An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights

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Abstract

Most literature on freedom of religion or belief argues that there should be a high threshold for the imposition of limitations to the manifestation of the right. However, the practice of the European Court of Human Rights shows that the bar is much lower than academics suggest. This article explores this issue by analysing a plethora of cases and on the basis of interviews with lawyers connected to the Court. While the Court often considers the requirements of legality, legitimacy, and necessity, it does so briefly; focusing mostly on the analysis of proportionality and the margin of appreciation to the State in question. This approach makes the decisions exceedingly subjective and leads to little legal certainty in the area. Therefore, it is suggested that if the Court would analyse all criteria to impose limitations strictly, it could become more efficient while providing greater protection for persons to manifest their religion or belief.

Keywords

European Court of Human Rights – human rights – freedom of religion or belief – limitation clauses – subsidiarity – margin of appreciation

1 Introduction

This article examines how limitations to freedom of religion or belief are analysed by the European Court of Human Rights (ECtHR or the Court). The

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ECtHR has jurisdiction over members of the Council of Europe (CoE), which includes most States in Europe, with a few exceptions, such as Belarus, Kosovo, and the Vatican City.¹ This article does not aim to explore every Member State of the CoE but focuses on cases concerning limitations to freedom of religion or belief that were decided by the Court. Limitations to freedom of religion or belief in this jurisdiction have been examined in several academic books, but the approach is often theoretical and normative.² The purpose of the present article is more practical. It aims to demonstrate how the ECtHR has approached limitations to freedom of religion or belief based on its case law and insights from those who work at the Court.

The right to freedom of religion or belief should only be limited in exceptional circumstances, but as Heiner Bielefeldt suggests, the distinction between rule and exception ‘is often blurred, sometimes even turned upside down’.³ Therefore, the present article aims to provide clarity on procedures that are part of the daily routine at the ECtHR in order to better understand why the Court often allows States to impose limitations to freedom of religion or belief. Consequently, the article provides significant insight into how limitations are factually imposed on each context and offers suggestions to improve the use of limitations in a manner which fulfils and protects the right to freedom of religion or belief of persons in the CoE.

The present article covers several areas related to limitations to freedom of religion or belief at the ECtHR. First, it provides an insight into the CoE, its objectives and institutional framework, including the admissibility procedure. Second, this article focuses on the criteria set by the Court when dealing with limitations to qualified rights, followed by a more detailed analysis of how the Court balances different rights and interests in sections 3–5.⁴ The article will

1 *Our Member States*, CoE, <www.coe.int/en/web/about-us/our-member-states>, accessed 24 August 2019.

2 See e.g. Heiner Bielefeldt *et al.*, *Freedom of Religion or Belief: An International Law Commentary* (Oxford: Oxford University Press, 2017); Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997); Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001); and Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005).

3 See e.g. Heiner Bielefeldt, ‘Limiting Permissible Limitation: How to Preserve the Substance of Religious Freedom’, *Religion and Human Rights* 15, 1–2 (2020), p. 7.

4 Heiner Bielefeldt correctly points out that the language of “balancing” can be misleading, but this is the term often mentioned by the ECtHR, so it was kept in order to reflect the decisions of the Court. See *ibid.*

combine theoretical analysis with answers provided by interviewees who currently work or have worked at the Court.⁵

2 History and Framework of the Council of Europe

2.1 *Historical Background*

After World War II, several European leaders decided to create an international organisation called the Council of Europe to ‘achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress’.⁶ These ideals and principles are often summarised in the three main pillars of the CoE: human rights, the rule of law, and democracy.⁷ The members of the CoE believed that these principles were necessary in order to avoid gross human rights violations, such as those experienced by them during World War II, as well as to protect States from Communist ideologies.⁸

In order to enforce these aims, in 1950, the Member States of the CoE drafted the Convention for the Protection of Human Rights and Fundamental Freedoms, often referred to as the European Convention on Human Rights (ECHR or the Convention).⁹ The ECHR was inspired by the Universal Declaration of Human Rights (UDHR); however, it differs from it in two main aspects: the list of rights in the ECHR focused only on civil and political rights, and the Convention created binding obligations to the Member States. Furthermore, the Convention later established the ECtHR, to ‘ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’.¹⁰ Member States of the CoE, as well as any person, group of individuals or non-governmental organisations (NGOs), can apply to the Court.¹¹

5 The interviews were limited to a small number of participants but those of exceptional talent. In most studies on the subject, it is often overlooked that most people working at the ECtHR are extremely dedicated to protecting human rights. Consequently, their contributions were invaluable for the findings of this work. All interviews conducted for the present article are on file with the author.

6 *Statute of the Council of Europe* (ETS 1), Art. 1(a).

7 *Europe and Its Institutions* (Strasbourg: CoE, 2017), p. 2.

8 Bernadette Rainey et al., *Jacobs, White, and Ovey: The European Convention on Human Rights* (6th edn., Oxford: Oxford University Press, 2014), p. 3.

9 *Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14* (ETS 5), Preamble.

10 *Ibid.*, Art. 19.

11 *Ibid.*, Artt. 33 and 34.

The ECHR is a ground-breaking document that instituted a revolutionary structure for the “adjudication of rights claims”.¹² The Convention was the first instrument to give effect and binding force to some rights enshrined in the UDHR, as well as the first to establish a supranational mechanism to guarantee that States Parties would fulfil their commitments.¹³ One of these commitments is the protection of the right to freedom of religion or belief.

2.2 Institutional Framework

The CoE currently has 47 Member States and represents more than 800 million citizens.¹⁴ The Council has legislative, judicial and executive bodies. The legislative body is the Parliamentary Assembly, which is composed of elected representatives of the Member States, who deliberate on the conventions that are enacted by the Council. The ECtHR is one of the judicial bodies of the CoE. It can decide on applications made by individuals or States Parties alleging violations of the European Convention on Human Rights. The simplified flow-chart below demonstrates how the Court processes cases:¹⁵

12 Fiona De Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave Great Debates in Law, Basingstoke: Macmillan Education/Palgrave, 2018), p. xxv.

13 *The Convention in 1950*, CoE, <www.coe.int/en/web/human-rights-convention/the-convention-in-1950>, accessed 24 August 2019.

14 *Our Member States*, *supra* note 1.

15 *The European Court of Human Rights in Facts & Figures—2017* (Strasbourg: CoE, 2018), p. 9.

The Court has 47 judges, each nominated by one of the Member States. Since the ECtHR has judges from both Common Law and Civil Law jurisdictions, they might approach their role from different perspectives (*i.e.* inquisitorial and adversarial). Furthermore, the Court can receive correspondences in any 'official language of one of the Council of Europe's member States', as it has lawyers with the necessary language skills to address them fairly.¹⁶ The framework seems to work well, despite occasional claims by States that the Court does not fully comprehend their domestic legal system.¹⁷

The Court can receive applications from any person within their jurisdiction, not only citizens of the Member States. The judgements of the Court are binding on the States concerned. The Committee of Ministers is the Executive body of the CoE, as it monitors the enforcement of the judgements issued by the Court.

2.3 *Admissibility of Cases*

This article is mostly aimed at the use of limitations to freedom of religion or belief at the ECtHR; however, in order for a case to be decided by the Court, it must first pass the admissibility test. This step is often overlooked, but it is fundamental for a case to be successful. The ECtHR is a supranational human rights court; therefore, it tends to be less formalistic than domestic courts when it considers applications.¹⁸ Nevertheless, in 2003, the rate of cases considered inadmissible or struck out by the Court was 96 per cent.¹⁹ The rate has since improved, and in 2017, it was reduced to 82 per cent, which continues to be a significantly high figure.²⁰ This rate means that out of 85,951 applications decided in 2017, 70,356 were considered inadmissible.²¹ Some lawyers working for the Court reframe legal issues—based on the facts—in order to make the cases more likely to pass this test. This is allowed by the Court, which is the 'master of characterisation to be given in law to the facts of the case'.²²

16 *Other Languages*, CoE, <<https://www.echr.coe.int/Pages/home.aspx?p=language/docs>>, accessed 10 February 2020.

17 *See, e.g., Hutchinson v. The United Kingdom*, 17 January 2017, ECtHR, No. 57592/08, dissenting opinion of Judge Pinto de Albuquerque, paras. 38–40.

18 D J Harris *et al.*, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn., Oxford: Oxford University Press, 2014), p. 43.

19 *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention—Explanatory Report* (Strasbourg: CoE, 2004), para. 7.

20 *The European Court of Human Rights in Facts & Figures—2017*, *supra* note 15, p. 8.

21 *Ibid.*

22 *Döner and Others v. Turkey*, 7 March 2017, ECtHR, No. 29994/02, para. 79.

However, the number of inadmissible cases is still substantial, meaning that the cases analysed in this article represent only a small fraction of those submitted to the Court.

Given that a failure to fulfil the requirements of admissibility is the primary cause of cases not being decided by the Court, it is essential to explain what these criteria are, as described in Article 35 of the ECHR:

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
 - (a) is anonymous; or
 - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
 - (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
 - (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.²³

Several issues can lead to the inadmissibility of a case, which can be grouped into three main categories: procedural, jurisdictional and merits-based. The procedural grounds are mostly described in Article 35, paragraphs 1 and 2, thus: non-exhaustion of domestic remedies; non-compliance with the six-month time limit; anonymous application; same matter as other cases; and abuse of the right of an individual application. For instance, France invoked this argument in the burka ban case; nonetheless, the argument was not accepted by the Court.²⁴

²³ ECHR, Art. 35.

²⁴ *SAS v. France*, 1 July 2014, ECtHR, No. 43835/11, paras. 66–68.

