International law and freedom of religion and belief
Origins, presuppositions and structure of the protection framework

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Introduction

The twilight of the idols has been postponed. For over two centuries, from the American and French revolutions to the collapse of Soviet Communism, political life in the West revolved around eminently political questions. We argued about war and revolution, class and social justice, race and national identity. Today we have progressed to the point where we are again fighting the battles of the sixteenth century – over revelation and reason, dogmatic purity and toleration, inspiration and consent, divine duty and common decency. We are disturbed and confused. We find it incomprehensible that theological ideas still inflame the minds of men, stirring up messianic passions that leave societies in ruin. We assumed that this was no longer possible, that human beings had learned to separate religious questions from political ones, that fanaticism was dead. We were wrong.

(Lilla 2007: 3)

This volume deals with the many-sided relation between law and religion. The various chapters identify areas of concern from the perspective of religious freedom and issues that deeply affect believers and non-believers alike, but regarding which no consensus exists. International law does not self-evidently resolve matters and make interpretative conflicts go away. What it does provide is a platform for critical scrutiny and a particular vocabulary for framing these matters. The results of the scrutiny will please some parties to a conflict more than others.

In relation to the other contributions to this volume, the aim of this chapter is to offer something by way of a philosophical, theological and historical elucidation of the origins and structure of international legal provisions granting the right to freedom of religion and belief, which international scrutiny is based on. The reason is that without such a clarification, it is difficult to understand some of the tensions that currently surround the right to freedom of religion and belief and make its implementation difficult. Furthermore, the chapter will focus on
identifying some problem areas and challenges we need to face in the attempt to protect freedom of religion and belief in a way that is both effective and able to include people who hold different conceptions of what religion and belief are. The chapter will finally offer some tentative ideas for ways forward in coping with these challenges.

**The new prominence of religion and belief**

For a long time, and as the headpiece of this chapter makes clear, the role and place of religion in personal and societal life was considered a fairly settled issue in the West, if not always in practice, at least in theory. In modern Europe, religion was seen as a largely private and individual matter even if principled legal disestablishment of religion did not rule out different religion–state institutional arrangements, or recognition of collectivist and institutional features of faith.¹

Today, many talk of a new visibility of faith and religion is viewed as a factor to take into account in seeking to comprehend societal patterns, human interaction and political action both locally and globally. What is more, sociologists have pointed out that ‘the sacred’ has increasingly freed itself from the control of institutionalized religion. ‘The religious’ has taken on new and individualized forms in European societies and elsewhere.

The headpiece identifies an instinctive reaction to religious diversity and societal changes taking place as a state of distress and confusion. In a similar vein, Martha Nussbaum titles a recent book *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*. In view of the apprehension and bewilderment and what she identifies as ‘the new religious intolerance’ that, for example, is expressed in bans on veiling and the building of minarets, Nussbaum asks us to self-critically scrutinize our views and attitudes and the roots of ill-considered ideas and unjustifiable biases. The goal is the realization of a more accommodating and respectful society characterized by ‘a commitment to ample and equal liberty’ in religious matters (Nussbaum 2012: 68).

Law must allow to all what it allows to some. Still, Nussbaum goes further than this, to her mind, Lockean position. She advocates an accommodationist approach that also allows for exceptions to generally applicable law on religious grounds in cases where the people in question are ‘severely burdened’ by a particular law and where there is no compelling state interest, like ‘peace’ or ‘public safety’ that can override individual interests. Nussbaum here proposes a broad reading of the concept of conscience that includes both religious and non-religious believers, agnostics and atheists. She is critical of certain US Supreme Court judgments for their failure to properly assess the extent of religious liberty, but on the whole she finds that the US constitutional principles are in order.² The problem lies elsewhere, as we saw above, on the ‘ethical’ plane of attitudes and misperceptions.

Nussbaum’s compatriot Winnifred Fallers Sullivan has less confidence in the national and international legal machinery being able to appropriately address matters of religious freedom and situations where exemption is sought from generally applicable law on religious grounds. Judges (and courts, legislators and administrative decision-makers) do not have the insight necessary to adequately deal with matters of faith. In fact, actual religious freedom is unattainable because of the fluidity of the sacred and in consequence the impossibility of a clearly delineated concept of religion on the basis of which to administer justice and give adequate protection to

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¹ For an overview of contemporary legal regulation and recognition of religion in Europe, see Doe 2011.

² Nussbaum 2012: 90–1, 120. The same cannot be said for Europe according to Nussbaum.
According to Sullivan, it is impossible to ‘justly [enforce] laws granting persons rights that are defined with respect to their religious beliefs or practices’ (Sullivan 2005: 8). She would prefer to promote the accommodation of difference generally instead of seeing religion as a special case with particular legal status (Sullivan 2005: 149–50).

Still, international law offers a platform for scrutiny for persons who seek recognition for their religious standpoints and who challenge the actions of states and the downsides of established majoritarian societal patterns that continue to mark national discourse, including legal discourse, despite homogeneity in many places being partly fictitious. International law, including its explicit provisions on freedom of religion and belief, is a platform that currently holds much appeal, despite the hesitations of Sullivan and many others. Human rights serve as an authoritative voice and a language for utopia in times of ‘post-modern insecurity’. They have achieved a dominant position when it comes to envisioning human life.

