, and ‘sensual meditation’ (allegedly associated with paedophilia). The Swiss authorities considered those ideas likely to undermine public order, safety and morality, and as a result they denied authorisation to the campaign. The religious group appealed against the refusal and when domestic courts rejected the complaint, it submitted an application to the ECtHR about a violation of its right to freedom of expression. The majority of the ECtHR held that the content of the expression in question was not political but commercial, given that the main function of the poster was to draw attention to Raëlism. The Swiss authorities enjoyed therefore a wide margin of appreciation with regard to the necessity of the ban on the poster campaign for reasons of public order, health, morals, and the rights of others. The limitation was also proportionate given that it was limited to the display of posters. According to the majority, the Raëlian movement could continue to disseminate its ideas through its website or other means.

Similarly to Otto-Preminger and Wingrove, what is most worrying in the approach of the ECtHR to Raëlien is that the Court justifies content-based limitations on freedom of expression, effectively without scrutinising the reasons behind those limitations. But such lack of scrutiny cripples the main function of rights, which is to preclude state action motivated by reasons that disparage or express contempt for certain unpopular or minority members of the community. As the dissenting judges Sajó, Trajkovska and Vučinić put it in Raëlien Mouvement

[I]t is particularly regrettable to see the protection of freedom of expression being diminished in respect of the world view of a minority. Moreover, at least the original justification for the ban given by the local police reflects the fact that the poster contained ideas and opinions which were at odds with the prevailing opinions of the local authorities and, perhaps, the majority of citizens of Neuchâtel. The accommodation of such sentiments as a ground for the restriction of freedom of expression is incompatible with the goals of the Convention.

This is exactly the reason-blocking view that we discussed in Chapter Three, namely that rights are activated in cases where invocations of the common good are likely to have

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40 Mouvement Raëlien Suisse v Switzerland, Application no. 16354/06, 13 July 2012.
41 I discuss this distinction between political, commercial and quasi-commercial speech in I. Trispiotis, ‘Spot the differences: How broad can commercial speech be?’, Oxford Human Rights Hub, 28 October 2012, at <http://ohrh.law.ox.ac.uk/spot-the-differences-how-broad-can-commercial-speech-be/>.
42 Joint dissenting opinion of Judges Sajó, Trajkovska and Vučinić, Mouvement Raëlien, at 35.
been polluted by impermissible kinds of reason. In fact, the powerful dissenting opinions in Raëlien Mouvement and I.A, along with the results in more recent cases such as Giniewski, Klein and Vereinigung Bildender Künstler hint at a possible change of the jurisprudence of the ECtHR towards more rigorous protection of religiously offensive speech. In Giniewski, Klein and Vereinigung Bildender Künstler the ECtHR has followed a more restrictive interpretation of the scope of the rights of others and has found the impugned limitations on freedom of expression not necessary in a democratic society, given that the journal articles and artworks in question did not incite to hatred. Even so, the ECtHR has yet to expressly abstain from the principle that offense to the majority’s religious feelings is a legitimate ground for limitations on freedom of expression. Inevitably it follows that parts of the Otto-Preminger and Wingrove doctrine survive until today, although the change of language in recent cases might be taken to imply that the ECtHR – or at least certain parts of it – shares the concerns of the Council of Europe about decriminalisation of blasphemy and robust protection of religiously offensive speech.43

7.3. Religious Beliefs and Free Expression

7.3.1. Three main arguments

A close reading of cases involving state limitations on blasphemy exposess three main sets of arguments that the ECtHR employs to mitigate the contradiction between safeguarding a public discourse open to everyone’s voice and excluding from the discourse those who deny what particular religions regard as sacred.44 First, certain types of offensive speech may undermine the spirit of tolerance, which is fundamental in a democratic society.45 Without elaborating on what tolerance means or entails,46 the ECtHR has repeatedly held that blasphemous art may be legitimately restricted as a ‘malicious violation of the spirit of tolerance which must be a feature of a democratic society.’47 A second related but

43 See discussion under 7.3.4. of this chapter.
44 Post, ‘Religion and freedom of speech’, 78.
46 Otto-Preminger-Institut, §47; Wingrove, §52. Although the ECtHR does not elaborate on the concept of toleration, a series of judgments on freedom of religion suggest that the ECtHR may prefer a thin, modus vivendi, conception of toleration at least in cases where speech upsets traditional religious beliefs. It is true that both Europe and the United States have envisaged secularisation of State power as the appropriate answer to an atrocious history of religion and politics in the West. See R. Geuss, History and Illusion in Politics (Cambridge University Press, 2001) 14-37 and 69-85. Secularisation has assumed various
distinct argument focuses on the distinction between offensive and gratuitously offensive speech. As above mentioned, the ECtHR grounds the distinction on the assumption that gratuitously offensive speech hinders believers from freely exercising their right to freedom of religion through breaching their right not to be insulted in their beliefs. Both the argument from tolerance and the distinction between offense and gratuitous offense place significant weight on the style of the speech in question. This underlying (and implicit) distinction between style and content has helped the ECtHR to uphold state limitations on speech without targeting specific groups of people whose right to free expression is curtailed. Rather, all kinds of speech are protected by human rights – even those kinds that shock, offend or disturb\(^47\) – insofar as certain rules of courtesy are respected by all public speakers.

There is a third argument employed to justify state limitations on blasphemous expression, based on public order, but mainly due to space constraints this chapter will not discuss it in any detail. As it happens in the cases of state limitations on the wearing of religious symbols that Chapter Six examined, the ECtHR has again been overly generous with regard to limitations on blasphemous expression grounded on public order concerns.\(^48\) That might be sensible given that the ECtHR, as a remotely positioned international human rights mechanism, should be amenable to the judgments of better-placed state authorities in cases of practices endangering their public order. But this is not to suggest that national authorities should get (or expect) a carte blanche whenever they fear for social disorder – quite the reverse. The right functioning of the ECHR depends on meaningful scrutiny of every kind of justification for limitations on rights, including public order. Meaningful scrutiny could entail, for instance, weighing the proposed measures against the rights in question and checking the availability of alternative, less restrictive, ways of state action in light of the distinctive facts of each case.

Returning to the first two arguments, an analysis of the justifiability of limitations on offensive speech could be pursued through deciphering toleration. The analysis could focus on what toleration entails in a liberal democracy and whether it involves a logical contradiction where we judge a practice to be wrong but nevertheless we have to refrain from acting against it in ways that might otherwise be thought appropriate. We could then balance between the reasons underlying toleration as a political principle and other stronger reasons related, for instance, to autonomy of believers in order to decide whether blasphemy (and its ban) is compatible with the concept of toleration.

The justifiability of state limitations on offensive speech could also be examined through a more thorough analysis of the distinction between the content and style of speech. We could, for instance, scrutinise the distinction and possibly reject it because the

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\(^47\) This is a well-established principle of freedom of expression under the ECHR and the majority of the ECtHR restated it in all the above-discussed cases on religiously offensive speech. See e.g. Otto-Preminger, §49; Wingrove, §57.

