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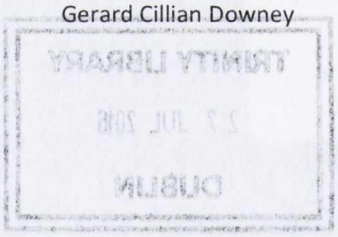
THE RIGHT TO RELIGIOUS EXPRESSION IN EUROPE AND IRELAND

A Dissertation submitted to the University of Dublin

for the Degree of Doctor of Philosophy

Gerard Cillian Downey



Trinity College Dublin, 2015

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Summary

This thesis explores the meaning of the right to religious expression in Europe and Ireland. As the contemporary legal environment has sought to re-characterise its relationship with religion, this thesis attempts to objectively appraise the substance of the right so as to give effect to the guarantees upon which it is founded. Through an analysis of the nature of religious belief and manifestation this thesis considers the consequences of religious expression and considers upon what legal basis it can be limited but also provided for.

This thesis has been divided into two parts. Part I examines the definition of religion and of religious manifestation with reference to the Irish Constitution and the European Convention on Human Rights. It argues that the legal definition of religion should be subjective in order to give effect to the protection afforded to the *forum internum*. Subsequently, this part looks to the legal definition of religious manifestation and demonstrates that the European Court of Human Rights has operated restrictively in this regard. It argues for a renewed theoretical stance recognising that, while the manifestation of religious belief can be subjective, the manifestation of the *forum externum* is not absolute. This part concludes by suggesting that the jurisprudence of Article 9 no longer affords religious belief adequate protection in the contemporary legal sphere and argues that religious expression can be effectively guaranteed under Article 10 of the European Convention. It maintains that religious expression should be afforded the highest level of protection under Article 10 alongside political expression.

Part II of this thesis examines the legal limitation of, and the provision for, religious expression. It considers the most prominent grounds for limitation, including secularism, gender equality and 'living together', and examines further applicable theoretical considerations pertaining to the limitation of religious expression. This second part also considers the context where the State has a positive obligation to provide for religious

expression. Through an analysis of rights theory this part concludes arguing that the obligation to provide for religious belief, in limited circumstances, is necessary to give reality to the right to religious expression.

In view of the legal challenges posed by the Islamic religion in the European sphere, part II of this thesis has applied its analysis to the limitation of the Islamic veil and the provision for Islamic finance. These contrasting expressions of religion have generated substantial challenges for the legal system. This thesis constitutes the first attempt to argue for the provision of Islamic finance on the basis of religious belief as opposed to commercial sensibility. It has approached these religious expressions in an impartial and unbiased manner so as to challenge the perception evident in jurisprudence which seeks at times to categorise minority religious expression as unacceptable.

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To my parents

who gave meaning to Article 42(1) of the Constitution

and to the reality that the primary and natural educator of the child

is the family

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Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

Glossary

burqā	a long and enveloping veil which covers the entire body worn by some women within the Islamic tradition.
dār al-ḥarb	realm of war; reference to territories not under Islamic governance.
dār al-Islām	realm of Islam; reference to territories under Islamic governance.
darūra	necessity.
fatwā	religious ruling or decision with binding effect.
fiqh	Islamic jurisprudence.
gharar	excessive uncertainty.
hījāb	a veil which is worn about the head and neck by some women within the Islamic tradition.
Ḥadīth	plural; recordings of the words and deeds of the Prophet Muhammad considered as an authoritative source of revelation and second to the *Qur'ān*.
ḥadīth	singular; a recording of the words and deeds of the Prophet Muhammad considered as an authoritative source of revelation and second to the *Qur'ān*.
ḥalāl	activities and items which are permitted by Islamic law.
Ḥanafī	school of Islamic thought.
Ḥanbalī	school of Islamic thought.
ḥarām	activities and items which are prohibited by Islamic law.
ijarā	lease or hire based finance.

ijarā wa iqtinā	lease or hire finance with acquisition rights.
ijmā	consensus of opinion.
imām	religious community leader.
istiṣnā	contract for the manufacturing of goods which are not yet in existence.
jilbāb	a generic term for a woman's outer cloak; traditionally covering the head and hands and worn in public.
makrūh	activities and items with are disapproved of by Islamic law.
maysīr	gambling.
mubāḥ	activities and items of which Islamic law is indifferent toward.
muftī	religious leader qualified to give a *fatwā*.
mudāraba	partnership contract finance model where one partner contributes finance while the other contributes time and labour.
mudāraba sukūk	investment model constructed in accordance with *mudāraba*.
mudārib	the agent in a *mudāraba* financial model.
murabāha	sale with a specified charge; loan structure without interest.
mushāraka	partnership contract finance model where both partners contribute capital and labour.
niqāb	an enveloping veil which covers the face with the exception of the eyes worn in conjunction with the *hījāb* or alternative Islamic veil by some women within the Islamic tradition.
qimār	similar to *maysīr*; refers to transactions of chance whereby an individual benefits at the expense of another party.

qiyās	reasoning by analogy.
Qur'ān	the book of Islamic revelation or scripture; believed to be the word of God.
ribā	unjustified increase on a financial transaction otherwise understood as the taking of interest or the participation in usury.
salam	sale for a future specific asset or commodity on pre-determined terms with advanced delivery of funds.
Shāfi'ī	school of Islamic thought.
Sharī'a	the way of life for Islamic adherents; also a generic term to describe Islamic law.
sukūk	Islamic bonds; investment model pertaining to an interest or ownership of tangible goods, assets, usufructs and services used to generate profit.
sukūk al-ijarā	Islamic bonds; investment model pertaining to an interest or ownership of tangible goods, assets, usufructs and services used to generate profit; constructed in the form of an *ijarā*.
sukuk al-mushāraka	Islamic bonds; investment model pertaining to an interest or ownership of tangible goods, assets, usufructs and services used to generate profit; constructed in the form of a *mushāraka*.
Sunna	the way in which the Prophet Muhammad and his companions lived; an authoritative guide for the application of the *Qur'ān* to the community.
takāful	insurance system in compliance with Islamic law.
ummah	the community of Islamic believers.

uṣūl al-fiqh	roots of Islamic jurisprudence.
Zāhiri	school of Islamic thought.
zakāt	one of the five pillars of Islam; funds given in charity to the poor by way of purification.

Introduction

The study of law and religion can often be characterised as an examination of dichotomous and antagonistic systems where the principles of liberalism and democracy are contrasted against systems of social fragmentation and institutional totalitarianism.[1] However, as legal systems in Europe and Ireland attempt to re-characterise their respective relationships with religion, this thesis argues for an unbiased guarantee of the right to religious expression on the basis of the fundamentality of religious belief in the life of religious adherents as 'one of the most vital elements that go to make up the identity of believers and their conception of life, but...also [as] a precious asset for atheists, agnostics, sceptics and the unconcerned.'[2]

This thesis asks the following questions; how can religion and religious expression be understood in legal systems and accordingly be appropriately protected under the Convention? And; in light of such, to what extent can religious expression be limited and provided for from a legal perspective?

Structure

This work is divided into two parts. Part I of the thesis examines the legal definition of religion and the legal definition of religious manifestation in order to inform an argument for the right to religious expression on the basis of a collaboration of Articles 9 and 10 of the European Convention on Human Rights which should be afforded the highest level of protection alongside political expression.[3]

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[1] Bassam Tibi, *Political Islam, World Politics and Europe: From Jihadists to Institutional Islam* (2nd edn, Routledge 2014).
[2] *Kokkinakis v Greece* (1993) Series A no 260-A [31].
[3] Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 690.

Neither the Irish Constitution nor the European Convention provides a definition of religion. In the absence of such, the first chapter of this thesis will examine a broad range of philosophical commentaries to demonstrate that any definition of religion in a plural legal system must be subjective; however, it is recognised that this has the inherent complication of making the legal definition open ended to the point of futility.[4] On the basis of such, this chapter will argue for a subjective and polythetic definition of religion, for the purposes of law, in order to reflect the almost limitless potential of the *forum internum*[5] while at the same time providing some guarantee to genuine religious individuals and communities and to the social system in which they operate.[6] This will be done with reference to domestic legislation and the Directives of the European Union, the jurisprudence of the Irish Courts and European Court of Human Rights and the opinion of the Law Reform Commission.

The second chapter of this thesis will examine the definition of religious manifestation; this is arrived at in two parts. The first part of this chapter will descriptively analyse the jurisprudence of the European Commission of Human Rights and the ECtHR. This will consider the division of religious manifestation into 'worship, teaching, practice and observance' in accordance with Article 9(1) of the European Convention.[7] This will facilitate an analysis of the methodology of the respective judicial institutions in order to demonstrate the way in which religious manifestation has been defined in present times. The second part of this chapter will apply the case law, which was examined in the first part, to demonstrate the evolving nature of the theory surrounding the definition of religious manifestation.[8] This will be facilitated by an appraisal of the drafting documentation of the relevant passages of the Universal Declaration of Human Rights and the jurisprudence of the Human Rights Committee.[9] It will be argued that, in future, the ECtHR must adopt a subjective approach towards the definition of religious manifestation in order to respect the

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[4] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2003) 120.
[5] Erica Howard, *Law and the Wearing of Religious Symbols; European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 17; Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2013) 3(2) OJLR 241.
[6] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 191.
[7] European Convention on Human Rights art 9(1).
[8] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2674.
[9] Malcolm D. Evans, '*Religious Liberty in International Law in Europe* (CUP 1997) 192.

religious beliefs of individual applicants.[10] At the same time, this argument will suggest that such an approach will not impede the appropriate limitation of Convention rights but; rather, it advocates a bifurcated approach to religious manifestation precluding the ECtHR from limiting any belief regarding the necessary manifestation of religious belief.[11]

The combination of the first two chapters will inform the third chapter of the thesis which will argue for a superior right to religious expression based on the fundamentality of religious conscience and the importance of freedom of expression. This central theoretical examination proposes to outline upon what basis religion acts as a fundamental reference point for individual adherents and operates to profoundly inform the way in which religious adherents orientate their lives.[12] It will argue that religion is an immutable characteristic; however, it will further demonstrate that such categorisations are inherently arbitrary on that basis that a biological or fundamental ability to change a human characteristic should not preclude a characteristic from being attributed intrinsic significance in human life. This chapter will also consider the counter-arguments against affording religious belief superior protection particularly that strain of argument which suggests that religious belief is inherently irrational.

The third chapter will continue to demonstrate that freedom of expression, under Article 10 of the European Convention and Article 40.6.1° of the Irish Constitution, is a fundamental human right, the limitation of which requires a high level of scrutiny.[13] It will be argued that, in circumstances where this expression is informed by freedom of

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[10] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 283-284.

[11] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHT; The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 165.

[12] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.

[13] Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 690; *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573, at 589.

conscience, which is both fundamental and inviolable,[14] expression will adopt a heightened significance as the right to religious expression which can be afforded the highest level of protection under Article 10 alongside political expression. This analysis will conclude the first part of this thesis.

Part II of the thesis examines the limitation of the right to religious expression and the provision for the right to religious expression. On the basis of the challenge which the Islamic religion is creating for the study of religion and law in the contemporary sphere,[15] this thesis will apply its theoretical considerations to methods of religious expression of the Islamic religion; namely, the prohibition of the Islamic veil and the provision for Islamic finance. This second part of the thesis proposes to demonstrate the current extent of the theoretical considerations of the Irish Court and the ECtHR with regard to the expression of religious belief and will advocate for a renewed theoretical approach in order to give reality to the guarantees afforded to religious adherents by virtue of the Irish Constitution and the European Convention.

The fourth chapter of this thesis examines the limitation of the right to religious expression. In doing so, it will examine the grounds for the limitation of the wearing of the Islamic veil specifically; namely, secularism, gender equality and, the most recently determined, obligation to 'live together'.[16] It will argue that the grounds for the general limitation of religious expression on the basis of secularism or gender equality are without merit on the basis of misconceived attribution of objective values to the meaning of religious expression. It will recognise the jurisprudential impact of the third ground for limitation 'living together' and suggest that such has marked the nadir in contemporary Article 9 jurisprudence. It will illustrate that this case advances the proposition that the right to religious expression is more robustly defended under Article 9 and 10 of the Convention. This chapter will also examine further theoretical considerations regarding the limitation of

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[14] Erica Howard, *Law and the Wearing of Religious Symbols; European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 17.
[15] Hilal Elver, *The Headscarf Controversy; Secularism and Freedom of Religion* (OUP 2012) 1.
[16] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [122].

religious expression from the perspective of the ECtHR and will argue that arguments of religious neutrality are in fact based on preconceived determinations regarding the meaning and scope of religion which fails to comprehend the ability for religion to be an all-encompassing life system such as that of the Islamic faith.[17] It will argue that constitutional models, such as secularism, multiculturalism and ethno-cultural nationalism significantly affect the way in which 'neutrality' is determined in individual Contracting States. It will be argued that, on the basis of unconscious or latent decision making, the Irish State has evidenced attributes of an ethno-cultural nationalistic constitutional model by which it orders its interaction with religion; however, it will be demonstrated that societal and legal modifications in the last twenty years have contributed to a reappraisal of this theory and will emphasis the increased move towards pluralism in the domestic context. This chapter will conclude with an examination of the limitation of religious expression in both the public and private sector and demonstrate distinctions which arise in those respective contexts.

Finally the fifth chapter will examine the positive obligation to provide for religious belief on the basis of the right to religious expression. To this end, this chapter will argue that the State has an obligation to provide for Islamic finance in order to give effect to the right to religious expression. In contrast to the Islamic veil, the Western sphere has been positively disposed to the facilitation of this religiously informed economic model.[18] This indirectly demonstrates that the West is predisposed to facilitating religious expression when society has the potential to economically gain from it. On the basis that this is a recently expanding concept in legal commentary this chapter will devote a substantial portion to the description of this economic model including its central religious characteristics in order to inform the structures which are commonly encountered in the legal sphere.[19] At the same time, this thesis recognises that the primary research question is that pertaining to religious expression generally and, upon that basis, will limit itself to an

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[17] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 6.

[18] Valentino Cattelan, 'Introduction. Babel, Islamic Finance and Europe; preliminary notes on property rights pluralism' in Valentino Cattelan (ed), *Islamic Finance in Europe: Towards a Plural Financial System* (Edward Elgar 2013).2.

[19] Nicholas H.D. Foster, 'Islamic Finance as an Emergent Legal System' (2007) 21(2) ALQ 171.

examination of the relevant issues pertaining to Islamic finance exclusively to give application to the theory.

The fifth chapter will categorise the act of participation in Islamic finance as a religious expression. It will detail what legislative requirements are necessary in the Irish State to facilitate this economic model and it will argue that these must be provided for on the basis of the right to religious expression. This chapter will argue for the interpretation of Convention rights with positive effect. In doing so, it will argue that the strict dichotomy between positive and negative rights is irrelevant for the attribution of positive duties to rights generally. It will argue that all rights contain positive duties. Further it will suggest that religious adherents are entitled to the duties which are necessary to provide for basic necessities in life and society and places particular emphasis on the Directive of the European Parliament and Council regarding the universal access to a basic payments account.[20] It will argue that the provision for religiously compliant finance is proportionate to the need of the religious community to adhere to their conscience while participating in a contemporary society. This chapter will conclude with an analysis of the recognition of positive obligations in the Irish Courts and the ECtHR in order to argue, on the basis of such obligations being widely endorsed, that positive obligations can be placed upon the State to provide for the right to religious expression in limited contexts.

The study of law can be a frantic exercise. The case law underlying this thesis constantly developed with important judgments such as *Eweida and Others v United Kingdom*[21] and *S.A.S. v France*[22] being decided during the time of research and having the effect of substantially adding not only to the theory which will be advocated in the thesis but also the commentary informing the same. In the final days before the submission of this work the German Federal Constitutional Court gave judgment in the case of BVerfG 471/10

[20] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.
[21] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013)
[22] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

and BVerfG 1181/10.[23] This judgment will significantly contribute to the content of the fourth chapter of this thesis and this thesis, perhaps, could be the first consideration, in time, of the issues generated by that same judgment.

Methodology

The research contained in this thesis is a combination of the traditional doctrinal and comparative methods of theoretical legal research; however, some examples of empirical research are presented such as the adoption of qualitative research methods in order to inform the subject basis of the fourth chapter. Correspondence was entered into with different branches of the Irish civil service in order to ascertain their position towards the accommodation of religious expression in the workplace. Further, archival research revealed the extent to which the Irish State has provided for the religious expression of the Roman Catholic religion. This research brought forward two government circulars in relation to the permitted religious expression of members of An Garda Síochána and the Army without which the primary argument of institutional ethno-cultural nationalism would be ill-founded. The combination of traditional legal research with practical research methods enables this research to apply to society in realistic terms.

This research has also adopted a multidisciplinary approach making reference not only to the legal school of thought but considering philosophy, theology, anthropology and economics. In view of the application of this research to Islamic expression, Arabic transliterations have been used throughout. Further, this thesis has cited from primary sources in their original language when possible in order to respect the authenticity of such sources. Upon the basis, translations are those of the writers throughout and errors solely attributable to him if so found. It is clear that the research of law and religion cannot operate in a theoretical vacuum; therefore, it has been necessary to extend the research methodology beyond the traditional legal method in order to give reality and practical effect

[23] BVerfG 471/10 and BVerfG 1181/10;ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, 13 March 2015.

to the conclusions to be ascertained during the course of the thesis. Finally, it must be stated that any thesis will generate a discussion of related and relevant topics yet must be mindful of its limitations. While this theory has been applied to expressions of the Islamic religion, namely the Islamic veil and Islamic finance, it has not been considered necessary or appropriate to consider these concepts beyond the extent to which they are presently discussed in the thesis. While the discussion of these related matters is merited, it can be considered beyond the scope of this thesis to do so, they being best understood as a basis upon which further research can be conducted and which this thesis can inform.

Part I

Chapter I

Definition of Religion

1.1 Introduction

The Irish Constitution and the European Convention on Human Rights both guarantee the right to religious freedom.[1] This right includes the freedom to manifest religion;[2] however, from a legal perspective, it is not clear what this commonly used term means.[3] This chapter proposes to formulate a basic definition of religion pursuant to the ECHR and the Irish Constitution and isolate examples of the use of qualified definitions of religion for the purposes of law and this research. The attempt to construct a definition of religion is not a new enterprise[4] nor is there any consensus on whether the term should be defined;[5] however, it is necessary for the purposes of this thesis to establish basic and qualified definitions of religion in order for the subsequent analysis to be applied.

In the absence of extensive legal commentary it has been necessary to consider philosophical and anthropological representations regarding the nature of religion to assist this research. The broad representations contained within modern commentary can be contrasted against the more restrictive colloquial understanding of religion which demonstrates the fundamental discord currently in existence between the academic enterprise and the general public.[6] The consideration of non-legal commentary provides a broad theoretical framework upon which the legal definition of religion can be appraised.

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[1] Bunreacht na hÉireann art 44, see also; European Convention on Human Rights art 9.
[2] Bunreacht na hÉireann art 44.2.1°, see also; European Convention on Human Rights art 9.1.
[3] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 21.
[4] Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 122-123.
[5] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 191.
[6] Craig Martin, 'Configured for Exclusion: Characterisations of Religion in Liberal Political Philosophy' (2007) 19 MTSR 40.

Analysis of the ECHR and the Irish Constitution demonstrates the expansive way in which religion can be defined; however, an examination of the jurisprudence of both the ECtHR and especially the Irish courts has demonstrated that qualifying characteristics can at times be placed on organisations for the purpose of their definition as religious. It is in such contexts that this chapter can isolate examples of the use of qualified definitions of religion.

1.2 Colloquial Characterisations of Religion

Adopting an expansive approach to the definition of religion is the most theoretically applicable method for its study; however, it is said that an approach which places little emphasis on the substance of belief, risks enabling diverse and potentially inappropriate communities to be defined as religious.[7] An open-ended approach to definition such as this can cause the term to 'lose its analytic usefulness'.[8] The following section proposes to outline a colloquial understanding of religion as the grounding basis for the present analysis.

1.2.1 The Meaning of Words as a Foundation for the Colloquial Understanding

The etymological interpretation of the word religion has not in itself gained any consensus in order to provide a basis for the present colloquial understanding.[9] Various scholars have attempted to trace the linguistic origins of the word in order to demonstrate its original meaning.[10] Saler has suggested that religion or *religio* is derived from the Latin *legere* and *ligare*, respectively translated as to gather together and to bind.[11] Such an

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[7] See; Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', in Thomas Idinopulos and Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998)155, see also; James L. Cox, *From Primitive to Indigenous: The Academic Study of Indigenous Religions* (Ashgate 2007) 86; Werner Cohn, 'Is Religion Universal? Problems of Definition' (1962) 2(1) JSSR 25; Mark L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones' (European University Institute Robert Schuman Centre for Advanced Studies, RSCAS 2014/19) 3.

[8] Kevin Schilbrack, 'What Isn't Religion?' (2013) 93(3) JR 291.

[9] Niko Tiliopoulos, 'In Search of a Scientific Definition of Religion' in Herman Westerink (ed), *Constructs of Meaning and Religious Transformation: Current Issues in the Psycology of Religion* (Vandenhoeck & Ruprecht 2013) 23-24.

[10] For a comprehensive linguistic analysis of the origin of the word religion see; Benson Saler, 'Religio and the Definition of Religion' (1987) 2(3) CA 395-399.

[11] Benson Saler, 'Religio and the Definition of Religion' (1987) 2(3) CA 396.

interpretation characterises religion as an organisation which regulates the lives of individuals in community with others; however, while the word may indeed draw its origins from these sources, its historical application has not been applied so broadly. Normative values have at times informed the interpretation of the word. Augustine interpreted the word to mean the 'worship of God'[12] and this theistic focus reflects the broad colloquial interpretation of religion which endured until perhaps the second half of the twentieth century. Augustine perceived Christianity as the culmination of religion[13] which is evidenced in his work *De Vera Religione*, or 'of true religion' .[14] This approach identifies religion as one single truth which was manifest in various ways throughout time; heralded by prophetic vision, to be purified and perfected until God had concluded his work and installed the most accurate institution.[15] By this view religion is synonymous with nouns such as King, Emperor or Caesar. A primary characteristic of these offices being that they are singularly definitive and specific: As there is only one king, so too can there only be one religion.

This view of religion, consisting of one true and exclusive manifestation, represents the historical colloquial approach to the definition of religion and was representative of the default position of scholarly analogy.[16] Indeed, this is evidenced in the Establishment of Churches and the collaboration between Church and State in early modern European history.[17] Christianity can be considered as a prototypical example of religion in the domestic and European context.[18] This construction of religion would be familiar to the majority of Western theorists considering religion and would have contributed towards their understanding of this topic.[19] Colloquial representations function to inform the basic understanding of any topic and form the basis of subjective interpretations of what religion

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[12] Paul J. Griffiths, *Problems of Religious Diversity* (Wiley 2001) 2-3.
[13] John H.S. Burleigh (ed), *Augustine: Earlier Writings* (The Westminster Press 1953) 235.
[14] See; John H.S. Burleigh (ed), *Augustine: Earlier Writings* (The Westminster Press 1953) 225.
[15] Augustine undoubtedly understood this to be the Catholic Church; however, his understanding is applicable to the present analysis, see; Timothy Fitzgerald, 'Benson Saler Conceptualizing Religion: Some Recent Reflections: A Response' (2008) 39(2) R 196.
[16] Timothy Fitzgerald, 'Benson Saler Conceptualizing Religion: Some Recent Reflections: A Response' (2008) 39(2) R 195.
[17] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 5.
[18] Benson Saler, *Conceptualizing Religion: Immanent Anthropologists Transcendent Natives, Unbounded Categories* (Brill 1993) 208.
[19] Benson Saler, *Conceptualizing Religion: Immanent Anthropologists Transcendent Natives, Unbounded Categories* (Brill 1993) 208.

may be defined as.[20] Wittgenstein speaks to this understanding when he posits that 'a word has one or more nuclei of uses which come into everybody's mind first.'[21] From a European perspective, this has an unquestionable Christian flavour; however, the genre expands to be ever more inclusive of such institutions 'that we call the Western monotheisms or the Abrahamic religions: Judaism, Christianity and Islam.'[22]

Ammerman writes that 'in everyday usage, the majority...use a Theistic spiritual discourse that is anchored in participation in religion organisations.'[23] The evolution of the colloquial interpretation of religion has led individuals to take their basic understandings of religion, as fostered in a Christian theistic experience, and categorise other movements as religions based on shared characteristics[24] such as Islam and Hinduism.[25] This expands the colloquial interpretation of religion from a purely Christian understanding but perhaps limits its application to religions which do not share basic characteristics with Christianity.[26] These polytheistic religions share the common component of a belief in a Supreme Being or Beings. A colloquial definition along these lines would be essentialist.

Schilbrack provides an accessible example of colloquialisms through sharing his childhood experiences playing football with his friends on the road. He informs us that as a car approached '...we would just holler, "Car!" and the meaning would be clear. Given our shared practice, the ontological claim by itself was enough to imply – or even constitute – the recommendation.'[27] The recommendation to which he referred was informed by context and what he refers to as 'shared practice'. Context and 'shared practices' form the basis of these colloquialisms which are formed based on the consensus of the group. Martin recalls that the word religion has in itself 'varied over time'[28] leading to the fact that 'there

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[20] Craig Martin, *A Critical Introduction to the Study of Religion* (Routledge 2014) 6.
[21] Cora Diamond (ed), *Wittgenstein's Lectures on the Foundation of Mathematics: Cambridge: 1939* (University of Chicago Press 1976) 239-240.
[22] Benson Saler, 'Conceptualizing Religion: Some Recent Reflections' (2009) 39(2) R 223.
[23] Nancy, T. Ammerman, 'Spiritual but not religious? Beyond binary choices in the study of religion' (2013) 52(2) JSSR 268.
[24] Craig Martin, 'Delimiting Religion' (2009) 21(2) MTSR 158.
[25] Craig Martin, 'Delimiting Religion' (2009) 21(2) MTSR 166.
[26] Rex Ahdar, Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2013) 141-142.
[27] Kevin Schilbrack, 'What Isn't Religion?' (2013) 93(3) JR 304.
[28] Craig Martin, 'Delimiting Religion' (2009) 21(2) MTSR 167.

is more than one contemporary colloquial use and contemporary uses function differently in different social contexts.'[29]

1.2.2 Colloquial Characterisations as Lexical Definitions

Colloquial understandings are imprecise and largely reflective of a majority opinion which makes them inappropriate for the full basis of academic inquiry.[30] Academic inquiry needs to adopt 'specialist definitions' by taking 'commonly accepted lexical definitions and...making the meaning of general terms more exact...'[31] This is necessary so as not to exclude those legitimate bodies which consider themselves as religious but do not fit within the normative construction for the majority of the population. The colloquial understanding is 'an indispensable point of comparison in our wrestling with religious freedom'[32] yet can be restrictive when attempting a broader and more inclusive analysis. At the same time this broader analysis has been criticised for including 'the Nation State or the Trade Union Movement' as religions which are in stark contrast to the colloquial understanding of religion. [33] Alienating the colloquial understanding of religion risks undermining the study of religion or perhaps limits the application of contemporary theory to only the broadest social movements which could be considered religious. The application of research has a real and significant value for religious believers.[34] This requires a robust defence of the category of religion and encourages a protectionist response. It cannot be forgotten that 'defining what counts as a religion...is not an abstract matter but one which has real effects on real people.'[35]

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[29] Craig Martin, 'Delimiting Religion' (2009) 21(2) MTSR 167.
[30] Craig Martin, *A Critical Introduction to the Study of Religion* (Routledge 2014) 6.
[31] Stephen Dawson, 'The Religious Resurgence and International Relations Theory' (2013) 39(4) RSR 203.
[32] Jeremy Webber, 'Understanding the Religion in Freedom of Religion' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 43.
[33] Timothy Fitzgerald, 'Benson Saler Conceptualizing Religion: Some Recent Reflections: A Response' (2008) 39(2) R 195.
[34] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 190-191.
[35] Timothy Fitzgerald, 'Benson Saler Conceptualizing Religion: Some Recent Reflections: A Response' (2008) 39(2) R 194.