We usually imagine human rights as above and beyond mundane politics, which is their utopian feature. We also attach certain expectations to human rights in their legal configurations. And sure enough, neutrality or impartiality is intrinsic to our image of both international and national law. The same is the case with our understanding of law’s relationship to religion. Even so, law sets out a framework of meaning and shapes our vision of human life and behaviour. Law makes sense of some things while downplaying the significance of other things. Beyond addressing disputes that arise, and regulating societal life, law is ‘a species of social imagination’ (Rosen 2006: 8–9, 11–12; Slotte 2010: 186–7). This is also what Sullivan wants us to be critically aware of.

International human rights law affirms the value of religion to human existence. The understanding of ‘belief’ and ‘religion’ is emphasized as broad, and protection should be generous. By way of legally binding provisions such as Article 18 of the International Covenant on Civil and Political Rights (hereafter ICCPR) and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR), various supervisory bodies and a special rapporteur, international law seeks to protect the religious freedom of individuals and groups, the freedom to believe or not to believe, and the freedom to manifest religion in private and publicly, individually and together with others. People must be free to seek the truth and this can take several different paths and expressions that are equally worthy of protection.

However, because international human rights law is formulated in very general terms we have to study the application of the law to understand what the law is taken to mean. Legal rights have ‘no meaning independent from the way [they are] interpreted by the relevant authority’ (Koskenniemi 2001: 36). And in practice, the institutional response to religious phenomena has frequently been disappointing; at least as far as the European human rights regime is concerned. It comes across as narrow-minded and overly cautious. Newer and more individualized life

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3 Sullivan 2005: 1–4. They are not simply incompetent, it is also improper for judges to take on the task of passing judgment on religion (Sullivan 2005: 100).
4 See Sullivan 2005: 3, 101, who observes how definitions of religion function as exclusionary. Thus, a clear legal definition of religion will not solve the problems facing the protection of freedom of religion and belief, even if it may limit the scope of discretion.
5 As is stated in General Comment No. 22, paragraph 2 of the Human Rights Committee, and often repeated elsewhere, the protection covers ‘theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief’. Moreover, ‘[t]he terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.’
stances, like Wicca, have been treated with caution and their manifestation only over time acknowledged as entitled to legal protection under the banner of freedom of religion and belief, if at all.\(^6\) Muslim women and girls face a continual uphill struggle trying to convince the European Court of Human Rights that, indeed, their dress code does not pose a threat to the democratic state, even in a country with a secularist state ideology such as France or Turkey.\(^7\) There are other similar cases.

Within the UN context, a brief look at the historical development of international legal instruments in the twentieth century likewise reveals recurring discussions about whether or not people should be allowed to change faith, seek to convince others about the truthfulness of their own religious path, scepticism about protecting non-religious belief, and general confusion and outright disputes regarding how to delineate ‘religion’ and ‘belief’ in the first place.\(^8\)

There are many reasons why human rights institutions struggle when they try to handle the sacred in all its fluidity. However, it is clear that in this exercise, they place institutional religion in an important interpretative position. Moreover, this chapter will suggest that, at least as far as European human rights institutions are concerned, a particular notion of religion has formed the blueprint for their engagement with the sacred, or what Sullivan calls ‘lived religion’,\(^9\) limiting their understanding both of religious phenomena and of the institutions themselves. Human rights institutions have been biased. As Sullivan has put it in a different context: ‘The vaunted “freedom” of religion is bounded, and in a very particular way’ (Sullivan 2005: 153–4).

Taking faith seriously

The European Court of Human Rights (hereafter the Court) does not see it as its mission to determine what is or is not religion.\(^6\) It also refrains from assessing the so-called legitimacy of particular beliefs. What it considers taking a stand on is state interventions in people’s lives and whether these interventions are justified. This is determined on the base of a fixed set of criteria. State interference with a person’s freedom to manifest his or her faith must – as it is said in Article 9 of the ECHR – be prescribed by law, and must be necessary in a democratic society in the interest of public safety or for the protection of public order, health, morals, or the rights and freedoms of others. Furthermore, it is not enough that there be a legitimate aim and a legal basis for the interference; the interference must also be proportionate to the legitimate aim pursued.

Most of the time, the Court passes swiftly over the issue of whether or not something is ‘religious’ within the meaning of Article 9(1) and then directs its attention to assessing defensible limitations to religious manifestations as indicated in Article 9(2) (Ahdar and Leigh 2005: 122–3; Slotte 2011b: 68; Ferrari 2012: 23). However, explicitly abstaining from defining religion (and

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6 See, e.g., Evans 2001: 57–9. In the case of X v. United Kingdom, 4 October 1977, No. 7291/75 (dec.), the Commission of Human Rights did not, for example, recognize Wicca as a religion.


8 For an overview of the discussions regarding Article 18 of the UDHR, Article 18 of the ICCPR, as well as the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, see Evans 1997: 183–207, 231–45.