\(^48\) I discuss this point in Trispiotis, ‘The duty to respect religious beliefs’, 544-552.
two are inextricably linked and because, even though the ECtHR claims the opposite, it is ultimately the content of the speech, that is, its offensiveness to the ethical values of the majority, or ‘morals’ according to Article 9(2) ECHR, that leads to its restriction.

I think that both those arguments could successfully expose various significant flaws in the justifiability of state limitations on offensive speech. But, in the same fashion to Chapters Five and Six, the following pages will follow a different approach. In line with the substantive account of the right to freedom of religion or belief that this thesis defended in Chapter Three, the following pages will analyse the limitations on offensive speech through the right not to be offended in one’s religious beliefs and will examine whether such a right is compatible with the state duty to treat everyone’s ethical responsibility with equal respect.

7.3.2. Pro tanto and prima facie rights

Is there a right not to be offended in one’s religious beliefs? Consider an example. Lies and loud music are annoying to many people. Think of someone who systematically lies to his friends. He always comes late at dinners, he pretends to like their new clothes and hobbies although he actually hates them, and he is a terrible gossipmonger with their secrets. Yet he enjoys his friends’ punctuality and honesty. He relies on their discreetness. And he is aware that his behavior falls woefully short of what being a good friend actually requires. Sometimes he may even think that his lies would disappoint his friends if they found out. But lying is convenient and he does not think that he has to change. Consider now someone else, a person listening to her iPod full-volume on the packed afternoon Tube. She knows that her manners are annoying for several fellow commuters. She has read signs about mutual respect on public transport and has noticed people sitting close-by feeling uneasy or glancing at her with contempt. But listening to her favourite playlist relaxes her and she prefers the volume to the maximum.

Thinking of those examples, we might agree that tricking one’s friends is morally wrong. Loud music often irritates fellow commuters. But are the bad friend and the irksome commuter under a duty to change their behavior? If we want them to change, for instance because we believe in the value of good and honest friendship and because we appreciate mutual respect in public means of transport, what could we do? Could we claim, for instance, that we have a right to good and honest friendships or a right to be respected by fellow commuters? Perhaps in those cases it might seem natural to agree that no such rights exist, at least not in the sense that their existence would generate duties on others to turn their iPod down, or tell always the truth about their friends’ style and hobbies. But would our intuitions indeed lead us to that answer, and why? Why do we think, for instance, that introducing iPod volume regulations would be an unjust and far-reaching state policy? Why does regulating friendships sound illogical and intimidating? We certainly deserve honest friends and respect from others, but do we have a right to those? Would those rights, if real, be human rights?

Part of the answer comes from a seminal distinction between pro tanto and prima facie rights. Most of our fundamental human rights are pro tanto, that is, they may be justifiably limited if certain important considerations arise and provided that invocations
of those considerations are not polluted by impermissible kinds of reason.\textsuperscript{49} The right to freedom of religious manifestation is a \textit{pro tanto} right. Contrary to the right to believe and change one’s beliefs (which are absolute\textsuperscript{50}) freedom to manifest one’s religion or belief may be subject to limitations such as public safety, health, morals, and the rights of others. Moreover, the right to freedom of religious manifestation includes more specific \textit{pro tanto} rights, such as freedom to teach one’s religion,\textsuperscript{51} to worship, to practice, and to observe.\textsuperscript{52} It also includes \textit{pro tanto} rights that are not explicitly protected by the text of the Convention, such as a right of religious groups to be conferred legal recognition on an impartial basis.\textsuperscript{53} But that does not mean, on the other hand, that all forms of religious manifestation are instances of the right. Rather, there are cases of pseudo-rights that present themselves as instances of the right to freedom of religious manifestation, but are not \textit{pro tanto} rights. Those pseudo-rights that seem to spring from other \textit{pro tanto} rights – but are actually not – are also known as \textit{prima facie} rights. \textit{Prima facie} rights dress up as rights in the sense that they apparently generate duties on others not to interfere with certain individual or collective freedoms. The difference, however, between \textit{prima facie} and \textit{pro tanto} rights is that \textit{prima facie} rights are mere interests and not actual rights. They do not therefore ground duties on others not to interfere with particular liberties. \textit{Prima facie} rights have no weight and there is no reason to balance other legitimate \textit{pro tanto} reasons for limitations against them.

As Chapter Three discussed, a \textit{pro tanto} right, such as the right to freedom of religion, provides weighty reasons for others not to interfere with the liberty of the right-holder in certain ways. But \textit{pro tanto} means that the weight of those reasons can be outweighed by other legitimate (and weightier) reasons in the circumstances. If that happens one can act unjustifiably with regard to the right in question, yet justifiably all things considered, i.e. on the balance of reasons. But even when \textit{pro tanto} rights are justifiably restricted they still leave duties to apologise, and possibly make amends, because one has acted against a \textit{pro tanto} reason.\textsuperscript{54} Recall that one of the main differences between non-teleological reason-blocking and teleological interest-based theories of rights is that an unjustifiable restriction of a \textit{pro tanto} right is independent of any harm, loss or setback to the right-holder’s interests. If someone borrows your car in your absence and there is no chance that you find out, your rights to property and respect for private life would still be infringed despite that no harm to your interests might have been caused.\textsuperscript{55} By contrast, unlike \textit{pro tanto} rights, violating \textit{prima facie} rights does not generate duties to apologise or compensate because limitations on those do not violate any

\textsuperscript{49} In contrast to some rights that are absolute, viz. they may not be restricted no matter how weighty other considerations are. A common example is the right to freedom from torture, secured under Article 3 ECHR.

\textsuperscript{50} See Article 9(1) ECHR.

\textsuperscript{51} See e.g. Kokkinakis v Greece, Application no. 14307/88, 25 May 1993.

\textsuperscript{52} See e.g. Jakobski v Poland, Application no. 18429/06, 7 December 2010.

\textsuperscript{53} See e.g. Metropolitan Church of Bessarabia and Others v Moldova, Application no. 45701/99, 13 December 2001; Moscow Branch of the Salvation Army v Russia, Application no. 72881/01, 5 October 2006. Also discussion in Chapter Three under 3.4.3.


\textsuperscript{55} ibid
moral duties. Finally, whereas balancing between pro tanto rights and other pro tanto considerations (e.g. public safety, public health) is possible, balancing is not possible vis-à-vis prima facie rights because those have no weight. By the same token, state interference cannot be ‘justified’ in cases involving prima facie rights, simply because we have no right to those.