Several cases fail the admissibility test because they fall outside the jurisdiction of the Court. Jurisdiction can be based on four criteria: personality (*ratione personae*), territory (*ratione loci*), time (*ratione temporis*), and subject-matter (*ratione materiae*). This means, in practice, that an alleged violation needs to be related to a State party to the ECHR (*ratione personae*); it needs to take place in territory controlled by the State (*ratione loci*); it has to take place after the State ratified the Convention (*ratione temporis*); and it must be related to one of the rights protected by the ECHR (*ratione materiae*). For example, in the case of a Sikh detainee who refused to wear a prison uniform because he did not recognise the authority of the State, the Court found the application inadmissible *ratione materiae* and *ratione personae*.²⁵

The most complex issues regarding inadmissibility are those based on merits. This category contains the issues described in Article 35(3)(a) and (b) of the ECHR, *i.e.* applications that are “manifestly ill-founded” or where the applicant has not suffered a significant disadvantage. Such expressions are more complicated than they appear, as exemplified by the case of *Dahlab v. Switzerland*. In this case, a primary teacher had converted to Islam and was not allowed to wear a headscarf while teaching; the Court found the application of Mrs Dahlab to be manifestly ill-founded.²⁶ The ECtHR analysed the merits of the case, as it asserted that ‘the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality’.²⁷ Consequently, the Court considered the limitation imposed on Mrs Dahlab’s right to freedom of religion or belief as legitimate and then considered the case inadmissible. Therefore, the expression “manifestly ill-founded” does not mean an application is flawed from its inception, as even the Grand Chamber could find an application manifestly ill-founded. The meaning is teleological, that is related to the “outcome of the case”.²⁸ Consequently, if it is highly probable that the Court will find no violation in a given case, then such case could be considered manifestly ill-founded.

Since the Court has a huge caseload and a tight budget to address all the cases, it is understandable that the ECtHR would always attempt to provide a quick resolution in most cases. Moreover, the Court should observe the principle of

25 *X v. The United Kingdom*, 6 March 1982, European Commission of Human Rights, No. 8231/78, pp. 27–28.

26 *Dahlab v. Switzerland*, 15 February 2001, ECtHR, No. 42393/98.

27 *Ibid.*

28 *Practical Guide on Admissibility Criteria* (Strasbourg: CoE, 2017), p. 54.

judicial economy and strive to be efficient. These issues are not just theoretical. The ECtHR allocated 63,350 applications to a judicial formation in 2017,²⁹ many more than the Court of Justice of the European Union, which received 1,656 cases in the same year.³⁰ Nonetheless, while the Court of Justice of the European Union received ca. EUR 370 million for 2018,³¹ the ECtHR received only EUR 72 million for the same period.³² Despite the efforts of the ECtHR to remain efficient while dealing with a massive amount of new cases and a huge backlog, the main disadvantage of such quick procedures is its impact on the fairness of the process as a whole. Once an application is considered inadmissible, it cannot be appealed, as pointed out in the flowchart in the previous section.³³ Therefore, it is vital that those submitting applications to the Court learn the admissibility criteria well in order to better support victims of human rights violations.³⁴

2.4 Legal Framework

As mentioned above, the ECHR was adopted in 1950. It was inspired by the UDHR but contained fewer rights than the Declaration.³⁵ The ECHR contains some rights that are absolute, such as the prohibition of torture and the prohibition of slavery.³⁶ These rights are absolute because they are not qualified or conditional.³⁷ In other words, there is no legitimate argument for the State to torture or hold someone in slavery, nor can the State allow such actions to take place in their jurisdiction. In contrast, the ECHR contains other rights that are considered qualified, such as the right to private life, expression, religion or belief and assembly.³⁸ These rights share similar characteristics, being that their

29 *The European Court of Human Rights in Facts & Figures—2017*, *supra* note 15, p. 5.

30 Court of Justice of the European Union, 2017 *Report: The Year in Review* (Luxembourg: CJEU, 2018), p. 14.

31 EU, *General Budget of the European Union for the Financial Year 2019: Draft* (EU, 2018), p. 15.

32 *ECHR Budget*, CoE, <www.echr.coe.int/Documents/Budget_ENG.pdf>, accessed 24 August 2019.

33 ECHR, Art. 28(2). *See also* Rainey *et al.*, *supra* note 8, p. 28.

34 For more information about issues concerning admissibility, *see Practical Guide on Admissibility Criteria*, *supra* note 28.

35 *See* section 2.1 (Historical Background).

36 ECHR, Artt. 3 and 4(1).

37 Natasa Mavronicola, 'What Is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights', 12:4 *Human Rights Law Review* (2012), p. 737.

38 ECHR, Artt. 8–11.

first paragraph provides the right to every person, and the second paragraph defines the exceptional circumstances in which the right can be limited.³⁹

Accordingly, Article 9 of the ECHR declares that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Based on the text of the article alone, it can be noticed that paragraph 1 provides for the right to freedom of thought, conscience and religion, and it mentions several examples of what it entails. In paragraph 2, however, the article mentions that freedom to manifest one's religion or beliefs can be limited in specific circumstances. Thus, freedom of thought and conscience are not qualified, and only the freedom to manifest one's religion or belief can be limited under strict conditions.

It is important to emphasise that limitations should always be exceptional and only implemented if they are compliant with all the criteria described above. As stressed by the Court in *Nolan and K v. Russia*, 'the exceptions to freedom of religion listed in Article 9 § 2 must be narrowly interpreted, for their enumeration is strictly exhaustive and their definition is necessarily restrictive'.⁴⁰ Thus, if a State fails to justify any of the requirements to impose a limitation on a qualified right, the Court should find that such State has violated said right.

3 Legal Rationale of Limitations to Freedom of Religion or Belief

This section aims to analyse the legal rationale that the ECtHR applies when deciding on limitations to freedom of religion or belief. As mentioned above, Article 9(2) of the ECHR lays down the criteria that need to be observed when a limitation to the right to freedom of religion or belief is imposed. These criteria

39 See further Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: CoE, 1997).

40 *Nolan and K v. Russia*, 12 February 2009, ECtHR, No. 2512/04, para. 73.

are often referred to as “the three-part test” for didactic purposes.⁴¹ However, even though the expression is commonly used by academics and NGOs,⁴² it rarely appears in cases at the ECtHR, and when it does, it is often mentioned by the parties, not the Court.⁴³ The test provides that a limitation must be prescribed by law (legality), meet a legitimate aim (legitimacy) and be necessary in a democratic society (necessity).⁴⁴ Once again, a State must justify that the imposition of limitation fulfils all these requirements. Otherwise, the Court will find a violation of the right in question.

The reason for this reluctance in using the expression of “three-part test” might be due to the fact that the ECtHR has progressively added more steps to this test, as seen, for instance, in *SAS v. France*.⁴⁵ In this case, the Court assessed (i) whether there was an interference with the rights in question (paras. 110–111); (ii) whether the measure was prescribed by law (para. 112); (iii) whether there was a legitimate aim (113–122); and (iv) whether the measure was necessary in a democratic society (paras. 123–159). The last criterion was divided into three parts and bundles the issues of necessity, proportionality and subsidiarity. These additional steps can be helpful in guiding the Court to decide on limitations to freedom of religion or belief.

The main questions set in the questionnaire for the interviewees, contributing to this section, were: ‘Does the Court consider all the elements of the three-part inquiry equally, or does it consider some elements solely as procedural issues?’ Our suspicion was that the Court often avoids a thorough analysis of the objective steps (legality, legitimacy and necessity) while focusing on a more subjective assessment of proportionality and the margin of appreciation. If that is true, it could explain why the analysis of the objective steps is much more concise than the other elements. Additionally, this analysis can also help elucidate why there is a lack of legal certainty in cases concerning limitations on freedom of religion or belief at the Court.

41 See Rainey *et al.*, *supra* note 8, p. 309.

42 See, e.g., Janneke Gerards, ‘How to Improve the Necessity Test of the European Court of Human Rights’, 11:2 *International Journal of Constitutional Law* (2013); and Richard Carver, *Freedom of Expression, Media Law and Defamation* (London: Media Legal Defence Initiative and International Press Institute, 2015), p. 14.

43 *Isayeva, Yusupova and Bazayeva v. Russia*, 24 February 2005, ECtHR, Nos. 57947/00 57948/00 57949/00, para. 167.

44 See, e.g., *The Sunday Times v. The United Kingdom*, 26 April 1979, ECtHR, No. 6538/74, para. 45.

45 *SAS v. France*, paras. 110–159.

3.1 *Interference with the Right to Freedom of Religion or Belief*

The question of interference was the first to be explored by the questionnaire. The formulation was the following: 'Why does the Court analyse whether there has been an interference with a right after the admissibility decision? Can a case pass the admissibility test if this criterion is not fulfilled?' It is evident that the Court must analyse whether the State had interfered with the right to freedom of religion or belief of a person. If the State did not interfere with the right, there would not be any justification for someone to claim a violation of such right. Consequently, the application would be considered inadmissible. However, the answer is less straightforward.

Most cases in which no interference is found are indeed considered inadmissible. For instance, in the case of *Acarca v. Turkey*, the applicant claimed that he was discharged from the army because of his religious views.⁴⁶ The State rejected the claims and affirmed that the applicant was discharged because of insubordination and the principle of secularism. The Court accepted the arguments posed by the State and decided that 'the applicant's discharge did not amount to an interference with the right guaranteed by Article 9 of the Convention. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.'⁴⁷

However, there are exceptions to this rule. In a similar case from Turkey, in which the applicant claimed he was dismissed because of his religious views, the State upheld that 'the protection of Article 9 (art. 9) could not extend, in the case of a serviceman, to membership of a fundamentalist movement, in so far as its members' activities were likely to upset the army's hierarchical equilibrium'.⁴⁸ The Court thus decided that there was no interference with the right in question but did not declare the application inadmissible.⁴⁹ This detail might seem technical, but it could allow an appeal and subsequently the overruling of the first judgement.