9 For terminology, see Sullivan 2005: 10.

10 Slotte 2012: 8. The following sections in part elaborate ideas also explored in Slotte 2011a, 2011b and 2012.
belief), and thus presumably favouring an inclusive reading of the phenomenon, does not mean that the Court’s work is free from some implicit notion of religion. Despite explicit non-policy as regards ‘religion’, the Court makes certain assumptions that guide its doings.

How does the Court conceptualize ‘religion’? This question can be approached by way of an example. The case of Eweida and Others v. the United Kingdom concerned four people who challenged the restrictions put on their freedom of religion and belief in the places where they worked. They claimed that ‘domestic law failed adequately to protect their right to manifest their religion’. In two of the cases, at stake were the dress codes imposed by a private employer, British Airways and a State-run hospital. In both of these cases, the women in question had not been allowed to wear a Christian cross visibly around their necks. The two other cases involved a Christian public registrar who for religious reasons refused to officiate over civil partnership ceremonies for same-sex couples as well as a Christian counsellor who worked for a national private organization that provided sexual therapy and a relational counselling service. The counsellor on religious grounds was unwilling to provide sexual therapy for same-sex couples.

There are many important aspects to this case, which concerns the extent to which employers must accommodate religion and belief. This chapter will nevertheless concentrate on how implicit ideas of religion and belief impacted the Court when it decided on the limits of justified state interference with religious manifestation.

The case indicates both continuity and a possible slight modification in the Court’s stance regarding faith. Studying the case law of the Court, it transpires that European human rights law sets out to protect religious convictions that are embraced with ‘seriousness’, which are ‘important’ and of a certain ‘intensity’. In the case of Eweida and Others, the Court also underlined, as it had done repeatedly in the past, that the ‘right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance’. If this benchmark is satisfied, the State, as it has to be neutral and impartial, has no right to assess the legitimacy of the beliefs in question or the ways in which they are expressed.

Carolyn Evans has in the past criticized this focus of the Court on theoretical systems and intellectual coherence as regards the phenomenon of religion. She has also pointed out that that which unites various religious and other life-views, the common and well-known, often ends up as an element in the assessment of whether something deserves protection (Evans 2001: 63, 65, 75 and 202. See also Ahdar and Leigh 2005: 124; Evans 1997: 290–2). As a result, established traditional expressions of religion become an exclusionary point of reference. In a way, it makes

11 Eweida and Others v. the United Kingdom, 15 January 2013, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 3.
13 Eweida and Others v. the United Kingdom, para. 81; Bayatyan v. Armenia, 7 July 2011, No. 23459/03 (GC), para. 110; Leela Förderkreis e.V. and Others v. Germany, 6 November 2008, No. 58911/00, para. 80; Jakóbski v. Poland, 7 December 2010, No. 18429/06, para. 44.
14 Eweida and Others v. the United Kingdom, para. 81; Manoussakis and Others v. Greece, 26 September 1996, No. 18748/91, para. 47; Hasan and Chausiv v. Bulgaria, 26 October 2000, No. 30985/96 (GC), para. 78; Refah Partisi (the Welfare Party) and Others v. Turkey, 13 February 2003, Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (GC), para. 1.
sense to look at the shared views of a group. It can clarify some matters. But the burden of proof for some believers can become high, particularly for those belonging to movements that are relatively new or small or loosely organized. Moreover, when ‘individuals have . . . to supply an extensive account of their beliefs,’ Nussbaum observes, it ‘gives unfair advantages to the articulate and educated’ (Nussbaum 2012: 79). And what happens when the group you belong to is greatly divided on a particular matter, there being various interpretations available? In fact, doctrines, rituals, texts and other religious markers rarely retain an exclusive stable meaning over time and place.

In sum, ideas about seriousness/sincerity as well as ‘legally defined orthodoxy’, to use Sullivan’s terms (Sullivan 2005: 7), have played a role and continue to be factors determining the level of protection that is granted to persons in matters of religion and belief. For the purpose of determining what falls within the scope of the ECHR, religion has been seen rather as having ‘dogmas and rules and texts and authorities’ than alternatively ‘a field of activity, one in which an individual’s beliefs and actions’ are ‘the result of a mix of motivations and influences, familial, ecclesiological, aesthetic, and political’.16

However, even when beliefs, be they religious or non-religious, attain the necessary ‘level of cogency and importance’, not every act ‘inspired, motivated or influenced by it constitutes a “manifestation” of the belief’. If an act or an omission to do something cannot be viewed as a direct expression or alternatively is ‘only remotely connected to a precept of faith’ then it enjoys no protection under Article 9(1).17 Hence, so as to ‘count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief,’ for example, through forming ‘part of the practice of a religion or belief in a generally recognised form’.18 This too is nothing new, and the respondent government in the case of Eweida and Others pointed this out in its defence.19

Before the case of Eweida and Others, the so-called ‘Arrowsmith test’ helped the Court (and earlier also the European Commission of Human Rights) to determine the scope of protection and was based on the assumption that ‘the term “practice” as employed in Article 9(1) does not cover each act which is motivated or influenced by a religion or belief’.20 Commentators have critically read this as meaning that applicants generally had to show that their activity was required by their faith or belief.21 The centrality of ‘compulsion’, of rather protecting something that is seen as a duty and mandated by a religion than something merely inspired by faith, also shows how the Court has looked for an ‘authority above the level of the individual’ in deciding cases and assessing the importance of the issues at stake.22 This is another instance where institutionalized religion has held a crucial role in clarifying what constitutes the ‘core’ of a person’s faith and as such enjoys stronger protection. Yet, within different ‘religions’, the idea of mandates and duties can hold a more or less central place, and the language in which a person conceptualizes commitment may differ a lot.