In our two examples, the right to honest friendships and the right to courtesy in one’s journey are prima facie rights. There is no right to travel free from disturbance, which means that pro tanto considerations stemming from freedom of expression and the right to privacy do not have to be weighed against the interest grounding the right not to be offended in one’s journey, in order to see whether others should be held under a duty to turn down their iPod’s volume in the tube. The fact that most people feel that they ought to respect their fellow commuters (i.e. serve their interests) by toning down their music does not mean that they are under a duty (which would imply a right) to behave in that way. Importantly enough, having good reasons to behave in a certain way does not entail that someone is under a duty to behave in a certain way. Feeling that we ought to turn our iPod’s volume down in the tube or that we ought to be punctual in our appointments or that we ought not to lie to our friends does not mean that we could not behave the other way. We might then be rude or untrustworthy or bad friends, but we are free to do so.56

7.3.3. Freedom of expression and freedom from religious offense

What does the distinction between pro tanto and prima facie rights entail in cases where fundamental beliefs, central to many people’s personalities, are publicly ridiculed? How, if at all, could we justify restrictions on videos or books that ridicule objects of religious veneration and display sacred figures in obscene settings? Recall that European authorities often ask for special leniency when restricting expression that would offend the religious sensibilities of their majorities. Their main contention is that no one should unconditionally satirise holy figures and sacred artifacts. For blasphemous expression can be tremendously and deeply offensive for a significant number of people who value religion, due to the central role religion plays in their identities.57 Several faithful members of the community go even further and believe that it is their religious duty to stand guard over religious ideals and thwart blasphemous art or journalism. The violent wave in the aftermath of the Danish cartoons and the ‘Innocence of Muslims’ video are sad corroborations for the endurance of that type of attitude. But still, is the significance of religion for certain people good enough a reason to justify legal measures against blasphemy and religious insult? In other words, could the interest to enjoy one’s religion

peacefully and without being offended, important as it is, ground duties to refrain from certain types of expression? Is it true, as the ECtHR has suggested, that there is a right not to be offended in one’s religious beliefs?

Those questions unveil considerable intricacies of the application of the distinction between *prima facie* and *pro tanto* rights. Even if the moral difference between the two remains intelligible, how do we know which rights are *pro tanto*? For instance, is the right not to be offended in one’s religious beliefs *pro tanto*? Or is it a *prima facie* pseudo-right? I think that the answer to this question depends not on the terms of the formulation of the right, but on the values and deep considerations that support it. It partly depends therefore on how we conceive of rights in general. Consider more specifically the terms of the conflict that emerges when one group of people proposes to ridicule what others deem sacred. If we think that there is a real danger that that kind of religiously offensive expression will have the effect of depriving people from important aspects of their freedom of religion, we may have to think in terms of a conflict between the artists’ freedom of expression and the believers’ right to freedom of religion. The conflict means that what we might have to decide to secure the latter right might contravene what respect for the former right requires.

If we think of this conflict in utilitarian terms, all we have to do is aggregate the number of the affected members in each group, calculate the probability that the offensive artworks in question will threaten the right to freedom of religion, multiply throughout, and develop a strategy that will secure violation of the smallest number of rights. But as we discussed in Chapter Three this is an unsatisfactory view of human rights. Instead of viewing freedom of expression simply in terms of individual interests, we might think of it in ways that make the conflict between blasphemous art and freedom from offense easier to resolve. The two rights could be balanced, for instance, based on whether the reasons that those rights are supposed to exclude are present in the particular political conflict on one side or the other—*exactly* as we dealt with conflicts between freedom of religion and freedom from discrimination.

But the assumption I will explore in the following pages is different. I will argue that limitations on offensive forms of expression are unjustifiable neither because we think that we can secure more individual rights by rejecting such limitations, *nor* because the interests of the artists in cases such as *Otto-Preminger* and *Wingrove* are more important than the interests of the affected religious believers. They are unjustifiable simply because the values and considerations supporting the putative right not to be offended are incompatible with the very idea of equal respect for our personal ethical responsibility that the moral right to freedom of religion asserts. If this interpretation is true, then the right not to be offended is a *prima facie* right that does not ground duties on others not to interfere with that particular liberty, and there is no reason to balance freedom of expression against it. What seemed to be a brute confrontation between two individual interests, that is, between free artistic expression and freedom from offense independently understood, ends up being resolved by focusing on the internal substantive relation that applies in our interpretation of the respective right-claims.

The argument I have in mind can be produced most economically by developing a conception of freedom of expression that makes room for a form of public life where
everyone may participate and speak his mind regardless of conscience. It would be useful therefore to start with a brief discussion of some of the reasons for strong protection of freedom of expression. One of the best arguments for the importance of free speech focuses on the significance of open discussion to the discovery of truth. That argument emphasises that restricting speech may prevent valuable opinions and evidence from being published, and have detrimental consequences for the discovery of truth and for the better information of individual and collective decisions. Silencing opinions we may be silencing the truth, whereas even wrong opinions may contain grains of truth necessary to find the whole truth. Also, opinions, even when objectively true, tend to become ‘prejudices over time if not argued over and defended; and uncontested opinions lose their vitality and effectiveness.’ Free speech is thus pivotal for the creation of new knowledge.

Another prominent set of arguments for freedom of expression focuses on its intrinsic value. Intrinsic value theories hold that free expression has value independently of the various benefits associated with strong protection of free speech. For freedom of expression is cardinal for self-development and self-fulfillment. People develop their personalities and their intellectual capabilities through freely expressing their thoughts; they can become more thoughtful and mature. Restrictions on freedom of expression obstruct those ways of interaction and interfere with the development of our identities. As Shiffrin has argued, the most convincing account of freedom of expression is ‘thinker-based’ because free expression facilitates core interests of autonomous agents by rendering their mental contents available to others (and vice versa) and by enhancing self-understanding.

Those arguments, however, face significant difficulties when we reach a question that any theory of freedom of expression will at some point have to face, that is, why should our society tolerate people’s freedom to express degrading, false, malign, or

58 A famous elaboration of that argument is in Areopagitica: A Speech Of Mr. John Milton For The Liberty Of Unlicenced Printing To The Parliament Of England (1644) (reprinted: Penguin Classics, 2014). See also the seminal J. S. Mill, On Liberty (Ticknor and Fields, 1863) (reprinted: Oxford World’s Classics, Oxford University Press, 1998). The importance of the discovery of truth coupled with fears about the interests of the government to hide it has led to the famous ‘market-place of ideas’ version of Mill’s theory. The ‘free-market of ideas’ argument (whose name echoes liberal economic theories against governmental interference in goods and services markets) has been particularly influential in the United States, where the U.S. Supreme Court employs a strict scrutiny test on content-based speech restrictions. The dissenting opinion of Holmes J. in Abrams v. United States, 250 U.S. 616, 630-631 (1919), first introduced the idea that content-based restrictions may be justified only in cases of emergency, viz. when there is clear and present danger. See G. Stone, L. Seidman, C. Sunstein, M. Tushnet and P. Karlan, The First Amendment (Wolters Kluwer, 2012) 31-36. For an insightful normative analysis of Mill’s theory see T. Scanlon, ‘A theory of freedom of expression’ (1972) 1(2) Philosophy & Public Affairs 204.