Another reason the ECtHR analyses the interference with rights in every instance is that, as mentioned above, the Court can consider a case inadmissible at any point. Therefore, since even the Grand Chamber could decide on grounds of admissibility, it is only natural that it would also include a justification for its decision on the interference with a qualified right. Yet, most States do not dispute these claims because the interference can easily be justified.

⁴⁶ *Acarca v. Turkey*, 03 October 2002, ECtHR, No. 45823/99.

⁴⁷ *Ibid.*, part A, at 2.

⁴⁸ *Kalaç v. Turkey*, 1 July 1997, ECtHR, No. 20704/92, para. 25.

⁴⁹ *Ibid.*, para. 31.

3.2 *Legality*

An interference may count as “prescribed by law” whether its source lies in statutory or common law. The ECtHR developed some criteria to analyse whether the interference of a qualified right is prescribed by law in the case *The Sunday Times v. The United Kingdom*:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁵⁰

To put it simply, for a law to fulfil the criterion of legality, it must be accessible and foreseeable. However, in practice, the Court is rather flexible regarding this criterion. First of all, the Court is fairly open concerning the definition of what constitutes law, as illustrated by the case of *Dogru v. France*. In this case, a Muslim student was expelled from her school because she refused to remove her headscarf, where the attire was regarded as ‘incompatible with physical education classes’.⁵¹ At the time of the expulsion, there was no law prohibiting pupils from wearing the headscarf; however, the Court stated that ‘the concept of “law” must be understood in its “substantive” sense, not its “formal” one. It, therefore, includes everything that goes to make up the written law, including enactments of lower rank than statutes.’⁵² Consequently, the fact that the parents signed the internal rules of the school when enrolling their daughter, taken together with the case-law of the *Conseil d’Etat* on the matter, was enough for the Court to consider that the “law” was accessible in that particular situation.⁵³

The second requirement of foreseeability is more difficult to analyse because it requires the law to be formulated with sufficient precision to enable a person to regulate his or her conduct. The Court has been very flexible in this regard, as it has allowed a certain degree of vagueness in the formulation of laws in order to ‘avoid excessive rigidity and to keep pace with changing

⁵⁰ *The Sunday Times v. The United Kingdom*, para. 49 (emphasis added).

⁵¹ *Dogru v. France*, 04 December 2008, ECtHR, No. 27058/05, para. 7.

⁵² *Ibid.*, para. 52.

⁵³ *Ibid.*, para. 59.

circumstances'.⁵⁴ In the *Dogru* case, the Court concluded that 'the applicant could foresee, to a degree that was reasonable, that at the material time the refusal to remove her headscarf during physical education and sports classes was liable to result in her expulsion from the school for failure to attend classes regularly'.⁵⁵

It is important to highlight that, at this point of the case analysis, the Court appears to be concerned only with the norms in question, *i.e.* whether or not the norms fulfil the criteria of accessibility and foreseeability. The Court is not making a judgment at this stage on whether the norms in question were proportionate. Therefore, this criterion is highly objective in nature. The Court could find, for instance, that the law was indeed accessible and foreseeable but, at a later stage, consider that it would be disproportionate to deprive an 11-year-old of the right to education because she was manifesting her religious beliefs through her choice of clothing. This is naturally theoretical because in the *Dogru* case, the Court considered the expulsion of the student proportionate and found no violation of the right to freedom of religion or belief.⁵⁶

One question to the interviewees in this regard was: 'has the Court recently become more rigorous in the analysis of the "prescribed by law" criterion?' The general answer was no, and the reason for this was often related to the principle of subsidiarity. The explanation was that the Court, being a supranational body, tends to avoid passing judgement on the quality of domestic laws. This is a sensible approach as courts generally try to avoid clashes with legislative bodies, and thus a supranational court would be even more cautious on this matter. Nevertheless, it is important to emphasise that States have given explicit permission to the Court to analyse these issues when they ratified the Convention.

The Court, however, appears to have paid more attention to this requirement recently.⁵⁷ *Altun and Others v. Turkey* is a case in point in how the Court can be stricter in relation to the requirement of legality. In this case, the Turkish law stated that '[a]ny person who disseminates propaganda in favour of a terrorist organisation shall be liable to a term of imprisonment of one to five years'.⁵⁸ The applicants were convicted of this crime when they participated in a religious ceremony to mourn deceased friends and relatives who were members

54 *Müller and Others v. Switzerland*, 24 May 1988, ECtHR, No. 10737/84, para. 29.

55 *Dogru v. France*, para. 59.

56 *Ibid.*, para. 78.

57 *See, e.g., Church of Scientology of St Petersburg and Others v. Russia*, 2 October 2014, ECtHR, No. 47191/06, para. 47; and *Mockutė v. Lithuania*, 27 February 2018, ECtHR, No. 66490/09, para. 128.

58 *Altun and Others v. Turkey*, 10 July 2018, ECtHR, No. 54093/10, para. 12.

of the PKK.⁵⁹ The Court was objective in this case, as it found a violation of Article 9 of the ECHR because ‘the interference with the applicants’ freedom of religion had not been “prescribed by law” in the sense that it had not met the requirements of clarity and foreseeability’.⁶⁰

3.3 *Legitimacy*

Article 9(2) provides a list of legitimate aims that can be invoked to justify an interference with the freedom to manifest religion or belief. They include public safety, protection of public order, health or morals and protection of the rights and freedoms of others. As explained in the Guide on Article 9 of the Convention, ‘[t]his enumeration of legitimate aims is strictly exhaustive and the definition of the aims is necessarily restrictive; if a limitation of this freedom is to be compatible with the Convention it must, in particular, pursue an aim that can be linked to one of those listed in this provision.’⁶¹ This interpretation is based on the case-law of the ECtHR, including the *obiter dictum* of the Court in *SAS v. France*, which goes on to say, ‘[f]or it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision.’⁶²

As mentioned above, the limitations on other qualified rights follow the same rationale as freedom of religion or belief; however, the legitimate aims can differ. For instance, one of the legitimate aims to interfere with the right to freedom of expression is “the prevention of disorder or crime”.⁶³ Freedom of religion or belief cannot be limited on this ground, as it is not listed in Article 9(2) of the Convention. Another important omission, when compared to other qualified rights, is the fact that freedom of religion or belief cannot be limited on grounds of “national security”, as further explained by the Court’s guide that:

This omission is by no means accidental; on the contrary, the refusal by the drafters of the Convention to include this specific ground among the legitimate grounds of interference reflects the fundamental importance of religious pluralism as “one of the foundations of a democratic society”

⁵⁹ *Ibid.*, para. 8.

⁶⁰ *Ibid.*, para. 16.

⁶¹ *Guide on Article 9 of the European Convention on Human Rights* (Strasbourg: CoE, 2018), para. 33.

⁶² *SAS v. France*, para. 113.

⁶³ *ECHR*, art. 10(2).

and of the fact that the State cannot dictate what a person believes or take coercive steps to make him change his beliefs.⁶⁴

Nevertheless, it is rather common that a particular limitation will be based on grounds that are similar (although not identical) to the ones prescribed by the ECHR. The Court has to deal with a range of languages and legislation that might not reflect the Convention verbatim. Consequently, despite the aims being strictly exhaustive, the Court is—once again—quite flexible in its consideration of the legitimate aims claimed by States, as demonstrated below in the brief analysis of each aim.

3.3.1 Public Safety

Public safety is not well defined by the Strasbourg Court. It is an aim that is often coupled with public order⁶⁵ due to their similarity.⁶⁶ One of the few instances in which the State claimed public safety as the only legitimate aim for a limitation of the right to freedom of religion or belief was in *Phull v. France*. In this case, the applicant was a practising Sikh who was compelled to remove his Turban at the security check of an airport in France.⁶⁷ The case was considered inadmissible, as the Court found that the interference with freedom of religion or belief was prescribed by law, had a legitimate aim to protect public safety and was considered necessary in a democratic society.⁶⁸ This case was decided in French, and the legitimate aim in French is “*sécurité publique*”. Thus, the meaning of safety here relates to public security, which explains why it is often argued by States in circumstances concerning public order.

However, if public safety can be equated with public security, what is the real difference between “national security (*sécurité nationale*)” and “public safety (*sécurité publique*)”? The Court noted the problematic English translation of public safety in *SAS v. France*, in which different expressions are used for specific qualified rights: ‘the Court first observes that “public safety” is one of the aims enumerated in the second paragraph of Article 9 of the Convention (*sécurité publique* in the French text) and also in the second paragraph of Article 8 (*sûreté publique* in the French text).’⁶⁹ Thus, when France argued that the ban on full-face veils aimed ‘to prevent danger for the safety of persons

64 *Guide on Article 9 of the European Convention on Human Rights*, *supra* note 61, para. 34.

65 *Ahmet Arslan and Others v. Turkey*, 23 February 2010 ECtHR, No. 41135/98, para. 43.

66 *Rainey et al.*, *supra* note 8, p. 314.

67 *Phull v. France*, 11 January 2005, ECtHR, No. 35753/03.

68 *Ibid.*

69 *SAS v. France*, para. 115.

and property and to combat identity fraud;⁷⁰ it did not mean safety as in well-being but safety as in security. Therefore, the Court concluded that ‘in adopting the impugned ban, the legislature sought to address questions of “public safety” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention’.⁷¹

This rationale is confirmed by the case-law of the Court, which has affirmed in other instances that it ‘considers that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety’.⁷² Consequently, this understanding of public safety seems very similar to the one of national security, which is not listed in Article 9(2) of the ECHR.