17 Eweida and Others v. the United Kingdom, para. 82; Skugar and Others v. Russia, 3 December 2009, No. 40010/04 (dec.); Arrowsmith v. the United Kingdom, 5 December 1978, No. 7050/75 (Commission), para. 71; C. v. the United Kingdom, 15 December 1983, No. 10358/83 (dec., Commission); Zaoui v. Switzerland, 18 January 2001, No. 41615/98 (dec.).
18 Eweida and Others v. the United Kingdom, para. 82.
19 Eweida and Others v. the United Kingdom, para. 58. See also, e.g., C v. United Kingdom, No. 10358/83.
21 See e.g. Evans 2001: 115–25; Uitz 2007: 29.
However, in the case of Eweida and Others, the Court did seem to make a modification with regard to its earlier reasoning. The Court now asserted that protection under Article 9 also included acts where there exists ‘a sufficiently close and direct nexus between the act and the underlying belief’. This ‘must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.’

Thus, it is, for example, not generally considered mandatory for a Christian to wear a cross, and many followers of Christianity do not. However, it was beyond doubt that while Ms Eweida was not fulfilling a duty, she was expressing her faith by wearing a crucifix. During the trial, third party interveners also criticized the ‘idea of a “mandatory requirement” … [as] too high and overly-simplistic’, asking instead for a more ‘subjective’ assessment of the importance of the particular type of manifestation to the person concerned. The Court’s eventual stance seems to give some acknowledgment to this.

The judgment in the case of Eweida and Others consequently seems to testify to a modification in what is required in terms of burden of proof when it comes to deciding what qualifies as religion and a manifestation of religion for the purpose of Article 9. However, while the idea of obligation has lost centrality in the interpretation, applicants still need to show that they do not simply seek protection for their ‘personal preferences’.

While the case indicates that the connection of one’s religious considerations to institutionalized religion has declined in importance, the references to sincerity, cogency and coherence remain.

This reference to sincerity – the difficulties of cogency and coherence have been discussed above – is, again, not entirely inappropriate as such. The approach seems more inclusive as regards adherents of new and non-traditional forms of religion and belief, thus avoiding some of the earlier pitfalls. The Court acknowledges that people’s motives for acting can differ and justifiably so. ‘Freedom’ is not a self-evident concept internal to religion and gets its meaning within the religious context in relation, for example, to the idea of there being a ‘truth’. However, we want to protect freedom legally so that people can be free to seek the truth. Therefore, without wanting to take a stand on what is the ‘truth’ in a theological sense, what we set out to protect in international law is those (religious and non-religious) convictions that are ‘sincere’, that is, hold a certain foundational importance in being true for the person concerned.

‘True’ in the sense that the person embraces a belief comfortably and desires it to guide his or her life and action, and also ‘sincere’ in the way that the person’s avowal of his or her religious stance tells ‘the truth’ about him or herself. The person is not seeking to mislead or deceive others. We do not expect hypocrisy. Nor do we readily accept an ironic posture here.

Nevertheless, Malcolm D. Evans has in the past remarked that established religions are seen as more ‘serious’ and as a result it is easier for persons belonging to these religions to convince the Court of the sincerity of their stance and their right to manifest their faith (Evans 1997: 290–1)

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23 Eweida and Others v. the United Kingdom, para. 82 [emphasis added]; Cha’are Shalom Ve Tsedek v. France, 27 June 2000, No. 27417/95 (GC), paras. 73–74; Leyla Sahin v. Turkey (GC), paras. 78 and 105; Bayatyan v. Armenia (GC), para. 111; Skugar and Others v. Russia; Pichon and Sajous v. France, 2 October 2001, No. 49853/99 (dec.).

24 Eweida and Others v. the United Kingdom, para. 76.

25 A problem that does continue to present itself is that a person may feel very strongly about performing a particular act but this act cannot be clearly led back to a particular ‘belief’. In the past, the Court has ruled against applicants in such a case. Evans 1997: 293; Svensson 2006: 235–6.

26 Hence, notwithstanding the multitude of ways in which the sacred takes form in today’s world, a fairly stable religious self is required as a matter of law.

27 It is not religion as such that is important here to the justification of freedom, but that people should be able to pursue their own way of life. Cf. Svensson 2006: 234.
It is therefore to be hoped that the case of Eweida and Others indicates a lasting alteration in terms of what the Court is able to acknowledge as a ‘serious’ religious stance.

Moreover, such a focus is still demanding on applicants. Some investment in supplying the ‘facts’ of the case can justifiably be expected of applicants. It can also frankly be asked how anyone but the person him- or herself can actually scrutinize the inner life of the person in question. However, in the context of human rights adjudication, Carolyn Evans has argued that it is not the individual who should have to show that his or her beliefs are serious, states being the ones upon whom the burden of proof lies to present evidence of unwarrantable insincerity aimed at securing some advantage or benefit.  