offensive speech? Recall that, if we aim at a thorough analysis of the right not to be offended in one’s religious sensibilities, our question should focus on why religiously offensive speech should be tolerated in a society. First, a normative justification of freedom of expression rooted upon the importance of free speech for the discovery of truth or pointing to its intrinsic value is unhelpful in our inquiry into the protection of religiously offensive speech. This is because in cases of speech offending believers the autonomy of a speaker conflicts with the autonomy of his audience. Yet if autonomy were the master value by which clauses protecting freedom of speech were to be interpreted, the doctrine would lack resources to systematically resolve such conflicts. That danger is particularly eminent vis-à-vis religious followers. For they could hardly be convinced that there is any truth to be discovered by ridiculing sacred figures and texts. Moreover, stronger versions of the discovery-of-truth argument are also difficult to pursue since they would entail that the search for knowledge should prevail over other potentially conflicting values. But if weakened to accommodate other interests that may at times prevail, then the argument from truth says ‘little more than that the quest for knowledge is a value that ought to be considered.’ Even if we argue that the moral distress blasphemy may cause is valuable as a way of ethical confrontation leading to social progress and fresh ideas, our argument would still fail to fit well-established religious assertions, such as that truth is to be found in scriptures and faith.

Intrinsic value theories of speech might fill the gap by adding that all kinds of speech, even those whose contribution to personal-development is questionable, such as those ridiculing saint figures, should be allowed because of their value for the development of our identities and self-fulfillment. But the argument would still be unpersuasive. That is because the right-holder’s interest, i.e. self-fulfillment, conceived independently from its consequences for the public interest, seems awkwardly remote – and insufficient by itself – to justify holding others under the extensive and burdensome duties that the right to freedom of expression generates. In other words, despite being important, personal development and freedom of thought seem insufficient to ground a duty on religious people to tolerate blasphemy or other forms of religiously offensive speech.

I think that a good way to overcome those difficulties is to rely on arguments suggesting that we should rigorously protect free expression as an important public good. According to that approach, freedom of expression is a right we should safeguard because

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63 It is important to test our arguments against potential objections coming from religious people because tracking an approximate consensus is crucial to formulate a coherent theory of freedom of expression. See Scanlon, ‘Freedom of expression and categories of expression’, 522.
67 According to Raz, this is the reason why in Common Law freedom of expression is defended mainly on public interest grounds. See Raz, The Morality of Freedom, at 179.
preserving democracy is good for everyone, a good not merely to its holders but to the public at large. Everyone benefits from democracy, regardless of the religious or secular bases of his conscience. It is noteworthy that public good arguments rely on the close link between freedom of expression and democracy. Placing democracy at the epicentre makes those arguments more suitable compared to the arguments focusing on the importance of free speech for the discovery of truth or on its intrinsic value to explain why states have to refrain from taking restrictive measures against offensive speech. Their rationale is more intelligible to religious followers, too.

A first public good argument that I would like to discuss focuses on the legitimising function of freedom of expression. Freedom of expression is central for democracy because laws and policies are legitimate only when they result from democratic decision-making. But there can be no democratic decision-making unless everyone is free to express his convictions on the laws or policies under discussion. An intuitive objection emerges here. Is provocative artistic expression a valid input in law or policy-making? Although freedom of political speech is clearly important to secure democratic participation and legitimise decision-making, could we say the same about other forms of expression? It seems that strong protection of art – especially of the obscene pieces that offend several members of the community – could not be properly explained solely because of its contribution to democratic legitimacy.

It is exactly that type of skepticism lurking beneath the reasoning of the ECtHR in Otto-Preminger and Wingrove. The now familiar proportionality test includes unusually detailed descriptions of the erotic scenes of the artworks in question – as if the sexual element and its quality determine the level of their protection by human rights legislation. It is interesting that in both cases the majority has taken into account the ‘provocative portrayal’ of holy figures and the engagement of the viewers in a ‘voyeuristic erotic experience’ as features capable of outraging Christians and meeting therefore the ‘high threshold of profanation’ required in the definition of the criminal offence of blasphemy. The proclaimed low aesthetic quality of the banned films is closely linked with the conclusion that the impugned limitations fall within the state’s wide margin of appreciation. But more generally, indeed, how relevant can a video depicting a nun fantasising Jesus Christ be to public participation and democratic legitimacy? Could we regard such a film as a meaningful input in a public discussion about, for instance, the place of religion in society? How can cartoons depicting the Prophet as a bomber contribute to socio-political debates on cosmopolitanism or multiculturalism?

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70 Otto-Preminger, §56.
71 Wingrove, §61.
72 ibid.
Intuitive questions like these seem to embarrass arguments for freedom of expression connecting its value with democratic participation. Perhaps we should take some steps back and consider principles that identify ‘more abstract value in the human situation.’\(^73\) For although we disagree on matters of political participation there are certain basic principles making up the conception of human dignity.\(^74\) As discussed in various earlier parts of this thesis, two main principles lie at the core of dignity: first, that each human life has intrinsic value, and second that everyone should have personal responsibility to define success in his life.\(^75\) On an abstract level those two principles reflect two fundamental liberal ideals: equality and liberty respectively. In other words, equality and liberty are conditions of human dignity; they lie at the heart of our humanity. Every person just by virtue of being human intrinsically carries them.

The two principles of dignity, namely that all lives are equally and intrinsically valuable and that everyone should be responsible to define success in her life independently and authentically, are intricately connected with the principle of democratic legitimacy, namely that the government has to treat everyone with equal respect and equal concern. That principle of legitimacy does not contest that majoritarian procedures lie at the core of the democratic political realm. However, \textit{fair} democracy requires that everyone should have a real and equal chance to influence collective decision-making.\(^76\) Crucially, that requirement involves more than just the right to vote. Full social membership entails that everyone should have equal chances to express his voice, which apart from opinions or arguments includes also prejudices, fears, tastes, attitudes, and countless other forms of expression via which we may contribute to the public culture.\(^77\) In that sense freedom of expression carries the same symbolic value as the right to vote, i.e. ‘its denial implies less than complete membership.’\(^78\) As a result a government that uses coercive power to impose decisions on dissenting people, without giving them the chance to express their beliefs, flouts human dignity. Such undemocratic decision-making spoils legitimacy too,\(^79\) in the sense that it produces decisions that are illegitimate \textit{vis-à-vis} muted individuals.\(^80\)