Martin assists a conclusion noting that 'the colloquial use of the word religion is like the colloquial use of the word furniture. There are no unique properties or characteristics that all things typically called furniture share.'[36] The colloquial understanding of religion should inform the foundations of this research; however, 'our everyday application of the word religion is arbitrary and unsophisticated. As such there is no way we could formulate a definition that could fit the colloquial use.'[37] The colloquial understanding informs and is informed by the prototypical religious representation in any given context. An overreliance upon the colloquial understanding in the Western context, largely informed by the Judeo-Christian religious experience, may compromise any definition of religion for legal application. As such these context specific definitions are of limited value. The following examination of philosophical and related academic commentary on religion proposes to demonstrate the evolution from this limited, essentialist definition of religion towards an expansive and open-ended characterisation.

1.3 Philosophic and Academic Commentary on the Characteristics of Religion

Religion has been at the forefront of philosophic inquiry since the earliest times as evidenced by the writings of Socrates, Plato and Aristotle and continues to generate academic scholarship in the present day.[38] This analysis has attempted to address fundamental issues surrounding the nature of the universe and mysteries of the world.[39] The following section considers the work of prominent philosophers and connected commentators who address fundamental aspects of religion. It can be accepted that the traditional line of analysis is based upon understandings of polytheism, monotheism or atheism and reflected by the colloquial understanding of religion.[40] This is referred to as the lexical approach to definition[41] owing to the fact that the lexical definition informs us how a

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[36] Craig Martin, *A Critical Introduction to the Study of Religion* (Routledge 2014) 6.
[37] Craig Martin, *A Critical Introduction to the Study of Religion* (Routledge 2014) 6.
[38] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 191.
[39] Louis P. Pojman and Lewis Vaughn, *Philosophy: The Quest for Truth* (9th edn, OUP 2014) 2.
[40] Carole M. Cusack, *Invented Religions: Imagination, Fiction, Faith* (Ashgate 2010) 1.
[41] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion' in Thomas Idinopulos and Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 143.

word was understood historically.[42] Such definitions are no longer persuasive for scholarly work.[43]

The nature of research has expanded and has adopted functionalist and polythetic methods of definition in response to the growing diversity of religious characterisation.[44] At the same time this expansion of definitional methodology has enabled practices not normally recognised as religious, such as Marxism and league sports, to be characterised as such.[45] The following section demonstrates the evolution of approach towards the definition of religion in philosophy and the related disciplines which has enabled an expansive definition to emerge. This non-legal commentary has assisted the present research in the absence of extensive legal discourse on the matter.

1.3.1 Early Philosophic Characterisations of Religion

The writings of Plato and Aristotle continue to serve as a foundation for philosophical analysis; as such they are referenced herein.[46] Plato's longest dialogue, *Laws*, contains some of the primary characteristics of religion.[47] His writings prescribe certain characteristics of religion including the existence of god and a belief in the soul.[48] The dialogue of the Athenian devotes a considered portion to the nature of the soul describing it as that which moves things within the heavens and on earth.[49] Contemporary theological representations are reflected in the writing of Plato when he speaks to the concept of god

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[42] Jonathan Z. Smith, *Relating Religion; Essays in the Study of Religion* (University of Chicago Press 2004) 134.
[43] Jonathan Z. Smith, *Relating Religion; Essays in the Study of Religion* (University of Chicago Press 2004) 134.
[44] Seth Daniel Kunin, Jonathan Miles-Watson 'Introduction' in Seth Daniel Kunin, Jonathan Miles-Watson (eds), *Theories of Religion; A Reader* (Rutgers University Press 2006) 3, 20.
[45] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', in Thomas Idinopulos and Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998)155, see also; James L. Cox, *From Primitive to Indigenous: The Academic Study of Indigenous Religions* (Ashgate 2007) 86; Werner Cohn, 'Is Religion Universal? Problems of Definition' (1962) 2(1) JSSR 25.
[46] Louis P. Pojman and Lewis Vaughn, *Philosophy: The Quest for Truth* (9th edn, OUP 2014) 6.
[47] Fred D Miller, 'The Rule of Reason in Plato's Law' in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 38.
[48] Fred D Miller, 'The Rule of Reason in Plato's Law' in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 38.
[49] B. Jowett (ed), *The Dialogues of Plato translated into English with Analyses and Introductions* (3rd edn, OUP 1892) 348.

'holding the beginning and the end and the middle of things.'[50] This omnipotent and independent conceptualisation of gods is consistent with the theory of theistic aseity whereby god is considered to exist of itself independent of all others.[51]

Plato perceives religion to have a polytheistic character. He advocates the worship of the gods as a necessary component of society. The central function of the deity is witnessed where the Athenian describes that man will;

> '...do service to the demons or spirits, and then to the heroes, and after them will follow the private and ancestral Gods, who are worshipped as the law prescribes in the places which are sacred to them.'[52]

Plato's writings further recognise the dual components of prayer and worship as fundamental characteristics of religion. Plato notes the public aspects of worship in the identification of the temples[53] which, from a contemporary perspective, is consistent with representations of institutionalised religion; however, his writings do not evidence a clear division between the religious and civil realms on the basis that the law 'does not consist of a set of ordinances promulgated by the gods and revealed to a prophet with a priestly class.'[54]

Plato's conception of religion bears similarities to a contemporary lexical understanding on the basis that he identifies common characteristics of religion, specifically; a theistic focus, a separation between good and evil and a conception of a soul, amongst others.[55] His perceptions are advanced by Aristotle whose views further inform the

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[50] Fred D Miller, 'The Rule of Reason in Plato's Law' in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 39.
[51] Jeffrey E. Brower, 'Simplicity and Aseity' in Thomas P. Flint and Michael C. Rea (eds), *Oxford Handbook of Philosophical Theology* (OUP 2011) 108.
[52] B. Jowett (ed), *The Dialogues of Plato translated into English with Analyses and Introductions* (3rd edn, OUP 1892) 141.
[53] B. Jowett (ed), *The Dialogues of Plato translated into English with Analyses and Introductions* (3rd edn, OUP 1892) 328.
[54] Fred D Miller, 'The Rule of Reason in Plato's Law' in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 39, see also; B. Jowett (ed), *The Dialogues of Plato translated into English with Analyses and Introductions* (3rd edn, OUP 1892) 323.
[55] Lynne Rudder Baker, 'Death and the Afterlife' in William Wainwright (ed), *The Oxford Handbook of Philosophy of Religion* (OUP 2007) 366.

understanding of the basic characteristic of religion to the present day.[56] Aristotle characterised god as perpetual and his illustration of god as the unmoved mover enables his theory to be understood from the joint perspectives of monotheism and polytheism.[57] His work further reflects conventional interpretations of characteristics of religion when he theorised that all living things had souls.[58] The writings of Plato and Aristotle collectively identify certain characteristics of religion which contribute towards an understanding of the nature of religion rather than making any express definitions of it. Such gives authority to the position that the early definition of religion was 'largely an unconscious process.'[59] The early Greek writings on religion provided the foundations for later Christian and monotheistic philosophers, amongst them; Aquinas.[60]

Aquinas built his philosophy of religion upon the theories of Plato and Aristotle within the context of a monotheistic religion - Christianity.[61] In his reconciliation of the pagan philosophy with the Christian religion he continued to identify the characteristics of religion identified by his philosophical predecessors, including; the omnipotent deity, once *nous* or *Zeus* now identified in the Trinity;[62] the division between the heavens and the earth; the manifestations of prayer and worship, and the division between good and evil.[63] These continued to form the basic characteristics of the medieval conception of religion from a Christian perspective in the Western sphere; however, while Aquinas modelled his theories upon the teachings of Christ[64] the application of his philosophy is not limited to

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[56] Philip S. Gorski, 'Recovered Goods: Durkheimian Sociology as Virtue Ethics' in Philip S. Gorski, David Kyuman Kim, John Torpey and Jonathan Van Antwerpen (eds), *The Post-Secular in Question: Religion in Contemporary Society* (New York University Press 2012) 81.
[57] Otfried Höffe, *Aristotle* (Christine Salazar tr, State University of New York Press 2003) 106.
[58] Lynne Rudder Baker, 'Death and the Afterlife' in William Wainwright (ed), *The Oxford Handbook of Philosophy of Religion* (OUP 2007) 372.
[59] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations*, (Brill 1998) 143.
[60] Mary M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (CUP 2006) 4.
[61] Eileen C. Sweeney, 'Thomas Aquinas on the Natural Law Written on our Hearts', in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 133.
[62] Jon Miller, 'Spinoza and Natural Law', in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 218.
[63] Lynne Rudder Baker, 'Death and the Afterlife' in William Wainwright (ed), *The Oxford Handbook of Philosophy of Religion* (OUP 2007) 372.
[64] Eileen C. Sweeney, 'Thomas Aquinas on the Natural Law Written on our Hearts', in Jonathan A. Jacobs (ed), *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 152.

Christian understanding alone.[65] Aquinas distinguishes a further characteristic of religion from his predecessors when he posited that the true law could be found by natural reason and supernatural revelation.[66] It was his view that this revelation could be obtained from scripture and interpreted by a priestly class, thus establishing the characteristic of an institutional religion separate from the temporal realm and contrasting his work from that of Plato and Aquinas.

The division of institutional from civil religion prefigures the contemporary separation of religion from the State. A subsequent characteristic of the reformation was its encouragement of the faithful, in the Western context, to develop a personal relationship with religion in order to seek salvation in accordance with their own conscience.[67] The writings of the early philosophers regarding the nature of religion assist the legal examination in that they illustrate fundamental and enduring characteristics of religious belief to the present day.[68]

1.3.2 Early Modern Legal Philosophers on the Characteristics of Religion

Hobbes and Locke were early advocates of religious freedom.[69] Their writings reflect a characteristic post-reformation Christian emphasis on scripture.[70] Both men advocated for the right to religious freedom on the basis that man should be free to pursue that which he believes will grant him salvation even when this belief is 'incompatible with the core tenets of revealed religion upheld by the Churches.'[71] Their contribution towards the philosophy of religion marks a departure from the exclusive concern in the interpretation of the Established Church and evidences an interest in the diversity of religious experience. While

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[65] William J. Wainwright, 'Introduction' in William J. Wainwright (ed), *The Oxford Handbook of Philosophy of Religion* (OUP 2007) 3.
[66] Vernon J. Bourke, 'Is Thomas Aquinas a Natural Law Ethicist?' (1974) 58(1) TM 59.
[67] Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (OUP 2001) 265.
[68] Eduardo Peňalver, 'The Concept of Religion' (1997) 107(3) YLJ 812.
[69] Their work is explored in greater detail in Chapter III.
[70] Douglas John Casson, *Liberating Judgment; Fanatics, Sceptics and John Locke's Politics of Probability* (Princeton University Press 2011) 201.
[71] Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (OUP 2001) 265.

Hobbes and Locke were not advocates of universal emancipation in religious matters, their writings prompted the generation of alternative characterisations of religion. [72] This was particularly evident in the writings of Spinoza.

Spinoza viewed that 'God's eternal law, the nature of nature in the world at large and the laws of reason' were identical[73] which has prompted commentators to posit that Spinoza 'is in quite close agreement with Aquinas'.[74] The writings of Spinoza contain a fundamental break with the philosophical characterisation of religion up until this point.[75] Israel suggests that his writings were of such significance that they prompted the break of philosophy from religion so as to re-establish itself as an independent discipline no longer in compliment to religion but in competition with it.[76] Spinoza's characterisation of god is indeterminate, with his contemporaries and later philosophers failing to reach agreement as to whether he was a deist, an atheist or an advocate of stoicism.[77]

Significantly, Spinoza wrote in *Ethics* that 'whatever we desire and do, whereof we are the cause insofar as we have the idea of God, that is, insofar as we know God, I refer to religion.'[78] He characterises religion as an individualistic and self-determinate experience and construct. Further, while he refers to a deity, emphasis can alternatively be placed on his construction, referring to the idea of God thus enabling a broader formulation of religion to emerge. His writings were fundamental in the departure of the philosophical inquiry

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[72] While Locke's famous *Letter Concerning Toleration* advocated for religious freedom it did so along a general reformed Christian theological basis and explicitly did not extend to Roman Catholics or Atheists, see; Rainer Forst, *Toleration in Conflict; Past and Present* (CUP 2013) 217.

[73] Eerol E. Harris, 'Spinoza's Treatment of Natural Law' in C. de Deugd (ed), *Spinoza's Political and Theological Thought* (North-Holland Publishing Company 1984) 66.

[74] Eerol E. Harris, 'Spinoza's Treatment of Natural Law' in C. de Deugd (ed), *Spinoza's Political and Theological Thought* (North-Holland Publishing Company 1984) 66.

[75] Carlos Fraenkel, *Philosophical Religions from Plato to Spinoza; Reason, Religion and Autonomy* (CUP 2012) 35.

[76] Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (OUP 2001) 240

[77] See; Jon Miller, 'Spinoza and Natural Law', in Jonathan A. Jacobs (ed.) *Reason, Religion and Natural Law; from Plato to Spinoza* (OUP 2012) 218, see also; Rosalie L. Colie, 'Spinoza and the Early English Deists' (1959) 20(1) JHI 23.

[78] Micheal L. Morgan, *Spinoza; Complete Works with the translations of Samuel Shirley* (Hackett 2002) 339.

regarding what, in the theological sense, consisted of true religion towards an analytical viewpoint which purported to examine what, in fact, religion consisted of.[79]

In comparison to Spinoza, the writings of nineteenth century William James were more sympathetic towards religious experience.[80] He stated that religion consisted of:

> 'the feelings, acts and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.'[81]

It can be suggested that his definition is influenced by aspects of post-reformation theology which emphasised the individualisation of religious experience[82] yet it can be considered to embrace, and also transcend, the contemporary colloquial definition of religion on the basis that he enabled individuals to determine the meaning of religion subjectively in like mind to Spinoza.[83] It is significant to note that James characterised religion as consisting of both thoughts and actions[84] in reference to a divine matter without attempting to define that matter as polytheistic, theistic or atheistic. This line of reasoning is later replicated in his lecture entitled *Circumscription of the Topic* where he suggests that divine matter consists of 'any object that is godlike, whether it be a concrete deity or not.'[85]

This characterisation of deity is significant. Early modern philosophers had characterised religion as consisting of some concept of definitive deity; as a god, gods or indeed as a natural essence.[86] James affirms that this deific character must remain as a central focus; however, by virtue of his definition he concludes that any attempt to define the substance of a concrete deity is unnecessary. Such an approach widens the capacity of the philosophical definition of religion to encompass atheistic movements and is consistent

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[79] Carlos Fraenkel, *Philosophical Religions from Plato to Spinoza; Reason, Religion and Autonomy* (CUP 2012) 35.
[80] Elhanan Yakira, *Spinoza and the Case for Philosophy* (CUP 2015) 42.
[81] William James, *The Varieties of Religious Experience* (Random House 1994) 36.
[82] Carolyn Evans, 'Introduction' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 8.
[83] Michael L. Morgan, *Spinoza; Complete Works with the translations of Samuel Shirley* (Hackett 2002) 339.
[84] James affirms the component of prayer in religious experience quoting Auguste Sabatier, *Esquisse d'une Philosophie de la Religion*; William James, *The Varieties of Religious Experience* (Random House 1994) 506.
[85] William James, *The Varieties of Religious Experience* (Random House 1994) 40.
[86] Undoubtedly Spinoza represented one of the most liberal and subjective interpretations of a deity, see; Aaron V. Garrett, *Meaning in Spinoza's Method* (CUP 2003) 24.

with his definition of a religious believer who merely participates in 'something solemn, serious and tender.'[87]

1.3.3 Modern Scholarly Reflections on the Characteristics of Religion

Emile Durkheim characterised religion as a 'division of the world into two domains, the one containing all that is sacred, the other all that is profane.'[88] While his use of the word sacred has clear religious connotations it should not be interpreted so narrowly as to exclude a neutral alternative. All belief systems may share a faith in something which they do not know to be true but trust in the absence of reason. This separation of faith from reason was emphasised in a judgment by the Supreme Court of Victoria, Australia, in the case of *Church of the New Faith v Commissioner of Pay-roll Tax*,[89] where Brooking J characterised religion as 'a dynamic relation between man and a non-human or superhuman being.'[90] This does not narrow the characterisation of religion to a theistic perspective exclusively but enables the individual to have an undefined relationship with faith. Durkheim is representative of the modern scholarly perception which characterises religion as an increasingly subjective practice which is no longer centrally characterised by a deity.

Wilfred Cantwell Smith suggested that religion has four distinct characteristics; (i) personal piety; (ii) an overt system of belief; (iii) practices and values, and; (iv) a universal meaning – religion in general.[91] His research feeds into the theory that religion can be characterised as culture which 'comes down to behaviour patterns associated with particular groups of peoples, that is to customs or to a people's way of life.'[92] Cultural theory has been highly influential in the definition of religion, particularly the cultural

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[87] William James, *The Varieties of Religious Experience* (Random House 1994) 44.
[88] Emile Durkheim, *The Elementary Forms of the Religious Life* (The Free Press 1965) 52.
[89] *Church of the New Faith v Commissioner of Pay Roll Tax*, [1983] VicRp 10; [1983] 1 VR 97 (5 May 1982) per Brooking J.
[90] *Church of the New Faith v Commissioner of Pay Roll Tax*, [1983] VicRp 10; [1983] 1 VR 97 (5 May 1982) per Brooking J.
[91] Wilfred Cantwell Smith, *The Meaning and the End of* Religion (Macmillan 1962) 48-49.
[92] Marvin Harris, *The Rise of Cultural Theory* (Crowell 1964) 16.

systems theory advocated by Geertz.[93] He suggested that religion consisted of a '(i) system of symbols which act to; (ii) establish powerful, persuasive and long lasting moods and motivations in men be; (iii) formulating conceptions of a general order of existence and; (iv) clothing these conceptions with such an aura of factuality that; (v) the moods and motivations seem uniquely realistic.'[94]

Geertz's classification of religion as culture is representative of the attempt of academic discourse to be inclusive in regard to a definition of religion. Such attempts risk alienating the colloquial perceptions.[95] Modern philosophical representations on the nature of religion have so broadened its characteristics as to define a wide variety of movements and organisations as religious.[96] Further, Atheism has continued to be categorised as a religious belief for the purposes of academic analysis.[97] Watson states that atheism is characterised by a belief in (i) the impossibility of proof; (ii) its functioning as an affirmation, and; (iii) commitments informed from an atheistic perspective.[98] Atheism could alternatively be understood as the antithesis of religion due to the fact that it functions primarily in rejection of a god; however, its socio-political construction as an oppositional movement may also be consistent with an early modern philosophical understanding represented in the writings of Spinoza and James.[99] This inclusive approach towards definition reconciles the fact that some colloquially recognised religions are themselves atheistic such as Theravada Buddhism.[100]

It is accepted that this research has largely neglected to consider the work of philosophers writing from an Oriental perspective. These writers provide an insight which is relevant for the broader examination of the definition of religion; however, as the purpose

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[93] Anthony Elliot and Charles Lemert, *Introduction to Contemporary Social Theory* (Routledge 2013) 145.
[94] Clifford Geertz, 'Religion as a Cultural System', in Michael Banton (ed), *Anthropological Approaches to the Study of Religion* (Routledge 1966) 4.
[95] Craig Martin, 'Configured for Exclusion: Characterisations of Religion in Liberal Political Philosophy' (2007) 19 MTSR 40.
[96] George Chryssides and Ron Geaves, 'Methodology in Religious Studies' in George Chryssides and Ron Geaves (ed), *The Study of Religion: An Introduction to Key Ideas and Methods* (2nd edn, Bloomsbury 2014) 25-27.
[97] George Chryssides, 'Does Size Matter?' in George Chryssides and Ron Geaves (ed), *The Study of Religion: An Introduction to Key Ideas and Methods* (2nd edn, Bloomsbury 2014) 112.
[98] Brenda Watson, 'Is Atheism a faith position? A reply to Brendon Larvor and Marilyn Mason' (2006) 4(12) T 44-45.
[99] See; s 2.3.2.
[100] William Herbrechtsmeier, 'Buddhism and the Definition of Religion: One More Time' (1993) 32(1) JSSR 15.

of this definition is to provide an adequate framework for legal developments in the Western sphere it has been necessary, in the interest of brevity, to limit the examination to philosophers specific to this concern in the interest of brevity. The following is an analysis of the mainstream theories surrounding the definition of religion in order to isolate an appropriate methodology for the purposes of this research.

1.3.4 Functionalism, Essentialism and the Polythetic Method

A cursory reiteration of the early philosophical and colloquial definition of religion may suggest that religion is characterised by; a belief in a supreme concept which may or may not be theistic; the worship of that concept in community or in isolation with prayers or actions and; the ability for this to be institutionalised. These characteristics, however, are largely essentialist in that they ascribe to religion certain qualities which are shared in common with all religions.[101] An immediate problem for scholars is the bias which is prevalent when attempting to determine what is essential in religion.[102] An inquiry which is largely theistic 'runs the risk of being unacceptably exclusive for the purposes of the right to freedom of religion'.[103] Such a definition can 'be based on very orthodox understandings of religion.'[104] At the same time Vickers warns that any over-inclusive characterisation of religion runs the risks of rendering any definition meaningless.[105]

A polythetic methodological approach to the definition of religion states that religions contain certain characteristics, only some of which an organisation must have in

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[101] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 194.
[102] Seth Daniel Kunin, Jonathan Miles-Watson 'Introduction' in Seth Daniel Kunin, Jonathan Miles-Watson (eds), *Theories of Religion; A Reader* (Rutgers University Press 2006) 5.
[103] Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 123.
[104] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 17.
[105] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 17.

order to be defined as a religion.[106] This method was articulated most clearly by Wittgenstein and his discussion of 'family resemblances':[107]

> 'Consider for example the proceedings that we call 'games'. I mean board-games, card-games, ball-games, Olympic games and so on. What is common to them all? – Don't say: 'There *must* be something common, or they would not be called 'games'' – but *look* and *see* whether there is anything common at all, but similarities, relationships, and a whole series of them at that...the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.'[108]

Wilson observes that polythetic definitions of religion are functional as they are based on relative instead of absolute identification.'[109] Wittgenstein convincingly illustrates this theory with those things commonly called games. His theory can apply to the concept of a collective conscience towards definition and perhaps also can be based to some extent on the sub-conscious.

This inclusive method of definition is considerate of a colloquial understanding of religion; however, it also facilitates a broader definitional stance which can lead to the inclusion of organisations not normally recognised as religious being characterised as such.[110] An exclusionary approach can be detrimentally influenced by traditional and orthodox perceptions of religion such as this example: Peňalver recalls that the 'meaning of the word religion developed within a uniformly Christian context'[111] and this serves to remind scholarship that in any definition of religion from which the common elements can be drawn, an inherent bias may be present which risks favouring traditional religions such as Christianity, Judaism and Islam over non-traditional world religions. Such an approach may

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[106] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 158, see also; Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 194.

[107] Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 124.

[108] Ludwig Wittgenstein, *Philosophical Investigations* (Gertrude Elizabeth and Margaret Anscombe trs, MacMillan 1953) 31-32.

[109] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 158.

[110] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', in Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998)155

[111] Eduardo Peňalver, 'The Concept of Religion' (1997) 107(3) YLJ 812.

encourage 'the view that some religions are superior to others.'[112] While it is true that this present analysis takes place in a Western context and is founded upon an inherent understanding of Christianity, legal discourse, intending to be applicable in the Western context, must be reconciled to Christianity and Islam as prototypical examples of religion in this jurisdiction.[113] This does not limit the potential for other religious groupings to be categorised as religious; however, it does bring to the fore those characteristics which are understood through time-honoured patterns of basic recognition and societal endorsement.

A response to this has been to create an open polythetic definition of religion whereby it is accepted that no example of religion would contain all the characteristics of religion. [114] This mitigates the possibility that traditional models of religion will be used as primary indicators of religious characteristics. At the same time this open-ended approach risks broadening the definition to such a degree that it is rendered meaningless enabling social and personal pursuits such as 'baseball or playing the stock market',[115] even 'Marxism',[116] to be characterised as religions. Such an approach risks alienating the colloquial understanding of religion and renders analytic value useless. By way of discouragement, Gunn recalls that the legal enterprise cannot construct an impractical definition of religion. He notes that 'while academics have the luxury of debating whether the term religion is hopelessly ambiguous, judges and lawyers often do not.'[117] Though functionalist definitions of religion are not immune to criticism[118] they may be necessary to ground a legal framework from which the 'legal' institution of religion can be understood.[119]

Vickers defined religion in the following terms:

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[112] Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 124.
[113] Martin Southwold, 'Buddhism and the Definition of Religion' (1978) 13(3) M 367.
[114] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 160.
[115] Peter B. Clarke, Peter Byrne, *Religion Defined and Explained* (Macmillan 1993) 8.
[116] Werner Cohn, 'Is Religion Universal? Problems of Definition' (1962) 2(1) JSSR 25.
[117] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 190-191.
[118] Brian C. Wilson, 'From the Lexical to the Polythetic: A Brief History of the Definition of Religion', Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 154.
[119] Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Routledge 2015) 67.

> 'Religion, then, can be taken to include a belief that reality extends beyond that which is capable of perception by the senses. To be 'religious' the belief system must have some relation to man's nature and place in the universe and his relation to things supernatural: it must have something to say about their place and function in the world.'[120]

Her definition is persuasive as it adopts a polythetic methodology which is wide enough to encompass the organisations which we would commonly identify as religious based on shared but not identical characteristics. It also reflects the interest in personal autonomy and the ability of the individual to act in accordance with their conscience consistent with the post-reformation philosophers. Yet it is functional in that it composes a definition of religion which can exclude sports clubs and political organisations in order to anchor the definition for a colloquial application.

Colloquial perspectives may 'wrongly assume that familiar or favoured creeds are real religions while different or new creeds are either not religious or are only pseudo-religious.'[121] Gunn reminds us that 'a definition may not simply be neutral but may contain an inappropriate societal value judgment.'[122] This has important consequences for the validation of minority religions that may be perceived as negative or harmful on the basis that they do not appear familiar. Philosophical enquiry has demonstrated that religion has been perceived to contain certain characteristics yet this essentialist definition is complicated on the basis that it can restrict the recognition of new religious organisations which do not necessarily fit within an established predetermination.[123]

To mitigate the risk of inherent bias a polythetic or open-polythetic method of definition can be adopted; yet, while the former equally risks inherent bias, the latter can be so open-ended that its adoption may render the right unrecognisable. Functionalist definitions, while equally open to criticism, perhaps represent the best method for legal application.