28 See also Ahdar and Leigh 2005: 184–9 for an attempt to formulate such an approach to cases involving matters of freedom of religion and belief.

The belief – action dichotomy

Given the emphases that the Court (and also the European Commission of Human Rights before that) has made in its case law, religion (however broadly construed) is indirectly valued as a particular way of thinking.  

Protection is above all related to this. It is this ‘core’ of religion that enjoys so-called absolute protection. As the Court also says in the Eweida and Others case: ‘Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified.’  

This freedom may not be restricted. People should be free to believe and not to believe. Indoctrination is prohibited and no one can be forced to reveal their beliefs. This so-called forum internum is a ‘hands-off’ area for States.

Additionally, religion comes across as a phenomenon in which a set of beliefs can relatively easily be separated from religious conduct of various kinds. In the case where an intimate link between belief and action/manifestation is underscored, as in other cases where it is said that a certain action must be a direct expression of a belief or – as before – be necessitated by it, the presupposition is that we can in fact clearly separate belief from action. The same assumption lingers in the background in situations where the Court contends that manifestations will not automatically be protected, as when an action is only motivated by, is contingent upon, or is remotely associated with a belief.

This distinction has implications for the entire reasoning about matters of faith and freedom of religion and belief. Article 9 of the ECHR is structured in accordance with this distinction. The distinction is consequently imperative in the judgments of the Court. Through this distinction we are presented with an understanding of a religious person whose faith is an inner state of mind clearly distinguishable from manifestations of faith, such as rites and rituals, symbols, clothing, teaching or observance of a particular diet. In contrast to the forum internum, the so-called forum externum and the right to manifest one’s faith is qualified. Acts of faith may have consequences for other people’s rights as well as societal

28 See also Ahdar and Leigh 2005: 184–9 for an attempt to formulate such an approach to cases involving matters of freedom of religion and belief.

29 The Court’s focus on coherence when determining whether a religious or non-religious belief deserves protection likewise reveals the idea of a relatively stable set of beliefs.

30 Eweida and Others v. the United Kingdom, para. 80.

31 See, e.g., Arrowsmith v. United Kingdom, para. 19.

32 See, e.g., Kokkinakis v. Greece, para. 31: ‘While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion”. Bearing witness in words and deeds is bound up with the existence of religious convictions.’
International law and freedom of religion and belief

Based on this presumed division, which is equally fundamental to the UN legal framework (as in Article 18 of the ICCPR) and institutions dealing with religion and belief, we can then categorize manifestations by calling them ‘necessary’, ‘generally recognized’ or the like, and subsequently decide that they are more or less worthy of protection by international human rights law. Hence, the possibility of separating belief and action is a fundamental prerequisite for law being able to deal with the phenomenon of religion, as when recognizing a need to balance various ‘interests’ (cf. Evans 1997: 315; Moens 1989–1990: 197). People have an absolute or unqualified right to hold beliefs, but their manifestation can legitimately be restricted.

This dichotomy can be challenged as artificial on the basis that belief and action cannot be neatly distinguished and ‘confined in logic-tight compartments’.

As H. A. Freeman pointedly observed back in 1958: ‘great religion is not merely a matter of belief; it is a way of life; it is action.’ What is more, ‘one of the “most scathing rebukes in religion is reserved for hypocrites who believe but fail to so act”’ (Freeman 1958: 826; as quoted in Moens 1989–1990: 215). This kind of inaction is often associated with theological notions of sin, a displeasing lukewarm commitment, or what Christ called ‘the weak flesh’ (the Bible, Matthew 26:41). The dichotomy belief-action also seems contingent on an idea of ‘choice’ as an actual possibility in matters of faith, an idea which can be studied and critically discussed in a number of ways as well.

Nevertheless, emphasizing that a distinction can be made between convictions held and their manifestation enables human rights bodies, for example, to tend to the need to keep religion out of certain public spaces as far as possible, acknowledging the negative right of others to freedom from religion and other rights, while presumably still guaranteeing freedom of conscience and protecting the ‘core’ of faith and ‘accommodating’ religion to some extent. In the case of Ms Ladele, an applicant in the case of Eweida and Others, the European Court decided that her freedom to act in accordance with her faith in the workplace by refusing to conduct marriage ceremonies for same-sex couples was at odds with the rights of others not to be discriminated against on the basis of sex and her employers’ equality and equal opportunity policies.

The belief-action dichotomy has not been ‘invented’ by international law or bodies scrutinizing governmental practice. ‘A discussion of the dichotomy, coupled with an uncritical assumption of its usefulness, can also be found among philosophers and political theorists of considerable stature,’ such as John Stuart Mill or Isaiah Berlin (Moens 1989–1990: 202; Mill 1962: 75; Berlin 1958: 9).

Similarly, Rex Ahdar and Ian Leigh have pointed out that the belief-action distinction is ‘[t]he earliest and perhaps most straightforward approach to limiting religion,’ having been advanced by both John Locke and Thomas Jefferson (Ahdar and Leigh 2005: 160–1).