\(^75\) Dworkin, \textit{Is Democracy Possible Here?}, 10.
\(^77\) Raz, ‘Free expression and personal identification’, 304. Also Post, ‘Participatory democracy and free speech’, 486.
\(^78\) Raz, ‘Free expression and personal identification’, 309.
\(^79\) Note though that, as Dworkin has argued, legitimacy is not ‘an all or nothing matter’; Dworkin, \textit{Is Democracy Possible Here?}, 97. For the different degrees of the ‘deficit in legitimacy’, particularly in cases of limitations on speech see J. Waldron, \textit{The Harm in Hate Speech} (Harvard University Press, 2012) 188-192.
Thus, this argument for strong protection of freedom of expression is based on the moral interconnections of the right with ethical independence and democratic legitimacy. It would be useful to contrast it therefore with the approach of the ECtHR. In cases such as Otto-Preminger, Wingrove, and I.A. the majority of the ECtHR has mainly reproduced the arguments of the respondent governments without explaining how the state interest in safeguarding respect for the religious beliefs of the majority can be reconciled with the requirements of this abstract principle of political legitimacy. That approach runs counter to an interpretation of freedom of expression as a public good, that is, because as a matter of democratic legitimacy everyone should have the chance to participate in the formation of our public culture with an equal voice. That loss in democratic legitimacy might be acceptable in a heteronomous state that exempts from democratic decision-making people with beliefs deviating from the state sanctioned orthodoxy, e.g. in a theocracy. But that is not the kind of state envisaged by the ECHR,\(^1\) whose preamble stresses the importance of democracy and equal protection of everyone’s rights and freedoms within the jurisdiction of the contracting states.\(^2\)

Thus far the argument from legitimacy partly answers why offensive speech is important for democracy, but there is an additional point. The moral and cultural environment of a community has remarkable impact on legislation and policy. People’s tastes, prejudices, views, activities and emotions – what is habitually pronounced as the public culture – determine collective decision-making more than ‘editorial columns or party political broadcasts or stump political speeches.’\(^3\) It is also a matter of fact that most members of a community refrain from exercising their right to free public political speech ‘in more than a minimal way.’\(^4\) Rather they commonly select to influence decision-making by their informal participation to the configuration of public culture. Artistic expression is a notable example of such participation. The argument that freedom of expression serves fair democracy as a public good entails that it is equally unfair to impose a collective decision on someone who was hindered from informally contributing to public culture, be that through filmmaking or writing erotic novels, as to someone whose public political speech was censored.

Besides, the importance of protection of artistic expression as a form of public participation is particularly relevant in cases of blasphemous art that ridicules rituals or objects of religious veneration. As a matter of fact ridicule is a distinctive type of expression, which cannot be fine-tuned to become less offensive or more politically correct.\(^5\) Its aim is satire, teasing, and scorn. Given that ridicule reflects certain people’s views and tastes, distorting or banning it is equivalent to unfairly withholding someone’s opportunity to express her voice. That means that collective decisions against those muted individuals will be deprived of democratic legitimacy.

\(^{1}\) For instance, the ECtHR has held that sharia law is incompatible with respect for democracy and human rights; see Refah Partisi v Turkey (The Welfare Party) and Others v Turkey, Application nos. 41340/98, 41342/98 and 41343/98 and 41344/98, 13 February 2003 (Grand Chamber), at §123 and §§126-128.
\(^{2}\) Article 1 ECHR.
\(^{3}\) Dworkin, ‘Foreword’, at 8.
\(^{4}\) Raz, ‘Free expression and personal identification’, at 309.
\(^{5}\) For a historical analysis of regulations of blasphemy see D. Keane, ‘Cartoon violence and freedom of expression’ (2008) 30 Human Rights Quarterly 845.
Furthermore, it follows from the above that the argument that everyone should have an equal chance to influence public culture does not make an exception for speech offending the majority. We cannot refuse participation in the moral environment to certain people just because most people dislike their views and tastes. Art or speech that ridicules religious convictions, rituals and holy figures abhors significant numbers of the community, perhaps the majority in certain European states. But that is not a good enough reason for forfeiting the principle that collective decisions should not be imposed to anyone deprived of a fair opportunity to express her attitude. Recall that the abstract right to equal respect for our ethical responsibility blocks exactly those impermissible kinds of reason and that this is why certain state limitations on free religious manifestation are unjustifiable. Of course that does not mean that racism or sexism, or other kinds of discriminatory, exclusionary or undemocratic stances will be tolerated at a later stage. Recall that the starting point is that the democratic state should treat everyone with equal respect and equal concern, which means that vulnerable groups must be protected in various positive ways, such as those discussed in Chapters Four and Five. In fact, anti-discrimination legislation, criminal law, positive measures and many other policies are enacted in order to secure equal and full social membership for everyone. However, the problem is that if we intervene ‘further up-stream’ and mute certain voices at the time when the collective opinion is formed, we spoil the only justification we have for insisting that everyone should respect the laws even if she fundamentally disagrees with them.

Moreover, there is a second public good argument for the protection of offensive speech, which is related to (but distinct from) the argument from democratic legitimacy. Content-based censorship is illegitimate because it amounts to official condemnation of certain ways of life mirrored by the restricted expression. Freedom of expression is a public good also because it contributes to everyone’s well-being inasmuch as ‘ways of life which are portrayed and expressed are validated through their portrayal and expression.’ Expressing ourselves we feel confident that others may share our problems, attitudes, tastes, and views. We can realise the worth of our selected way of life noticing that we are free to integrate into our society through it. We may also feel that several and diverse ways of life are attractive and selectable.

That validation of various ways of life through their public portrayal is intertwined with the ability of social identification, which is fundamental for individual well-being, given that everyone should at least have the chance to feel a full member of his community. In that sense, content-based censorship not only blocks validation, but also constitutes an official condemnation of certain ways of life that are expressed via the restricted speech. Thus, in our case, banning religiously offensive speech (i.e. content-

86 Currently, the rates of religious observance in Europe are in decline, with only a relatively small number of countries hosting majorities that regularly attend Church services (more specifically, these are Spain, Sweden, Germany, Russia, Portugal, Turkey, Ukraine, Italy, Croatia, Poland, Greece and Cyprus). See European Social Survey Round 4, at <http://ess.nsd.uib.no/ess/round4/>. Also ‘Religious attendance: Europe’s irreligious’, The Economist, 9 August 2010, at <http://www.economist.com/node/16767758>.
87 Waldron, The Harm in Hate Speech, 173-203.
89 Raz, ‘Free expression and personal identification’, at 312.
based censorship) amounts to officially condemning certain people who find holy figures and rituals funny, or even arousing. In such cases, state authorities may counter-argue that their only purpose was to ban that particular expression and not to condemn a whole way of life. Yet the social symbolism of content-based restrictions is that ‘the government restricts and impedes the ability of that way of life as a whole, and not just the offending aspect, to gain public recognition and acceptability’ with damaging consequences for the well-being of certain people.