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[120] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 22.
[121] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 195.
[122] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 197.
[123] Dan Merkur, 'The Exemplary Life' in Thomas Idinopulos, Brian C. Wilson (eds), What is Religion? *Origins, Definitions and Explanations* (Brill 1998) 74.

1.4 The Legal Definition of Religion

The Irish Constitution is not silent on the subject of religion; however, this fundamental document does not provide any clear definition of religion. In the absence of such it is necessary to interpret the text in order to demonstrate its capabilities in a contemporary context. Subsequently, this section proposes to examine the Directives and decisions of both the European Council and the ECtHR in order to demonstrate the broad legal approach to definition within the European sphere. This complements the interpretation of the Irish text which is read with reference to an almost homogeneous population. The European Union can be characterised as an ongoing project in diversity management with the varied combination of historic, political, ethnic and religious traditions subject to the same human rights framework.[124] The ECtHR has the further complicated task of interpreting the rights guaranteed within the ECHR and applying them consistently across the Contracting States to the Convention. Subscription to the ECHR indicates that these States share common values, such as the right to religious expression. While these States share a common interest in the protection of this right, it is not clear if there is any consensus between them regarding the definition of religion. This analysis of the primary textual sources in both Europe and Ireland outlines the theoretical capabilities of the human right guarantees.

1.4.1 Bunreacht na hÉireann

The Irish Constitution is replete with religious imagery and sentiment.[125] The document was constructed to reflect the characteristics of liberal and republican democracy from a Christian and arguably Catholic perspective;[126] however, as the constitutional proximity to religious teaching and the validation of religious components has received

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[124] Michael A. Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals' (2004) 7 YHRDLJ 133.
[125] Ivana Bacik, 'The Irish Constitution and Gender Politics: Developments in the Law on Abortion' (2013) 28(3) IPS 380.
[126] Enda McDonagh, 'Philosophical-Theological Reflections on the Constitution' in Frank Litton (ed), *The Constitution of Ireland: 1937-1987* (Institute for Public Administration 1988) 198.

extensive academic consideration elsewhere[127] the following analysis limits itself to the examination of the capability of the Constitution to adopt a broad definition of religion.

While the Constitution evidences a largely Christian conception of religion the Law Reform Commission has indicated that 'religion [should] be defined to include Christian and non-Christian religions'.[128] This can be justified with reference to Article 44.1 of the Constitution which prefaces the right to religious freedom:

> 'The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence, and shall respect and honour religion.'[129]

This Article is constructed from a monotheistic perspective of God and its interpretation can be informed by the, now repealed, Articles 44.1.2° and 44.1.3° of the Constitution which read as follows:

> 'The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.
>
> The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.'[130]

The characteristics of the religious institutions and congregations listed within this repealed subsection suggest that the Constitution envisaged a Judeo-Christian construction of religion. The LRC has suggested that 'religions such as Islam, Hinduism or Buddhism were not represented by any organised communities in Ireland' at the time of the enactment of the Constitution; however, they conclude that this should not preclude the constitutional guarantee of religion from applying to them.[131] The encompassing of these faith-based organisations suggests a theistic aspect to the first of two independent clauses within the

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[127] See; Frank Litton (ed), *The Constitution of Ireland: 1937-1987* (Institute for Public Administration 1988); Eoin Carolan and Oran Doyle (eds), *The Irish Constitution* (Thompson Roundhall 2008); Eoin Daly, *Religion, Law and the Irish State* (Clarus Press 2012).

[128] Law Reform Commission, Consultation Paper on the Crime of Libel (LRC CP 5-1991) 174.

[129] Bunreacht na hÉireann art 44.1.

[130] Bunreacht na hÉireann art 44.1.2°, 44.1.3°; repealed by the Fifth Amendment of the Constitution Act, 1972.

[131] Law Reform Commission, Consultation Paper on the Crime of Libel (LRC CP 5-1991) 81.

constitutional guarantee of religion freedom. It is primarily evidence of the fact that the Constitution values these long-established religions.

It can be suggested that Article 44.1 has two independent clauses. The first encapsulates the acknowledgement of God while the second pertains to the substantive guarantee of religious respect. The division of this Article enables the constitutional definition of religion to equally apply to a polytheistic or atheistic construction of religion. Both clauses can be read independently of one another enabling a broader interpretation of religion which encapsulates, but does not limit its protections to, the Christian components of the document. While it cannot be said with authority that this definition is consistent with the framers of the Constitution, their recognition of all other religious denominations, named and unnamed, at the enactment of the Constitution supports the theory that this clause can be interpreted inclusively rather than exclusively.

A further argument would place emphasis on the ability of the Constitution to be interpreted as a 'living instrument', as identified in *Sinnott v Minister of Education*[132] and in the decision of *McGee v Attorney General*.[133] It could be suggested that the definition of religion could evolve consistent with the modification of legal standards; however, the judgment of Dunne J in the case of *Zappone v Revenue Commissioners*[134] limits the ability of society re-examine and re-interpret social mores in view of contemporary values.[135] Dunne J stated that 'there is a difference between an examination of the Constitution in the context of ascertaining unenumerated rights and redefining a right which is implicit in the Constitution and which is clearly understood.'[136] It may perhaps be argued, on the basis of the clearly restrictive interpretation of religion evidenced in the construction of the Constitution, that religion was understood from the perspective of the drafters of the Constitution in parallel to their understanding of marriage, as in the judgment of Dunne J. Alternatively a distinction could be drawn between the singular definition of marriage, as understood from the perspective of the drafters of the Constitution, and the diverse nature

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[132] *Sinnott v Minister of Education* [2001] 2 IR 545.
[133] *McGee v Attorney General* [1974] IR 284.
[134] *Zappone v Revenue Commissioners* [2006] IEHC 404.
[135] Bríd Moriarty and Eva Massa (eds), *Law Society of Ireland; Human Rights Law* (4th edn, OUP 2012) 42.
[136] *Zappone v Revenue Commissioners* [2006] IEHC 404.

of religion. An argument which emphasises the living instrument approach could suggest that the further broadening of the definition of religion is consistent with the liberal approach of the drafters. The Irish Constitution fails to provide any definition of religion yet can be interpreted broadly, consistent with the interpretation of the ECHR.

1.4.2 European Convention on Human Rights and Legal Instruments of the European Union

The right to religious freedom is guaranteed by Article 9(1) of the ECHR:

> '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.'[137]

Article 9(1) does not contain a definition of religion nor does it provide any indication as to what characteristics religion or belief must be comprised of. It guarantees that belief can be changed and that it can be shared with others or practiced in private. Reflecting the unlimited nature of the mind which individuals have over it[138] the Article places no restriction on what individuals believe to be religious which leaves the definition open to broad interpretation. The *travaux préparatoire* of Article 9 indicates a desire amongst delegates to arrive at an operable definition of religion. Evans notes that it was adopted in its current form with neither 'debate nor comment.'[139]

Article 9 ECHR is characterised by the binary aspects of the *forum internum* and the *forum externum*.[140] The *forum internum* pertains to the sphere of personal beliefs and individual conscience.[141] As such this Article guarantees absolute freedom in the realm of individual conscience and enables each individual to define religion according to their own characteristics. Hambler observes that the *forum internum* is entirely internal to the extent

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[137] European Convention on Human Rights art 9(1).
[138] Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2013) 3(2) OJLR 240.
[139] Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 270.
[140] Lucy Vickers, *Religious Freedom and Discrimination in the Workplace* (Hart Publishing 2008) 41.
[141] Erica Howard, *Law and the Wearing of Religious Symbols; European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 17.

that 'no one else need be aware of [another's] religious conviction.'[142] An application of the *forum internum* would define religion with reference to an unquantifiable amount of religious characteristics. It is entirely consistent with an open-ended polythetic approach to definition and functions to demonstrate that the State cannot limit the capabilities of individual conscience. The ECtHR has consistently affirmed the primacy of the *forum internum*.[143]

In 2004 the European Council adopted a Directive establishing the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.[144] Article 10(1)(b) stated that:

> 'the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.'[145]

This echoed the UN Human Rights Committee which defined religion in 1993 as 'theistic, non-theistic and atheistic.'[146] This directive was adopted into Irish law in 2006.[147] It represents the only attempt by the European Union to construct an operable definition of religion. Bearing similarity with the interpretations discussed earlier in early to contemporary philosophical definitions of religion, this Directive enables atheism to be defined as a religious concept. It further recognises the ability for atheists to participate in expressions of their views. It is reflective of an expansive quality of the *forum internum*.

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[142] Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Routledge 2015) 12.
[143] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2013) 3(2) OJLR 241.
[144] Council Directive (EC)83/2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L304/12.
[145] Council Directive (EC)83/2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L304/12, art. 10(1)(b).
[146] Human Rights Committee, 'General Comment No 22 UN Doc HRI/GEN/1/Rev.1 at 35' (1994).
[147] European Communities (Eligibility for Protection) Regulation 2006, SI No 518/2006.

At the same time, it must be recalled that this directive was not adopted primarily to provide a definition of religion. It was adopted to provide an operable definition of religion for the purpose of protecting refugees and accordingly must be interpreted in conjunction with the purpose of the legislation. Individuals who request refugee status can apply on the basis that their native country is hostile towards religion or on the basis that it is hostile towards all religions other than the Established religion. Twenty countries currently have laws in place criminalising apostasy.[148] Apostasy consists of the renunciation of a religion which ordinarily is followed by the conversion to another religion. The renunciation of a religious belief in order to declare oneself an atheist is restricted by criminal sanctions including the death penalty in these jurisdictions.[149] The directive reflects this in the protection of those persecuted for the abstention from formal acts of religious worship. The European Council intended to form a context specific definition of religion for the purposes of this directive and while it provides a clear definition relevant to this study the purpose of the directive must inform its interpretation. Indeed, 'what one decides is the best or the right definition of religion will depend on and be indexed to one's purposes.'[150] It is clear that, while the definition of religion from the perspective of the Irish Constitution and the ECHR must remain expansive, qualified legal definitions are permissible where they are necessary to address specific predicaments.

1.5 Towards a Qualified Definition of Religion

The Irish Constitution and the ECHR can be interpreted to define religion in the absence of specific characteristics; however, limitations on the application of legal benefits afforded to these organisations inform the creation of a qualified definition of religion within the Irish and European context. The qualified definition includes organisations primarily identified as religious but which possess further characteristics, such as a public benefit, in order to obtain the legal benefits commonly afforded to this category of

[148] Pew Research Centre Forum on Religion & Public Life, Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread, 21 November 2012 <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/> accessed 3 June 2014.
[149] Pew Research Centre Forum on Religion & Public Life, Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread, 21 November 2012 <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/> accessed 3 June 2014.
[150] Kevin Schilbrack, 'What Isn't Religion?' (2013) 93(3) JR 292.

organisations. These benefits are primarily tax exemptions on the basis of their charitable status.[151] This section examines legislation and directives from the domestic and European context in addition to the case law from both the Irish courts and the ECtHR in order to isolate instances of benefit deprivation in order to inform a qualified definition of religion.

1.5.1 Reluctance to Award Religion as a Qualifying Factor: addressing the Directives of the European Council and Irish Legislation

The *forum internum* enables any individual to believe in whatsoever they desire.[152] On this basis it is largely possible for any individual to believe in any religion and for that same individual to define religion howsoever they desire. The legal definition of religion, in theoretical terms, is boundless; however, an examination of the restriction of legal benefits afforded to religions by virtue of their characteristics demonstrates qualified legal definitions to emerge. In legislation which awards religion a legal definition of religion must encompass those organisations which are afforded legal benefits by virtue of their characterisation as religious and must exclude those harmful entities which are harmful to society. The following demonstrates that no such clear limitation exists in the European context; however, the domestic context does specify moderate limitation in the subject of legislation. It should be stated, in the interest of clarity, that the limitations discussed here are distinct from any limitation of the manifestation of religious belief. Such limitations form the substance of chapter II of this thesis.

The European community has been reluctant to be drawn into any proposal which would directly or indirectly construct a definition of religion. This was evidenced in its refusal to provide distinguishing characteristics of sects which would function to differentiate them from the definition of religion.[153] In 1999 the Council of Europe published

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[151] Robert Meakin, *The Law of Charitable Status; Maintenance and Removal* (CUP 2008) 146.
[152] Erica Howard, *Law and the Wearing of Religious Symbols; European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 17.
[153] See; James T. Richardson, Massimo Introvigne, 'Brainwashing Theories in European Parliamentary and Administrative Reports on Cults and Sects' (2004) 40(2) JSSR 143.

its recommendation on the *Illegal Activities of Sects*,[154] further; on the 17 March 2014 the European Parliament adopted a resolution on the protection of minors against the excesses of sects.[155] The latter resolution recognises that the activities of sects fall for determination under Article 9 of the ECHR.[156] The ability for sects to be protected under Article 9 of the ECHR is representative of the expansive approach with the Council of Europe has adopted towards the definition of religion. In the Parliament's response to specific instances of danger represented in its resolution it has enabled sects to be categorised as a sub-division of religion. The Irish jurisdiction has adopted a more robust response to the exclusion of harmful and dangerous organisations for the purposes of the legal definition of religion.

The Irish Statute book frequently has cause to cite religion, predominantly in the protection of individuals from discrimination[157] but also for the regulation of various types of enterprise or organisation;[158] however, such legislation does not provide a definition of religion. It evidences characteristics of religion containing; the recognition of a deity[159]; the recognition of rites and ceremonies[160]; and the acknowledgement of the clerical order and institutional religion.[161] Whilst such characteristics are acceptable they are not sufficiently numerous as to indicate a polythetic definition to emerge in the Irish context. It can be stated that the Charities Act 1961-2009 and the Defamation Act 2009 provide negative definitions of religion and function to restrict the legal benefits afforded to religious from applying to harmful organisations and thus assisting a qualified definition of religion to emerge.

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[154] Council of Europe, 'Illegal Activities of Sects' Recommendation 1412 (1999).
[155] European Parliament, 'The Protection of Minors Against the Excesses of Sects' Doc 12595, Reference 3776 of 20 June 2011.
[156] European Parliament, 'The Protection of Minors Against the Excesses of Sects' Doc 12595, Reference 3776 of 20 June 2011, pt C, [11].
[157] See; Employment Equality Act 1998; Equal Status Act 2000.
[158] See; Adoption Act 2010; SI No 320/1947 Rules For The Government of Prisons 1947; SI No 551/2006 Mental Health Act 2001 (Approved Centres) Regulations 2006.
[159] This is evidenced both in the construction of oaths, see; SI No 345/2012 Defence Act 1954 (Military Judge) (Form of Oath and Solemn Declaration) Rules 2012; SI No 179/2009 Electoral Act 1992 (s 165) Regulations 2009; Garda Síochána Act 2005, s 16, and in the limitation of liability based on 'acts of God', see; SI No 529/2003 Wireless Telegraphy (Multipoint Microwave Distribution System) Regulations 2003; Merchant Shipping (Liability of Shipowners and Others) Act, 1996, Article IV.2; Environmental Protection Agency Act, 1992, s 18.4.28B.1(a).
[160] SI No 3/1996 European Communities (Fresh Poultrymeat) Regulations, 1996, s 33; The Dublin Cemeteries Committee Act 1970, s 21.
[161] Income Tax Act, 1967, s 548; The Dublin Cemeteries Committee Act 1970, s 21.

The Charities Act 1961 does not provide a positive definition of religion. It makes a specific concession for the practices of the Roman Catholic Church in s 45(2) when it extends the recognition of masses which are celebrated in private to be considered as charitable under the criteria of gift for the advancement of religion.[162] The sacrifice of mass, offered in public or private, is determined to occasion 'public benefit'[163] for the purposes of this legislation. The extension of privileges to religious societies in the interest of the 'public good' suggests that religions are only defined as religious for the purposes of legislation when they occasion a public good. Public good is capable of subjective and objective interpretation; however, clear aspects of harmful behaviour can exclude an organisation from the benefits afforded by virtue of the Act. This is evidenced in the amendments to the Act under s 3 of the Charities Act 2009 as follows:

> 'For the purposes of this section, a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult –
>
> (a) the principle object of which is the making of profit, or
>
> (b) that employs oppressive psychological manipulation –
>
> (i) of its followers, or
>
> (ii) for the purpose of gaining new followers.'[164]

The Act reflects the negative influence which cults and other organisations can have on individuals and qualified their enjoyment of the benefits which are afforded to religion.

It is of note that the Oireachtas in the construction of this legislation did not attempt to offer a definition of religion instead including limiting factors in the application of the Act. This legislation can be interpreted to exclude dangerous or harmful organisations from being defined as religious for the purposes of the Act; however, this negative approach to definition is not an entirely acceptable solution. This was emphasised in the debate surrounding the Defamation Act 2009, which included a similar negative provision, when Denis Naughten T.D. called for 'clarity regarding the definition of religion'.[165] He questioned the status of 'some African religions' the Church of Scientology and the Jehovah Witness

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[162] Charities Act 1961, s 45.
[163] Charities Act 1961, s 45(1).
[164] Charities Act 2009, s 3(10)(a)-(b)(i)-(ii).
[165] Denis 'Defamation Bill 2006 [Seanad]: Committee Stage', Select Committee on Justice, Equality, Defence and Women's Rights Debate (Seanad, Dublin, 1 July 2009).

Movement.[166] These movements have been outlawed or classified as cults in other jurisdictions.[167] The characterisation of cults, as either principally motivated by financial means or utilising oppressive psychological manipulation, is insufficient for legislative exclusion. It would be positive to emphasise the requirement that religion possess a public benefit demonstrated through endorsed conduct in order to be legislatively defined as such; however, it must be accepted that any requirement of public benefit would be equally subjective and unsuited to general application

S 36 of the Defamation Act 2009 makes it a criminal offense to publish or utter blasphemous matter.[168] This matter includes actions or statements which are considered as 'grossly abusive or insulting in relation to matters held sacred by any religion'.[169] It does not extend the protections of religion to 'an organisation or cult'[170] which has 'the principal object of which is the making of profit'[171] or 'employs oppressive psychological manipulation'[172] on 'its followers'[173] or 'for the purpose of gaining new followers'.[174] This is directly reflective of the Charities Act 2009 discussed above.

The Defamation Act 2009 similarly does not offer a definition of religion for its interpretation; rather, both pieces of legislation proffer "religion is not" classification systems. The Defamation Act 2009 was informed by the LRC Consultation Paper on the Crime of Libel which preceded its enactment.[175] In considering the meaning of blasphemy the LRC presented a historical and contemporary analysis of the crime which demonstrated its Christian, Common Law origins and contrasted these with the competing interests of religious plurality in a contemporary legal sphere. In light of these contrasting interests they state that 'considerable difficulty...exists in reaching any acceptable definition of what

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[166] Denis Naughten, 'Defamation Bill 2006 [Seanad]: Committee Stage', Select Committee on Justice, Equality, Defence and Women's Rights Debate (Seanad, Dublin, 1 July 2009).
[167] Carolyn R. Wah, 'Jehovah's Witnesses and the Responsibility of Religious Freedom: The European Experience' (2001) 43(3) JCS 598-599.
[168] See Defamation Act 2009, s 36(1): 'A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding €25,000.'
[169] Defamation Act 2009, s 36(2)(a).
[170] Defamation Act 2009, s 36(4).
[171] Defamation Act 2009, s 36(4)(a).
[172] Defamation Act 2009, s 36(4)(b).
[173] Defamation Act 2009, s 36(4)(b)(i).
[174] Defamation Act 2009, s 36(4)(b)(ii).
[175] Law Reform Commission, Consultation Paper on the Crime of Libel (LRC CP 5-1991).

constitutes a religion in the context of a modern law.'[176] They further observe that 'any legislation we propose might be arguably in contravention of those provisions of the European Convention on Human Rights.'[177] This is due to the anxiety that a legislative definition of religion may exclude organisations which are religious yet do not fit within the traditional framework of religious for the purposes of law. It is a direct acknowledgement that due to the plurality of religious beliefs a unified definition cannot be simply achieved.

In the absence of any clear direction within the European sphere, the analysis of Irish legislation demonstrates a context specific legal definition of religion to emerge. The exclusions contained within the Charities Act 1961-2009 and the Defamation Act 2009 provide a context whereby it is possible to identify a group which is not defined as a religion for the purposes of law. This negative approach to definition is not ideal and does not afford the clarity which legislation requires to distinguish or categorise religions, sects and cults. The legislative interest in the public benefit of religious organisations should be emphasised and enhanced so as to further exclude dangerous religious movements. No clear or positive definition therefore can be drawn from the directives of the European community or the domestic legislature in this present examination.

1.5.2 Reluctance to Award Religion as a Qualifying Factor: examining the jurisprudence of the ECtHR and the Irish Courts

Any negative approach to definition, represented within the legislation above, can be the subject of determination by the ECtHR or the Irish Courts. The ECtHR has been consistently reticent to distinguish religious groups from sects and other communities while the Irish jurisprudence does not speak to this issue at all. It is then necessary to address the judgments and determinations of the respective institutions to explicate their present theory and isolate contexts where they have excluded organisations from being defined as religious for the purposes of law.

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[176] Law Reform Commission, Consultation Paper on the Crime of Libel (LRC CP 5-1991) 173.
[177] Law Reform Commission, Consultation Paper on the Crime of Libel (LRC CP 5-1991) 173.

The ECtHR has not provided a definition of religion.[178] At the same time the issue of religion and the interpretation of Article 9 has been a consistent feature in the decisions of the ECtHR and the analysis of those decisions has demonstrated that the ECtHR applied certain limited characteristics for a concept or organisation to be defined as religious.[179] The court has been resistant to examine the components of religion and has appeared to adopt an approach that religion is largely autonomous, subjective and unnecessary to define.[180] The following analysis demonstrates that the ECtHR has adopted a liberal approach towards the definition of religion[181] which must not be interpreted purely with reference to officially recognised religious communities[182] while at the same time adopting limiting factors in comparison to the possibilities of the ECHR.

Kokkinakis v Greece[183] was the 'first real case concerning freedom of religion to have come before the European Court since it was set up.'[184] The applicant had been arrested in excess of sixty times for proselytism and alleged that his most recent conviction contravened his rights to religious freedom under Article 9 of the ECHR. The decision of the, now abolished, European Commission of Human Rights in this case featured a fusion of two opposing nouns; (i) religion, and; (ii) sect. The respondent Contracting State submitted case law which repeatedly refers to the Jehovah Witness Movement as a 'sect';[185] however, the decision of the ECtHR refrains from doing so and references both the fact that the Jehovah's Witness Movement enjoys the status as 'known religion'[186] and recognises the right of Mr Kokkinakis to practice his religion.[187] This reluctance to distinguish between these competing terms with a view to developing a jurisprudential definition of religion may have been resisted on foot of the inability of the court to examine matters pertaining to the substance of belief. This was illustrated in the case of *Metropolitan Church of Bessarabia v Moldova*[188] where the court affirmed that:

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[178] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 21.
[179] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 21.
[180] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2013) 3(2) OJLR 237.
[181] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 21.
[182] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 22.
[183] *Kokkinakis v Greece* (1993) Series A no 260-A.
[184] *Kokkinakis v Greece* (1993) Series A no 260-A per Partly Concurring Opinion of Judge Pettiti.
[185] *Kokkinakis v Greece* (1993) Series A no 260-A [9-10], [20].
[186] *Kokkinakis v Greece* (1993) Series A no 260-A [32].
[187] *Kokkinakis v Greece* (1993) Series A no 260-A [36], [43].
[188] *Metropolitan Church of Bessarabia v Moldova* App no 45701/99 (ECtHR, 13 December 2001).

> '...the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other.'[189]

The ECtHR permits a very limited form of inquiry into the activities of groups which characterise themselves as religious. This was affirmed in *Manoussakis v Greece*[190] where the ECtHR stated 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.'[191] This inquiry was permitted only to the preservation of public safety and excluded 'any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.'[192] This line of case law suggests that the ECtHR defines religion broadly inclusive of theistic and atheistic perspectives and supports a less qualified approach to religious definition.

Some features of this decision in *Kokkinakis v Greece*[193] are additionally relevant for this study. The ECtHR affirms that freedom of thought, conscience and religion, as enshrined in Article 9, is '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.'[194] In his partly dissenting judgment, Pettiti J states that 'believers and agnostic philosophers' possess this right.[195] This decision reflected the broad approach which the ECtHR adopted towards the definition of religion including not only theistic faiths but atheistic movements and new religious movements

The ECtHR has recognised that several Christian denominations;[196] Islam;[197] Hinduism;[198] Buddhism;[199] Judaism;[200] atheism,[201] and; a variety of other religions and

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[189] *Metropolitan Church of Bessarabia v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [116].
[190] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996).
[191] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996) [39].
[192] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996) [47].
[193] *Kokkinakis v Greece* (1993) Series A no 260-A.
[194] *Kokkinakis v Greece* (1993) Series A no 260-A [31].
[195] *Kokkinakis v Greece* (1993) Series A no 260-A per Partly Concurring Opinion of Judge Pettiti.
[196] *Knudsen v Norway* (1985) 42 DR 247; *Iglesia Bautista 'El Salvador' v Spain* (1992) 72 DR 256.
[197] *X v United Kingdom* (1981) 22 DR 27; *Yanasik v Turkey* (1993)74 DR 14; *Karaduman v Turkey* (1993) 74 DR 93.
[198] *Chauhan v United Kingdom* (1988) 65 DR 41; *ISKCON and Others v United Kingdom* (1994) 76-A DR 41.

beliefs[202] fall under the protection of Article 9 of the ECHR.[203] It is significant to note also that the activities of the Jehovah's Witness Movement[204], the Church of Scientology[205] and the Unification Church (Moonies)[206], who have at times been identified as sects,[207] have been considered as religious for the purposes of Article 9 by the EComHR and the ECtHR. This shows that the EComHR and the ECtHR take a 'generous approach to defining religion or belief.'[208]

While the ECtHR applies a generally broad criterion with regard to definitional characteristics, it has introduced limiting factors.[209] In the case of *X v Germany*[210] the applicant alleged that the refusal of the Administrative Authorities of Hamburg to permit his ashes to be scattered on his own land upon his death infringed his rights under Article 9 of the ECHR. The applicant alleged that the compulsion to be buried in a cemetery containing Christian monuments was against his personal convictions. The EComHR accepted that the applicant's claim was based on a strong personal motivation; however, it stated that a belief, for the purposes of Article 9, had to contain 'some coherent view on fundamental problems.'[211] Evans interprets this judgment to suggest that 'some level of intellectual or moral coherence is required before something can be considered a religion or belief.'[212]

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[199] *X v United Kingdom* (1975) 1 DR 41.
[200] *D v France* (1983) 35 DR 199.
[201] *Angeleni v Sweden* (1986) 51 DR 41.
[202] *Kokkinakis v Greece* (1993) Series A no 260-A; *X v the Church of Scientology v Sweden* (1979) 16 DR 68; *X v Austria* (1981) 26 DR 89.
[203] Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 140.
[204] *Kokkinakis v Greece* (1993) Series A no 260-A.
[205] *The Church of Scientology v Moscow* App no 18147/02 (ECtHR, 5 April 2007).
[206] *Nolan and K v Russia* App no 2512/04 (ECtHR,12 February 2009).
[207] See, *inter alia*; Emmanuelle Bribosia, Isabelle Rorive and Amaya Úbeda de Torres, 'Protecting Individuals from Minorities and Vulnerable Groups in the European Court of Human Rights: Litigation and Jurisprudence in France' in Dia Anagnostou and Evangelia Psychogiopoulou (ed), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Contexts* (Martinus Nijhoff 2010) 87.
[208] Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 140.
[209] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 21, see also; Merilin Kiriorg, 'Freedom of Religion or Belief – The Quest for Religious Autonomy' (PhD Thesis, University of Oxford 2011) 136.
[210] *X v Germany* (1981) 24 DR 137.
[211] *X v Germany* (1981) 24 DR 137 [1].
[212] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 54.