3.3.2 Public Order

The aim of protection of public order is treated similarly to public safety, especially when it comes to how broadly the ECtHR has interpreted these expressions. Malcolm Evans suggests that both aims could even be considered together as there is little difference in their meaning.⁷³ Public order has often been invoked by States to limit one’s right to manifest religion or belief through religious attire, as decided by the Court in *Leyla Şahin v. Turkey* (para. 99) and *Dogru v. France* (para. 60).⁷⁴ It is difficult to understand how wearing a headscarf could disrupt public order, but the ECtHR has often accepted this argument.

The requirement of legitimacy is highly objective, analysed in the same manner as the criterion of legality. Consequently, at this stage, the Court is only analysing whether a limitation pursues one of the legitimate aims of the right in question. For example, in the case of *İzzettin Doğan and Others v. Turkey*, the case concerned both Alevi Muslims who were allegedly discriminated against by the Turkish government, which did not automatically recognise their places of worship and benefitted less from the taxes that they paid than the majority religious groups. The Court accepted that the legislation concerning the recognition of places of worship and taxation had the legitimate aim to protect public order, and therefore, the Court considered that Turkey fulfilled both

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Metropolitan Church of Bessarabia and Others v. Moldova*, 13 December 2001, ECtHR, No. 45701/99, para. 113.

⁷³ Evans, *supra* note 2, p. 324.

⁷⁴ See also *Dahlab v. Switzerland*; and *Kurtuluş v. Turkey*, 24 January 2006, ECtHR, No. 65500/01.

the criteria of legality and legitimacy.⁷⁵ However, taking into consideration the facts of the case, the Court found that the interference with the right to freedom of religion was not necessary in a democratic society.⁷⁶

3.3.3 Public Health

The legitimate aim of protecting public health is rarely discussed in the case-law of the ECtHR. One of the few cases was decided in 1978 by the European Commission of Human Rights, which decided that States do not need to grant exemptions for Sikhs who choose not to wear helmets when riding a motorcycle, as such interference would be justified on public health grounds.⁷⁷ Public health has also been used to justify interferences with the right of Jehovah's Witnesses to manifest their beliefs due to their refusal to receive blood transfusions. The Court found that the laws aimed at dissolving Jehovah's Witnesses communities had a legitimate aim to protect public health,⁷⁸ but such dissolutions were not proportionate to the aim pursued.⁷⁹ A more recent example is the one of a nurse who was also not allowed to wear a crucifix at a hospital in The United Kingdom based on grounds of public health.⁸⁰

3.3.4 Public Morals

The legitimate aim of protection of public morals is arguably the least objective aim to restrict freedom of religion or belief. The United Nations Human Rights Committee (UNHRC), when explaining the scope of the right in the context of the International Covenant on Civil and Political Rights (ICCPR), has clarified that 'the concept of morals derives from many social, philosophical and religious traditions'.⁸¹ The ECtHR has quoted this passage in *SAS v. France*⁸² and acknowledged in the case of *Gough v. The United Kingdom* that 'national

75 *İzzettin Doğan and Others v. Turkey*, 26 April 2016 ECtHR, No. 62649/10, paras. 99–102.

76 *Ibid.*, para. 135.

77 *X v. The United Kingdom*, 12 July 1978, European Commission of Human Rights, No. 7992/77.

78 *Jehovah's Witnesses of Moscow and Others v. Russia*, 10 June 2010, ECtHR, No. 302/02, para. 106.

79 *Ibid.*, para. 160.

80 *See Eweida and Others v. The United Kingdom*, 15 January 2013, ECtHR, Nos. 48420/10, 36516/10, 51671/10, and 59842/10, paras. 96–100.

81 Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, (CCPR/C/GC/34), para. 32.

82 *SAS v. France*, para. 38.

authorities enjoy a wide margin of appreciation in matters of morals since there is no uniform European conception of morals'.⁸³

What the Court has often considered a matter of morality is nudity and sexual issues, thus mostly related to freedom of expression. However, some issues could be linked to freedom of religion or belief as well. For instance, a State could justify an interference to the right to freedom of religion or belief of someone who professes a sincere belief in 'the inoffensiveness of the human body' and decides to walk naked, as confirmed by the Court in the case of *Gough v. The United Kingdom*.⁸⁴ What sometimes complicates this subject is the fact that when dealing with controversial expressions, the Court often refers to the *obiter dictum* from *Handyside v. The United Kingdom* that the right to freedom of expression protects 'not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.⁸⁵ Nevertheless, the Court found in *Handyside* that the censorship of a rather inoffensive book had a legitimate aim to protect morals, thus allowing the State to censor it. The Court has also allowed the censorship of sexual pictures associated with religious themes.⁸⁶

3.3.5 The Protection of the Rights and Freedoms of Others

The aim of the protection of the rights and freedoms of others is frequently invoked by States when an interference with a qualified right takes place. The UNHRC and the ECtHR have divergent theoretical perspectives on this. The UN body has declared that concerning the aim of "respect of rights and reputation of others", the term "rights" generally refers to 'human rights as recognised in the Covenant [ICCPR] and more generally in international human rights law'.⁸⁷ Moreover, the term "others" refers to 'persons individually or as members of a community'.⁸⁸ The UNHRC landmark cases that deal with this legitimate aim are *Ross v. Canada* and *Faurisson v. France*,⁸⁹ both cases concerning anti-Semitic speech. The ECtHR, instead, has an open perspective, thus '[t]he

83 *Gough v. The United Kingdom* 28 October 2014, ECtHR, No. 49327/11, para. 166.

84 *Ibid.*, paras. 156–158 and 185–188.

85 *Handyside v. The United Kingdom*, 7 December 1976, ECtHR, No. 5493/72, para. 49.

86 See, e.g., *Müller and Others v. Switzerland*; *Otto-Preminger-Institut v. Austria*, 20 September 1994, ECtHR, No. 13470/87; and *Wingrove v. UK*, 25 November 1996, ECtHR, No. 17419/90.

87 Human Rights Committee, *General Comment No. 34*, para. 28.

88 *Ibid.*

89 *Ross v. Canada*, 26 October 2000, Human Rights Committee, No. 736/1997, para. 11.5; *Faurisson v. France*, 8 November 1996, Human Rights Committee, No. 550/1993, para. 9.6.

range of rights which might be protected is not limited.⁹⁰ In practice, both bodies have been deferential to States on this issue,⁹¹ a point emphasised by the interviewees, who observed that States could easily frame a violation of the rights of others, even if they need to refer to one of the Convention rights.

Nevertheless, the ECtHR approach has been problematic, because this legitimate aim is often unsubstantiated by States and the Court has been lenient with this practice. The *Otto-Preminger Institut* case is often mentioned in this regard, as a film with satirical religious themes was censored in order 'to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons'.⁹² Such a right is not present in the Convention, nor in any other major international human rights document, but the rationale was accepted by the Court.⁹³ In a case from 2017, Muslim parents requested a school to exempt their daughters from taking part in mixed swimming classes, as that would go against their beliefs. The parents argued that 'since the objectives of education, socialisation and integration were, in their view, not called into question by an exemption from mixed swimming lessons, especially where the parents had organised private swimming classes for their daughters, and there was nothing likely to disrupt the smooth functioning of the school in any way or in any form, the interference in question had not been based on any valid legitimate aim'.⁹⁴ However, the Court accepted the argument of the State without explaining which "rights of others" were violated if some children did not attend mixed swimming classes. The decision was the following:

The Court shares the Government's view that the contested measure was aimed at the integration of foreign children from different cultures and religions, as well as the smooth functioning of the education system, compliance with compulsory schooling and equality between the sexes. In particular, the measure was intended to protect foreign pupils from any form of social exclusion. The Court is prepared to accept that these elements can be attached to protection of the rights and freedoms of others

90 Rainey *et al.*, *supra* note 8, p. 323.

91 T Jeremy Gunn, 'Permissible Limitations on the Freedom of Religion or Belief' in John Witte Jr and M Christian Green (eds.), *Religion and Human Rights: An Introduction* (Oxford: Oxford University Press, 2011), p. 261.

92 *Otto-Preminger-Institut v. Austria*, para. 48.

93 See also *Wingrove v. The United Kingdom*; *IA v. Turkey*, 13 September 2005, ECtHR, No. 42571/98; and more recently *ES v. Austria*, 25 October 2018, ECtHR, No. 38450/12.

94 *Osmanoğlu and Kocabaş v. Switzerland*, 10 January 2017, ECtHR, No. 29086/12, para. 62.

or the protection of public order within the meaning of Article 9 § 2 of the Convention.⁹⁵

3.3.6 Final Remarks on Legitimacy

Jeremy Gunn asserts that '[t]o the extent that limitations clauses impose practical limits on states actions, the "legitimate purpose" requirement is the weakest prong.'⁹⁶ The interview questions aimed to inspect whether or not this statement was true, with questions such as: 'In your opinion, is the Court thorough when analysing the legitimate aims invoked to limit freedom of religion or belief?' Additionally, 'to what extent do they correlate with or rely on the terms of Article 9(2) of the ECHR?' Most interviewees affirmed that the Court analyses this requirement briefly for the same reasons as the requirement of legality, meaning that States will always find a way to justify their claims under one of the aims. Consequently, the analysis of legitimate aims tends to be brief, the Grand Chamber judgment in *SAS v. France* being an exception.⁹⁷ Therefore, this is a missed opportunity for the Court to apply an objective criterion and, in this manner, discourage States from pursuing expansive interpretations of the legitimate aims.