It is important to note at this point that the public good argument from the pervasive nature of content-based censorship is in two senses narrower than the public good argument from democratic legitimacy. First, it places weight on the symbolic nature of content-based restrictions, but does not include a positive right to equal access to public expression. Second, it does not hold that speech should never be restricted. It seems that sometimes certain forms of expression may have such adverse consequences that their restriction could be justified, provided that those consequences be weighed against the negative implications for individual well-being and the public good outlined above. In fact, Raz does not deny that some lifestyles, e.g. joining a racist neo-Nazi group, are deprived of moral value and might have to be officially condemned. However, the implications (and desirability) of perfectionist theories of moral value fall outside the scope of this thesis. What is important is to keep in mind that both justifications thus far discussed are public good arguments because they consider restrictions on freedom of expression harmful not only to the muted individuals but to fair democratic participation in general.

Robust protection of freedom of speech for reasons of democratic legitimacy and social identification begs the question why expression offending religious beliefs should be regulated with stricter criteria than those applying to other types of expression. Many believe that since religion is central to the identities of many members of our community it deserves special protection. But the public good arguments thus far defended do not leave space for such an exception. They do not leave space for such exceptions partly because of the same reasons that justify strong protection for the right to freedom of conscience itself: because a state that equally respects our individual responsibility for our own lives cannot grant some parts of the community the right to deploy collective power in order to shape an ethical culture more suited to their tastes. A right not to be offended in one’s religious beliefs is therefore a prima facie pseudo-right precisely because it is incompatible with the very idea of ethical responsibility that freedom of religion asserts. This section argues therefore that freedom of expression is, at least to a certain extent, supported by the very same moral principle.

Certainly, blasphemy and other types of religiously offensive expression are upsetting, if not deeply hurtful, for the religious followers whose faith is ridiculed. The arguments of this section do not bypass or underestimate those people’s sorrow. They just indicate that there are certain important reasons of political, rather than personal, morality that defeat the reasons grounding a right not to be offended, at least in cases of

90 ibid 318.
91 ibid
blasphemous expression or expression that aims to ridicule religious beliefs, figures or symbols.

7.3.4. Blasphemy, religious hatred and violence

Blasphemous speech must be distinguished from speech inciting to religious hatred and violence, although the distinction is less easy to draw than certain parts of the theory suppose.\(^{92}\) Space restrictions again prevent a more thorough analysis of the distinction, but the principles grounding rights on the fundamentals of human dignity suffice, I think, to affirm that the right to freedom of expression does not protect speech inciting to violence. There is, however, disagreement – including disagreement within liberalism\(^{93}\) – as to whether freedom of expression justifies protection of hate speech.\(^{94}\) From a doctrinal perspective, it is noteworthy that the ECtHR keeps a firm stance with regard to hate speech regulations, including incitement to religious hatred. According to a long and consistent line of cases,\(^{95}\) freedom of expression does not cover protection of hate speech because ‘this is incompatible with the values of the Convention, notably tolerance, social peace and non-discrimination.’\(^{96}\) Prohibition of incitement to hatred also derives from the UN ICCPR, which stipulates that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.\(^{97}\) At the moment, virtually all member states of the Council of Europe implement legislation outlawing incitement to hatred, including religious hatred, with some states also including specific, often more stringent, provisions on incitement to hatred through mass media.\(^{98}\) Denials of certain historical facts, such as the Holocaust or particular genocides, are criminal offences in certain countries.\(^{99}\) Nevertheless, the ECtHR has been

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93 See e.g. Waldron, The Harm in Hate Speech, 173-203.
96 Norwood v United Kingdom, Application no. 23131/03, 16 November 2004.
97 Article 20(2) ICCPR.
98 See Factsheet: Hate speech (European Court of Human Rights, June 2015) at <http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf>.
criticised for being overly generous in classifying particular forms of speech as hate speech and approving their restriction.\textsuperscript{100} The Court usually approves three main forms of state justification for limitations on free speech based on Article 14 of the Convention (protection from discrimination); Article 17 (no rights may be manipulated to destroy other rights or freedoms of the Convention); and, third, on the state duty to secure public order and public peace. Although I will not analyse this point further here, it is important to stress that robust protection of free expression as an important public good requires that content-based restrictions, such as prohibition of hate speech, should only be reserved for few – and extreme – circumstances. Generous classifications of speech as hate speech flout that principle. The emphasis placed by the Venice Commission\textsuperscript{101} and the relevant Council of Europe Recommendations\textsuperscript{102} on the requirements of a direct causal link with danger of severe disturbance of public order and/or direct incitement to violence confirm the idea that only restrictions against extreme speech may qualify as necessary in a democratic society.\textsuperscript{103}

Apart from the ECHR, competence of the European Union with regard to state regulations of blasphemy is limited. Freedom of religion and freedom of expression are secured in Articles 10 and 11 (respectively) of the EU Charter of Fundamental Rights. Moreover, according to Article 51(1) of the Charter, these provisions apply only when member states are implementing EU law. Yet when enacting or maintaining national blasphemy laws Member States do not act in the course of implementation of EU law.\textsuperscript{104} Therefore, according to the European Commission there is no competence to control whether ‘domestic legislation respects the obligations of the Member States regarding fundamental rights – as resulting from international agreements and from their internal legislation.’\textsuperscript{105} Whether and how the accession of the EU to the ECHR will affect this principle remains to be seen.\textsuperscript{106}

Finally, it is positive that the latest reports\textsuperscript{107} and Recommendations\textsuperscript{108} of the Council of Europe support abolition of blasphemy and religious insult legislation. Their

\begin{thebibliography}{99}
\bibitem{Venice1}Venice Commission, \textit{Blasphemy, Insult And Hatred} (cited above).
\bibitem{Parliamentary1}Parliamentary Assembly Council of Europe, \textit{Recommendation 1805}.
\end{thebibliography}
principles reflect more general trends in international human rights law. Moreover, the special attention of the Council of Europe Recommendation 1805 to the central role of freedom of expression for democratic legitimacy and equal public participation echoes the public good arguments for the protection of freedom of speech defended above. Lastly, it is noteworthy that notwithstanding the shortcomings of the jurisprudence of the ECtHR on blasphemous expression certain European states have decided to repeal or amend their relevant domestic provisions. For instance, the UK government announced in 2013 that the Public Order Act would be amended to remove the word ‘insulting’, which entails that the use of insulting language will no longer be illegal in cases in which a specific victim cannot be identified. In 2013, the Netherlands formally repealed its 80-year-old law on prohibition of ‘abusive blasphemy’. These are progressive steps towards more rigorous protection of freedom of expression which, as the ECtHR itself recognised almost 40 years ago, does include forms of expression that ‘offend, shock or disturb’.