In the case of *Campbell and Cosans v United Kingdom*[213] the applicants alleged that the use of corporal punishment in the schools that their children attended was contrary to their philosophical beliefs. The applicants did not invoke their rights under Article 9 in this case; however, during the course of the decision the EComHR noted that belief, for the purposes of Article 9, had to denote 'views that attain a certain level of cogency, seriousness, cohesion and importance.'[214] This prescription is broad and facilitative of a diversity of world views and religious perceptions prompting Evans to observe that 'the tendency of the court and Commission at the definition stage of Article 9 cases has been to adopt a philosophy of inclusiveness.'[215]

This approach by the EComHR and the ECtHR can be criticised on the basis that such a broad interpretation makes the guarantee of the right essentially meaningless.[216] In the case of *X v Austria*[217] the applicant challenged the validity of criminal sanctions imposed on him on the basis of neo-Nazi activities. The applicant contended that his conviction in the domestic courts, under a generalised statute designed to stop the re-introduction of Nationalist Socialism in Austria, infringed his freedom of belief, under Article 9, and his freedom of expression, under Article 10. The EComHR acceded to his submission and proceeded to consider whether the Contracting State had violated his freedom under, *inter alia*, Article 9 of the Convention on the basis that neo-Nazi activities were consistent with a belief. The EComHR determined that the penal measures taken against the Applicant were justified under Article 9 and necessary in a democratic society as opposed to finding no application of the right. Later in *Hazar, Hazar and Acik v Turkey*[218] the EComHR declared admissible a complaint whereby the applicants alleged that they had been convicted on the basis of their membership of the Communist Party. They alleged that this was contrary to Article 9 of the ECHR.[219] Both cases demonstrate the breadth of the potential definition of religion from the perspective of the jurisprudence of the European Court which reflects the broad polythetic representations previously discussed. Such an approach risked the right

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[213] *Campbell and Cosans v United Kingdom* (1982) Series A no 48.
[214] *Campbell and Cosans v United Kingdom* (1982) Series A no 48 [36].
[215] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 392.
[216] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 65.
[217] *X v Austria* (1963) 13 CD 42.
[218] *Hazar, Hazar and Acik v Turkey* (1992) 73 DR 111.
[219] This case was settled in advance of determination.

being interpreted to the point of obscurity if it is to encompass political or even social movements such as sports clubs and teams.[220]

The Directives of the European Council and the jurisprudence emanating from the ECtHR reflect the intention to define religion broadly inclusive of a multitude of world views based on an important belief pertaining to fundamental issues.[221] This view is not limited to theistic faiths but extended to atheists and agnostics.[222] The substance of Article 9 enables anyone to believe whatsoever they desire without limitation and the ECtHR guarantees that right so long as it has 'some coherent view on fundamental problems'[223] and that the views 'attain a certain level of cogency, seriousness, cohesion and importance'[224] The Courts demonstrate a particular willingness to facilitate the widest possible definition of religion which has justifiably generated criticism that such an open-ended attitude towards a definition may render any such definition meaningless.[225] This provides some justification for the failure of the court to differentiate between religions and sects or new religious movements for the purposes of Article 9. It also gives some explanation as to why the court has made little attempt to limit the extent of its definition.

The case law emanating from the Irish Courts does not contain any definition of religion instead sharing many of the features interpreted with reference to the Constitution and legislation. Case law evidences a historical preoccupation with the Christian religion, particularly represented by the Roman Catholic Church. Such has given rise to the recognition of the sacerdotal privilege.[226] The examination of how the court applies this privilege in the modern context functions as a distinguishing characteristic between religions for the purposes of law and other organisations. Further, the application of the benefits of the Charities Acts has illustrated characteristics of religion which were not contained within the Acts. This limiting speculation can be made with a view of the principles of charity and the law of trusts. Finally the court has had occasion to determine

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[220] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 20.
[221] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 21
[222] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 13.
[223] *X v Germany* (1981) 24 DR 137 [1].
[224] *Campbell and Cosans v United Kingdom* (1982) Series A no 48 [36].
[225] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2003) 120.
[226] Martin O'Dwyer, 'Matter of Evidence: Sacerdotal Privilege and the Seal of Confession in Ireland' (2013) 13 UCDLR 112.

the nature of a cult which assists our definition further. This section references relevant law from the jurisdiction of the United Kingdom where it has been cited with approval in the Irish legal system or where it has been referenced in recommendations of the Irish Law Reform Commission.

Nineteenth-century Irish case law defined religion as the organisation represented in the body of the Church of Ireland as a member of the Anglican Communion.[227] This institutional focus was can be attributed to the Establishment of the Church of Ireland,[228] yet this presumption did not carry forward with the enactment of the 1922 Constitution[229] or with the subsequent 1937 Constitution.[230] It resulted in the recognition of religious plurality giving rise to a variety of interpretations of religion beyond the characteristics of the Established Church.

The courts have articulated legal principles with reference to religious precepts to supplement the fundamental basis of our legal system. One such principle is the sacerdotal privilege afforded to clergy in the case of *Cook v Carroll*.[231] Sacerdotal privilege, often referred with reference to its secular construction as legal-professional privilege, refers to the way by which a communication is protected from disclosure in evidence on the basis that it was communicated confidentially between a party and his advisor.'[232] In this circumstance the advisor was a Roman Catholic priest and the communication was made while both the plaintiff and the defendant were receiving spiritual counsel together.[233] This forms the basis of professional privilege in Irish case law and has been extended to apply to other relationships including counsellor and client in the case of *E.R. v J.R.*[234] Carroll J annexed the judgment of Gavin Duffy J from the Article 44.1 of the Constitution, repealed by the Fifth Amendment of the Constitution Act, 1972. This judgment applied the sacerdotal privilege to all religions within the State.

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[227] *R v Gathercole* [1838] 2 Lew. C.C. 254.
[228] Consequently disestablished by the Irish Church Act 1869.
[229] Constitution of the Irish Free State (Saorstát Eireann) Act 1922 art 8.
[230] *Irish Shell Ltd v Elm Motors Ltd* [1984] IR 200, per McCarthy J at 227.
[231] *Cook v Carroll* [1945] IR 515.
[232] John B. Saunders (ed), *Mozley & Whiteley's Law Dictionary* (Butterworths 1977) 255.
[233] *Cook v Carroll*, [1945] IR 515, at 516.
[234] *E.R. v J.R.* [1981] ILRM 125.

This case is significant for the interpretation of a definition of religion from the case law of the Irish jurisdiction on the basis that as the benefit of sacerdotal privilege is extended to all religions it is a corollary to suggest that those organisations which do not benefit do not fit within the qualified legal definition of religion under Irish case law.[235] In the case of *Johnson v Church of Scientology*[236] the High Court refused to extend sacerdotal privilege to the ministers of the Church of Scientology. It affirmed the order of Geoghegan J dated 30 April 1999 when he directed 'the defendants to disclose to the plaintiff those documents in respect of which the defendants have maintained a claim of sacerdotal privilege.'[237] In his order, Geoghegan J resisted the plea of sacerdotal privilege on the basis that the relationship did not bear similarities with the priest and penitent and further that the privilege afforded to spiritual but non-confessional exchanges did not apply in this context. Geoghegan J's refusal to afford this organisation a privilege afforded to all religious organisations could be interpreted to suggest that this organisation was not compatible with the definition of religion for the purposes of law in the Irish legal system. While the court on that occasion did not characterise this organisation as a cult, it may have been considered to have possessed characteristics which were incompatible with the qualified definition of religion. However, there are limitations with the advancement of this point. Though the organisation was not entitled to rely on a privilege afforded to all religions the judgment of Geoghegan J did not deal with this issue at any length. In the absence of detailed consideration his judgment can be interpreted to indicate that the organisation was a religion generally but not a religion in this qualified context of common law legal professional privilege.

The Charities Acts 1961-2009 provide for tax exemption on the basis of religious classification.[238] Analysis of the case law determining the legitimacy of religions and religious ventures can yield a definition of religion from the perspective of the Irish Courts. Lord Macnaghten established the four grounds for the grant of charitable status in the case of *Commissioners for the Special Purpose of Income Tax v Pemsel,*[239] the third of which were

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[235] This excluded those other groups to whom the privilege was extended such as counsellor and client.
[236] *Johnson v Church of Scientology & Ors* [2001] 1 IR 682.
[237] *Johnson v Church of Scientology & Ors* [2001] 1 IR 682 at 684.
[238] Charities Act 2009 s 3(1).
[239] *Commissioner for the Special Purpose of Income Tax v Pemsel* [1891] AC 531.

those grants for the advancement of religion. This ground was further clarified by Lord *Hanworth MR in Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners*[240] as;

'...the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests and the observances that serve to promote and manifest it.'[241]

Organisations that wish to receive tax exemption on the basis that they are religious therefore must be compatible with this definition. While no case has been determined in this matter it is significant to note that the Church of Scientology is not afforded charitable status at this time in the Republic of Ireland.[242] The Irish Courts have not determined that the Church of Scientology is a non-religious entity for the purposes of s 3 of the Charities Act 2009 yet the absence of charitable status is yet a further indication that this organisation may not be considered compatible with the qualified definition of religion for the purposes of Irish law.

The Church of Scientology has been restricted in other European jurisdictions.[243] While the Irish Courts have not expressly excluded the organisation from the definition of religion it is important to note that there is no collective approach to define this organisation as a religion within the European context. Case law in Europe and Ireland has reflected the urge to restrict the definition of religion so as to protect individuals from harm. This reinforces the observation that the legislation and case law of the jurisdiction emphasise the importance of public benefit in the definition of religion. It has divided religion from pseudo-religious groupings also addressed as sects.[244]

The ECtHR and the Irish Courts have responded in a contextual manner to individual complications which have arisen with regard to the legal definition of religion. It can be said that the institutions have adopted direct and indirect measures in their respective attempt to define religion. The analysis which has taken place above can be narrowed to state that

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[240] *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1931] 2 K.B. 465.
[241] *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1931] 2 K.B. 465, at 477.
[242] Church of Scientology Mission of Dublin Ltd. Company No: 216937.
[243] See; *The Church of Scientology and Another v Sweden* (1979) 16 DR 68. Its application to the Revenue of the United Kingdom for tax exemption on the basis of religion was rejected in 1999.
[244] See; John A. Saliba, *Understanding New Religious Movements* (AltaMira Press 2003).

both the ECtHR and the Irish Courts have adopted the position that religion can be defined in an open ended and polythetic manner generally; however, reluctance to award religion has demonstrated where the respective institutions have adopted context specific definitions in view of individual circumstances. In effect, the courts can be said to initially define religion in a polythetic manner yet adopt a functionalist approach in certain circumstances above. This can be in view of the limitations of a statue or alternatively in view of the boundaries of the common law. Effectively, the court can be interpreted as indicating that all organisations are capable of being defined as a religion for the purposes of law but not all religions will qualify as religions for the purposes of certain statues or provisions of the common law. This contraction of the general definition can give rise to a qualified definition of religion.

1.5.3 The Law Reform Commission

The LRC emphasised this division in its *Report on the Law Relating to Seduction and the Enticement and Harbouring of a Child.*[245] They observe the following:

> 'The activities of a religious denomination or sect are subject to public order and morality and the disruption of family unity could well be held to offend public order and morality. Furthermore, it is submitted that a congregation, order, society or other group within or adhering to a particular church or sect is not in itself a religious denomination within the meaning of Article 44.2.5 of the Constitution.'[246]

The observations of the LRC can be interpreted to mean that any pseudo-religious group which promotes activities which are contrary to public order and morality do not satisfy the definition of religion for the purposes of Irish law. It is necessary that the groups operate within the confines of the law and be a positive influence on their community.

The way in which organisations regulate themselves and their followers will significantly impact their ability to be defined as a religion. The LRC demonstrates this with reference to a judgment of the King's Bench Division of the High Court in the case *Lough v*

[245] Law Reform Commission, The Law Relating to Seduction and the Enticement and Harbouring of a Child (LRC - Working Paper No 6-1979).
[246] Law Reform Commission, The Law Relating to Seduction and the Enticement and Harbouring of a Child (LRC - Working Paper No 6-1979). 20.

Ward.[247] Here the applicant father sought compensation for the loss of the servitude of his daughter when she entered a religious community which, while claiming to be founded on aspects of Catholicism,[248] demonstrated elements of harmful behaviour. This pseudo-religious organisation could be considered as a new religious movement for the purposes of contemporary legal application. At the age of sixteen the girl entered the Abbey of Christ the King and assumed the rank of novice at alarming speed.[249] Cassells J awarded exemplary damages of £500 and granted an injunction preventing the defendants from continuing to harbour the girl. His comments in relation to the religious society diminish any division between religions and new religious movements. He considers the organisation to be a 'strange and small body'[250] but observes that;

> '[S]ome people may think that they are much misguided; but this is a land which tolerates many kinds of religious beliefs. I have to deal with this case and with nothing else.'[251]

The judgment of Cassells J could be interpreted as an early example of the broad definitional stance which the court adopted towards the definition of religion. The learned trial judge recognised the detrimental influence which the organisation had on the girl in question and the integrity of the family; however, he still characterised the organisational belief as a religion for the purposes of the common law. He proceeded to place limitations of the exercise of the rights of the religious organisation in question; however, this has no bearing on the primary characterisation of the organisation as a religion for the purposes of law.

Cassells J later emphasises the power of religion and illustrates why its legal regulation and classification is important for maintaining the public good;

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[247] *Lough v Ward & Anor* [1945] 2 All ER 338.
[248] Catholicism in that the organisation was originally attached to the Church of England and consequently adapting to a model based on the tenets of the Roman Catholic Church.
[249] The organisation, named the *Confraternity of the Kingdom of Christ* was characterised by its embodiment of Roman Catholic teaching while operating in an unconventional manner with the creation of many 'Archbishops' serving relatively few parishioners. See judgment.
[250] *Lough v Ward & Anor* [1945] 2 All ER 338, at 340.
[251] *Lough v Ward & Anor* [1945] 2 All ER 338, at 342.

> 'a religious influence is very dangerous and very powerful, and never so dangerous and never so powerful as when it is exercised by superior minds and older minds over an inferior and younger mind'[252]

This judgment demonstrates that religion can function as a danger to society when used as a threat to the values and interests of the State. If further functions as an example of the correct manner by which the court should approach complex cases concerning the definition of religion. It clarifies that all organisations can be classified as religious where they so indicate and that this characterisation does not impede the court from considering the limitation of the exercise of this right. Perhaps the absence of public benefit, or more specifically, the presence of threat will function as strong motivations for the court to adopt limitations. This has no bearing on the definition of religion in the general sense.

The examination of the approach emanating in the legislative sphere of the European and Irish jurisdiction is greatly assisted by the exploration of the jurisprudence of the ECtHR and the Irish Courts in attempting to demonstrate examples of a qualified legal definition of religion. It is clear that the European institutions and ECtHR have been reluctant to adopt any clear or positive definition of religion; neither have they facilitated a clear differentiation between religions and sects so as to give rise to the negative definition articulated in the Irish context. The Irish legislature and case law has demonstrated that the domestic context has adopted a more robust defence of religion in certain contexts. This has been articulated in the form of negative definitions of religions which limit the affordance of legal benefits reserved for religious communities from harmful organisations. This cautionary approach to religion facilitates a system whereby an organisation, identified as religious from a subjective perspective, is not regarded as such for the purposes of legislation. It is suggested that this approach is mindful of the many obstacles entailed in the attempt to create a positive definition of religion. Further, this approach does not suggest that an individual is restricted from identifying an organisation as a religion, thus adhering to the inviolable nature of the *forum internum*, while protecting the normative value attached to religious groupings. Such an approach can be characterised as a context specific qualified definition of religion.

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[252] *Lough v Ward & Anor* [1945] 2 All ER 338, at 346.

1.6 Conclusion

A great majority of contemporary philosophers and legal scholars have prefaced their work with a rhetorical question asking why it was necessary to define religion.[253] Given the vast body of discourse considering the definition of religion it is clear that no comprehensive definition exists nor is there any consensus regarding which methodology to adopt when attempting to interpret a definition of for the creation of one for the purposes of further research;[254] however, it continues to be a fundamental issue in the study of religion both within and external to the legal realm.[255]

Gunn recalls that:

> 'Judicial decisions about what constitutes religion makes a very real difference in the lives of persons who may or may not obtain refugee status, or in the economic viability of a group that may or may not be recognised as a tax-exempt religious association.'[256]

The Irish jurisdiction does not adopt any clear definition of religion; however, in the absence of judicial consideration the perception of the Council of Europe, the European Council and the ECtHR is persuasive. It indicates that no comprehensive legal definition of religion exists for the purposes of interpreting Article 9 of the ECHR. This can be attributed to the unrestricted liberty of the mind, the importance which religion has in the life of the faithful and the inviolability of the *forum internum*. First, it can be said that the basic legal definition of religion is interpreted utilising the open-ended polythetic method. That is to say that there are certain characteristics which define religion, which have been discussed at length above, yet no example of religion is required or could necessarily be said to contain all or a selection of these characteristics. This chapter concludes that it is impossible to construct an acceptable definition of religion capable of being consistent with the possibilities of Article 9

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[253] See, *inter alia*; Victoria Harrison, *Religion and Modern Thought* (Canterbury Press 2007) 26.
[254] E. Thomas Lawson, 'Defining Religion...Going the Theoretical Way' in Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 43.
[255] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 197.
[256] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 191.

of the ECHR and Article 44 of the Irish Constitution. There is no basic legal definition of religion.

Secondly, a qualified definition of religion can be said to exist in certain identified contexts which is distinct from the basic legal definition of religion. A qualified definition could be described as complex on the basis that it accepts that there are no identifiable parameters to the definition of religion in the general context yet in specific contexts parameters have been applied to qualify the definition. This is to state that, while all beliefs are capable of giving rise to a religion, not all religions correspond to the definition of religion in qualified contexts. This has been demonstrated with reference to the common law, particularly placing emphasis on the judgment of Geoghegan J. in the decision of *Johnson v Church of Scientology*,[257] and also upon specified statues, herein with reference made in the domestic context to the Charities Act 2009 and the Defamation Act 2009.

Any qualified definition of religion discussed above enjoys the presumption of legality and lawfulness. While these definitions could give rise to an argument that they are incompatible with the broad definition of religion contained in both the ECHR and the Constitution such could be rebutted on the basis that they do not disregard any such broad definition; rather, they apply narrowing factors adopted in order to give reality to a purpose which may lie behind any common law privilege or legislative provision. The courts require Convention rights to be practical and effective in their application.[258] Additionally, law must be capable of operating with a view to practicalities. Qualified definitions of religion enable law to be operative and function to ensure that benefits which are afforded to religious beliefs and organisations surrounding same are only awarded in the public's interest.

Freeman observes that 'if in principle we cannot determine what religion is, then we cannot determine what it is not'.[259] This chapter accepts that there is no basic definition of religion from a philosophical or legal perspective; however, it recognises that qualified definitions of religion exist in certain contexts which may be compatible with the

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[257] *Johnson v Church of Scientology & Ors* [2001] 1 IR 682.
[258] See, *Airey v Ireland* (1979) Series A no 32; *Sisojeva and Others v Latvia* App no 60654/00 (ECHR, 16 June 2005) and; *Bode (a minor) and Ors v Minister for Justice Equality and Law Reform* [2006] IEHC 341.
[259] David Hugh Freeman, *A Philosophical Study of Religion* (Craig Press 1964) 1.

Convention and the Irish Constitution. It concludes with an endorsement of the observations of Clarke and Byrne who state that 'no one who defines religion for the purpose of the study of religion believes himself to be producing a simulative definition of an entirely new coinage.'[260] As such, while the basic legal definition of religion is open-ended and polythetic, any qualified approach to definition made herein can be regarded as functionalist and must correspond to an identified issue or context.

[260] Peter B. Clarke, Peter Byrne, *Religion Defined and Explained* (Macmillan 1993) 5.

Chapter II

Definition of Religious Manifestation

2.1 Introduction

The right to religious freedom has been divided, albeit with growing objection,[1] into the *forum internum* and the *forum externum*.[2] While the former 'protects the sphere of personal beliefs and religious creeds'[3] the latter pertains to actions which are 'intimately linked'[4] to these beliefs such as 'worship or devotion which form part of the practice of a religion or belief in a generally recognised form.'[5] The previous chapter of this thesis demonstrated the expansive quality of the definition of religion for the Constitution and the Convention and further isolated the use of qualified definitions of religion for the purposes of law; consequently, this chapter aims to define the characteristics of religious manifestation for the purposes of Article 9 of the European Convention of Human Rights. While the Irish Constitution guarantees the 'practice of religion'[6] this right has not been subject to substantial judicial consideration.[7] In the absence of domestic case law this chapter primarily relies on the jurisprudence emanating from the ECtHR in its interpretation of Article 9(1) of the Convention.

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[1] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 254.
[2] Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Routledge 2015) 12; Lucy Vickers, *Religious Freedom and Discrimination in the Workplace* (Hart Publishing 2008) 41; Venice Commission, 'Guidelines for Review of Legislation Pertaining to Religion or Belief' (Venice, 18-19 June 2004) 10.
[3] *C v United Kingdom* (1984) 37 DR 142 147.
[4] *S.A.S. v France* App no 43835/11 (ECHR, 1 July 2014) [55].
[5] *Eweida and Others v United Kingdom* App nos 48420/10; 59842/10; 51671/10 and 36516/10 (ECtHR, 15 January 2013) [82].
[6] *Bunreacht na hÉireann* art 44.2.1°.
[7] Eoin Daly, 'Regulating Religious Function: The Strange Case of Mass Cards' (2010) 10(1) HLJ 55.

Article 9(1) of the ECHR guarantees the right 'to manifest...religion or belief, in worship, teaching, practice and observance.'[8] The first part of this chapter analyses the judicial interpretations of these subcategories in order to detail those actions which are currently defined as manifestations of religion or belief for the purposes of Article 9. This is complicated by the varied and inconsistent way in which the European Commission of Human Rights and the ECtHR have approached the characterisation of religious manifestation.[9] The second section consists of an analysis of the judgments of the court in order to isolate the jurisprudence of the respective institutions. A consistent strand of case law which has determined the parameters of the definition of religious manifestation is not ascertainable.[10] The analysis of the case law reveals that the EComHR adopted objective criteria, derived from institutional conceptualisations of religion, in order to define religious manifestation.[11] This has alienated the application of Article 9 to individuals from religious minorities.[12] The following chapter proposes to demonstrate that the jurisprudence of the ECtHR has developed inconsistently such that the judicial reliance upon the necessity of religious manifestations has evolved giving rise to an increasingly subjective approach in order to characterise religious manifestation for the purposes of Article 9.

2.2 The Division of Religious Manifestation

The manifestation of religion or belief has been divided into four categories by Article 9 of the Convention; namely, 'worship, teaching, practice and observance.'[13] These four categories 'are open to a variety of interpretations'[14] which must comply with 'common

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[8] ECHR art 9(1).

[9] Bernadette Rainey, Elizabeth Wicks, Claire Ovey (eds), *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 434.

[10] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2674.

[11] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 672.

[12] James T. Richardson, 'Minority Religions, Religious Freedom and the New Pan-European Political and Judicial Institution (1995) 37(1) JCS 58.

[13] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 18; ECHR art 9.

[14] Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 103.

norms, valid for all European democracies.'[15] While it appears that these terms can be interpreted in an expansive way, so as to embrace a general category of religious activity,[16] the decisions of the EComHR and the judgments of the ECtHR have held that not every action motivated by religious belief can be considered as religious manifestation for the purposes of Article 9.[17] The following four sections detail in substance those activities which have been characterised to date as manifestations of religious belief for the purposes of Article 9 of the Convention in order to provide a contextual background for the subsequent theoretical analysis. It should be stated that these actions have often been primarily identified with their relevant subcategory and as such have been so divided in the present description; however, this does not preclude a manifestation of religion or belief being capable of being identified with one or more categories.[18] Indeed 'the manifestations to which Article 9(1) refers are...a catalogue of not wholly distinct activities.'[19] Following on from the descriptive analysis, this chapter turns towards an analysis of those respective judgments to illustrate the jurisprudence of the courts and to indicate the current position of the ECtHR towards the characterisation of religious manifestation.

2.3 Worship

Worship is considered to be afforded the 'highest status of the manifestations listed in Article 9(1).'[20] This is on the basis that manifestations of worship are 'considered essential to religious life' while other practices are 'treated as less important.'[21] Worship features first in the list of approved manifestations of religion protected under Article 9 of the ECHR and is also encapsulated within Article 44.1 of the Irish Constitution whereby the State

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[15] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureann (eds), *Law, State and Religion in the New Europe* (CUP 2012) 306.

[16] W. Cole Durham Jnr, 'Religious Association Law' in T. Lindholm, W. Cole Durham Jnr and B.G. Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Martinus Nijhoff 2004) 358.

[17] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 29.

[18] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 29.

[19] David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 433.

[20] Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 107.

[21] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds),*Religion and International Law* (Martinus Nijhoff 2004) 394.

'acknowledges that the homage of public worship is due to Almighty God.'[22] Worship often takes place in community with others and could be considered perhaps as the 'most obvious form of collective manifestation of belief.'[23] In line with this, religious organisations are capable of exercising rights under Article 9 ECHR.[24] This section discusses those judgments which have concerned the sites of worship and the registration of a religious community. The manifestation of religious worship is further intimately linked to the autonomy of religious communities and the appointment of leaders.[25] Finally the performance of ritual must also be understood to be an aspect of the worship of religion and as such has featured prominently in the case law of the court.[26]

2.3.1 Regulation of the Religious Community

Freeman notes that 'great religion is not merely a matter of belief; it is a way of life.'[27] For many religious believers the act of worship as a manifestation of religion takes place principally in community with others, something which has given rise to a multiplicity of issues regarding the regulation of community affairs.[28] The case of *Manoussakis and Others v Greece*,[29] mentioned previously in the first chapter of this these,[30] concerned the registration of a religious community and the conviction of the applicant for having 'established and operated a place of worship for religious meetings and ceremonies of followers of another denomination...without authorisation.'[31] The court observed that: 'the apparently innocent requirement of an authorisation to operate a place of worship had

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[22] *Bunreacht na hÉireann*, art 44.1.
[23] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14(2) ELJ 261.
[24] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14(2) ELJ 261.
[25] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002) [61].
[26] Clifford Geertz, *The Interpretation of Cultures* (Fontana Press 1993) 112.
[27] Harrop A. Freeman, 'A Remonstrance for Conscience' (1958) 106(6) PLR 806.
[28] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds),*Religion and International Law* (Martinus Nijhoff 2004) 394.
[29] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996).
[30] See; s 1.5.2.
[31] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996) [12].

been transformed from a mere formality into a lethal weapon.'[32] This judgment endorsed the way in which individuals manifest their religion through communal activity.[33]

The manifestation of religious belief in acts of worship can also be dependent upon the ability of a religious community to offer communal worship in a building or location to which a community had become accustomed to. This was recognised in the more recent judgment of *Svyato-Mykhaylivska Parafiya v Ukraine*[34] which concerned the refusal of the State to register the change of the religious community's statutes thus leading to a violation of Article 9 of the ECHR.[35] Previously, the EComHR had recognised that the access restrictions placed on Stonehenge during the Summer Solstice could be considered as a limitation of an applicant's right to worship in a place which was significant to the community.[36] These determinations suggest that the ECtHR recognise that religious organisations often required structures and buildings which may be distinctive from other surrounding structures. Further they may utilise certain items within these structures to manifest religion beyond the ambit of the premises. One such manifestation which has received judicial consideration has been the call to prayer.