In theory, there would be no problem if the criteria discussed in this chapter were non-discriminatory. Freedom, however, is a relational concept and a situated concept. We talk about freedom to and freedom from something or someone and freedom in relation to something and someone, but rarely do we talk about freedom in an abstract sense. This means that any

34 ‘Choice’ is repeatedly asserted as a vital aspect of freedom in matters of religion and belief under international law but when read as including ‘change’ it has remained a matter of controversy internationally. For a more comprehensive discussion of the role that the idea of ‘choice’ plays in the conceptualization of the right to freedom of religion and belief under the ECHR, see Edge 2000.
35 The Court has been criticized for its judgment regarding Ms Ladele’s case, as she took up employment at a point when marrying same-sex couples did not form part of her work description.
understanding of freedom will always be conditioned. But, again, the criteria mentioned above appear to fail to capture the diversity of ways in which the sacred manifests itself, the manifoldness of lived religion. Put in another way, the distributive outcomes of the Court’s reasoning regarding religion and belief affect believers asymmetrically. As Silvio Ferrari remarks in light of the results of his recent quantitative study of the case law under Article 9, it is possible that the Court has developed its own conception of religion (and freedom in relation to matters of faith) which fits better with some religions than with others (Ferrari 2012: 20).

**Expressing particular sensibilities?**

Ferrari’s observation accords with other recent findings suggesting that the Court rationalizes religion in a specific way through its use of particular categories and distinctions, like those discussed above. *Forum internum-forum externum*, private–public, political–economic (and religious), and the ‘religious-secular’ are all key distinctions in the international legal imagination that indicate ‘European experiences and conceptualizations’.

The ways in which human rights institutions (and not simply European ones) talk about religion and thereby incessantly employ categories and distinctions mentioned in this chapter, and other ones, have precedents in modern thinking and Enlightenment thought.

The references above to historical influential theorists who have relied on the belief-action dichotomy in their lines of reasoning regarding religious liberty should encourage investigation into the conceptual framework and lead us to historicize the categories at work. It is also important to note that, if critics are to be believed, these categories and distinctions seem largely expressive of ‘protestant religious sensibilities’, to use Sullivan’s terms, and do not cater to the array of ways in which the sacred can find expression and the variety of contemporary senses of religious personhood.

The Court seems to rely on a so-called post-reformation, almost ‘pietistic’ understanding of religion. Religious faith is characterized as something largely private, individual and voluntary. It is a personal matter. For the most part, religious faith is understood as being analogous to various kinds of intellectual conviction (Evans 2001: 63, 75–6; Evans 2008: 313). As we saw above, the Court puts greater emphasis on views than acts, something which, according to Sullivan and others, is ‘a typically protestant (small “p”) focus’. As long as your opinions, or ‘beliefs’, are safeguarded, things are by and large fine (Sullivan 2005: 92).

Similarly, in his book *Sincerity and Authenticity*, Lionel Trilling identifies the idea of ‘sincerity’, which is so central to the Court’s reasoning, as ‘a state or quality of the self’ that ‘at a certain point in its history the moral life of Europe added to itself [as] a new element’ (Trilling 1973: 2). The idea was that by being true to one’s own self, one could not ‘be false to any man’. While Trilling points out that sincerity in the twentieth century in which he is writing is ‘a mere intensive’—‘I sincerely mean that!’—having lost much of its import during the preceding four centuries of European history (Trilling 1973: 6); in law, the criterion of sincerity does retain a role in assessing...
‘the degree of congruence between feeling [belief] and avowal’. A moral attitude is captured here, an absence of pretence and ulterior motives.

This outlook on matters of faith influences the perception of the societal ambitions of religious life stances. Religion — “true” religion some would say — on this modern protestant reading . . . [is] understood as being private, voluntary, individual, textual, and believed. Public, coercive, communal, oral, and enacted religion, on the other hand . . . [is] seen to be “false”. What is more, while the first one is ‘free’, the second one ‘is closely regulated by law’ (Sullivan 2005: 8). As Talal Asad has observed, law’s role in the modern Western world has been to seek to domesticate religion and counteract societal disorder (Asad 2003: 134). Through law, civil government exercises regulatory power of the state over undesirable conduct.

Thus, the understanding of faith and of freedom in matters of faith goes with a specific perception of society — a modern ‘liberal’ perception — in which religion contents itself with a low-key and limited role. It also accords with a particular understanding of the role of law, including law’s nature. Law is regarded as ‘secular’, as religiously disconnected, in relation to religious phenomena.

Sullivan sums up these remarks nicely when she makes the following observation about the conceptual framework through which today’s religious landscape is consequently managed. “The ‘return’ of religion takes place in a space structured and conditioned by law — secular law, the ‘rule of law,’ a law that enjoys an unprecedented hegemony” (Sullivan 2005: 153). It is civil government through law rather than religion that ultimately holds the interpretative prerogative in organizing the societal space. Hence, the distinctions that we encounter in international law are political. They empower and legitimate particular actors and have in some instances helped organize the societal space for a long time.