7.4. Conclusion

In light of the more general claim of this thesis about the importance of a moral interpretation of the reasons behind limitations on rights in order to resolve tensions between them, this chapter has drawn attention to the internal connections between freedom of expression and freedom of religion. I argued that the right not to be offended in one’s religious beliefs is a prima facie right that should play no role in the balancing exercise of the ECtHR. What we were looking for was something to capture the sense that a brute confrontation between the rival interests to freedom of expression and to peaceful enjoyment of our conscience does not tell the whole story – the sense that, as Waldron puts it, in some moral conflicts the issue is not of quantitative weight of individual interests, but of qualitative precedence of certain moral considerations over others. The approach followed by the ECtHR to mitigate the anti-democratic consequences of limitations on religiously offensive speech is unconvincing and in conflict with the normative account of freedom of religion that Chapters Two, Three and Five of this thesis defended. For reasons that this Chapter discussed, it is unsurprising that that part of the jurisprudence of the ECtHR has been repeatedly criticised. Certain recent judgments as well as recent Recommendations of the Council of Europe seem to bolster confidence in an approach securing stronger protection of the right to freedom of expression in future cases. The realisation and endurance of this hope remains to be seen.

109 UN Human Rights Committee, General Comment No. 34.
110 Parliamentary Assembly Council of Europe, Recommendation 1805.
111 P. Strickland and D. Douse, ‘“Insulting words or behaviour”: Section 5 of the Public Order Act 1986’, House of Commons Library, Home Affairs Section, SN/HAl5760, 15 January 2013.
113 Handyside v United Kingdom, Application no. 5493/72, 7 December 1976.
Conclusion

This thesis started by setting out a fundamental dimension of human dignity that supports the right to freedom of religion or belief, and now I can reiterate this initial idea with the refinements that were added along the way. The right to freedom of religion or belief derives its normative force from the principle that everyone is responsible to define value in his life and perform accordingly, with authenticity and independent from coercion to conform to the ethical choices and values of others. We are equally entitled to this abstract principle of ethical responsibility regardless of the religious or secular nature of our conscience and regardless of whether we belong to a majority or a minority section of the community. Moreover, this principle of ethical responsibility has to be interpreted in light of equal respect simply because the values of liberty and equality, in their deep connections with human dignity, are intertwined rather than conflicting.

Abstract principles are pointless without concrete illustrations. I attempted to defend my claims by showing how equal respect for our personal ethical responsibility bears on different issues of socio-legal controversy now: the relationship between freedom of religion and freedom from religious discrimination as well as between religious discrimination and sexual orientation discrimination; the wearing of religious symbols including the full-face veil in public; and the regulation of blasphemous expression. In future times the law and religion discourse might stop discussing Ladele and reasonable accommodation of religion in employment, the full-face veil bans in Europe, and

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religion in education,³ and begin to investigate more rigorously issues of bioethics, the role of church in social welfare movements, or protection of refugee religious minorities. But our equal entitlement to ethical independence will remain and will continue to command respect from legislators and policy-makers. Recall that the principle may not be political in itself, but sparks significant political implications. The most abstract is its profound connection with political legitimacy, that is, the principle that the government has no moral power to enforce obligations against its members unless it secures human rights, such as freedom of religion or belief, that make the exercise of our personal responsibility for our own lives possible.

I relied on conceptions of liberty and equality that allow no compromises between the two values, or between them and the right to freedom of religion. This is the key to the interpretations of the right to freedom of religion or belief under the Convention that this thesis defends. I suggested, among others, that the most attractive account of the right is reason-blocking, rather than interest-based; that the fashionable argument that complaints about violations of the right to freedom of religion can be analysed either from the vantage point of conscience or from discrimination disregards the shared normative foundations of the two rights; that a state can legitimately pursue a particular conception of fraternity and civility in its public space insofar as its policies are framed in light of responsibility rather than conformity; that fair democracy requires an open to everyone’s voice public culture, including offensive speech and provocative art. At each stage of the argument I examined significant parts of the relevant case law in an effort to demonstrate that the interpretation of freedom of religion or belief that this thesis offers explains morally important parts of the jurisprudence of the ECtHR better than its rivals. Even if someone rejects those arguments, any alternative theory will still have to come up with principles that not only offer a convincing account of the normativity of human rights, but also make sense of the jurisprudence of the ECtHR in an equally systematic way to what this study attempted to offer.

Some parts of the thesis, especially Chapters Four, Six and Seven, feature a shift in emphasis and style from the philosophical abstractness of principles to the precision of legal and case analysis. This is because I think that the practice of the ECtHR unveils an important virtue of my arguments. Time and again the moralised approach of this study identifies shared principles and solutions where other perspectives, driven by moral skepticism and an unrelenting sense of ethical division, see only incompatible extremes.

The way that a reason-blocking account of the right to freedom of religion – which understands it as a way of excluding certain types of reason in politics – frames religious accommodation in general rules or policies provides a clear illustration. The two sides of the controversy surrounding accommodation, informed by the familiar dipole of liberty and equality-based accounts, perceive it in all-or-nothing terms. Schematically, one view maintains that individuals or groups motivated by their conscience should enjoy a presumptive right to conscientious objection to general laws whenever they conflict with their ethical convictions. The opposing view holds that no one should enjoy special treatment on grounds of conscience and that full compliance with legitimate rules is exactly what the principle of equal treatment actually requires. These positions are of an all-or-nothing quality. It is either that believers are vulnerable to a hostile majority that militantly pursues ‘political correctness’ disrespecting various special needs of religious groups, or that religion is the object of unfair favouritism by a political community that flouts its fundamental duty to treat us as equals regardless of conscience.

Both positions make a number of implicit assumptions, among others about the proper conception of the right to freedom of religion – which, I argued, depends on how we conceive of rights in general. But although some of those assumptions are hampered by serious theoretical flaws, they are habitually left unexplored in the mainstream law and religion discourse. Chapters Two and Three of the thesis attempted to expose and untangle a number of assumptions underlying the assumed rivalry between liberty and equality-based theories of freedom of religion. Consider only one example. Both accounts view the right to freedom of religion as protecting certain important individual interests against the demands of the common good. Liberty-based accounts consider those interests eligible for ‘special’ protection against majorities; equality-based accounts disagree. But this interest-based teleological interpretation of the right is not the only one available. As we discussed, an interest-based approach does not adequately capture the idea that there are certain kinds of reason that must be excluded from politics and, as a result, from any balancing exercise. Rather, an interpretation of a government’s overall behaviour is more suitable to unveil impermissible kinds of reason, such as prejudice, that have potentially corrupted otherwise legitimate majoritarian arguments. This is the kind of interpretive test that ultimately shows which forms of state influence and which limitations on our freedom of conscience can be justifiable in a fair pluralistic democracy. Concentrating on the assumed rivalry between liberty and equality, or between those values and freedom of religion, not only protracts unsatisfactory conceptions of liberty and equality, but also blurs the very point of judicial tests in demarcating human rights.