In the case of *Ouardiri v Switzerland*[37] the applicant contended that the domestic legal restriction against the building of minarets was a violation of the right to religious freedom.[38] The minaret is a distinctive architectural feature of mosques and is frequently used for the call of the community to prayer and the recitation of prayer.[39] The court found the application inadmissible on the grounds that the applicant was not a victim for the purposes of the Convention.[40] Similarly it dismissed the application of the *Ligue des Musulmans de Suisse* on the grounds that it was not presented in evidence that they had

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[32] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996) [41].
[33] Charles F. Furtado Jr., 'Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe' (2003) 34 CHRLR 338.
[34] *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007).
[35] *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007) [152].
[36] *Chappell v United Kingdom* (1987) 53 DR 241.
[37] *Ouardiri v Switzerland* App no 65840/09 (ECtHR, 28 June 2011).
[38] *Ouardiri v Switzerland* App no 65840/09 (ECtHR, 28 June 2011) [1].
[39] Sheila S. Blair and Jonathan M. Bloom, 'Art and Architecture; Theme and Variation' in John L. Esposito (ed), *The Oxford History of Islam* (OUP 1999) 244.
[40] *Ouardiri v Switzerland* App no 65840/09 (ECtHR, 28 June 2011) [1].

intended to build a mosque with a minaret in the near future.[41] The court did not take the opportunity to indicate if a minaret or the action of building a minaret constituted a manifestation of religion. In the case of *Schilder v the Netherlands*[42] the ECtHR recognised that the ringing of bells was a recognised form of worship.[43]

2.3.2 Appointment of Leaders

The participation of the religious community in the appointment of its religious leaders has been considered as a religious manifestation integral to worship for the purposes of Article 9.[44] This was recognised in the case of *Serif v Greece*[45] in which the applicant was prosecuted for having 'usurped the functions of a minister of a "known religion" and for having publicly worn the dress of such a minister.'[46] The Contracting State had amended legislation to the effect that the appointment process of *muftī's* (religious leaders) in the Islamic community was changed. The State disregarded the independent election of the applicant by the members of the Islamic community which led to a violation of Article 9 of the ECHR for its interference in the worship of the Islamic community.[47] This judgment bears factual resemblance with the later judgment of *Agga v Greece*[48] where the court considered that the actions of a religious leader constituted manifestations of religion for the purposes of Article 9.[49] The court similarly found that there had been a violation of Article 9 of the ECHR.[50]

This perception is consistent with the later judgment of *Hasan and Chaush v Bulgaria*[51] where the court recalled that 'religious communities traditionally and universally

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[41] *Ligue des Musulmans de Suisse and Others v Switzerland* App no 66274/09 (ECtHR, 28 June 2011) [1].
[42] *Schilder v the Netherlands* App no 2158/12 (ECtHR, 16 October 2012).
[43] *Schilder v the Netherlands* App no 2158/12 (ECtHR, 16 October 2012) [19].
[44] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 423.
[45] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999).
[46] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [13].
[47] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [54].
[48] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002).
[49] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002) [53].
[50] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002) [61].
[51] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000).

exist in the form of organised structures.'[52] These organised structures provide 'religious ceremonies [which] have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules.'[53] This case concerned the involvement of the State in the internal organisation of the Islamic community in Bulgaria. The ECtHR recognised that, on the basis of his position as a religious leader, the applicant had duties and responsibilities to 'thousands of believers who had placed their trust in him as their representative'.[54] This case has been interpreted to suggest that the religious communities have a 'near-absolute ...autonomy' in their internal regulation[55] and have the right to such not only by virtue of Article 9 but in conjunction with Article 11 of the Convention.[56] The autonomy of the religious community is often highly significant in order to enable the religious community to worship for the purposes of Article 9.[57]

2.3.3 Ritual

Geertz has suggested that ritual entails 'some sort of ceremonial form – even if that form be hardly more than the recitation of a myth, the consultation of an oracle, or the decoration of a grave...'[58] Religious rituals give 'direct expression to belief'[59] which can also include 'practices integral to such acts, including the building of places of worship, the use of ritual formulæ and objects, the display of symbols, and the observance of holidays and days of rest.'[60] As such rituals 'carry with them a message that celebrates some belief' they can be distinguished as one of the most obvious forms of religious worship.[61] The EComHR and ECtHR have examined various issues regarding the rituals of religious communities and, as

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[52] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [62].
[53] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [62].
[54] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [119].
[55] Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 10.
[56] Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 119.
[57] David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 599.
[58] Clifford Geertz, *The Interpretation of Cultures* (Fontana Press 1993) 112.
[59] Dalia Vitkauskaitė-Meurice, 'The Scope and Limits of the Freedom of Religion in International Human Rights Law' (2011) 18(3) J 844.
[60] Dalia Vitkauskaitė-Meurice, 'The Scope and Limits of the Freedom of Religion in International Human Rights Law' (2011) 18(3) J 844.
[61] Lawrence G. Sager 'The moral economy of religious freedom' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 21.

will be demonstrated in the passage which follows, have generally endorsed the perception that these rituals constitute manifestations of religious worship which fall under Article 9 ECHR.

The use of actions and symbols can be considered as one of the most important parts of the manifestation of religion[62] and the ECtHR has recognised that these forms of ritual worship are capable of protection under Article 9 of the ECHR.[63] In the case of *Eweida and Others v United Kingdom*[64] the court recognised that the wearing of a crucifix could be considered as a manifestation of religious worship.[65] This observation was reinforced in the interpretation of the Grand Chamber of the court in *Lautsi v Italy*[66] when it found that a 'crucifix is above all a religious symbol'[67] yet at the same time it did not impede the court from inferring an alternative 'secular symbolic value'[68] from the symbol. This sentiment was echoed in the concurring opinion of Judge Power who, while resisting the concept of secularism as a neutral ideology, noted that symbols can generally be 'carriers of meaning. They may be silent but they may, nevertheless, speak volumes.'[69] This places an emphasis on the context in which the crucifix is utilised and enables it to be capable of contrasting definitions.

The court has further endorsed the recognition of other objects which are capable of the protection of Article 9 on the basis of their necessity in ritual worship. The court recognised that 'specific liturgical objects' can be necessary for the manifestation of religion in the case of *Metropolitan Church of Bessarabia v Moldova*.[70] Religious organisations often

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[62] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 396.
[63] Simon Barnett, 'Religious Freedom and the European Convention on Human Rights: The Case of the Baltic States' (2001) 29(2) RSS 93.
[64] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[65] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [89].
[66] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011).
[67] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) [66].
[68] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) [71].
[69] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) Concurring Opinion of Judge Power.
[70] *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [129].

govern and control assets necessary for religious worship.[71] This judgment affirmed that the registration of a religious community may be necessary to enable it to guard with sufficient care those objects required for religious worship. Peroni has argued that this characterisation of those objects has broadened to encompass incense sticks as manifestations of religion or belief[72] subject to the judgment in *Gatis Kovaļkovs v Latvia*.[73] That same judgment recognised conventionally characterised actions of worship including; reading, prayer and meditation as manifestations of religious belief.[74] These actions had similarly been recognised as manifestations of religious worship in the case of *Leela Förderkreis EV and Others v Germany*[75] alongside the ability of religious organisations to characterise the performance of 'joint working projects' as manifestations for the purposes of Article 9 ECHR.[76]

The court has taken a dismissive view of applicants who contend that Article 9 guarantees any right to observe religious holidays and rest days in disregard of contractual obligations.[77] The EComHR and the new court have both dismissed the argument that religious holidays constitute a manifestation of religion for the purposes of Article 9.[78] In the decision of *Konttinen v Finland*[79] the applicant alleged that the operation of rest days, in line with legislation, favoured those whose religious obligation required rest on a Sunday but which was detrimental to his religious requirement to worship on a Saturday. The EComHR stated, notwithstanding that the applicant had no basis of claim for interference with his rights under Article 9 by virtue of the operation of contract, that his refusal to work on the basis of an allegedly religiously required day of rest was not a manifestation of religion

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[71] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 166.
[72] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 682.
[73] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [60]; [68].
[74] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [60].
[75] *Leela Förderkreis EV and Others v Germany* App no 58911/00 (ECtHR, 6 November 2008).
[76] *Leela Förderkreis EV and Others v Germany* App no 58911/00 (ECtHR, 6 November 2008) [81].
[77] Katayoun Alidadi, 'Reasonable Accommodation for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment' (2012) 37 ELR 704.
[78] See; *Konttinen v Finland* (1996) 87 DR 68; *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012).
[79] *Konttinen v Finland*(1996) 87 DR 68.

capable of protection under Article 9 of the Convention. This determination was mirrored in the decision of the EComHR in *Stedman v United Kingdom.*[80]

In the recent judgment of *Francesco Sessa v Italy*[81] the court determined that, while the actions of ritual worship are capable of protection under Article 9, a general day of rest was not a manifestation of religion for the purposes of Article 9. Mr Sessa was a lawyer by profession and he contended that the refusal of a judge to grant an adjournment in a case with which he was involved so as to enable him to observe a religious rest day infringed his rights under Article 9 of the Convention. The court stated that 'it is not disputed between the parties that the applicant was able to perform his religious duties.'[82] As such, the court characterised the manifestation of religion as pertaining to the active participation in religious ritual and not to the desire to rest based on tradition or religious convention. This is consistent with the previous case of *Kosteski v Former Yugoslav Republic of Macedonia*[83] where the court held that the applicant's absence from work was not a manifestation of religious belief even when it may have been motivated by the intention to celebrate a religious rest day.[84]

The court has also been willing to exclude certain actions pertaining to the burial of the dead from encapsulation within the category of religious manifestation. In the case of *Jones v United Kingdom*[85] the applicant alleged that his right to religious freedom had been infringed by a limitation placed upon him by Flintshire County Council which restrictedhim from incorporating a photograph of his daughter within her tomb stone. The ECtHR in response stated that: '...refusing permission for a photograph on a memorial cannot be regarded as preventing any manifestation of the applicant's religious beliefs.'[86] It did not regard the photograph to amount to a manifestation of religious belief. The rational of the court on this occasion failed to yield to the subjective beliefs of the applicant surrounding

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[80] *Stedman v United Kingdom* (Unreported, European Commission of Human Rights, App no 29107/95, 9 April 1997)
[81] *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012).
[82] *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012) [37].
[83] *Kosteski v Former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR, 13 April 2006).
[84] *Kosteski v Former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR, 13 April 2006) [38].
[85] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005).
[86] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005) [3].

the burial of the dead even when many academics would agree[87] that the practices surrounding death 'are close to the heart of religion'[88] and often embody the clearest representations of 'religious and cultural difference.'[89]

A final note should be made with reference to dietary regulation and ritual slaughter. While ritual slaughter can be an integral part of the practice of religion, primarily for members of the Jewish and Islamic community,[90] this practice has largely been encapsulated within the category of observance from the perspective of the ECtHR.[91] As such it will be discussed in turn at the appropriate juncture.[92] Worship is perhaps the clearest form of the manifestation of religious beliefs guaranteed under Article 9 of the ECHR[93] and the case law in this area indicates the broad perspective which the court has adopted in defining actions as forms of religious manifestation; however, in light of recent judgments, it appears that the court has adopted a 'progressively narrower view of what amounts to a manifestation' under this category.[94] While Evans envisaged worship to possess the highest status of religious manifestation[95] the jurisprudence to date would suggest the continued restrictive interpretation of this right. The ECtHR noted in *Eweida and Others v United Kingdom*[96] that any act of worship must be in 'a generally recognised form'[97] which signals the continued restriction of this category.

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[87] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 674.
[88] Winnifred Fallers Sullivan, 'Judging Religion' (1998) 81(2) MQLR 215.
[89] Peter Cumper, Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) ELJ 132.
[90] Carla M. Zoethout, 'Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter' (2013) 35(3) HRQ 663.
[91] *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000) [74].
[92] See; s 2.6.1.
[93] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14(2) ELJ 261.
[94] Malcolm D. Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 295.
[95] Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 107.
[96] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[97] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [82].

2.4 Teaching

Like the practice of worship, the teaching of religion has also been considered as essential for the successful manifestation of religion from the perspective of the ECtHR.[98] This can be prompted by the desire to share what one considers to be 'the ultimate truth.'[99] The ECtHR has observed that individuals can engage in this activity in both an active and a passive capacity.[100] This is particularly in the context of proselytisation, a term which this study abandons in preference of the term propagation of religion belief. As such, the following will discuss extracts from prominent judgments concerning the manifestation of religion or belief through teaching during the course of ministerial work but predominantly within the area of faith conversion stemming from the right to propagate religious beliefs.[101]

2.4.1 Ministerial Work

The teaching and communication of religious instruction is a fundamental objective of many religious organisations.[102] This was evidenced in the submission of the World Council of Churches, in the judgment of *Kokkinakis v Greece*,[103] where it stated that 'bearing witness and engaging in evangelism is an essential mission of every Christian and every Church.'[104] Before considering the propagation of religion in the public sphere it is important to recognise that the court has considered the actions of religious leaders to be characteristic of religious manifestations in the area of teaching. This was observed in the case of *Grandrath v Germany*[105] where the EComHR accepted that the duties of a minister towards his religious community amounted to a religious manifestation for the purposes of

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[98] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 394.
[99] Cornelis de Jong, 'Workshop 4: The Propagation of Religion or Belief' (2007) 2(1) RHR 79.
[100] *Kokkinakis v Greece* (1993) Series A no 260-A; *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[101] Bernadette Rainey, Elizabeth Wicks, Claire Ovey (eds), *Jacobs, White &Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 416.
[102] See; *The Holy Bible; New Revised Standard Version* (OUP 1995) Mark 16:15 – 'And he said to them, "Go into all the world and proclaim the good news to the whole creation." See also; *The Qur'ân* (OUP 2005) *Al-Nahl* 125 – '[Prophet], call [people] to the way of your Lord with wisdom and good teaching.'
[103] *Kokkinakis v Greece* (1993) Series A no 260-A.
[104] *Kokkinakis v Greece* (1993) Series A no 260-A [48].
[105] *Grandrath v Germany* 10 YB ECHR 626 (1966).

Article 9 of the Convention.[106] This was further endorsed in the case of *Serif v Greece*[107] when the new court considered that the restrictions imposed on the applicant religious leader unnecessarily interfered with his right to teach the religion within his autonomous religious community.'[108] Later, the court recognised that this endorsement was not limited to ministers of religion but to the members of an association 'including those proclaiming or teaching religion.'[109]

2.4.2 Propagation of Religion or Belief

The principal area of litigation concerning the teaching of religion entails the propagation of faith which can generate a conflict between the propagator's right to manifest their religion and the addressee's right to have a religion.[110] The propagation of religion or belief is perceived as central to the life of the religious adherent[111] and as such has largely been considered as a manifestation of religion. It must be recalled that this manifestation can entail the automatic attack on or disqualification of another religion or belief.[112] As mentioned in the opening paragraph of this section, the analysis of the jurisprudence of the court suggests that the manifestation of religion in the propagation of religion or belief can take place in both an active[113] and passive capacity.[114] The seminal judgment in this area is undoubtedly *Kokkinakis v Greece*[115] which considerably advanced the analysis of the right of religious freedom in the European sphere.[116] In this case the court considered that 'the right to try to convince one's neighbour'[117]could be defined as an aspect of the manifestation of religious belief.

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[106] *Grandrath v Germany* 10 YB ECHR 626 (1966) [31].
[107] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999).
[108] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [39].
[109] *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECHR, 5 October 2006) [61].
[110] Stijn Smet, 'Freedom of Religion Versus Freedom from Religion: Putting Religious Duties Back on the Map' in Jerome Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff 2012).
[111] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 394.
[112] Cornelis de Jong, 'Workshop 4: The Propagation of Religion or Belief' (2007) 2(1) RHR 81.
[113] See; *Kokkinakis v Greece* (1993) Series A no 260-A.
[114] See; *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[115] *Kokkinakis v Greece* (1993) Series A no 260-A.
[116] Council of Europe, 'Overview of the Court's case law on freedom of religion' (31 October 2013) [8].
[117] *Kokkinakis v Greece* (1993) Series A no 260-A [31].

In *The Moscow Branch of the Salvation Army v Russia*[118] the court accepted that the external and missionary actions of an association, including the wearing of distinctive clothing, could be considered as a manifestation of religious belief[119] on the basis of its role in 'proclaiming or teaching religion.'[120] The court has predominantly considered the wearing of religiously inspired or compelled clothing under the practice of religion; as such, this is addressed in turn.[121] An organisation can also organise seminars and run meditation centres with a view to teaching individuals about religion.[122] These actions can be considered as clear characteristics of religious manifestations based on the right of individuals to disseminate information regarding religion under Article 9.

While preaching on the roadside to a passing audience is a clear example of the active propagation of belief, the court has also recognised other religious manifestations which could be regarded as passive propagations of religion. In the case of *Dahlab v Switzerland*[123] the ECtHR recognised that the Islamic headscarf was a manifestation of religion which is capable of possessing a proselytising effect.[124] This was based on the fact that the Islamic headscarf was considered to be a 'powerful external symbol' from which certain perspectives of the applicant could be inferred.[125] It was not considered necessary to determine whether the objective perspectives corresponded with the subjective perspectives of the applicant. This observation was later reaffirmed in the case of *Şahin v Turkey*[126] and *Dogru v France*.[127] These judgments can be compared with the judgment of *Lautsi v Italy*[128] with specific reference to the concurring opinion of Judge Power where she noted that religious symbols, in this circumstance the crucifix, 'are carriers of meaning.'[129] The judgment of the majority did not agree with the ruling of the Chamber where it

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[118] *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006).
[119] *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006) [92].
[120] *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006) [61].
[121] See; s 2.5.1
[122] *Leela Förderkreis EV and Others v Germany* App no 58911/00 (ECtHR, 6 November 2008) [81].
[123] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[124] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].
[125] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].
[126] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [111].
[127] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [64].
[128] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011).
[129] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) Concurring Opinion of Judge Power.

considered the crucifix to be a powerful external symbol; rather, it contrasted the facts of both the present case and *Dahlab v Switzerland*[130] on the basis of the 'tender age of the children' under that teacher's care.[131] It is not clear, however, if this is consistent with *Şahin v Turkey*[132] or *Dogru v France*.[133] It is clear that judicial inconsistency pervades this category in a similar way to the manifestation of religion in acts of worship.

2.5 Practice

The practice of religion is an ambiguous and arguably elastic term used to protect activities such as the use of religious clothing, the activities of individuals and the engagement of individuals with specific items.[134] It is also has the largest capacity for judicial interpretation which has made it so relevant for the consideration of the evolving theory and the scope of religious manifestation under Article 9.[135] The characterisation of religious practice has been most effective in illustrating the emerging theory of the ECtHR. At the same time, practice has been afforded 'peripheral status' due to the judicial reluctance to engage with the substance of this category of religious manifestation.[136] Certain elements assist in the attempt to discern a wider theoretical understanding, such as the reluctance of the ECtHR to 'recognise and protect types of manifestation that fail to describe themselves in private, cognitive and disembodied terms.'[137] In the absence of a clearer terminology it has fallen upon the judiciary to function as 'arbiters of scriptural interpretation'[138] in order to ascertain what practices can be considered as manifestations of religious practice. This approach has been 'less than satisfactory'[139] and has resulted at times in judges making assumptions regarding the religious beliefs of individuals on the basis of their own objective

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[130] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[131] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) [73].
[132] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [111].
[133] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [64].
[134] Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 306.
[135] Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 111.
[136] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 241.
[137] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 241-242.
[138] *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707, 716 (1981).
[139] Julie Maher, 'Eweida and Others: A New Era for Article 9?' (2014) 63 ICLQ 222.

reference points which have predominantly been shaped by Christian–Occidental experience.[140]

Evans observes that there is an inconsistency between the French and English version of the text of Article 9 of the ECtHR.[141] She suggests that the French '*les pratiques*' refers to a much narrower conception of religious manifestation than the English 'practice.'[142] Her argument suggests that the practice (plural) of religion may be limited to an institutional conception of religious manifestations in generally recognisable forms such as clothing and ritual, while an opposing broader interpretation may extend to all such acts which give reality to the substance of belief such as alms giving and ritual violence.[143] The court has not addressed this potential linguistic discrepancy in subsequent case law which leaves the judiciary to adopt a broad and encompassing method of definition or a narrow and reductive methodology.[144] The following is an analysis of case law where the court has recognised certain practices as manifestations of religion for the purposes of Article 9.

2.5.1 Clothing

Religious dress and clothing are generally understood to constitute recognisable forms of religious practice from the international human rights perspective.[145] Clothing can form an important part of religious practice[146] and its exhibition can be considered as essential from the perspective of the religious adherent.[147] Predominantly, the case law of the ECtHR in this area has concerned the Islamic headscarf and the veil generally which has in turn prominently demonstrated the clash between occidental and oriental perspectives regarding the proper role of religion in society and the correct way in which religious belief

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[140] Christopher McCrudden, 'Multiculturalism, freedom of religion, equality, and the British Constitution: The JFS case considered' (2011) 9(1) ICON 219-221.
[141] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 111.
[142] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 111.
[143] Stephen G. Gey, 'Free Will, Religious Liberty and a Partial Defence of the French Approach to Religious Expression in Public Schools' (2006) 42(1) HLR 60.
[144] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 111.
[145] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 592.
[146] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 591.
[147] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 396.

can be manifested.[148] This is the subject of a later comprehensive analysis in this thesis.[149] The court has also considered the status of the turban.[150]

The first cases to come before the EComHR regarding the Islamic veil were respectively *Karaduman v Turkey*[151] and *Bulut v Turkey*.[152] These cases concerned penalties imposed upon the applicants for their failure to furnish a university with their photograph without their wearing the Islamic veil. Both contended that the demand placed upon them by the university was an interference with their right to religious practice and a violation of Article 9 of the Convention.[153] The conclusion of the EComHR can be misleading. Academics have differed on the correct interpretation of its ruling with some suggesting that the EComHR failed to recognise the Islamic headscarf as a manifestation of religion[154] while others have suggested that it did.[155]

Returning to the facts of the case, the applicants contended that the failure to include their picture, including the headscarf, amounted to a violation of their right to manifest their religion. The court recognised two things; first the 'freedom of students to manifest their religion subject to restrictions'[156] and secondly that '[photo identification] cannot be used...to manifest his religious beliefs.'[157] This must be interpreted to mean that the court recognised that the Islamic veil is indeed a manifestation of religious belief, albeit subject to restrictions, while photographic identification cannot be considered as such. This determination shares similarities with the decision of the ECtHR in *Jones v United*

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[148] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2680.
[149] See; s 4.5.1.
[150] See; *Mann Singh v France* App No 24479/07 (ECHR, 13 November 2008); *Ranjit Singh v France* App No 27561/08 (ECHR, 30 June 2009).
[151] *Karaduman v Turkey* (1993) 74 DR 93.
[152] *Bulut v Turkey* (1993) 74 DR 93.
[153] *Karaduman v Turkey* (1993) 74 DR 93 104; *Bulut v Turkey* (1993) 74 DR 93 [Griefs].
[154] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2678.
[155] Finnis J, 'Endorsing Discrimination Between Faiths: A Case of Extreme Speech?' (Notre Dame Law School Legal Studies Research Paper No 08-08, 2008); Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14(2) ELJ 265.
[156] *Karaduman v Turkey* (1993) 74 DR 93 108; *Bulut v Turkey* (1993) 74 DR 93 – *'Celle-ci peut soumettre la liberté des étudients de manifesterleur religion à des limitations...'*
[157] *Karaduman v Turkey* (1993) 74 DR 93 109: *Bulut v Turkey* App no 18783/91 (EComHR, 3 May 1993) – *'...ne peut être utilisée par celui-ci afin de manifesterses convictions religieuses.'*

Kingdom[158] whereby the court recognised that burial practices are characteristic of religious manifestation while excluding the picture of the daughter of the applicant from being characterised as such for the purposes of Article 9.[159] This concept was affirmed in the subsequent case of *Sofianopoulos, Spaïdiotis, Metallinos and Kontogiannis v Greece*[160] when the ECtHR stated that:

> '...identity cards cannot be regarded as a means intended to ensure that the adherents of any religion or faith whatsoever should have the right to exercise or manifest their religion.'[161]

It follows that the judgments of *Karaduman*[162] and *Bulut*[163] should be interpreted to mean that the EComHR characterised the Islamic veil as a manifestation of religion for the purposes of Article 9.

A subsequent decision of the ECtHR regarding the Islamic veil expressly approved its characterisation as a manifestation of religious expression[164] thus clarifying the analytical uncertainty generated by both *Karaduman*[165] and *Bulut*.[166] The judgment of the ECtHR in *Dahlab v Switzerland*[167] provided the intellectual backdrop to the subsequent judicial analysis of the Islamic veil in the European sphere.[168] Rorive observes that 'what comes out from this decision is a distrust of the European Court of Human Rights towards the Islamic headscarf itself.'[169] In total, sixteen cases have come before the EComHR and the ECtHR

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[158] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005).
[159] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005) [3].
[160] *Sofianopoulos, Spaïdiotis, Metallinos and Kontogiannis v Greece* App no 1988/02, 1997/02, 1977/02 (ECtHR, 12 December 2002).
[161] *Sofianopoulos, Spaïdiotis, Metallinos and Kontogiannis v Gree*ce App no 1988/02, 1997/02, 1977/02 (ECtHR, 12 December 2002) [1] – *'La Courestimeque la carte d'identité ne peut pas être considérée comme un moyen destiné à assurer aux fidèles, de quelque religion ou confession qu'ils soient, le droit d'exercerou de manifesterleur religion.'*
[162] *Karaduman v Turkey* (1993) 74 DR 93 104.
[163] *Bulut v Turkey* (1993) 74 DR 93.
[164] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].
[165] *Karaduman v Turkey* (1993) 74 DR 93 104.
[166] *Bulut v Turkey* (1993) 74 DR 93.
[167] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[168] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26(1) JLR 330.
[169] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2680.

relating to the ban on the Islamic headscarf in education: Six of these concern teachers[170] while ten relate to students.[171] Two judgments pertain to the regulation of the Islamic veil in the public sphere.[172] The most recent judgment regarding the Islamic veil concerned a member of the public contesting the domestic legislation in France which precluded her from wearing her veil in all public spaces.[173] All of these judgments recognise and affirm the fact that the Islamic veil is an unquestioned manifestation of religion capable of protection under Article 9 of the Convention.