Quite the opposite, since the Court has been overly flexible when examining the legitimacy criterion, States have freely expanded the scope of specific legitimate aims, and the Court has done little to limit their actions. Consequently, the Court has generated jurisprudence which supports States to invoke broad interpretation of legitimate aims when imposing limitations for freedom of religion or belief. A remarkable example was the case of *SAS v. France*, in which the Court permitted the justification for a ban on full-face veils based on the aim of "living together", declaring that under certain conditions:

the "respect for the minimum requirements of life in society" referred to by the Government—or of "living together", as stated in the explanatory memorandum accompanying the bill (see paragraph 25 above)—can be linked to the legitimate aim of the "protection of the rights and freedoms of others".⁹⁸

Living together is obviously not a legitimate aim to limit freedom of religion or belief. The Court, however, linked "living together" with the legitimate aim

⁹⁵ *Ibid.*, para. 64.

⁹⁶ Gunn, *supra* note 91, p. 261.

⁹⁷ *SAS v. France*, para. 114.

⁹⁸ *Ibid.*, para. 121.

of ‘protection of the rights and freedoms of others’ so as to fulfil this limb of the test. This is highly contested but has been widely accepted in cases before the ECtHR. Principles, such as human dignity, living together, *laïcité* or secularism, are fundamental in a democratic society; nonetheless, legitimate aims are supposed to be narrow, and these justifications are simply too vague to satisfy the objective criteria of Article 9(2). Consequently, if the legitimate aims are truly supposed to be narrow, and the omission of national security as an aim is intentional in order to reflect religious pluralism as ‘one of the foundations of a “democratic society”’,⁹⁹ then the Court should explain precisely how these principles could serve as a legitimate aim to impose a limitation on one’s freedom to manifest a religion or belief.

Part of the problem is that applicants rarely contest this point, which allows the Court to reframe the legitimate aim proposed by States in cases concerning limitations to freedom of religion or belief.¹⁰⁰ In any case, as mentioned above, the fact that the courts consider that a limitation or interference with the right to freedom of religion or belief has a legitimate aim does not mean that they will consider it necessary or proportionate. In fact, in many cases in which the Court found a violation of the right to freedom of religion or belief, the Court decided that the interference was provided by law and had a legitimate aim.¹⁰¹

3.4 *Necessity and Proportionality*

Since legality and legitimacy are mostly treated as formalistic issues by the ECtHR, the part of the test that concerns the necessity of a limitation tends to be the defining requirement in most cases related to the manifestation of freedom of religion or belief. The Convention provides for a narrower definition of necessity than the ICCPR, as it requires the State to justify where a certain limitation is necessary *in a democratic society*.¹⁰² In practice, however, this concept does not translate into a higher protection being afforded to freedom of religion or belief. Furthermore, in this part of the test, the Court also considers whether a limitation is proportionate to achieve one of the legitimate aims mentioned above and whether it will grant a margin of appreciation to States. The margin of appreciation, a contentious issue, will be examined separately (section 4).

The limitations that the Court considers as “necessary in a democratic society” naturally vary from case to case. The ECtHR, for instance, has held that it

99 *Nolan and K v. Russia*, para. 73.

100 *See, e.g., Leyla Şahin v. Turkey*, 10 November 2005, ECtHR, No. 44774/98, para. 99.

101 *See, e.g., Hamidović v. Bosnia and Herzegovina*, 5 December 2017, ECtHR, No. 57792/15.

102 *Cf. ICCPR*, Art. 18; with *ECHR*, Art. 9(2).

was not necessary to prohibit proselytising of civilians,¹⁰³ but it deemed necessary the seizure of films considered offensive to some religious groups.¹⁰⁴ The ECtHR has summarised the principles that should guide its future decisions on matters of necessity in the *Silver* case, in which it explained that:

- (a) the adjective “necessary” is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”;
- (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
- (c) the phrase “necessary in a democratic society” means that, to be compatible with the Convention, the interference must, inter alia, correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued”;
- (d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.¹⁰⁵

To reiterate, at this stage, the Court often examines two issues: whether the interference with the right corresponds to a “pressing social need” and whether an interference is “proportionate to the aim pursued”. The question of the margin of appreciation is often included while the Court deliberates on the issue of necessity. While there is no formal difference between the analysis of “pressing social need” and “proportionality”, the nature of such examination varies substantially, as the proportionality assessment is much more subjective than the pressing social need assessment. Furthermore, if one of these sub-categories of the test is not met by the State, then the Court will find that the limitation was not necessary in a democratic society. In practice, this means that even if the Court finds that an interference with a qualified right has a pressing social need, such interference might fail the proportionality test if the measures imposed to limit the right are not proportionate to the legitimate aim pursued.

Taranenko v. Russia is a notable example in this regard. In this case, the applicant joined a group of activists who invaded a government building to protest against President Putin. She was arrested, and the Court considered that there was a pressing social need in the case to arrest the applicant.¹⁰⁶ However,

103 *Larissis and Others v. Greece*, 24 February 1998, ECtHR, Nos. 23372/94 et al., paras. 57–61.

104 *See, e.g., Otto-Preminger-Institut v. Austria*; and *Wingrove v. The United Kingdom*.

105 *Silver and Others v. The United Kingdom*, 25 March 1983, ECtHR, Nos. 5947/72 et al., para. 97.

106 *Taranenko v. Russia*, 15 May 2014, ECtHR, No. 19554/05, paras. 76–79.

the fact that she was in custody for a year and was sentenced to three additional years in prison led the Court to conclude that the measure was not proportionate to the legitimate aim pursued.¹⁰⁷

The analysis of proportionality is undoubtedly helpful in many cases, but it has its pitfalls. First, the scrutiny of proportionality says little about the nature of an interference. The example of *Müller and others v. Switzerland* is helpful to explain this point. In this case, the State confiscated paintings regarded as obscene because they could offend “religious sensibilities”. The ECtHR considered the seizure of the paintings necessary for the protection of public morals. Since Switzerland did not destroy the paintings, even though the local Criminal Code provided for the destruction of obscene media, the Court did not find the imposed measures disproportionate.¹⁰⁸ Therefore, the proportionality assessment did not consider whether or not laws on obscenity should be criminalised, only that the measures imposed by the government were proportionate to achieve the aim of protecting public morals.

Second, proportionality does not help States to set standards based on ECtHR jurisprudence. Another example regarding freedom of expression illustrates this issue well. In *Delfi AS v. Estonia*, an online news website was held liable for defamation posted on the comment section of their articles and was thus obliged to pay the injured person the equivalent of EUR 320 for non-pecuniary damages—a sum that the ECtHR considered proportionate.¹⁰⁹ However, in *Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt v. Hungary*, a similar case involving notice and takedown of insulting comments on an Internet news portal, the ECtHR decided that the domestic courts had failed to balance the ‘rights and interests of all those involved’, thus finding a violation of freedom of expression.¹¹⁰ The main difference between the cases was not the nature of the cases, nor the rights involved, but the level of the insults included in the comments: in *Delfi* they were considered as hate speech, while in *MTE and Index.hu Zrt* they were deemed merely insulting.¹¹¹ Therefore, States will find little legal certainty when looking at the case-law of the Court on issues related to offensive speech online.

Third, the proportionality analysis can have adverse effects when used to balance the right to freedom of religion or belief against abstract principles. This point can be noticed in *Ebrahimian v. France*. In this case, a social

¹⁰⁷ *Ibid.*, para. 95.

¹⁰⁸ *Müller and Others v. Switzerland*, para. 40.

¹⁰⁹ *Delfi AS v. Estonia*, 16 June 2015, ECtHR No. 64569/09.

¹¹⁰ *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v. Hungary*, 2 February 2016, ECtHR, No. 22947/13, para. 91.

¹¹¹ *Ibid.*, para. 85.

assistant working in a psychiatric hospital claimed that her right to freedom of religion or belief was violated when her contract was not renewed because she wore a headscarf at work. While examining the issue of necessity, the Court framed the matter as a balance between the principles of neutrality in public services and the right of the applicant to wear the headscarf.¹¹² Since neutrality is not a legitimate aim, the Court gave—in practice—much more weight to the principle invoked by France than the individual right, stating that: ‘it was impossible to reconcile the applicant’s religious beliefs and the obligation not to manifest them’ and consequently deciding ‘to give priority to the requirement of State neutrality and impartiality’.¹¹³ Consequently, when balancing abstract principles and the right to freedom of religion or belief, the analysis of proportionality becomes easily determined by the arguments provided by the States, as pointed out by the dissenting judges in the case:

While the Court must be conscious of its subsidiary role, it cannot divest itself of its supervisory role by adjusting the terms of Article 9(2), broadening—with reference to ever more abstract ideals and principles—the scope of the limitations for which that provision exhaustively provides and disengaging with the requirements of proportionality.¹¹⁴

Proportionality, however, plays a vital role and can lead to different consequences, as was the case in *Larissis and Others v. Greece*. In this case, Air Force officers were convicted by military courts of proselytising among other officers and civilians. The Court considered that there was an interference with the right to freedom of religion or belief, that it was prescribed by law and that it had a legitimate aim to protect the rights and freedoms of others. Therefore, the only aspect left to examine was the necessity and proportionality of the measures. On this point, the Court expressed that Article 9 does not ‘protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church’.¹¹⁵

The Court thus divided proselytism into two categories: the proselytism of officers and that of civilians. In doing so, the ECtHR was able to provide a nuanced decision, in which it considered that proselytism of officers by a superior officer was improper because it could make subordinate officers feel pressured

¹¹² *Ebrahimian v. France*, 26 November 2015, ECtHR, No. 64846/11, para. 63.

¹¹³ *Ibid.*, para. 70.