This understanding of the right to freedom of religion or belief explains its abstract character under the Convention. Article 9 ECHR is not an attempt to define the right in any detail. By contrast, interpretation is required in order to outline the scope of the right before it becomes applicable in practice. Article 9 only contains directions pointing to the sensitive area of individual conscience – simply because we know based on our shared historical and social experience that the community’s practices in this area might feature unacceptable attitudes violating the fundamentals of human dignity, and most notably the abstract right to have our ethical responsibility treated with equal respect. The provision therefore poses, and invites, interpretive questions such as those discussed in this thesis.
Think again of religious accommodation. Does a community that provides various forms of accommodation to parents, carers and people suffering from health impairments, but does not provide similar forms of accommodation for reasons of conscience, respect ethical responsibility? Or does this practice show contempt for some people’s ethical choices? When such cases of discrepancy transpire, the ECtHR must strictly scrutinise the differential treatment in question because it could be a symptom of a violation of equal respect for ethical responsibility and of our rights to freedom of religion and freedom from religious discrimination as a result. But, as we discussed in Chapter Five, treating the availability and selection of comparators as part of the diagnosis, rather than as a constitutive element, of a violation of rights entails that differential treatment may well be compatible with treating as equals provided that the most plausible interpretation of the government’s overall behaviour does not betray an impermissible ethical judgment about how others should live. It is precisely this focus on the reasons behind limitations on rights that distinguishes my arguments from other egalitarian theories of the right to freedom of religion,4 which place too much emphasis on comparisons between religious and secular claims with the aim to extend different forms of accommodation of important interests, such as health claims, to religion.

While an approach paying attention to whether the reasons that our right to freedom of religion is supposed to exclude are present in a particular political conflict might sound conceptually modest, it is neither a compromise nor feeble. Consider, for instance, the debate about the ban on the wearing of the full-face veil from public space in France and Belgium. One side insists that not only the ban in question, but all limitations on the wearing of religious symbols in public are unjustifiable because they treat religious people and their commitments with less respect compared to others. The other side claims that the majority of a state can deploy collective power to form the moral environment that is more suited to its tastes; that it can ban the wearing of particular clothes or symbols if they transgress dominant norms of civility, for instance. The right to freedom of religion is incompatible with the first view because it does not pay enough attention to the reasons behind particular limitations on the wearing of symbols. If limitations can be justified entirely apart from any assumption that their imposition will be ethically beneficial, for instance that people will lead better lives in a public culture stripped of certain symbols, they are compatible with the right to freedom of religion. But the right also rejects the competing, and equally extreme view, which unconditionally permits collective and deliberate forms of manipulation of our common culture by the majority. Consider also the example of bans on religiously offensive expression. Self-proclaimed proponents of freedom of conscience regard blasphemous publications as quintessential violations of peaceful enjoyment of conscience, which assumingly occupies prime moral location in the right to freedom of religion or belief. The rival position starts from similar premises, but it claims that the interests grounding the right to freedom of expression trump the interests grounding the right not to be offended in one’s religious beliefs – at least in cases of blasphemous expression. My approach rejects both those positions. A

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4 The most notable example is the ‘Equal liberty’ theory; see C. Eisgruber and L. Sager, Religious Freedom and the Constitution (Harvard University Press, 2007).
closer look at the available interpretations of the putative right not to be offended in one’s religious beliefs show that there is no such right, not because the interests grounding freedom of religion are less important than the interests grounding freedom of expression or other considerations of the common good, but because no conception of such a right could be compatible with the principle of equal respect for ethical responsibility and authenticity that underlies the right to freedom of religion itself.

You might be disappointed because my arguments do not offer what certain parts of the current normative debate usually advertise, namely practical, simple solutions that straightforwardly resolve questions about the scope and application of the right to freedom of religion or belief. But their promises proved elusive. We discussed that a general right to conscientious objection is implausible, and it is equally implausible to deny all sorts of accommodation of conscience – with or without comparable cases available. What is actually remarkable about all-or-nothing approaches to religious freedom is not that they are unresponsive to the egalitarian principle of equal respect for everyone’s conscience, but that they insist on deviations from that principle. But this is a pity. For the underlying conceptions of religious freedom that make those all-or-nothing approaches attractive in the first place are – paradoxically – interlaced with equal respect for others regardless of conscience. We cannot discard the idea that it is really important to be personally responsible about how we live and that that importance belongs equally to all. The idea of equal respect, along with its more specific principles and instantiations, can explain why ‘no exceptions to general rules’ or ‘more respect for religion’ thrive as slogans. So the theorisation of the right to freedom of religion that this thesis pursues is ultimately an effort to reinstate our understanding of the right to its deep and inescapable normative roots. There is of course more work to be done – but its direction must follow the impulse towards the abstract right to be treated with equal respect and concern that underpins not just the right to freedom of religion, but the morality of rights as a whole.

In any event, even if my arguments are successful, I do not mean that there is anything effortless or uncontroversial about the project of moving from abstract moral standards to their practical implementation in law. In the foregoing discussion I have tried to avoid simplistic formulations and tests, to illuminate some hard and complex problems, and to include as many views as possible. It is unlikely that you will agree with each and every point of the analysis, and my goal is certainly not to wipe disagreement away. I will be satisfied, however, if this study persuades readers that seeking fair principles of cooperation in religiously diverse communities is, far from ‘pragmatic’, related to more general principles of justice, that equal respect for ethical responsibility lies at the core of interpretive arguments that efforts to specify abstract human rights require, and that human dignity entails that collective action can only be justified in an area between systematically disadvantaging conscience on the one hand, and ignoring the vulnerability of religious minorities to hostility and insensitivity on the other.

This is not to suggest that the appeal of those abstract principles, or even human dignity, is universal. Skepticism about whether morality and other departments of value
are independent or true is familiarly rife in moral philosophy. In a religiously diverse Europe there will always be disappointed individuals or sections of the community who believe that their values, lifestyles and convictions are not equally respected to others’. This could occur even in cases where, upon reflection, we realise that the government correctly understood the scope of their right to freedom of religion and the level of protection it requires, and treated them with equal concern to others. Those complaints are by no means groundless. Indeed, the objecting individuals would have had their beliefs and values better protected were their views about fairness to prevail. But no one should expect that our common moral environment be shaped in full conformity to her ethical commitments. No group should reasonably expect to be the sole beneficiary of a constitutional system of protection of our public moral space against private will.

This is the situation in which we find ourselves. For many of us religious commitments matter enormously. But we should be able to recognise that value comes in various shapes and shades of vehemence in different systems of beliefs, religious and non-religious. Justice, imagination and empathy towards others should prompt us to fix, refine and protract fair terms of respectful coexistence. That is what equal respect for human dignity, including our own dignity, means; what human rights and freedom of religion aim to secure; that is what we have been proud to recognise in our diverse European legal traditions; and that is what I tried to offer in these pages.

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