The EComHR and the ECtHR has also considered the status of the turban as an item of clothing through which individuals may manifest their religion on five occasions.[174] The conclusions which the court has drawn regarding the turban bear distinct similarities with the conclusions regarding the Islamic veil. In the context of the veil, the court has consistently utilised the phrase that 'wearing the headscarf may be regarded as motivated or inspired by religious belief.'[175] This phrase is repeated, substituting the headscarf for the turban, in the cases of *Ranjit Singh* and *Jasvir Singh*[176] where it states: '*le port du turban...un acte motive ou inspiré par un religion ou une conviction religieuse*.'[177] The court will most likely continue to draw parallels between other 'ostentatious'[178] religious manifestations represented in clothing.

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[170] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001); *Kurtulmuş v Turkey* App no 65500/01 (ECtHR, 24 January 2006); *Çağlayan v Turkey* App no 1638/04 (ECtHR, 3 April 2007); *Yilmaz v Turkey* App no 37829/05 (ECtHR, 30 September 2008); (1993) 74 DR 93; *Tandoğan v Turkey* App no 41298/04 (ECtHR, 3 June 2008).

[171] *Karaduman v Turkey* (1993) 74 DR 93; *Bulut v Turkey* (1993) 74 DR 93; *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005); *Köse v Turkey* App no 26625/02 (ECtHR, 24 January 2006); *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008); *Kervanci v France* App no 31645/04 (ECtHR, 4 December 2008); *Aktas v France* App no 43563/08 (ECtHR, 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR, 30 June 2009); *Gamaleddyn v France* App no 18527/08 (ECtHR, 30 June 2009); *Ghazal v France* App no 29134/08 (ECtHR, 30 June 2009).

[172] *El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008); *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

[173] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

[174] *X v United Kingdom* (1978) 14 DR 234; *Phull v France* App no 35753/03 (ECtHR, 11 January 2005); *Mann Singh v France* App no 24479/07 (ECtHR, 13 November 2008); *Ranjit Singh* v France App no 27561/08 (ECtHR, 30 June 2009); *Jasvir Singh* v France App no 25463/08 (ECtHR, 30 June 2009).

[175] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [47].

[176] *Ranjit Singh* v France App no 27561/08 (ECtHR, 30 June 2009); *Jasvir Singh* v France App no 25463/08 (ECtHR, 30 June 2009)

[177] *Ranjit Singh* v France App no 27561/08 (ECtHR, 30 June 2009) [1]; *Jasvir Singh* v France App no 25463/08 (ECtHR, 30 June 2009) [1].

[178] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [71].

2.5.2 Actions and Items

In one of the earliest decisions of the EComHR regarding the manifestation of religion the applicant alleged that the refusal of the prison authorities to permit him to send articles for publication in a Buddhist magazine violated his right to practice his religion under Article 9 of the Convention.[179] The applicant indicated that communication with other Buddhists was a necessary manifestation of his religious belief.[180] The EComHR accepted that this may constitute an interference with the applicant's freedom of expression; however, it stated that '...he has failed to prove that it was a necessary part of his religious practice.'[181] As such the engagement in actions to communicate with others based on religious belief was not considered to be a manifestation of religion capable of protection under Article 9 of the Convention.

The primary decision of the EComHR regarding the manifestation of religious belief is *Arrowsmith v United Kingdom*[182] which concerned the alleged interference with the right of the applicant to manifest her beliefs upon her prosecution for the distribution of pacifist leaflets contrary to the Incitement to Disaffection Act 1934. The EComHR recognised that pacifism was a belief capable of protection under Article 9 of the ECHR;[183] however, the EComHR disregarded the submission of the applicant that the action of distributing leaflets containing her beliefs was a legitimate manifestation of that belief. It stated that:

> '...when the actions of the individuals do not actually express the belief concerned they cannot be considered to be as such protected by art 9(1) even when they are motivated or influenced by it...the beliefs do not express pacifist views. The Commission considers, therefore, that the applicant, by distributing the leaflets, did not manifest her beliefs...'[184]

In the case of *Pretty v United Kingdom*[185] the applicant submitted that domestic legal obstacles which frustrated her ability to be assisted in her suicide violated her rights under

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[179] *X v United Kingdom* (1975) 1 DR 41 41.
[180] *X v United Kingdom* (1975) 1 DR 41 42.
[181] *X v United Kingdom* (1975) 1 DR 41 42.
[182] *Arrowsmith v United Kingdom* (1978) 19 DR 5.
[183] *Arrowsmith v United Kingdom* (1978) 19 DR 5 [69].
[184] *Arrowsmith v United Kingdom* (1978) 19 DR 5 [71]; [75].
[185] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [80].

Article 9 of the Convention on the basis that this was an action on foot of her belief in assisted suicide. She claimed that this idealistic viewpoint could be comparable with veganism[186] and pacifism[187] which had previously been recognised as beliefs capable of protection under Article 9.[188] The court concluded that such an action was not a manifestation for the purposes of Article 9.[189] This case has been criticised due to the emphasis which it placed on the manifestation of belief as a criteria to define the substance of belief.[190] This will be addressed subsequently at the appropriate juncture in this chapter.[191]

In the case of *D v France*[192] the applicant submitted that his refusal to issue customary divorce papers to his ex-wife would infringe his religious freedom. The applicant emphasised his status as a Kohen within Judaism which placed additional restrictions on him which would affect his ability to remarry.[193] The EComHR rejected the argument that the refusal of the applicant to issue his ex-wife with papers constituted a manifestation of religious belief. In doing so it placed emphasis on the opinion of the religious authorities, to whom the applicant subscribed, to state that such a practice was in opposition to the institutional perspective regarding divorce. It stated that: '...in refusing to hand over the letter of repudiation...the applicant was not manifesting his religion in observance or practice.'[194]

The most recent judgment concerning religious practice is *Austrianu v Romania*.[195] The applicant alleged that the confiscation of his cassette player by the prison authorities

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[186] *H v United Kingdom* (Unreported, European Commission of Human Rights App no 18187/91, 10 February 1993).
[187] *Arrowsmith v United Kingdom* (1978) 19 DR 5.
[188] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [80].
[189] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [82].
[190] Malcolm D. Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 294.
[191] See; s 2.7.3.
[192] *D v France* (1983) 35 DR 199.
[193] Jacob A. Moss, Rivka B. Kern Ulmer, '"Two men under one cloak" –The Sages Permit it: Homosexual Marriage in Judaism' (2008) 55(1) JH 82.
[194] *D v France* (1983) 35 DR 199 [2].
[195] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013).

had infringed his religious practice.[196] The applicant, in this matter, submitted that the cassette player was necessary in order for him to listen to religious recordings and the refusal to make a cassette player available to him obstructed his ability to hear his religious recordings and thus infringed his rights under Article 9. The court observed that certain educational items can be considered as manifestations of religion for the purposes of Article 9 and it appeared to accept that the action of listening to the cassette player was indeed a manifestation of religion; however, similarly to the determination in *Jones v United Kingdom*[197]; *Karaduman v Turkey*[198] and; *Bulut v Turkey*[199], the court did not consider this object as a manifestation of belief for the purposes of Article 9. This proposition will be discussed in more detail at a subsequent stage. While the court has indicated a narrowed approach towards the characterisation of manifestation with regards to worship and teaching its progressively subjective emphasis in contemporary case law, to be discussed later,[200] would suggest that the category of practice may indeed experience expansion in the coming years.

2.6 Observance

Evans contends that 'the term observance seems to have been conflated into a slightly extended notion of worship.'[201] The term is explicitly tied up with the concept of ceremony and ritual[202] which draws a parallel between itself and worship; however, in recent years the jurisprudence of the ECtHR has begun to consider this category on its own merit.[203] It appears from the case law isolated below that the primary example of religious observance concerns dietary regulation. While this category of religious manifestation has expanded in recent years it still is one of the least litigated grounds of Article 9 of the Convention.

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[196] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013) [99].
[197] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005).
[198] *Karaduman v Turkey* (1993) 74 DR 93.
[199] *Bulut v Turkey* (1993) 74 DR 93.
[200] See; s 2.7.
[201] Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 108.
[202] Oxford English Dictionary, 'observance' <http://www.oed.com/view/Entry/129873?redirectedFrom=observance#eid> accessed 15 September 2014.
[203] See; *Jakóbski v Poland* App no 18429/06 (ECtHR, 7 December 2010); *Vartic v Romania* (no. 2) App no 14150/08 (ECtHR, 17 December 2013).

2.6.1 Dietary Regulation

Ritual slaughter 'as indeed its name indicates, constitutes a rite...whose purpose is to provide...meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice.'[204] The conflation of ritual observance with other categories of religious manifestation, namely practice in this context, is evidenced within this judgment.[205] This case concerned the limitations placed upon a Jewish religious community in France from slaughtering meat in accordance with their religious beliefs. While ritual slaughter is permitted in France it is authorised by the Jewish Central Consistory. The applicant organisation split away from this centralised body due to a disagreement on how ritual slaughter was to be performed. The applicant practiced a stricter form of ritual slaughter than that required by the Central Consistory. It sought to observe the rules of Shulchan Aruch and to provide glatt meat to its adherents.[206] The ECtHR refers to ritual slaughter as both a practice[207] and an observance.[208]

In more recent years the ECtHR has stated that religious manifestations concerning dietary regulation are considered as observances of religion. In the case of *Jakóbski v Poland*[209] the applicant alleged that the refusal of the prison authorities to provide him with meat-free meals in accordance with his religious dietary requirements amounted to a violation of his rights under Article 9 of the Convention. The court affirmed that the desire to regulate individual diet in accordance with religious precepts was an observance capable of protection under Article 9 of the ECHR.[210] This line of reasoning was pursued in the subsequent case of *Vartic v Romania*[211] where the court reaffirmed that the requirement of a vegetarian diet, in accordance with the Buddhist religion, was a legitimate observance of

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[204] *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000) [73].
[205] *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000). This chapter recalls that the division of religious manifestation into worship, teaching, practice and observance is not an absolute division, nor can the ascription of any action to a category preclude the ECtHR from making a judgment under an alternative heading.
[206] *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000) [31].
[207] *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000) [73].
[208] *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000) [74].
[209] *Jakóbski v Poland* App no 18429/06 (ECtHR, 7 December 2010).
[210] *Jakóbski v Poland* App no 18429/06 (ECtHR, 7 December 2010) [54].
[211] *Vartic v Romania (no. 2)* App no 14150/08 (ECtHR, 17 December 2013).

religion capable of protection under Article 9.[212] It appears, therefore, that the jurisprudence of the court will continue to recognise dietary regulation as an observance of religion.

2.7 The Evolving Theory surrounding the Definition of Manifestation; the Requirement of Necessity and a turn towards Subjectivism

Up until this point, the research distilled in this chapter has limited itself to the identification of actions which have been defined as manifestations of religion for the purposes of Article 9 of the Convention from the perspective of case law. The following second section proposes to reassess these decisions and judgments in order to illustrate the evolving theory surrounding the definition of religious manifestation. In the absence of guiding principles from the drafting process of the ECHR, this analysis is prefaced with a description of Article 18 of the Universal Declaration of Human Rights which contributed theoretically to the formation of Article 9 of the Convention.[213] The EComHR and the ECtHR have been criticised for their failure to 'develop a sufficiently coherent and principled approach' to the definition of religious manifestation.[214] This has led to inconsistency in the application of precedent which has resulted in uncertainty regarding the necessary criteria to be satisfied in respective cases.[215]

The following section proposes to demonstrate that the European jurisprudence surrounding Article 9 has evolved from the narrow and institutional objective interpretation of religious manifestation towards a more expansive and subjective interpretation of individual beliefs; however, this evolution has failed to sufficiently distance itself from the perceptions of religion undoubtedly influenced by the prototypical religion in the Western

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[212] *Vartic v Romania (no. 2)* App no 14150/08 (ECtHR, 17 December 2013) [54].
[213] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds),*Religion and International Law* (Martinus Nijhoff 2004) 389.
[214] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26(1) JLR 322.
[215] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2674.

sphere; Christianity.[216] This has resulted in the characterisation of religious manifestation with reference to Judeo-Christian religious values considerate of the 'old compromises painstakingly worked out' between religion and the public sphere in Europe.[217] This analysis of the theory surrounding religious manifestation demonstrates that the shift in the European jurisprudence towards a more subjective definition of religious motivation fails to truly reflect the purpose of the rights guaranteed under Article 9 which should ensure that the 'believer has the right to depart from the majority view'[218] as opposed to having to conform to it. The failure of Article 9 has contributed to the necessity to re-evaluate the nature of the right of religious freedom for the purposes of law and has provided the motivation for the examination of the right to religious expression which lies at the heart of this thesis and discussed in more detail in the following chapter.[219]

2.7.1 The Universal Declaration of Human Rights

Evans informs us that the UDHR was influential in the drafting and codification of the ECHR.[220] In the absence of substantial guidance from within the *travaux préparatoires* of the Convention[221] it is relevant to briefly outline the interpretation of this international convention in order to illustrate the potential capacities of Article 9. Article 18 of the UDHR states that: everyone has the right 'to manifest his religion or belief in teaching, practice, worship and observance'[222] which is similarly replicated in the construction of Article 9 of the ECHR. On this basis, Article 9 can be interpreted with reference to the jurisprudence emanating from the United Nations Human Rights Committee and the terms of the UDHR, upon which Article 9 of the ECHR was undoubtedly modelled.[223] In 1993 the UNHRC

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[216] Benson Saler, *Conceptualizing Religion: Immanent Anthropologists Transcendent Natives, Unbounded Categories* (Brill 1993) 208.
[217] Oliver Roy, *Secularism Confronts Islam* (George Holoch tr, Columbia University Press 2007) 6.
[218] Peter Cumper, Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) ELJ 139.
[219] See; s 3.4.
[220] Malcolm D. Evans, '*Religious Liberty in International Law in Europe* (CUP 1997) 192.
[221] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 389.
[222] Universal Declaration of Human Rights (UDHR) art 18.
[223] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 387.

adopted comments and recommendations in light of the right to religious freedom.[224] This led to the enumeration of 'a range of acts which the *forum externum* may include.'[225]

> Paragraph 4 of the UNHRC's General Comment No 22 reads as follows:
>
> 'The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private." The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulæ and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.'[226]

It appears that the UNHRC has been positively disposed towards engaging with the substance of the right to religious freedom[227] which has at times demonstrated how the jurisprudence of the ECtHR and the EComHR is 'out of step with international developments.'[228] The UNHRC has adopted a more liberal attitude towards the composition of religious manifestation which and has demonstrated such in characterising the use of narcotics as a legitimate form of worship for the purposes of Article 18.[229] The UN material, especially the Krishnaswami study into religious rights and practices,[230] indicates that the categories of worship, teaching, practice and observance are not to be interpreted in a

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[224] United Nations Human Rights Committee, *General Comment No 22* (UN Doc HRI/GEN/1/Rev.1 at 35 (1994))
[225] Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 30.
[226] United Nations Human Rights Committee, *General Comment No 22* (UN Doc HRI/GEN/1/Rev.1 at 35 (1994)) [4].
[227] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2675.
[228] Carolyn Evans, Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 176.
[229] *Prince v South Africa* Com No 1474/2006 (UN Doc CCPR/C/91/D/1474/2006.
[230] Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices (E/CN.4/Sub.2/200/Rev. 1).

limited manner.[231] The UN material suggests, contrary to the ECtHR, that no special emphasis is to be placed on the private or individual manifestation or religious belief.[232] Krishnaswami stated that:

> '...the declaration was prepared with a view to bringing all religions and beliefs within its compass, and on the other hand that the forms of manifestation and the weight attached to them, vary from one religion or belief to another, it may be safely assumed that the intention was to embrace all possible manifestations of religion or belief with the terms teaching, practice, worship and observance.'[233]

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief has also attempted to enumerate the actions which are capable of characterisation as religious for the purposes of Article 18 with a view to expanding the application of this right.[234] The 1981 resolution stated that the freedom of thought, conscience, religion or belief shall expressly include the freedoms:

(a) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
(b) to establish and maintain appropriate charitable or humanitarian institutions
(c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
(d) to write, issue and disseminate relevant publications in these areas;
(e) to teach a religion or belief in places suitable for these purposes;
(f) to solicit and receive voluntary financial and other contributions from individuals and institutions;
(g) to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
(h) to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
(i) to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.[235]

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[231] Carolyn Evans, Freedom of Religion under the European Convention on Human Rights (OUP 2001) 105.
[232] See; *Kokkinakis v Greece* (1993) Series A no 260-A [31]; 'religious freedom is primarily a matter of individual conscience'.
[233] Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices (E/CN.4/Sub.2/200/Rev. 1) 17.
[234] United Nations General Assembly, 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (A/RES/36/55).
[235] United Nations General Assembly, 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (A/RES/36/55) art 6.

The influence of the UDHR cannot be underestimated in the interpretation of the ECHR with particular reference to Article 9 in this context; however, the flexible approach which the UNHRC has adopted towards the definition of religious manifestations in International Human Rights law evidences a theoretical divergence from the ECtHR.[236] This can be witnessed in the following decisions of the UNHRC which tend to evidence an expansive approach to the definition of religious manifestation.

The UNHRC has been proactive in the consideration of unprecedented applications, the interpretation of which may have assisted the ECtHR in their subsequent determination under the ECHR. Para. 11 of the UNHRC's General Comment No 22, previously mentioned above, states the following:

> 'Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief...'[237]

This position was restated by the UNHRC in the case of *Westerman v Netherlands*;[238] however, the Committee emphasised that the conscientious objection was a manifestation of religion only to the extent that it pertained to the desire to refrain from any use of lethal force. In the case of *Yoon and Choi v Republic of Korea*[239] the Committee recognised that conscientious exemption to military service was a manifestation of religious belief and a right under Article 18 of the Covenant. It stated that 'the author's refusal to be drafted for compulsory service was a direct expression of their religious belief, which it is uncontested,

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[236] Tawhida Ahmed, *The Impact of EU Law on Minority Rights* (Hart Publishing 2011) 35.
[237] United Nations Human Rights Committee, *General Comment No 22* (UN Doc HRI/GEN/1/Rev.1 at 35 (1994)) [11].

[238] *Westerman v Netherlands* Com No 682/1996 (UN Doc CCPR/C/67/D/682/1996.
[239] *Yoon and Choi v Republic of Korea* Com No 1321-1322/2004 (UN Doc CCPR/C/88/D/1321-1322/2004).

were genuinely held.'[240] Committee Member Solari-Yrigogen handed down a dissenting opinion which further emphasised the significance of the manifestation:

> 'The fundamental human rights to conscientious objection entitles any individual to an exemption for compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion.'[241]

The majority of the Committee recognised that conscientious objection to military service was a manifestation of a belief and a right under Article 18 of the Covenant. It was not until 2011 that the ECtHR recognised such a right in the case of *Bayatyan v Armenia*.[242] The evolution of the case law in the ECtHR in this regard will be the subject of further analysis at a subsequent juncture.[243] It is sufficient to note the willingness of the Committee to be proactive in the recognition of rights under the Covenant to a greater extent than the ECtHR.[244]

At the same time, it should be noted that several Committee members have dissented with regard to the classification of conscientious objection as a right under Article 18. Committee member Wedgwood noted the following:

> 'The sanctity of religious belief, including teachings about a duty of non-violence, is something that a democratic and liberal state should wish to protect...[b]ut article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirement of a shared society. For example, citizens cannot refrain from paying taxes, even where they have conscientious objection...'[245]

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[240] *Yoon and Choi v Republic of Korea* Com No 1321-1322/2004 (UN Doc CCPR/C/88/D/1321-1322/2004) [8.3].
[241] *Yoon and Choi v Republic of Korea* Com No 1321-1322/2004 (UN Doc CCPR/C/88/D/1321-1322/2004) Dissenting Opinion by Committee Member Mr Hipólito Solari-Yrigogen.
[242] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) [110].
[243] See; s 3.3.2.
[244] The UNHRC continued to affirm this line of reasoning in the decision of *Jung et al v Republic of Korea* Com No 1593-1603 (UN Doc CCPR/C/98/D/1593-1603/2007) where it was found that the absence of an alternative to compulsory military service infringed Article 18 of the Covenant. Further, in the decision of *Zafar Abdullayev v Turkmenistan* Com No 2218/2012 (UN Doc CCPR/C/113/D/2218/2012) the Committee found that the State had violated the author's rights for prosecuting him on foot of his refusal to participate in compulsory military service on the basis of his religious beliefs as a Jehovah's Witness. At para. [7.7] the Committee its prior jurisprudence stating '...although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscientious.'
[245] *Yoon and Choi v Republic of Korea* Com No 1321-1322/2004 (UN Doc CCPR/C/88/D/1321-1322/2004) Dissenting Opinion by Committee member Ruth Wedgwood.

This evidences the jurisprudential juxtaposition wherein the ECtHR appears to struggle with balancing the requirements of religious liberty with the demands of 'shared society'. Further, members have resisted the expanding nature of the right, as evidenced in recent jurisprudence, whereby the right to conscientious objection was seen as an absolute right. In the decision of the Committee in *Young-Kwan Kim et al v Korea*[246] Committee members Iwasawa, Neuman, Scibert-Fohr, Shany and Vardzelashvili jointly opined that '...the Committee has employed this absolute approach in recent cases...[w]e do not consider the majority's explanation for the change of analysis persuasive.'[247]

The Committee has also upheld applications by authors alleging State interference with the freedom of religious organisations and the propagation of belief which could be said to have guided generally the jurisprudence of the ECtHR. In the case of *Malakhovsky and Pikul v Belarus*[248] the applicant author claimed that the State's Committee on Religions and Nationalities refusal to register their Krishna Consciousness Movement as a religious association violated Article 18 of the Covenant. The Committee recognised that the right had been violated in the circumstances.[249] Committee member Wedgwood noted, in her individual concurring opinion, '[Article 18] is not limited to old and established religions, or to large congregations, and it is fundamental to freedom of religious conscience.'[250] In the case of *Sister Immaculate Joseph et al v Sri Lanka*[251] the authors' complaint alleged that the refusal of the State to permit the religious organisation to incorporate on the basis of a State deference to Buddhism infringed their right under Article 18 of the Covenant. The Committee noted that:

> '...it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's

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[246] *Young-Kwan Kim et al v Republic of Korea* Com No 2179/2012 (UN Doc No CCPR/C/112/D/2179/2012).
[247] *Young-Kwan Kim et al v Republic of Korea* Com No 2179/2012 (UN Doc No CCPR/C/112/D/2179/2012) Joint Opinion of Committee members Yuji Iwasawa, Gerald L. Neuman, Anja Scibert-Fohr, Yuval Shany and Konstantine Vardzelashvili. This was similarly demonstrated in the decision of the Committee in *Min-Kyu Jeong et al v Republic of Korea* Com No 1642-1741/2007 (Un Doc CCPR/C/101/D/1642-1741/2007 where, in the context of similar facts, a comparative opinion was expressed by Committee members Yuji Iwasawa, Gerald L. Neuman and Michael O'Flaherty.
[248] *Malakhovsky and Pikul v Belarus* Com No 1207/2003 (UN Doc No CCPR/C/84/D/1207/2003).
[249] *Malakhovsky and Pikul v Belarus* Com No 1207/2003 (UN Doc No CCPR/C/84/D/1207/2003) [7.6].
[250] *Malakhovsky and Pikul v Belarus* Com No 1207/2003 (UN Doc No CCPR/C/84/D/1207/2003) Individual opinion by Committee member Ruth Wedgwood (concurring).
[251] *Sister Immaculate Joseph et al v Sri Lanka* Com No 1249/2004 (UN Doc No CCPR/C/85/D/1249/2004).

> manifestation of religion and free expression, and are thus protected by Article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.'[252]

The Committee concluded that there had been a breach of the Covenant in the circumstances.[253] Finally, this consistency with ECtHR jurisprudence was evidenced in the decision of *Viktor Leven v Kazakhstan*[254] when it noted that:

> '...the right to freedom to manifest one's belief in worship, observance, practice and teaching encompasses a broad range of acts, including those integral to the conduct by the religious group of its basic affairs, such as freedom to choose religious leaders, priests and teachers and the freedom to establish seminaries or religious schools.'[255]

The UNHRC has demonstrated a willingness to extend the boundaries of conduct which could be defined as a religious manifestation for the purposes of Article 18 of the Covenant. In the case of *Leirvåg et al v Norway*[256] the Committee found a violation of Article 18 where a new compulsory religious education model was taught in State schools with no facility for the exemption of the author's humanist children. The Committee observed '[t]he scope of Article 18 covers not only protections of traditional religions, but also philosophies of life, such as those held by the authors.'[257]

In the case of *Boodoo v Trinidad and Tobago*[258] the UNHRC reaffirmed that the freedom to manifest religion 'extends to ritual and ceremonial acts giving expression to beliefs as well as various practices integral to such acts.'[259] This case concerned the limitation on the author's right to wear a beard and worship at religious services according to Islamic practices, both of which were classified as manifestations of belief.[260] Subsequently, in the case of *Bikramjit v France*,[261] the applicant author alleged that his

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[252] *Sister Immaculate Joseph et al v Sri Lanka* Com No 1249/2004 (UN Doc No CCPR/C/85/D/1249/2004) [7.2].
[253] *Sister Immaculate Joseph et al v Sri Lanka* Com No 1249/2004 (UN Doc No CCPR/C/85/D/1249/2004) [7.3].
[254] *Viktor Leven v Kazakhstan* Com No 2131/2012 (UN Doc No CCPR/C/112/D/2131/2012).
[255] *Viktor Leven v Kazakhstan* Com No 2131/2012 (UN Doc No CCPR/C/112/D/2131/2012) [9.2].
[256] *Leirvåg et al v Norway* Com No 1155/2003 (UN Doc No CCPR/C/82/D/1155/2003).
[257] *Leirvåg et al v Norway* Com No 1155/2003 (UN Doc No CCPR/C/82/D/1155/2003) [14.2].
[258] *Boodoo v Trinidad and Tobago* Com No 721/1996 (UN Doc CCPR/C/74/CD/721/1996 (2002).
[259] *Boodoo v Trinidad and Tobago* Com No 721/1996 (UN Doc CCPR/C/74/CD/721/1996 (2002) [6.6].
[260] *Boodoo v Trinidad and Tobago* Com No 721/1996 (UN Doc CCPR/C/74/CD/721/1996 (2002) [6.6].
[261] *Bikramjit v France* Com No 1852/2008 (UN Doc CCPR/C/106/D/1852/2008).

freedom of religion had been violated under Article 18 of the UDHR[262] in light of the limitation on ostentatious religious manifestations in French public schools.[263] The UNHRC recalled that 'the freedom to manifest a religion encompasses the wearing of distinctive clothing or head coverings.'[264] Of particular interest was the recognition that distinctive religious clothing can be more than a symbol of religion but rather 'an essential component of...identity.'[265] Both these cases represent the broad and inclusive attitude of the UNHRC with regard to the definition of religious manifestation.