¹¹⁴ *Ibid.*, partly Concurring and Partly Dissenting Opinion of Judge O’Leary.

¹¹⁵ *Larissis and Others v. Greece*, para. 45.

to read religious books as if it were a veiled command.¹¹⁶ However, the Court affirmed that the State could not prohibit the same officers from sharing their beliefs—in their personal capacity—with civilians, as they did not have any authority over them.¹¹⁷ Therefore, in this case, the proportionality analysis allowed the Court to take each circumstance into consideration separately and deliver a balanced decision.

4 Subsidiarity and the Margin of Appreciation

4.1 *Conceptual Remarks*

The principle of subsidiarity and the concept of the margin of appreciation have always been points of contention for academics, lawyers and the Member States of the CoE. Judge Spano has written extensively on this topic and suggests that the Court should be coherent when applying the principle of subsidiarity.¹¹⁸ Additionally, the *Copenhagen Declaration*, a document that aimed to reform the Court, was highly criticised in its draft by the excessive importance given to subsidiarity.¹¹⁹

In order to understand why the concept is so contentious, one first needs to understand its meaning and function in the system. Subsidiarity is, simply put, the ‘relationship between two institutions or norms, by which one supplements the other in appropriate circumstances’.¹²⁰ In the context of international human rights treaties, the principle of subsidiarity means that State Parties to such treaties have the primary responsibility to protect the rights of its citizens, and an international body or court has a supplementary responsibility to make sure that States fulfil their obligations.¹²¹ The ECtHR has called the practical application of this principle “the margin of appreciation”. Consequently, the margin of appreciation is the level of judicial deference granted by the

¹¹⁶ *Ibid.*, paras. 47–55.

¹¹⁷ *Ibid.*, paras. 56–61.

¹¹⁸ Robert Spano, ‘The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’, *Human Rights Law Review* (2018), p. 20. See also Robert Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’, *Human Rights Law Review* (2014).

¹¹⁹ Janneke Gerards and Sarah Lambrecht, *The Final Copenhagen Declaration: Fundamentally Improved with a Few Remaining Caveats*, Strasbourg Observers, 18 April 2018, <www.strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats>, accessed 24 August 2019.

¹²⁰ Gerald L. Neuman, ‘Subsidiarity’ in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 361.

¹²¹ CoE, *Copenhagen Declaration*, para. 7.

Court to national authorities in determining certain cases, mostly those involving qualified rights.¹²²

It is not uncommon to hear students and academics referring negatively to the concept of the margin of appreciation, as they may consider the Court too deferential to States. However, the criticism is sometimes misplaced. What is problematic is not the concept of the margin of appreciation *per se*, as all supranational courts allow some level of discretion for national authorities to decide their own cases. What is truly problematic is the fact that the Court automatically grants a wide margin of appreciation for States to decide specific issues, including freedom of religion or belief. Therefore, the criticism should be directed to the level of deference accorded to a State, rather than the concept itself.

The criteria that the Court has used to apply the concept of the margin of appreciation have been less than ideal, but this matter has an intrinsic logic. The ECtHR takes several elements into consideration when deciding whether or not the margin of appreciation can be granted to States, for example: level of consensus, moral controversy, broad and deep consideration by national courts, and seriousness of the right infringed.¹²³ Furthermore, the Court has decided that in relation to limitations to qualified rights, it leaves to States a margin of appreciation that is ‘given both to the domestic legislator (“prescribed by law”) and to the bodies that are called upon to interpret and apply the laws in force’.¹²⁴

Nevertheless, this margin is not unlimited. The Court stated in a landmark case that it ‘is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision’.¹²⁵ The same rationale is valid for other qualified rights. Therefore, even if the State declares that a particular issue falls within its margin of appreciation, it is the Court that decides whether or not to grant this margin to States.

As mentioned above, all supranational courts accord a certain level of deference to national authorities, but the concept of “margin of appreciation” has become synonymous with a wide level of deference to States. Consequently,

122 See, e.g., Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012), pp. 26–37.

123 See also Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee’, 65 *International and Comparative Law Quarterly* (2016).

124 *Handyside v. The United Kingdom*, para. 48.

125 *Ibid.*, para. 49.

other human rights courts and treaty bodies have chosen not to apply the concept in their jurisdiction. The African Court on Human and Peoples' Rights (ACtHPR) has mentioned, in relation to qualified rights, the concept of the margin of appreciation in the *Tanganyika* case while describing the jurisprudence of the ECtHR, but it did not apply the concept in its decisions.¹²⁶ The Inter-American Court of Human Rights (IACtHR) has avoided the concept in cases related to freedom of religion or belief.¹²⁷ Furthermore, Judge Cançado Trindade mentioned that the concept could not be developed in the Inter-American system without weakening the protection of rights.¹²⁸

The UNHRC, in its early decisions, granted a "certain margin of *discretion*" to States in the application of limitations to freedom of expression.¹²⁹ This margin is also acknowledged in the *Siracusa Principles*, particularly in the context of limitations on grounds of protecting morals.¹³⁰ However, these principles clarify that such a margin of discretion does not apply to the rule of non-discrimination.¹³¹ In any event, the UNHRC affirmed in General Comment No. 34 that the scope of freedom of expression should not 'be assessed by reference to a "margin of appreciation"'.¹³² General Comment No. 34 is more recent than the *Siracusa Principles*, which indicates that the UNHRC would probably extend the same idea to the right to freedom of religion or belief.

The main difference between the UNHRC and the regional courts is that the former does not issue binding judgements, only expert views. Therefore, it is naturally easier for the UNHRC to make more forceful assertions because there is no legal obligation imposed by the Committee.¹³³ Nonetheless, that is not the case at the other regional courts that also rejected the concept of the margin of appreciation, meaning that the ECtHR could be more involved in a judicial dialogue with other regional courts, which have similar jurisdictional powers, in order to review its approach to subsidiarity.

126 *Tanganyika Law Society v. Tanzania*, 14 June 2013, ACtHPR, No. 9/2011, paras. 106.2 and 106.3.

127 *'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*, 5 February 2001, IACtHR, Series C No. 73.

128 Antônio Augusto Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (2nd edn., Santiago: Editorial Jurídica de Chile, 2006), p. 390.

129 *Hertzberg et al. v. Finland*, Human Rights Committee, No. 61/1979, para. 10(3).

130 Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (E/CN.4/1985/4, Annex), para. 27.

131 *Ibid.*, para. 28.

132 Human Rights Committee, *General Comment No. 34*, para. 36.

133 See, e.g., McGoldrick, *supra* note 123.

4.2 *Questions to the Interviewees*

The questions about issues of subsidiarity and the margin of appreciation did not intend to explore whether or not the interviewees considered the concepts appropriate, but whether there was a difference in treatment between cases related to freedom of religion or belief and other rights. The Court often grants a wide margin of appreciation in cases related to limitations to freedom of religion or belief, which is a problematic issue.¹³⁴ However, the Court has allowed the same flexibility for States regarding other rights and even in matters concerning derogation in time of emergency.¹³⁵

Since a wide margin of appreciation is not reserved for matters regarding religious issues, one might ask what the importance of the concept in this area is. The main answer seems to be related to respecting plurality. The Court has lawyers and judges from different backgrounds, which allows for exploring cases from different perspectives, but plurality also makes it difficult to impose a single interpretation in all cases concerning limitations to freedom of religion or belief from 47 States. Another point raised by the interviewees was that, when drafting a decision, the lawyers connected to the Court always check the case-law in regard to a specific issue. If the ECtHR had repeatedly granted a wide margin of appreciation to that matter, they would often follow these decisions, a point that is easily observed in *SAS v. France*.¹³⁶ The interviewees explained that, despite the Court not having a formal doctrine of precedent (meaning that the ECtHR is not bound by its previous decisions), it works hard to be coherent in its judgements. The Court has a dedicated research body—the Jurisconsult—which works to ensure the consistency of judgements in line with the jurisprudence of the Court.

Another point raised by the lawyers connected to the Court was more practical. They explained that if a case is controversial in domestic courts, and the domestic courts had given enough attention to the merits of the case, then the ECtHR tends to apply the principle of subsidiarity in order to avoid analysing the same contentious matter once again. The assumption, in this case, would be that if the matter was difficult for domestic courts to decide, then it would be even more difficult for a supranational Court to issue a judgement on the same topic.

Does the margin of appreciation affect legal certainty? It certainly does in cases related to religious matters. The Court is often predictable in affording a margin of appreciation in such cases, but not in the way it decides over a

¹³⁴ *SAS v. France*, para. 129.

¹³⁵ *Ireland v. The United Kingdom*, 18 January 1978, ECtHR, No. 5310/71, para. 207.

¹³⁶ See, e.g., *SAS v. France*, para. 129.

particular topic related to religion or belief. For example, when States invoke constitutional principles—such as secularism or *laïcité*—the Court tends to afford a wide margin of appreciation to such State.¹³⁷ According to the interviewees, these principles carry a heavy weight but do not automatically exonerate States from their obligations. Furthermore, if a State does not have these principles enshrined in their Constitution (as few jurisdictions do) but decides to use the same arguments, they would not carry the same weight for the Court. This is indeed what the Court decided in *Hamidović v. Bosnia and Herzegovina*, as Judge De Gaetano expressed in his concurring opinion:

Only in exceptional cases, such as when the principle of secularism is embedded in the constitution of a country or where there is a long historical tradition of secularism, can secularism be said to fall, in principle, within the ambit of the expression “for the protection of the rights and freedoms of others” for the purposes of the second paragraph of Article 9. The separation of church and State is no more an excuse for an aggressive form of *laïcité* than it is for promoting secularism at the expense of freedom of religion.¹³⁸

While the margin of appreciation has been a contentious issue for the Court, it has also allowed the Court to get involved in some important issues by using its subsidiary prerogatives. Some interviewees explained that if the Court is too rigid on some issues, there may be a backlash from States. This point is not unwarranted, as several countries have threatened to leave the CoE and the Court. However, the primary function of the Court is to protect human rights, not States.