Sullivan’s remarks are generally made with regard to the situation in the United States, but they also resonate with observations about how the European Court has visualized and managed situations that have raised matters of freedom of religion and belief. The European human rights system cherishes a particular type of society, a democracy ruled by law and ‘dearly won over centuries’. Until the early 1990s, most Council of Europe member states were politically structured according to ‘the principles of liberal democracies’ and, with the exception of Turkey, Greece and Cyprus, the countries in the main had a Catholic or Protestant majority population (Ferrari 2012: 14). Hence, the types of faith that Strasbourg institutions could have come across to a great extent would have inhabited societies ordered in keeping with the democratic ideal of the European human rights system.

Without wanting to ignore the many dissenting voices, now as well as historically, national law and majority institutional religions in Western Europe would also in the main have

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38 Quote from Trilling 1973: 7. Of course, this reading of the idea of sincerity and being earnest also seems in no way exclusive to law, or to a ‘small p’ protestant vision.
39 Sullivan 2005: 8, in a different context. The latter one is, paradoxically, ‘the religion of most of the world’ (Sullivan 2005: 8).
41 It is worth noting that until the Second Vatican Council, the Catholic Church did not accept the democratic ideals unconditionally. However, the European Court started to deal with religion well after the Second Vatican Council at which point the distance between Protestant and Catholic Churches had decreased. I am thankful to the editor for pointing this out.
coincided in their assessment of prohibited, permitted and required action.\(^{42}\) ‘[T]he modern religio-political arrangement has been largely, although not exclusively, indebted, theologically and phenomenologically, to protestant reflection and culture’ (Sullivan 2005: 7).

Alongside other explanations, such as the judicial restraint shown by the Strasbourg institutions (Ferrari 2012: 23–4), this gives some indication of why the situation was relatively straightforward for a long time and freedom of religion and belief was not the focus of high-profile legal cases. The fact that a leading idea during the drafting of the ECHR and its Article 9 was that a reading of this article would confirm existing national legislation in matters of faith is an aspect of this as well (cf. Evans 1997: 266–70).

In many of the recent high-profile cases, however, faith that historically has not had – or been allowed – the same opportunity to shape the foundational fabric of European societies has been at issue. In reference to these cases, quite the opposite seems to be ‘true’, judging by the way the Court has conceptualized these cases not simply as instances of potential violations of individual rights, in which the set of criteria mentioned in Article 9(2) has to be fulfilled for there not to be a violation. Instead, and in the Court’s own words, the cases touch upon such large issues as ‘democracy’, ‘state neutrality’, ‘secularism’, ‘reconciling the interests of the various groups’, ‘religious harmony’, ‘tolerance’, ‘gender equality’, and the like.\(^{43}\) Phrasings like these unmistakably signal that much seems to be at stake in the figure of a singular individual veiling herself.

What is potentially at stake in such cases of freedom of religion and belief is the aforementioned foundational fabric, and the reaction is to defend entrenched notions, or so it seems in how readily the Court has gone along with state parties such as Turkey or France in concluding that limitations on individual Muslim women’s and girls’ veiling in educational establishments have been justified.\(^{44}\)

The many findings of violation in connection with the state–religion arrangements and the treatment of religious minorities in member states with the majority Orthodox religion – in contrast to countries with a Catholic or Protestant majority – make up a different set of cases that similarly expose the prevailing guiding notion of religion. According to the findings of Ferrari, this set of cases reveals the Court’s wariness of affording too extensive a role to religion in public life and accepting too close a connection between religion and governmental institutions. Conversely, the lack of findings of violation with respect to Protestant countries, and the low overall number of cases from these countries, may, among other things, result from a convergence in the understanding of faith and its potential role in the ordering of social and political life.\(^{45}\)

To return to the quote at the beginning of this chapter, the standard assumption is that ‘religious’ and ‘political’ questions must not mix. Engagement in society and thus also in some

\(^{42}\) See, e.g., Evans 2008: 314. Coexistence has not been without tensions of course, as seen in the way in which the applicants in the Eweida and Others v. the United Kingdom case manifested their Christian faith met with resistance.

\(^{43}\) Slotte 2012: 26–31, 55; and, e.g., Leyla Şahin v. Turkey (GC), paras. 106–107, 111 and 116; Dogru v. France, paras. 62, 66 and 70; Kervanci v. France, paras. 62 and 66; Dahlab v. Switzerland. See also, e.g., Evans 2006: 54.

\(^{44}\) E.g., Leyla Sahin v. Turkey (GC); Dogru v. France; Kervanci v. France.

\(^{45}\) Ferrari 2012: 31–3. In regard to recent high-profile cases, such as the chamber and Grand Chamber judgments of Lautsi and Others v. Italy, no. 30814/06, the Court’s standpoint and ‘judicial activism’ on the basis of its concept of religion has met with criticism from Orthodox and Catholic countries, not from Protestant or what Ferrari calls religiously ‘mixed’ countries (meaning that no confession has a membership of 50 per cent or more of the population). Ferrari 2012: 13 (fn 1), 29–30.
respects the understanding of ‘citizenship’ should not be shaped by religious considerations. Given these parameters, some expressions for the sacred, some religious embodiments, clearly appear to be ‘safe’ as they seemingly accept the conditions imposed by ‘secular’ law, while others come across as a cause of concern, a threat to liberal democracy and ultimately to sovereign authority.