It appears from a cursory analysis of the decisions of the UNHRC and the ECtHR that the former is more willing to recognise religious experience outside the restrictive and individualised attitude of the ECtHR.[266] The decisions of the UNHRC are capable of constituting influential precedence for the interpretation of Article 9 of the ECHR; however, based on the broad theoretical perspective of the UNHRC and the narrow approach of the ECtHR it does not appear that European jurisprudence will evolve in the same manner. Taylor states that:

> 'There are a number of obvious differences between European and United Nations practice in determining the range of protected forms of manifestation of religion or belief.'[267]

He suggests that the decisions of the UNHRC in this context and also the views of the Special Rapporteur on the manifestations of religion, reflecting worldwide practices of religion, has the potential to 'increase [the] sensitivity' of the ECtHR when dealing with religious manifestations in an increasingly plural community of Contracting States.[268] It remains to be seen whether the ECtHR will accept this invitation in its subsequent jurisprudence.

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[262] *Bikramjit v France* Com No 1852/2008 (UN Doc CCPR/C/106/D/1852/2008) [3.1]
[263] Loi n° 2004-228 du 15 mars 2004.
[264] *Bikramjit v France* Com No 1852/2008 (UN Doc CCPR/C/106/D/1852/2008) [8.3]
[265] *Bikramjit v France* Com No 1852/2008 (UN Doc CCPR/C/106/D/1852/2008) [8.7]
[266] Tawhida Ahmed and Anastasia Vakulenko, 'Minority Rights 60 Years after the UDHR; Limits on the Preservation of Identity?' in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law; Six Decades After the UDHR and Beyond* (Ashgate 2010) 165.
[267] Paul M. Taylor, *Freedom of Religion; UN and European Human Rights Law and Practice* (CUP 2005) 347.
[268] Paul M. Taylor, *Freedom of Religion; UN and European Human Rights Law and Practice* (CUP 2005) 348.

The UNHRC does not appear to guardedly characterise the manifestation of religion with the same reliance upon policy concessions which its European counterpart exhibits.[269]At the same time the broad characterisation of religious expression which the UNHRC adopts does not preclude its decisions from consistently concluding that a manifestation, capable of protection under Article 18, can be justifiably limited in response to a competing interest.[270] This approach, it is submitted, successfully respects the indeterminable nature of religious belief as the foundation for religious manifestation, which enables any limitation exercise to adequately respect the inviolable nature of individual conscience in religious matters. In light of this comparison, the following sections consider the evolving theory surrounding the definition of religious manifestation in the ECtHR.

2.7.2 'Either Alone or in Community with Others'

As previously mentioned, Article 9(1) of the ECHR guarantees the right to religious freedom 'either alone or in community with others.'[271] The interpretation of this Article states that the right is primarily afforded to individuals to manifest religion under Article 9 and not collectives.[272] While this may be correct, previous analysis has demonstrated that the court is most comfortable in the defence of the rights of religious organisations which prejudices individuals who cannot identify with reference to an orthodox interpretation of their co-religionists.[273] The theoretical mind-set of the ECtHR towards the definition of religious manifestation has been predicated on assumptions of orthodoxy and perceived essential and non-essential elements of religious manifestation.[274] The following proposes to demonstrate how the jurisprudence of the ECtHR has shifted from the position of institutional necessity towards subjectivism.

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[269] Paul M. Taylor, *Freedom of Religion; UN and European Human Rights Law and Practice* (CUP 2005) 340.
[270] Paul M. Taylor, *Freedom of Religion; UN and European Human Rights Law and Practice* (CUP 2005) 350.
[271] ECHR art 9(1).
[272] Charles F. Furtado Jr., 'Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe' (2003) 34 CHRLR 338.
[273] Peter W. Edge, 'Determining Religion in English Courts' (2009) Applied Study of Law and Religion Group (Oxford Brookes, 2009) 25.
[274] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 665.

2.7.3 From Necessity towards Subjectivism: the Shifting Jurisprudence of the European Commission of Human Rights to the European Court of Human Rights

The way by which the EComHR and ECtHR has approached the definition of religious manifestation has progressively shifted from the determination of necessary characteristics, with reference to a religiously informed objective standard, towards an increasingly subjective approach.[275] While previous judgments determined necessity with reference to the authority of a religious group by way of the 'necessity test',[276] contemporary judgments have adopted a more subjective analysis inclusive of the beliefs of the applicant while still, at times, having recourse to religious authority, albeit in an altered capacity.[277] The judicial prototypical understandings of religion can be detrimental to the interests of true religious diversity, particularly for the endorsement of non-traditional and non-Christian religious manifestations.[278] The danger of such still remains at the heart of the jurisprudence of the ECtHR and, as such, is addressed in the closing section of this chapter.

In her analysis of the decisions of the EComHR and the judgments of the ECtHR, Peroni suggests that the early judicial characterisation of religious manifestation was made with reference to conceptions of religious orthodoxy[279] and the process of essentialising religious groups.[280] This is similar to the historical approach towards the definition of religion, as discussed in the first chapter of this thesis, whereby scholars adopted essentialised characteristics for the purposes of distinguishing religious entities from non-religious organisations.[281] Both essentialist methods are of limited use for the successful guarantee of religious manifestation due to their ability to preclude non-traditional or

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[275] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 283-284.

[276] Samantha Knights, *Freedom of Religion, Minorities, and the Law* (OUP 2007) 44.

[277] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 687.

[278] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26(1) JLR 341.

[279] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 672.

[280] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 676.

[281] See; s 1.3.4.

unfamiliar religious organisations.[282] The early decisions of the EComHR demonstrate a direct reliance upon institutional justification for actions to be considered as manifestations of religious belief.[283] In *X v United Kingdom*[284] the EComHR refused to characterise the ability to communicate in print media as a manifestation of religious belief for the purposes of Article 9 on the basis that the applicant had 'failed to prove that it was a necessary part of his religious practice.'[285] In the subsequent, similarly named, case of *X v United Kingdom*[286] the applicant alleged that he was served non-kosher food which violated his rights under Article 9. The EComHR rejected his submission on the basis that the 'Jewish Visitation Committee advised him to accept the vegetarian Kosher diet.'[287] They continued to state that 'the Chief Rabbi was also consulted and approved the authorities' efforts'[288] suggesting that the applicant was incorrect in his interpretation of his dietary regulation beliefs in order to manifest his religious observance.

This strand of reasoning was later encapsulated within the judgment of *Arrowsmith v United Kingdom*.[289] This case was 'undoubtedly a turning point in Article 9 jurisprudence through its formal requirement of a strict connection between beliefs and their manifestations'.[290] The EComHR stated that: 'the term "practice" as employed in Art 9(1) does not cover each act which is motivated or influenced by a religion or a belief.'[291] It continued to note that actions which are merely 'motivated or influenced' by a belief cannot be protected by Article 9.[292] This case has given rise to the development of a 'necessity test' for the purposes of Article 9 whereby the action in question must be necessary from the perspective of the applicant's religion in order to be defined as a manifestation of religion

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[282] Massimo Introvigne, 'Religion as claim; social and legal controversies' in Jan G. Paltvoet and Arie L. Molendijk (Brill 1999) 69.
[283] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 672.
[284] *X v United Kingdom* (1975) 1 DR 41.
[285] *X v United Kingdom* (1975) 1 DR 41 [1].
[286] *X v United Kingdom* (1976) 5 DR 8.
[287] *X v United Kingdom* (1976) 5 DR 8.
[288] *X v United Kingdom* (1976) 5 DR 8.
[289] *Arrowsmith v United Kingdom* (1978) 19 DR 5.
[290] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2006) 211.
[291] *Arrowsmith v United Kingdom* (1978) 19 DR 5 [71].
[292] *Arrowsmith v United Kingdom* (1978) 19 DR 5 [71].

for the purposes of Article 9.[293] Determining necessity was problematic for members of the judiciary who are required to operate impartially in religious matters but who, at the same time, felt compelled to distinguish between necessary and un-necessary manifestations without the relevant theological background or formation; however, on the basis of the EComHR's preference towards institutional conceptions of religious organisations, it is unsurprising that the judiciary turned toward religious organisations for authority in defining the boundaries of religious manifestation for the purposes of Article 9.[294]

In the subsequent judgment of *D v France*,[295] concerning the refusal of a Jewish Kohan to surrender divorce papers in accordance with the instruction of his religious authorities, the EComHR disregarded the beliefs of the applicant preferring to align itself with the institutional organisation to which he was affiliated. It noted that 'the applicant would seem to be at variance on this point with the religious leaders under whose authority he claims to be acting.'[296] In *V v Netherlands*[297] the EComHR dismissed the applicant's submission that his beliefs precluded his participation in a compulsory pension scheme on the basis that such a belief did not 'have any close links' with a religion or belief.[298] While accepting that the decision of *Arrowsmith* by the EComHR constituted a turning point,[299] an examination of the jurisprudence of the EComHR 'reveals some variation in its stringency'[300] regarding the determination of 'necessary' manifestations. This has enabled the ECtHR to depart from the strict application of the test in the subsequent judgments of the new court; however, it cannot be stated that the ECtHR has expressly overturned the precedents established by the EComHR.[301]

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[293] See; Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Routledge 2015) 78; Rex Ahdar, Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 166; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 111.

[294] The court has demonstrated that it is comfortable in the defence of the religious manifestation of religious organisations in a way which it is not regarding individual applicants, see; Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26(1) JLR 335.

[295] *D v France* (1983) 35 DR 199.

[296] *D v France*(1983) 35 DR 199.

[297] *V v Netherlands* (1984) 39 DR 267.

[298] *V v Netherlands* (1984) 39 DR 267 [2].

[299] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2006) 211.

[300] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2006) 211.

[301] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2006) 216.

The judgment of *Kokkinakis v Greece*[302] demonstrated the court's 'increased willingness to go beyond the diversity of facts specific to each case and articulate general principles stemming from religious freedom.'[303] While this judgment instigated an increased willingness by the ECtHR to defend the religious manifestation of individuals it did not dispense with its recourse to religious institutions. In the course of the judgment the court differentiated between proper and improper propagation of religion with reference to the opinion of the World Council of Churches which described the former as 'an essential mission and a responsibility of every Christian and every Church.'[304] Simultaneously, this case marks a further turning point in the jurisprudence of the ECtHR on the basis that, while the court retained the ability to defer to religious authority, it no longer emphasised this requirement to the same extent which it had previously.[305]

In the cases of *Efstratiou v Greece*[306] and *Valsamis v Greece*[307] the applicant parents submitted that the disciplinary procedure, initiated against their children on behalf of their school due to the failure of the same children to participate in a commemorative military parade, was an infringement of their religious beliefs. The applicants were members of the Jehovah's Witness community. In their view, pacifism constituted a fundamental tenet of their religious belief which required them to abstain from acts of war or violence. The court heard that, when the school refused to allow the children to absent themselves during the course of the parade, they had failed to attend without permission and had thus been suspended. The ECtHR determined that the 'obligation to take part in school parade was not such as to offend her parent's religious convictions.'[308] In its ruling the majority of the court was prepared to conclude that the participation in a commemorative parade was not contrary to pacifist beliefs even though this was the understanding and belief of the applicants.

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[302] *Kokkinakis v Greece* (1993) Series A no 260-A.
[303] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 286.
[304] *Kokkinakis v Greece* (1993) Series A no 260-A [48].
[305] Silvio Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law' in Jeroen Temperman (ed), *The Lausti Papers; Multidisciplinary Reflections on Religious Symbols in the Public Classroom* (Martinus Nijhoff 2012) 26.
[306] *Efstratiou v Greece* App no 24095/94 (ECtHR, 18 December 1996).
[307] *Valsamis v Greece* App no 21787/93 (ECtHR, 18 December 1996).
[308] *Efstratiou v Greece* App no 24095/94 (ECtHR, 18 December 1996) [38].

It should be noted, however, that this judgment was the subject of a persuasive dissent by judges Thór Vilhjálmsson and Jambrek. They concluded that it was not appropriate for the court to substitute the beliefs of the applicants in the context.[309] They indicated that such substitution would only be appropriate where the religious or philosophical convictions were 'obviously unfounded and unreasonable'.[310] They concluded that there was no such indication in the present circumstances and accordingly that there had been a violation of Article 9 of the Convention.

This judgment of the majority prompted Martínez-Torrón and Navarro-Valls to observe that 'the court in effect substituted its judgment for the conscience of the person involved, defining what was "reasonable" for them to believe...'[311] Academics have criticised the dangerous role which the court advocated in this circumstance[312] which would bring judges 'dangerously close to adjudicating on whether a particular practice is formally required by a religion – a task which judges...appear ill-equipped to handle.'[313] Edge suggests that 'the court seeks to enter into determining what one must believe and how one must act in order to meet religious duties in a particular tradition.'[314] He states that such a scenario would cause the judiciary to 'have recourse to dominant, well-documented traditions than to the individual beliefs of the applicant.'[315]

The ECtHR continued to pursue this line of reasoning into the early twenty-first century with a series of controversial cases demonstrating the potentially harmful effect the

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[309] *Valsamis v Greece* App no 21787/93 (ECtHR, 18 December 1996) Joint Dissenting Opinion of Judges Thór Vilhjálmsson and Jambrek; *Efstratiou v Greece* App no 24095/94 (ECtHR, 18 December 1996) Joint Dissenting Opinions of Thór Vilhjálmsson and Jambrek.

[310] *Efstratiou v Greece* App no 24095/94 (ECtHR, 18 December 1996) Joint Dissenting Opinions of Judges Thór Vilhjálmsson and Jambrek.

[311] Javier Martínez-Torrón, Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib (eds), Facilitating Freedom of Religion or Belief: A Deskbook (Martinus Nijhoff 2004) 234.

[312] Javier Martínez-Torrón, Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib (eds), Facilitating Freedom of Religion or Belief: A Deskbook (Martinus Nijhoff 2004) 234: David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 433.

[313] David Harris, Michael O'Boyle, Colin Warbrick, Law of the European Convention on Human Rights (2nd edn, OUP 2009) 433.

[314] Peter W. Edge, 'The European Court of Human Rights and Religious Rights' (1998) 47(3) ICLQ 687.

[315] Peter W. Edge, 'The European Court of Human Rights and Religious Rights' (1998) 47(3) ICLQ 687.

jurisprudence to date was having on the influence of subsequent judgments.[316] In the case of *Pretty v United Kingdom*[317] the ECtHR refused to characterise suicide as a manifestation capable of protection under Article 9; however, they also stated that, on that basis, the applicant's belief was also precluded from protection under Article 9 as 'not all opinions and convictions constitute beliefs in the sense protected by Article 9(1) of the Convention.'[318] Evans warns that such a judgment would suggest that 'largely personally held ideas, opinions and beliefs, no matter how seriously taken, will not fall within the scope of Article 9.'[319] This judgment can be criticised for its adoption of a new analytical approach towards religious manifestation which cannot be logically reconciled with previous judgments. Evans speculates regarding the consequences of such a theoretical approach of the court in the following terms:

> '...in order to determine whether a form of belief is a religion or belief for the purposes of Article 9 the court looked not to the nature of those beliefs but to the narrower, second order question of the nature of the manifestation. This is...illogical since it could yield a different answer depending on the activity in question...In the *Arrowsmith* itself the Commission thought that whilst pacifism "qualified" as a form of belief...the act in question – the distribution of leaflets...had not been a manifestation...merely motivated by them. If the reasoning had been applied in *Arrowsmith*, however, pacifism would not have been considered to be protected at all by the second element of Article 9(1) simply because the nature of the act in question was not a manifestation on the facts of the case.'[320]

This judgment, had this theoretical approach been adopted in subsequent decisions, would have had a significant impact on the way in which religion is defined for the purposes of Article 9 for the following reasons.

The theoretical underpinning of the judgment in *Pretty*[321] goes against what Lavrysen addresses as the 'bifurcated approach to negative obligation cases'.[322] He

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[316] Valerie A. Lykes, James T. Richardson, 'The European Court of Human Rights, Minority Religions and New versus Original Member States' in James T. Richardson and François Bellanger (eds), *Legal Cases, New Religious Movements and Minority Faiths* (Ashgate 2014) 177.
[317] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).
[318] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [82].
[319] Malcolm D. Evans, European Parliament, 'The Freedom of Religion or Belief and the Freedom of Expression' (Study) [EXPO/B/DROI/2008/56] 14.
[320] Malcolm D. Evans, 'Freedom of Religion and the European Convention on Human Rights Approaches, Trends and Tensions' in P. Cane, C. Evans, Z. Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 294.
[321] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

demonstrates that, in negative obligation cases, the court first looks to whether there has been an interference with a Convention right and secondly whether that interference is capable of passing the proportionality test.[323] For the purposes of this present analysis it could be suggested that the second stage includes an examination of whether the action is indeed a manifestation for the purposes of Article 9. In the case of *Pretty v United Kingdom*[324] the ECtHR first approached this issue from the perspective of a secondary characteristic; namely manifestation. Religious manifestation should be understood as a secondary characteristic to religious belief, on the basis that, in the absence of religious belief it is not possible to argue for a manifestation of same. While this approach to definition of religion and religious manifestation has not been adopted in subsequent judgments of the ECtHR it demonstrates the way in which the court distorts its theoretical analysis of rights in favour of policy issues which may exist in individual Contracting States.[325]

The theoretical uncertainty in the jurisprudence of the ECtHR, which came to a head in *Pretty v United Kingdom*,[326] was carried into the subsequent judgment of *Jones v United Kingdom*.[327] As previously discussed, this case concerned an applicant who stated that the refusal of his local authority to permit him to affix a picture of his daughter to her gravestone violated his right to manifest his religion under Article 9. Relevant to the present consideration, the applicant submitted in evidence that the Church of Wales accepted photographs upon gravestones as authority for his claim of religious necessity. Interestingly, in a departure from the traditional use of ecclesiastical authority, the court stated that 'it is irrelevant for this purpose that the church of which the applicant is a member permitted such photographs, for it cannot be argued that the applicant's beliefs required a photograph.'[328] This judgment emphasises the ease with which the judiciary was

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[322] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHT; The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 165.

[323] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHT; The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 165.

[324] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

[325] Paul M. Taylor, *Freedom of Religion; UN and European Human Rights Law and Practice* (CUP 2005) 351.

[326] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

[327] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005).

[328] *Jones v United Kingdom* App no 42639/04 (ECtHR, 13 September 2005) [3].

comfortable in substituting the beliefs of an individual in order to determine necessity, and perhaps the perception of a religious community, in place of its own understanding of religious belief.

As recognised previously,[329] burial practices are widely recognised as examples of religious manifestation. Individuals can hold folk religious beliefs concerning religious rituals which take 'place beneath the radar of religious officials and institutions.'[330] The court's perception that the photograph amounted to a unnecessary manifestation should not have justified the court in the dismissal of the individual applicant's very real and legitimate belief. It is perhaps due to the imbalanced approach which the ECtHR exhibited during this period that the judgment in *Şahin v Turkey*[331] adopted an increased subjective approach in the determination of the definition of religious manifestation.[332]

As detailed at length previously[333] the judgments concerning the Islamic veil demonstrated the judicial reluctance to clearly define the veil as a manifestation of religion[334] until such time as it was finally clarified in *Şahin v Turkey*.[335] Gilbert notes that the judgment of this case 'heralded a more consistent approach when assessing what constitutes a manifestation of religious belief' in that the reasoning of the court reflected a greater desire to engage with the subject of individual beliefs.[336] The jurisprudence of the court shifted in *Şahin* through its acceptance of practices that 'though not necessarily required by a religion, were still motivated or inspired by it.'[337] The Grand Chamber of the ECtHR noted in that case that 'the headscarf may be regarded as motivated or inspired by a religion or belief...the regulations in issue...constituted an interference with the applicant's right to manifest her religion.'[338] This overturns the previous standard in *Arrowsmith*[339] which precluded actions which were merely motivated or inspired by religion or belief from

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[329] See; s 2.3.3.
[330] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 2.
[331] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).
[332] Myriam Hunter-Hénin, *Law, Religious Freedoms and Education in Europe* (Ashgate 2011) 366.
[333] See; s 2.5.1.
[334] See; *Karaduman v Turkey* (1993) 74 DR 93.
[335] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).
[336] Myriam Hunter-Hénin, *Law, Religious Freedoms and Education in Europe* (Ashgate 2011) 366.
[337] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 242.
[338] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [78].
[339] *Arrowsmith v United Kingdom* (1978) 19 DR 5.

the protection of Article 9.[340] This theoretical alteration broadened the potential application of Article 9 and directed the jurisprudence towards a more subjective approach regarding the definition of religious manifestation.

The judgment in *Şahin*[341] is further significant due to the fact that the ECtHR emphasises that 'the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed'.[342] This is an explicit limitation on the authority of the courts to interpret the substance of religious belief in order to ascertain what is necessary and what is unnecessary. Gilbert warns that any 'attempt to find a consistent line between the jurisprudence of *Şahin*[343] and of the case law leading up to it' has 'caused problems.'[344] Thus, he suggests that this judgment radically overturns the previous jurisprudence.[345] This shift in approach placed greater emphasis on the subjective qualities of individual belief[346] and has expanded the category of religious practice by including religious actions which are not necessarily required by religious organisations to be characterised as religious manifestations.[347]

The subsequent judgments of the ECtHR demonstrated a further willingness to re-characterise the substance of religious manifestation for the purpose of Article 9 with an emphasis on the subjective religious interpretations of the applicant.[348] In *Jakóbski v Poland*[349] the ECtHR accepted the submission by the applicant that a vegetarian diet was a manifestation of his Buddhist religious beliefs. The court rejected the submission of the respondent government which noted, due to the fact that vegetarianism was merely encouraged but not prescribed, that it could not be considered an essential manifestation of the applicant's religion. Significantly, in the absence of any religious institutional necessity,

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[340] *Arrowsmith v United Kingdom* (1978) 19 DR 5 [71].
[341] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).
[342] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [107].
[343] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).
[344] Howard Gilbert, 'Redefining Manifestation of Belief in Leyla Şahin v Turkey' (2006) 3 EHRLR 315.
[345] Howard Gilbert, 'Redefining Manifestation of Belief in Leyla Şahin v Turkey' (2006) 3 EHRLR 315.
[346] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14(2) ELJ 260.
[347] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 242.
[348] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 242.
[349] *Jakóbski v Poland* App no 18429/06 (ECtHR, 7 December 2010).

the ECtHR accepted and endorsed the perception of the applicant recognising that the desire to be provided with a vegetarian diet can be 'taken for reasons other than religious ones.'[350] It found that the desire to be provided with a meat-free diet was indeed motivated by a religious belief in the present instance and thus recognised such action as falling within the definition of religious manifestation. Peroni suggests that the court, in these most recent judgments, has adopted what she calls 'relatively objective porous filters'.[351] This suggests that the ECtHR is broadening the characterisation of religious manifestation for the purposes of Article 9 by accepting individual and subjective interpretations of religious beliefs and their requirements on the part of the applicant.

In the case of *Gatis Kovaļkovs v Latvia*[352] the applicant submitted that the confiscation of incense sticks violated his right to religious freedom as such objects were necessary for the practice of religion. The ECtHR did not refute the applicant's beliefs that the use of such objects could constitute a manifestation of religious manifestation. It noted that 'it is not the court's task to determine what principles and beliefs are to be considered central to the applicant's religion or to enter into any other sort of interpretation of religious questions.'[353] This demonstrates the subjective characterisation of religious manifestation for the purposes of Article 9; however, it continued to note that it would take into consideration the response given by the religious congregation to which the applicant subscribed and their views regarding the use of incense.[354] The congregation submitted that 'if circumstances did not permit it, the burning of incense sticks was not mandatory.'[355] As such the ECtHR determined that the religious manifestation in question was 'not essential for manifesting a prisoner's religion,'[356] and upon that basis the applicant was declared manifestly ill-founded.[357] This judgment combines the conventional broad characterisation of religious manifestation with the earlier reliance of the EComHR upon institutional direction regarding necessary religious manifestations. Significantly, the judgment

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[350] *Jakóbski v Poland* App no 18429/06 (ECtHR, 7 December 2010) [45].
[351] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 680.
[352] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012).
[353] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [60].
[354] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [60].
[355] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [18].
[356] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [68].
[357] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012) [69].

recognises that the action in question is a manifestation of religion for the purposes of Article 9 on the basis of the sincerely held belief of the applicant. It no longer characterises religious manifestation with sole reference to institutional requirements; however, it does consider the views of the institutional religion in the examination of the proportionality of any limitation exercise. This bifurcated approach is theoretically preferable on the basis that it respects the internal legitimacy of religious belief and the ability of the applicant to subjectively determine the requirements of same.

This perspective was seen again in the case of *Austrianu v Romania*[358] which concerned the confiscation of the applicant's cassette player and his allegation that this constituted an infringement of his rights under Article 9 on the basis that it was used to play religious tapes. While the ECtHR recognised that the confiscation of the cassette player could constitute an interference with the applicant's right[359] it continued to determine that cassette players are 'not essential for manifesting religion.'[360] Similarly to the judgment in *Gatis Kovaļkovs v Latvia*[361] the ECtHR determined that the non-essential nature of the action justified an interference with the applicant's rights under Article 9 yet did not preclude him from having these rights.[362] The court is faced with a difficult task in the determination of cases which present unconventional religious scenarios and in the case of applicants who hold views which may not necessarily be validated by the religious organisation to which they subscribe. The ECtHR must adopt a standard whereby trivial and fraudulent actions are excluded from the protections of religious manifestation, in order to protect the status of religion, while at the same time it cannot exclude unfamiliar conduct which could potentially deprive genuine claimants from obtaining the protection of Article 9 on the basis that their claim cannot be externally validated.

It is accepted that some requirement of essential criteria can be beneficial when attempting to define religious manifestation in practical or perhaps colloquial terms; however, the absence of essentiality should not preclude the action in question from being

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[358] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013).
[359] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013) [104].
[360] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013) [106].
[361] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012).
[362] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013) [107].

considered a manifestation of religious belief for the purposes of Article 9; rather, it should be considered a factor in the potential limitation of the right. Similar to the definition of religion, the definition of religious manifestation should adopt a bifurcated methodology; first examining whether there is a manifestation capable of protection under Article 9 of the Convention with reference to the subjectivity of religious belief and secondly examining whether any interference with this right could pass the legality, legitimacy and proportionality tests.[363] It is suggested that essentiality properly falls for determination, not in the first category but within the second as demonstrated in the most recent judgments of *Austrianu*[364] and *Kovaļkovs.*[365] Examining the issue from this perspective, as earlier represented in the decisions of the UNHRC, would enable ritualistic actions such as burning incense to be defined as a religious manifestation for the purposes of Article 9 as opposed to excluding them. This approach would cause the ECtHR to subject the limitations to the same level of scrutiny as it would any other limitation of religious manifestation which would, in turn, strengthen the analytical approach of the court and enrich its jurisprudence. It would also respect the beliefs of the applicant in a greater way through accepting that their understanding of their religious requirements is correct while precluding that fact from automatically justifying its free and inhibited manifestation in the public sphere.

The current theoretical position of the ECtHR appears to fit within the 'relatively porous objective criteria' identified by Peroni in her comprehensive analysis of the case law to date.[366] The theoretical shift towards subjectivism enables the right to religious manifestation to apply to a much broader category of individuals. It is, further, more appropriate that the ECtHR approach issues of determination using the bifurcated method outlined above which respects the ability of individuals to determine subjectively the requirements of their religious belief, without necessary recourse to religious authorities, and at the same time enabling the limitation exercise to guard against potentially harmful actions. It must be recalled that the determination of religious necessity is largely an

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[363] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHT; The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 165.

[364] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013).

[365] *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012).