The *SAS* case concerning the Burka ban in France is emblematic in this regard. The Court affirmed, in relation to Article 9 of the ECHR, that ‘the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is “necessary”’.¹³⁹ The dissenting judges pointed out that this argument goes against the common understanding in international law on the wearing of religious attire,¹⁴⁰ for instance, the UNHRC General Comments Nos. 22 and 28,¹⁴¹ as well as the views of the Committee in *Hudoyberganova v.*

¹³⁷ *Leyla Şahin v. Turkey*, paras. 31–35 and 116.

¹³⁸ *Hamidović v. Bosnia and Herzegovina*, para. 4.

¹³⁹ *SAS v. France*, para. 129.

¹⁴⁰ *Ibid.*, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, paras. 19–20.

¹⁴¹ Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, (CCPR/C/21/Rev.1/Add.4), paras. 4 and 8; Human Rights

Uzbekistan.¹⁴² The consequences of this case are disconcerting, as five countries in Europe now impose bans on full-face veils.¹⁴³

In sum, the main problem with the margin of appreciation is the extent of the concept on matters concerning limitations to the right to manifest one's religion or belief. Issues regarding religious beliefs are indeed subjective, but that does not mean that limitations are equally subjective. Quite the contrary, the role of the Court is not to decide whether the belief is appropriate or not but to deliberate upon the limitation itself. A limitation should always be exceptional, never discriminatory and clearly defined. Therefore, the margin of appreciation—in cases concerning freedom of religion or belief—should always be narrow in principle.

5 Protection of Members of Minorities and Persons in Vulnerable Situations

In this section, the impact of limitations to freedom on members of minorities and persons in vulnerable situations in the Council of Europe will be explored. This section will first examine the protection of members of minority religious groups and of new religious movements by the ECtHR. Then, the article asks whether atheists and those not affiliated with any religion have the same rights as members of religious groups. Finally, the article will explore how the Court has protected persons in vulnerable situations, such as women, children and asylum seekers.

5.1 *Members of Minority Groups*

The Court has protected members of minority groups in many cases, for instance, the protection of Jehovah's Witnesses in *Begheluri and Others v. Georgia* as well as Alevi Muslims in *İzzettin Doğan and Others v. Turkey*. In the latter case, the ECtHR reiterated that:

Committee, *General Comment No. 28: Article 3 (the Equality of Rights between Men and Women)*, (CCPR/C/21/Rev.1/Add.10), para. 13.

142 *Raihon Hudoyberganova v. Uzbekistan*, 5 November 2004, Human Rights Committee, No. 931/2000.

143 Rebecca Tan, *From France to Denmark, Bans on Full-Face Muslim Veils Are Spreading Across Europe*, The Washington Post, 16 August 2018, <www.washingtonpost.com/world/2018/08/16/france-denmark-bans-full-face-muslim-veils-are-spreading-across-europe/?tid=ss_mail&utm_term=.a6735a0c4971>, accessed.

The right enshrined in Article 9 would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of a religion of legal protection. Such limitative definitions have a direct impact on the exercise of the right to freedom of religion and are liable to curtail the exercise of that right by denying the religious nature of a faith.¹⁴⁴

Despite this strong statement, new religious movements might struggle with issues related to registration (e.g. *Church of Scientology of Moscow v. Russia*),¹⁴⁵ funding (as in the case of Neo-Pagan groups)¹⁴⁶ or the use of illegal substances as a sacrament (for example, members of Santo Daime).¹⁴⁷ While the Court is highly inclusive in its approach to recognising different beliefs, new religious movements might not be considered by the ECtHR as religious in nature and, consequently, can face more difficulties than established religious groups.¹⁴⁸

The Court has also been inconsistent in some areas, such as when dealing with religious symbols. As mentioned above, the ECtHR has often allowed States to impose limitations on Muslim women wearing the headscarf and full-face veils. The Court has even stated that the headscarf is a symbol of proselytism and repression in *Dahlab v. Switzerland*, as it declared that in a school setting ‘the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality’.¹⁴⁹ Nevertheless, when the Court was questioned about whether a crucifix in a classroom would serve the same purposes of proselytism, the ECtHR said that the influence of the crucifix could not be proven.¹⁵⁰ In addition, Judge Bonello even stated that it would be bizarre for the Court to ‘deny European heritage value to an emblem recognised over the centuries by millions of Europeans as a timeless symbol of redemption through universal love’.¹⁵¹ It is difficult to understand the discrepancy in

144 *İzzettin Doğan and Others v. Turkey*, para. 114.

145 *Church of Scientology Moscow v. Russia*, 05 April 2007, ECtHR, No. 18147/02.

146 *Ásatrúarfélagid v. Iceland*, 18 September 2012, ECtHR, No. 22897/08.

147 *Fränklin-Beentjes and CEFLU-Luz Da Floresta v. The Netherlands*, 6 May 2014, ECtHR, No. 28167/07.

148 See *Guide on Article 9 of the European Convention on Human Rights*, *supra* note 61, paras. 21–22.

149 See, e.g., *Dahlab v. Switzerland* and *Dogru v. France*, para. 56.

150 *Lautsi and Others v. Italy*, 18 March 2011, ECtHR, Grand Chamber, No. 30814/06, para. 66.

151 *Ibid.*, Concurring opinion of Judge Bonello, para. 4.2.

the treatment of religious symbols from different traditions, but that is what the Court has decided on this topic.

5.2 *Freedom of Belief of Non-Believers*

This study also examined, although briefly, whether the Court protected freedom of conscience of believers and non-believers equally. The article found that in theory, the level of protection is the same for believers and non-believers, as the Court has repeatedly asserted that:

freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.¹⁵²

The Court has, in the case of *Folgerø v. Norway*, protected the rights of humanist parents to raise their children in accordance with their worldview, thus allowing the children to be exempted from religious studies.¹⁵³ The Chamber judgment of the Court in the *Lautsi* case mentioned above concerning the crucifix in classrooms also protected the right of parents who did not want their children to study under the influence of a religious symbol that they did not share, as it stated that ‘[r]espect for parents’ religious convictions and for children’s beliefs implies the right to believe in a religion or not to believe in any religion. The freedom to believe and the freedom not to believe (negative freedom) are both protected by Article 9 of the Convention.’¹⁵⁴ Nevertheless, the Grand Chamber overturned this decision by a majority of 15 votes to 2.¹⁵⁵

5.3 *Persons in Vulnerable Situations*

Persons in vulnerable situations can include, among others, women, children, and asylum seekers. Some cases related to women have already been discussed in this article. States have a positive obligation to protect gender equality and to respect the right of individuals to manifest their beliefs.¹⁵⁶ Unfortunately, the ECtHR has not balanced these elements well, as it has allowed, in several instances, States to impose sanctions on women who wish to display religious

¹⁵² *Kokkinakis v. Greece*, 25 May 1993, ECtHR, No. 14307/88, para. 31 (emphasis added).

¹⁵³ *Folgerø and Others v. Norway*, 29 June 2007, ECtHR, No. 15472/02.

¹⁵⁴ *Lautsi and Others v. Italy (Second Section)*, 3 November 2009, ECtHR, No. 30814/06.

¹⁵⁵ *Lautsi and Others v. Italy (Grand Chamber)*.

¹⁵⁶ ECOSOC, *Report of the Special Rapporteur on Freedom of Religion or Belief and the Status of Women in the Light of Religion and Traditions*, (E/CN.4/2002/73/Add2), paras. 101–102.

attire.¹⁵⁷ In the case of *Leyla Şahin v. Turkey*, in which a student received sanctions for wearing the headscarf at university, the Court accepted the argument that the restrictions to religious attire were aimed at protecting secularism and gender equality.¹⁵⁸ However, as pointed out in the dissenting opinion of Judge Tulkens: ‘if wearing the headscarf really was contrary to the principle of equality between men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private’.¹⁵⁹ The main problem when the Court allows for such limitations is that they restrict not only the right to manifest one’s religion but also, among others, women’s freedom of movement and expression, the right to private life and non-discrimination.