Even if the Strasbourg jurisprudence ever since 1993, when a violation for the first time was found of Article 9 in the case of Kokkinakis v. Greece, has incessantly reiterated that religious pluralism is a vital part of the society that the ECHR cherishes, this pluralism is thus circumscribed. Ideas of law, society, citizenship and civil governance affect the shape and scope of ‘acceptable’ diversity in matters of religion and belief. In a way, some circumscription of diversity is inevitable. However, we have to ask to what extent the Court acknowledges – or is in fact willing to acknowledge – its own prejudices. It is a concern if the criteria (logic) that are operative are taken for granted, left unreasoned, asymmetries in the outcomes overlooked, and the principles for decision-making not critically reviewed in all respects. Such an attitude does not seem helpful with regard to the actual national contexts in which the conflicts that come before the Court arise nor in a climate where some believers – as the quote at the beginning of the chapter makes clear – are met with suspicion or outright hostility when they seek to lead a life of faith.

**Concluding remarks**

Authors discussed in this chapter persuasively make the point that international judicial bodies cannot decide on the authenticity of religion and belief. These bodies should think little of their own theological expertise and instead prudently seek accommodation and the broadest possible freedom. (Of course, this stance rests on the premise that we hold freedom in matters of faith and belief to be an important general value to begin with.) Beyond this general avowal, however, there is less unity as to the role and place of law, with critics pointing out the deficiencies of legal responses to conflicts involving matters of faith.

This chapter has also pointed out shortcomings in the response on the part of European human rights law in particular to situations and dilemmas involving religion that face today’s societies. Its response has not necessarily corresponded with the self-understanding of believers and their expectations regarding legal protection. Even if we would, however, want to avoid external definition and assessment of what constitutes religion in the main, the Court in this case, and judicial bodies more generally, still somehow have to take a stand on what counts as religion or manifestation of religion for the purposes of law, so as not to render legal regulation so broad and inclusive that it becomes operationally meaningless. Moreover, given that we seem able to disclose as prejudiced almost any tool with the help of which the Court goes about its business – and I am here talking about prejudiced or biased in an unqualified sense, not as either ‘negative’ or ‘positive’ – how should we approach the issue of adjudication in religious matters?

Because previous practice can be criticized as partly misguided, this chapter favours a shift rather than a mere broadening of the understanding of the phenomena of religion. By simply broadening that which international law sees as ‘religion’, we do not get at the foundational structural problems in the current conceptualization.

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46 In order to function, law needs criteria on which decisions can be based – to legislate on an issue which is uncontrollable at least in some respect would be plainly absurd. For a similar comment underlining a connection between the role of law and a definition of religion, see Ahdar and Leigh 2005: 114.
This is also important for the reason that a discussion of the kind explored in this chapter does not rest on the idea that freedom of religion and belief in a legal sense could be absolute. Instead, it is about contemplating the way in which we approach situations through law that are religiously relevant in some respect. It is about clarifying and being aware of what is at stake and what tools might be helpful when we try to deal with situations and conflicts where word stands against word and need against need and a reference to a right to freedom of religion and belief does not of itself self-evidently resolve the situation.

Increasing our knowledge and understanding of what may be important in a religious respect does not signify that we thus afford religious actors absolute interpretative prerogative in societal matters. It is not about broadening the space of absolute freedom of religion and belief nor, alternatively, the space in which society can intervene in the exercise of religion by democratic means. What happens instead is that our way of perceiving things, our self-evident categorizations, are no longer indisputable and a priori valid.

A historical retrospective is enlightening here. The content of religious freedom has historically been a matter of debate. What should it include? What aspects of the phenomenon of religion are legally significant? And how far should freedom stretch? When – if at all – do matters of religion and belief trump state sovereignty? Thinking about freedom to a high degree means thinking about what we wish to allow or prohibit, that is, freedom’s limits rather than its essence. These questions cannot be answered in the abstract. A historical outlook reveals the inescapable embeddedness of ideas and the conflicts, exclusions and violence that have accompanied these matters and now form legacies and the backdrop for ‘rectified’ and seemingly neutral categories.

Instead of anxiously reacting in a way akin to the sentiment disclosed in the opening quote, this chapter suggests that we need to be willing to take the discussion about how borders are currently being drawn and elaborate on the grounds for decision-making. Instead of hiding, so to speak, behind legal techniques of managing the sacred, as sometimes seems to be the case, international legal institutions need to examine the concepts used in their judgments rather than rely on stereotypical reasoning about religion, and simple repetition of formulae in other case law.

Religious diversity is a given and we need to explore our deep-seated notions and their ability to grasp ‘the world out there’ in a meaningful way; in the context of this chapter, the notions through which international law operates. Total agreement remains impossible, and ‘sincere’ belief sometimes has to yield to other shared concerns, but without engaging with law, different religious traditions, and ways of being ‘faithful’ in the first place, it is not possible to critically examine the stories that define and sustain current order and imagination either, or potentially interrupt unsustainable reproduction.

However, whether law is the best instrument for enabling people to cope with difference and religious diversity is another question. Following Nussbaum, the principal problem may not necessarily lie with the legal framework but operate on a moral plane.

**Bibliography**


47 The last sentence paraphrases Stenqvist 2006: 89.


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