While the Court has advanced gender equality in many ways,¹⁶⁰ the most restrictive measures towards the manifestation of freedom of religion or belief in Europe have been towards Muslim women. According to Rebecca Tan, several countries in Europe have considered or are considering bans on full-face veils, as illustrated in the figure below:¹⁶¹

Category	Countries
Nationwide bans or partial bans	France, Belgium, Bulgaria, Austria, Denmark, the Netherlands
Local bans in cities or towns	Spain, Italy, Switzerland
No bans, but pending legislation for local or national bans	Germany, Latvia, Finland, Luxembourg

Such policies exist despite the number of women wearing the full-face veil being extremely small. This is not surprising because the Court has repeatedly sanctioned such bans.¹⁶² However, it must be noted that the Court recently found a violation of the right to freedom of religion or belief of a woman in Belgium who was excluded from a courtroom because she refused to remove

157 See, e.g., *Dahlab v. Switzerland*, *Kurtulmuş v. Turkey* and *SAS v. France*.
158 *Leyla Şahin v. Turkey*, para. 116.
159 *Ibid.*, para. 12.
160 See, e.g., *Opuz v. Turkey*, 9 June 2009, ECtHR, No. 33401/02.
161 Tan, *supra* note 143.
162 See, e.g., *Belcacemi and Oussar v. Belgium*, 11 July 2017, ECtHR, No. 37798/13; and *Dakir v. Belgium*, 11 July 2017 ECtHR, No. 4619/12.

her headscarf.¹⁶³ This example is proof that the Court can do more to protect the freedom of women to manifest their religion or belief.¹⁶⁴

Regarding children, the Court has protected the parents' right to educate their children in accordance with their beliefs, as provided for in Article 2 of Protocol 1 of the ECHR. Nonetheless, as argued by Anat Scolnicov, '[i]nternational law has, for a long time, protected religious freedom and religious choice as a right of the family, rather than a right of the child.'¹⁶⁵ The Court has followed this approach as it seems to disregard Articles 3(1) and 14(1) the Convention of the Rights of the Child (CRC). Article 3(1) provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' While Article 14(1) declares, moreover, that 'States Parties shall respect the right of the child to freedom of thought, conscience and religion.'¹⁶⁶ In the *Dogru* case mentioned above, in which a student was expelled from school for wearing a headscarf, the Court found such measures proportionate. Nonetheless, it is difficult to justify how such actions would be in line with the CRC. The *Dogru* case is not unique, as limitations to the rights of children to manifest their religion or belief in school contexts are often upheld by the Court.¹⁶⁷

The final vulnerable group to be analysed in this article is asylum seekers. According to the Refugee Convention, individuals who have a well-founded fear of being persecuted on grounds of religion may apply for asylum in other countries.¹⁶⁸ If the request for asylum is rejected, States can expel foreigners to their country of origin, as long as it does not violate the principle of *non-refoulement*. The principle of *non-refoulement* prohibits States from expelling 'a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'¹⁶⁹ Based

163 *Lachiri v. Belgium*, 18 September 2018, ECtHR, No. 3413/09, para. 48.

164 See further Nazila Ghanea, *Women and Religious Freedom: Synergies and Opportunities* (Washington D.C.: USCIRF, 2017).

165 Anat Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* (London: Routledge, 2011), p. 185.

166 *Convention on the Rights of the Child* (1577 UNTS 3).

167 See, e.g., *Kervanci v. France*, 04 December 2008, ECtHR, No. 31645/04; *Ranjit Singh v. France*, 30 June 2009, ECtHR, No. 27561/08; *Jasvir Singh v. France*, 30 June 2009, ECtHR, No. 25463/08; *Ghazal v. France*, 30 June 2009, ECtHR, No. 29134/08; *Gamaleddyn v. France*, 30 June 2009, ECtHR, No. 18527/08; *Bayrak v. France*, 30 June 2009, ECtHR, No. 14308/08; and *Aktas v. France*, 30 June 2009, ECtHR, No. 43563/08.

168 *Convention Relating to the Status of Refugees* (189 UNTS 137), art. 1(A)(2).

169 *Ibid.*, Art. 33(1).

on this principle, some applicants who were threatened to be expelled have correctly argued that such action could lead to a violation of the prohibition of torture, as well as their rights to life and freedom of religion or belief. The Court has often avoided deliberations on the right to freedom of religion in these cases, but these judgments provide an interesting insight into how some judges consider the right in question.

In *FG v. Sweden*, the applicant declared that he had converted to Christianity in Sweden and would likely suffer persecution if deported to Iran. The Grand Chamber said that there could be a violation of the right to life and the prohibition of torture if the applicant were returned to Iran without an assessment of the consequences of his religious conversion.¹⁷⁰ Despite this favourable decision, Judges Jäderblom and Spano expressed that as long as the applicant manifested his religious views “discreetly”, his life would not be at risk, ‘for a convert who keeps a low profile, in the sense that he is not proselytising or does not manifest his Christianity in a political context, but attends home services and keeps religious materials in the home, there is not normally a risk of ill-treatment of a degree or nature sufficient to engage Articles 2 and 3.’¹⁷¹ Judge Sajó rightly contended that a separate analysis of the right to manifest one’s religion should take place in the instant case.¹⁷² Judges Ziemele, De Gaetano, Pinto de Albuquerque, and Wojtyczek issued a separate joint opinion criticising the decision, declaring:

we cannot accept the respondent State’s assumption that the applicant would not be persecuted in Iran because he could engage in a low-profile, discreet or even secret practice of his religious beliefs. Not only is the external manifestation of one’s faith an essential element of the very freedom protected by Article 9 of the Convention, but at least—and certainly—in the case of Christianity, bearing external witness to that faith is “an essential mission and a responsibility of every Christian and every Church”.¹⁷³

This joint opinion approaches limitations to substantive rights seriously. It provides not only a discussion based on the facts but also engages with the jurisprudence of the Court and dialogues with international law documents

¹⁷⁰ *FG v. Sweden (Grand Chamber)*, 23 March 2016, ECtHR, No. 43611/11, para. 158.

¹⁷¹ *Ibid.*, opinion of Judge Jäderblom, joined in respect of part 1 by Judge Spano, para. 1.

¹⁷² *Ibid.*, Separate opinion of Judge Sajó.

¹⁷³ *Ibid.*, Joint separate opinion of Judges Ziemele, De Gaetano, Pinto De Albuquerque and Wojtyczek.

regarding freedom of religion or belief, such as a report from the UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt and the UNHRC General Comment 22.¹⁷⁴ This was, however, the minority's opinion and not regarded by the Court in more recent cases. In *A v. Switzerland*, the Court considered another case of newly converted Christians being deported to Iran as inadmissible. The Court explained that the applicant would only be at risk in Iran 'if he proselytised or attracted public attention in another way', 'which was not the case for the applicant, who was an ordinary member of a Christian circle'.¹⁷⁵ Thus, in practice, the Court allowed the deportation because the applicant was not too vocal about his faith and was not proselytising.

6 Conclusions

While most scholars on freedom of religion or belief argue that there should be a high threshold for the imposition of limitations to freedom of religion or belief, the practice of the Court shows that, in reality, this rarely happens. The present article explored this issue by analysing the case-law of the ECtHR and on the basis of interviews with lawyers connected to the Court.

As demonstrated in section 2, the Court is much more formalistic than expected in its analysis of the so-called three-part test (legality, legitimacy, and necessity). There are three main reasons that often result in the Court's succinct analysis of some elements of this test. First, the Court has a massive backlog of cases, forcing it to issue judgments quickly. Second, the principle of judicial economy is interpreted in a manner that pushes the Court to focus only on the most noticeable issues at hand. Therefore, if a case has some problems concerning legality but is clearly disproportionate, the focus would shift to the necessity and proportionality aspects, rather than legality or legitimacy. The third reason is related to the principle of subsidiarity. The Court appears to be more comfortable making statements about the proportionality of specific restrictions than the quality of the laws of a particular country or their legitimate aims, which subsequently leads to a more subjective analysis of cases.

The ECtHR could benefit from a stricter approach to the three-part test, especially concerning legality and legitimacy. States have to fulfil all the requirements of the three-part test in order to impose a limitation on freedom of religion or belief. Therefore, if a State fails one of these requirements, the Court could find a violation of the right in question directly, and subsequently

¹⁷⁴ *Ibid.*, footnote 28.

¹⁷⁵ *A v. Switzerland*, 19 December 2017, ECtHR, No. 60342/16, paras. 14 and 43.

avoid long deliberations over other conditions, thus saving time and resources. Consequently, a stricter approach to this test could lead to more efficiency for the Court, while at the same time, providing greater protection for persons to manifest their beliefs.

Another point of contention concerning limitations to freedom of religion or belief, which should be reconsidered by the Court, is the topic of subsidiarity and the concept of the margin of appreciation. The main problem here is not the concept itself but how it has been applied in cases concerning limitations of the right to manifest one's religion or belief. The Court has assumed that issues regarding limitations to the manifestation of religion or belief are inherently subjective, thus automatically granted States a wide margin of appreciation. Questions regarding religious beliefs are indeed subjective, but that does not mean that limitations are equally subjective. On the contrary, the role of the Court when deciding on limitations to a qualified right is much more objective, as it concerns only a specific interference—to a particular right—in a given context. Therefore, the Court should have a neutral stance before determining the extent of the margin of appreciation afforded to States in cases concerning limitations to freedom of religion or belief.

The final section demonstrated the negative impact of the ECtHR decisions on members of minorities and persons in vulnerable situations. It also demonstrated the lack of consistent jurisprudence when dealing with limitations to freedom of religion or belief in matters regarding religious symbols. For example, the Court has allowed States to impose limitations on Muslim women who chose to wear the headscarf at work or in school because of its “proselytising effect”, while it allowed States to deport newly converted Christians to Iran because they did not proselytise enough. Naturally, every case is unique, but it was evident in the cases concerning asylum seekers that the dissenting judges considered that more needed to be done to protect the right to freedom of religion or belief of persons in vulnerable situations. Moreover, what makes the opinion of the dissenting judges so powerful was the fact that they connected the case-law of the Court with a range of international human rights documents from other organisations, something that should be encouraged at the Court.

In conclusion, the Court has undoubtedly been a force for good in Europe. It has diligent lawyers and judges who are genuinely committed to promoting and protecting human rights in Europe. However, there is much room to improve, and the area of freedom of religion is one that requires an extra effort from the Court in order to be more coherent in its judgments. Naturally, the Court cannot remedy this issue alone. States should provide a higher budget to the Court and not pressure the ECtHR to allow them an even wider margin

of appreciation. Applicants need to draft their applications carefully, read the guides provided by the Court to be informed about its jurisprudence and present sound arguments based on international human rights law to advance this field altogether. Religious and non-religious organisations should also look beyond their immediate interests and support, whenever possible, applicants that do not share their same beliefs. If all these actors work towards the protection of freedom of religion or belief for everyone, it will be much easier for the Court to issue fairer judgments on issues regarding limitations to freedom of religion or belief.

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