[366] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 680.

improper task for the judiciary.[367] The following considers that, due to the reluctance of the judiciary to sufficiently engage in a theoretical perspective with the substance of religious manifestation and upon their traditional reliance upon the necessity test, their approach to neutrality is flavoured in favour of the Christian tradition which has narrowed the potential scope of Article 9 to the detriment of minority and non-traditional religious organisations.

2.7.4 Judicial 'Neutrality' has resulted in a Christian Benchmark for Religious Manifestation

The court's insistence that the State remain 'neutral' in religious matters[368] calls into question the judicial understanding of neutrality. Perceived neutral laws and standards can in fact be informed by a broader cultural and societal perception.[369] Martinéz-Torrón and Navaro-Valls both comment that 'the laws considered neutral usually conform – as does any law – to the ethical values that are dominant in a determined social environment at a certain time.'[370] This can be seen with reference to the example of the accepted working week within the European sphere which usually designates Sunday as a day of rest, reflecting the Christian tradition from which this practice undoubtedly originates.[371] Perceptively 'neutral' laws, such as these, more facilitate Christian observance to the detriment of the Jewish Sabbath on Saturday or the Islamic Friday Observance.[372] Evans recalls that societal values 'are not neutral: they are vehicles for the legitimation of a very real set of assumptions concerning the proper reach of religion in the public sphere.'[373]

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[367] David Harris, Michael O'Boyle, Colin Warbrick, Law of the European Convention on Human Rights (2nd edn, OUP 2009) 433.

[368] *Aktas v France* App no 43563/08 (ECtHR, 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR, 30 June 2009); *Gamaleddyn v France* App no 18527/08 (ECtHR, 30 June 2009); *Ghazal v France* App no 29134/08 (ECtHR, 30 June 2009); *Jasvir Singh v France* App no 25463/08 (ECtHR, 30 June 2009); *Ranjit Singh v France* App no 27561/08 (ECtHR, 30 June 2009).

[369] Javier Martínez-Torrón, Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 236.

[370] Javier Martínez-Torrón, Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 236.

[371] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 598.

[372] See; *Konttinen v Finland* (1996) 87 DR 68.

[373] Malcolm D. Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 313.

Neutrality in religious matters is a complex concept which may be impossible for Contracting States to achieve in legal systems built in response to a dominant social group.[374] The danger of conceptually neutral laws is that they may indirectly support the position of the majority and thus further subjugate minority religious groups.[375] Legal norms which have developed in the European sphere regarding the position of religion in the State have been clarified in the years since the construction of the ECHR; however, this has been largely with reference to the influence of the Christian Churches, often considered the prototypical example of religion in the operation of the Western sphere.[376] The establishment of boundaries between religion and the State in the European sphere was built upon an understanding of the Christian religion.[377] This perspective fails to appreciate the growing diversification of issues and religious interests coming before the court.[378]

It is clear that contrasting religious organisations place different emphasis on religious manifestation and differ on the boundaries of what can be encompassed within this practice.[379] Sullivan observes that, in contrast to familiar mainstream Christian traditions, other religious groups emphasise 'the needs and identity of the community [which can] take precedence and religious practice plays a bigger role'.[380] When attempting to ascertain the requirements of distinct religious groups the court has previously applied an orthodox interpretation of that religion which may not be consistent with the beliefs of the applicant in question.[381] Beaman observes that 'there is a tendency when dealing with religious groups with which we are not familiar to essentialise them, often in orthodox terms.'[382]

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[374] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 598.
[375] Javier Martínez-Torrón, Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 237-238.
[376] Ronan McCrea, 'Religion as a Basis of Law in the Public Order of the European Union' (2009-2010) 16(1) CJEL 84.
[377] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3(2) OJLR 236.
[378] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26(1) JLR 321-322.
[379] Kevin Boyle, 'Freedom of Conscience in International Law' in Council of Europe, *Freedom of Conscience* (12-14 November 1992) 39.
[380] Winnifred Fallers Sullivan, 'Judging Religion' (1998) 81(2) MQLR 449.
[381] Lori G. Berman, 'The Missing Link: Tolerance, Accommodation and...Equality' (2012) 9(3) CD 19.
[382] Lori G. Berman, 'The Missing Link: Tolerance, Accommodation and...Equality' (2012) 9(3) CD 19.

The status of religion and belief has played an increasingly significant role within the European political agenda in recent years.[383] This has forced the court to interact with unfamiliar belief systems in its attempt to impose a cohesive and pan-European response to religion within society.[384] In the absence of truly theoretical engagement with the substance of religion and religious manifestation within the European sphere, the court found recourse with familiar Christian and Protestant models which shaped its understandings of the boundaries between optional and required religious conduct.[385] Vickers comments that this resulted in a greater significance attributed to 'orthodoxy in Christianity rather that orthopraxy'[386] to the detriment of those religions which placed emphasis in external religious manifestations. Vickers aligns her theory with Protestant theology which involved the idea of 'the separation between body and mind, with faith more a matter of the mind and its state of "righteousness" than a matter of the body.'[387] Such a disposition towards religious manifestation could only emphasise those discrete manifestations which the ECtHR has been willing to recognise while limiting those devotional or non-essential practices in view of competing interest.

Case law concerning the Islamic veil outlines the inherent Christian Occidental philosophical and theological orientation of the ECtHR.[388] In the judgment of *Dahlab v Switzerland*[389] the court defines the Islamic veil as 'powerful' and 'directly recognisable' which may have a 'proselytising effect.'[390] This can be contrasted with the language utilised by the ECtHR in the case of *Eweida and Others v United Kingdom*[391] when it described the crucifix as 'discreet' which appears to positively influence the judgment of the court.[392]

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[383] David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 441.
[384] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2696
[385] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 600.
[386] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 600.
[387] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 599.
[388] See; s 2.5.1.
[389] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[390] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].
[391] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[392] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [94].

Earlier in the case of *Lautsi v Italy*[393] the court described the crucifix as an 'essentially passive symbol'[394] which did not have a 'proselytising tendency'.[395] Most recently in the judgment of *S.A.S. v France*[396] the court went so far as to recognise that many members of society perceived of the Islamic clothing in issue 'as strange.'[397] These judgments must be understood in light of the 'broader struggle to define and apply boundaries to religion's role and influence in European societies at a time when established boundaries are being challenged.'[398] It is submitted that the Islamic community embodies the largest religious entity to challenge the current definition of religious manifestation from the perspective of the ECtHR. Their resistance to limit their practices in line with 'old compromises'[399] has created the biggest theoretical obstacle in the interpretation of Article 9 perhaps since the landmark judgment of *Kokkinakis v Greece*.[400] This has resulted in a disappointing line of jurisprudence concerning the protection of the religious manifestation of minorities within the European sphere.[401]

Rorive comments that 'a uniform solution throughout Europe might neither be achievable nor desirable.'[402] As emphasised in the previous chapter, there is no clear definition of religion for the purposes of Article 44 of the Irish Constitution or Article 9 of the ECHR.[403] Due to the fact that religious manifestation is a secondary characteristic derived from the characterisation of religion, the courts do not have recourse to an explicit strand of conduct which may or may not be permissible on the basis of this absence of uniformity. This has resulted in their imposition of essential characteristics upon religious manifestation and judicial determination between necessary and unnecessary manifestations contrary to

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[393] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011).
[394] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) [72].
[395] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011) [74].
[396] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[397] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [120].
[398] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 58.
[399] Oliver Roy, *Secularism Confronts Islam* (George Holoch tr, Columbia University Press 2007) 6.
[400] *Kokkinakis v Greece* (1993) Series A no 260-A.
[401] Nathan A. Adams IV, 'Human Rights Imperative: Extending Religious Liberty Beyond the Border' (2000) 33(1) CILR 53.
[402] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2696.
[403] See; s 1.6.

the limitless construction of the *forum internum*.[404] In the absence of guidance ,the judiciary have had recourse to their personal understanding of religion which is grounded in a largely Christian conception. While this does not at first glance appear unfair, the degree to which manifestation is defined is then made with reference to a Christian benchmark.

Recalling the early conceptions of human rights, Cumper and Lewis comment that 'religious freedom has been predicated on the assumption that a believer has the right to depart from the majority view and act according to his/her view.'[405] It remains to be seen if the court will continue to develop its assertive approach[406] and adopt the bold and imaginative stance[407] which it requires to sufficiently define religious manifestation in the coming years.

2.8 Conclusion

It has not been possible to determine, with any consistency, the way in which the EComHR and the ECtHR have defined the manifestation of religion for the purposes of Article 9.[408] As stated at the beginning of the chapter, this analysis has been primarily focused on the jurisprudence of these respective institutions in the absence of domestic precedence. Subsequently, the research has been divided into a discursive and an analytical section. The discursive section provided a comprehensive assessment of the judgments which have been issued from the EComHR and the ECtHR concerning the manifestation of religion. The division of these cases into the categories of worship, teaching, practice and observance is an attempt to better illustrate the way in which the court has addressed and codified various actions as religious manifestations. This has not been done in a way which

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[404] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 665.

[405] Peter Cumper, Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) ELJ 139.

[406] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 306.

[407] David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 441.

[408] Daniel J. Hills and Daniel Whistler, *The Right to Wear Religious Symbols* (Macmillan 2013) 58.

precludes the court from modifying the characterisation adopted here; merely, this research illustrates the way in which the jurisprudence has evolved to date.

The subsequent body of work constitutes an analysis of these respective judgments in order to ascertain the evolving theory surrounding the definition of religious manifestation from the perspective of Article 9 of the Convention. This research has shown that, while the interpretation of the ECHR can be informed with reference to the drafting process of the UDHR,[409] the European legal sphere has adopted a narrower approach to the characterisation of religious manifestation than that witnessed in the jurisprudence of the UNHRC.[410] This research has demonstrated that the ECtHR exhibits a preference towards institutional conceptualisations of religious belief which has influenced the way in which the ECtHR has defined religious manifestations.

The evolving theory, from the necessity test towards a subjective approach, has demonstrated the degree to which the jurisprudence in this area is inconsistent leading to contrasting judgments and evidences the judicial acquiescence to social perceptions regarding the scope of religion which may not be appropriate in all cases. It is clear that, at times, the court has sought to construct a definition of religious manifestation which purports to exclude artificial or trivial beliefs;[411] however, the manner in which the court has attempted to realise this has brought the judiciary dangerously close to arbitrating on the substance of belief. Finally the court has approached this issue with regard to judicial neutrality; however, neutral laws may in fact affirm the status of the dominant group in any society and thus may reflect their inherent values to the detriment of minorities.[412] When neutral laws are shaped with reference to the prototypical example of religion they have the potential to exclude legitimate manifestations of religion which cannot be related to in such terms. The imposition by the court of a neutral standard thus can be understood as an

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[409] See; Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 34; Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark E. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) 389.

[410] Tawhida Ahmed and Anastasia Vakulenko, 'Minority Rights 60 Years After the UDHR; Limits on the Preservation of Identity?' in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law; Six Decades After the UDHR and Beyond* (Ashgate 2010) 165.

[411] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14(2) ELJ 260.

[412] Lucy Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) JLP 598.

attempt to achieve a homogenous and orthodox standard of religious manifestation.[413] It is precisely in the absence of a unified conception of religious belief that the rights of the minority must be protected to a much higher level.[414] This thesis accepts that the attempt to impose neutrality may not be practically achievable nor may it be desirable; rather, an attempt to recognise historical realities while effecting Convention rights might give transparency to the interpretation of rights by the ECtHR.

The situation as it stands is a sorry one. The failure of the judiciary to engage with Article 9 in a heightened theoretical manner has led to a strand of inconsistent judgments. The definition of religious manifestation should reflect the breadth of the definition of religion arrived at in the first chapter of this thesis and be interpreted using an open-ended polythetic methodology. Such an approach to definition would not preclude the court from grounding any limitation of the right where a manifestation appears to be unfounded or rather from considering institutional necessity in the broad examination of the issue. The *forum externum* should be considered to have an aspect of the *forum internum* in that it should not be defined in a limited manner or in any manner which would tend to disregard the unlimited scope of religious belief.

The definition of religious manifestation should be broad so as to encompass those legitimate actions based on a religious belief; however, the current approach of the ECtHR has failed to articulate Article 9 to its full potential. A broad definitional stance does not preclude the court from subsequently finding any interference with the manifestation as legitimate; rather, such an approach, formed with reference to the approach of the UNHRC, respects individual applicants in the assertion of their beliefs. The shift of jurisprudence from the requirements of necessity towards a subjective approach respects the individual in their ability to adhere to their religion, which was defined in the most expansive manner during the course of the first chapter of this thesis. This method subjectively characterises the manifestation of religious belief for the purposes of Article 9. Such a determination, however, does not preclude the court from limiting the manifestation of the same in view of

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[413] Peter W. Edge, 'The European Court of Human Rights and Religious Rights' (1998) 47(3) ICLQ 687.
[414] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2696.

competing interests. Such will be discussed at a subsequent juncture of this thesis. A concluding note must be made, on the basis of the recent emergence of this subjective theoretical approach, that the analysis of the wider jurisprudence evidences a Christian benchmark for the characterisation of religious manifestation which is detrimental to minority religions. It remains to be seen how the ECtHR will respond to this.

Chapter III

The Fundamentality of Religious Conscience and the Importance of Freedom of Expression: Creating a Superior Right to Religious Expression

3.1 Introduction

The object of this thesis is to consider the substance of limitations placed upon the right to religious expression and subsequently to analyse those situations whereby positive measures are required in order to facilitate this right in the public sphere. The protection of religious interests against competing rights within Europe and Ireland is often grounded upon the assumption that there is something 'special'[1] and 'valuable'[2] about religion yet this poorly analysed assertion is no longer sustainable without criticism. The first part of this chapter proposes to demonstrate that religious belief makes demands of conscience which fundamentally characterises the way in which an adherent will orientate themselves towards life. It is suggested that an examination of the transformative and emotional responses to the demands of religious conscience will demonstrate its primal role in the life of the religious adherent.

This subjective analysis gives way to an examination of the legal concept of immutability, exploring its definition and significance so as to characterise religion as an immutable characteristic in opposition and in rebuttal to arguments which seek to diminish the protection afforded to religion on the basis of its significance.[3] The attempt to

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[1] See; Steven G. Gey, 'Why is Religion Special: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment' (1990) 52 UPLR 147; Sonu Bedi, 'Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15(2) JPP 235.

[2] John H. Garvey, 'An Anti-Liberal Argument for Religious Freedom' (1996) 7 JCLI 276.

[3] See; Brian Barry, 'Chance, Choice and Justice' in Robert E. Goodin and Philip Petit (eds), *Contemporary Political Philosophy: An Anthropology* (2nd edn, Blackwell 2006); Aileen McColgan, 'Class Wars? Religion and

understand the actions of religious adherents without reference to the demands of their conscience is an extension of the theoretical disposition purporting to essentialise religious experience which was rejected during the course of the preceding chapters.[4] Scholarship which has attempted to do so can be criticised for its attempt to place an emphasis on objective standards of religious experience which are undoubtedly informed from an occidental perspective.[5] This analysis emphasises that religious adherents perceive that there is a fundamental significance attached to religious conscience on the basis of an assortment of factors including its merit as a tool of self-identification and its properties of personal enrichment.[6] This assertion is defended against any perspective which views religious belief as irrational and thus incapable of being afforded superior protection within the rights hierarchy of the European Court of Human Rights.[7]

The second part of this chapter demonstrates that the significance of conscience, informed by religious belief, elevates the general freedom of expression and creates the right to religious expression which can be afforded the highest level of protection under Article 10 of the ECHR alongside political expression. Further, this analysis suggests that the dichotomy separating religious manifestation from expression should be relaxed and a renewed judicial interest be fostered in this period of increased litigation based on religious rights. It proposes to demonstrate that, while the interpretation of both the right to religious freedom and the right to freedom of expression can address the rights of religious individuals, their symbiotic relationship has not been sufficiently exploited and their interpretation to protect religious interests has not realised its full potential.[8] In the absence

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(in)equality in the workplace' (2009) 38(1) ILJ 1; Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech' (2014) 62(3) AJCL 739 .

[4] See; Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 676-679, see also; s 1.6 where this thesis adopted a polythetic definition of religion in response to essentialist constructs which are recognised to be of limited use for e theoretical application; Dan Merkur, 'The Exemplary Life' in Thomas Idinopulos, Brian C. Wilson (eds), *What is Religion? Origins, Definitions and Explanations* (Brill 1998) 74.

[5] Fethi Açikel, 'A Critique of Occidental Geist: Embedded Historical Culturalism in the Works of Hegel, Weber and Huntington' (2006) 19(1) JHS 60.

[6] Arif A. Jamal, 'The Impact of Definitional Issues on the Right of Freedom of Religion and Belief' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 102.

[7] Peter Cumper, 'The Reasonable Accommodation of Conservative Religious Beliefs and the Protection of LGBT Rights at the Workplace' in Marie-Claire Foblets, Katayoun Alidadi, Jørgen S. Nielsen and Zeynep Yanasmayan (eds), *Belief, Law and Politics; What Future for a Secular Europe* (Ashgate 2014) 150.

[8] David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 441.

of 'a uniform conception of the significance of religion in society'[9] religious adherents can find recourse to an enhanced form of freedom of expression when augmented by the significance of the freedom of religious conscience. This examination is mindful of the altered dynamic between religion and the State in the Western sphere[10] yet conscious of the rights of religious adherents in what can be described at times as a militantly secular environment.[11]

3.2 The Implications of Religious Belief and the Fundamentality of the Religious Conscience

The following section proposes to demonstrate that religious belief can contain demands of conscience which can contribute fundamentally to the way in which an adherent orientates themselves towards life.[12] It examines the implications of attempting to adhere to these demands of religious conscience from a subjective perspective so to mitigate the failure of contemporary discourse to sufficiently appreciate the cognitive and emotional aspects of religious belief.[13] This section examines the proposition that religion is an immutable characteristic for the purposes of Article 44 of the Irish Constitution and Article 9 of the ECHR with a view to demonstrating that the limitation of religious expression must be subject to the utmost scrutiny thus presumptively categorising religious expression as part of the core protections of Article 10 ECHR.[14] Finally, this section rebuts any argument which would suggest that religious beliefs are irrational and thus undeserving of enhanced protection in the European sphere by emphasising a subjective interpretation of religious belief more appropriate for legal analysis. Understanding the heart of religion enables us to 'distinguish the Jew from the Rotarian, the Christian from the democrat or the Sikh from the

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[9] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [130]; *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [109].

[10] John T.S. Madeley, 'European Liberal Democracy and the Principal of State Religious Neutrality' in John T.S. and Madeley, Zsolt Enyedi (eds), *Church and State in Contemporary Europe: The Chimera of Neutrality* (Frank Cass Publishers 2003) 1-2.

[11] Denise Meyerson, 'Why Religion Belongs in the Private Sphere, not the Public Square' in Peter Cane, Carolyn Evans, Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 45.

[12] Andrew Altman, 'Freedom of Speech and Religion' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (OUP 2005) 377.

[13] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark W. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff Publishers 2004) 396.

[14] This will be dealt with in greater detail during the second part of this chapter. See; s 3.3.

mere hat-wearer.'[15] It attempts to mitigate the damage incurred when scholarship attempts to analyse religion from the perspective that rationality is found primarily within objective truth presented by physical evidence.

3.2.1 The Demand of Religious Conscience in the Life of the Religious Adherent

Ms Lillian Ladele was the third applicant in the case of *Eweida and Others v United Kingdom*.[16] She was employed by the London Borough of Islington as a registrar of births, deaths and marriages and was designated as a civil partnership registrar in December 2005 on the basis of an optional requirement under the UK Civil Partnership Act 2004.[17] She perceived that same-sex partnerships were contrary to God's law[18] and was facilitated initially in making informal arrangements with her colleagues to exchange same-sex civil registration ceremonies for marriage ceremonies.[19] The subsequent disciplinary action taken against her by the Borough of Islington, on the grounds of her refusal to act in contravention to her conscience, was found to be proportionate to the interest of the Contracting States in attempting to secure the rights of others.[20]

Rawls contrasts the actions of those who attempt to adhere to the demands of conscience against those who engage in civil disobedience.[21] He portrays individuals with minority conscientious viewpoints as 'biding their time hoping that the necessity to disobey will not arise.'[22] Contrary to the assertive citizen, the conscientious citizen is in a reluctant position, against the views of the majority, who seeks the freedom to act in accordance to

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[15] Sonu Bedi, 'Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15(2) JPP 235.
[16] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[17] Civil Partnership Act 2004 (UK).
[18] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [23].
[19] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [26].
[20] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [106].
[21] John Rawls, *A Theory of Justice* (Harvard University Press 1999) 324.
[22] John Rawls, *A Theory of Justice* (Harvard University Press 1999) 324.

inherent and fundamental prescriptions which cannot necessarily be explained in a neutral manner.[23] Leigh and Hambler portray Ms Ladele in this category:

> 'The moral dilemma for Ladele can be characterised as one which would involve personal culpability. In performing a civil partnership ceremony, she personally would be engaging in disobedience to God by sanctioning relationships which she believed incurred his great displeasure. Ladele had no desire to try to prevent civil partnership ceremonies from going ahead (she was happy initially to engage in informally swapping the registration of civil partnership ceremonies with colleagues in exchange for marriage ceremonies) – her one concern was to act personally in accordance with her conscience.'[24]

The demands of conscience in the life of the believer cannot be adequately quantified nor can this analysis sufficiently impart the degree of importance which these individuals attribute to the significance of their beliefs. The religious conscience can be understood to provide an intellectual framework upon which the adherent bases their moral, social and cognitive processes.[25] It establishes a reference mechanism upon which the religious adherent will construct their interactions with life, society and the world.[26] This analysis extracts certain characteristics of religious conscience and demonstrates how it can substantially affect the lives of the religious adherent. The following purports to examine in greater detail the demands of religious conscience on religious adherents with a view to extending to such individuals greater protection under the law. As the present examination is limited, this study restricts itself to the analysis of; (i) the transformative characteristics of the religious conscience, and; (ii) the emotional response of the religious conscience. Finally, this section reconciles these characteristics with atheism on the basis of the subjective characterisation of religion for the purposes of Article 9.[27]

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[23] André Droogers, 'Defining Religion; A Social Science Approach' in Peter B. Clarke (ed), *The Oxford Handbook of the Sociology of Religion* (OUP 2009) 274; Michael Stokes Paulsen, 'Is Religious Freedom Irrational' (2012) 112(6) MILR 1056.

[24] Ian Leigh, Andrew Hambler, 'Religious Symbols, Conscience and the Right of Others' (2014) 3(1) OJLR 8.

[25] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.

[26] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.

[27] See; s 1.4.

3.2.1.i The Transformative Characteristic of the Religious Conscience

The religious conscience can be characterised as fundamental for the way in which it enables the adherent to interact with the substance of their belief. The religious conscience has at times been viewed as a vehicle for the transmission of natural law.[28] The interaction of the religious adherent and the super-human or non-human entity, where applicable,[29] can often be influenced by concepts of reciprocity whereby the actions of the religious adherent can generate a reaction by this entity. This is clearly demonstrated in salvation or 'prophetic religions'[30] which place an emphasis on reincarnation, resurrection or immortal life.[31] While consistent with identifiable religious entities such as Christianity, Hinduism and Islam, this concept of spiritual regeneration and renewal formed part of the religious heritage of the prehistoric period.[32] The concept of religious reciprocity, whereby the actions of the religious adherent can generate a reaction by this non-human or super-human entity, can offer 'a comprehensive program for achieving inner spiritual resolution or final escape from life's limitations and sorrows.'[33] Often, religion of this nature generates responses to the meaning of life and develops concepts of the afterlife, though this is not a uniform conceptualisation of religious belief.[34] Religions which perceive of an afterlife generate concerns for their adherents which can be of fundamental significance and value in their response to life. The religious conscience can influence transformative behavioural responses through the attempt of the religious adherent to conform to the demands of religion.

Religious communities which consider man's relationship with a spiritual afterlife can generate a dichotomy between 'salvation [and] damnation'[35] which, in turn, can motivate a

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[28] See; Norman, Kretzmann 'Lex Iniusta Non est Lex - Laws on Trial in Aquinas' Court of Conscience' in (1988) 33(1) AJJ 109; citing Aquinas 'Conscience is...a dispositional state containing the precepts of natural law...'

[29] See; 1.6.

[30] Robert N. Bellah, 'Max Weber and World-Denying Love: A Look at the Historical Sociology of Religion' (1999) 67(2) JAAR 280.

[31] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2009) 27.

[32] Mircea Eliade, *The Sacred & The Profane: The Nature of Religion* (Willard R. Trask tr, Harcourt, Brace & World 1959) 164.

[33] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2009) 170.

[34] See; 1.6.

[35] Laurence G. Sager 'The Moral Economy of Religious Freedom' Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 25.

response by religious adherents. Sager reminds us that 'the stakes assigned to being faithful or faithless are typically quite high'[36] which can either lead to the continued spiritual existence of an individual after their death or their destruction.[37] This extension of spiritual life beyond the time of death is a primarily religious construction which is influenced by individual traditions, dogmas and authorities.[38] While it is impossible to succinctly reconcile the varied theological and traditional interpretations of death, a coherent line of thought can be seen among prophetic, reincarnation and Animist religions that the actions of the religious adherent in this life will impact the next.[39] Salvation, illumination or election can motivate a complex modification of human behaviour. Undoubtedly this can provide a comfort for religious adherents while also perhaps contributing to their own feeling of helplessness.

In order to mitigate this helplessness, Freud notes that religious adherents turn towards concepts of a 'benevolent Providence...which will not suffer us to become a plaything of the over-mighty and pitiless forces of nature.'[40] Freud, of course, wrote from the perspective that religious belief was an obsessional neurosis which is inherently detrimental to an individual. [41] He interpreted the promise of some religions to contain a belief that death was not an extinction 'but the beginning of a new kind of existence which lies on the path of development to something higher.'[42] Faced with the finality of death, religious adherents, since prehistoric times, have found consolation in the promise of the eternal return.[43] While Freud is ultimately dismissive of this belief, his writings capture the

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[36] Laurence G. Sager 'The Moral Economy of Religious Freedom' Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 25.
[37] Edward B. Tylor, *Primitive Culture* (vol. 1, 6th edn, John Murray 1920) 426.
[38] This was evidenced in the writings of the early Philosophers. See; s 1.3.1.
[39] See; Christopher M. Moreman, *Beyond the Threshold: Afterlife Beliefs and Experiences in World Religions* (Rowman & Littlefield Publishers 2010).
[40] Sigmund Freud, 'The Future of an Illusion' in James Strachey (tr), *The Standard Edition of the Complete Words of Sigmund Freud, Vol. XXI (1927-1931): The Future of an Illusion, Civilisation and its Discontents and Other Works* (Hogarth Press 1974) 18.
[41] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2009) 77.
[42] Sigmund Freud, 'The Future of an Illusion' in James Strachey (tr), *The Standard Edition of the Complete Words of Sigmund Freud, Vol. XXI (1927-1931): The Future of an Illusion, Civilisation and its Discontents and Other Works* (Hogarth Press 1974) 18.
[43] Mircea Eliade, *Cosmos and History: The Myth of the Eternal Return* (Harper & Brothers 1954) 89.

vulnerability of adherents and assist to explain their motives.[44] The promise of salvation, reincarnation, return or renewal can cause adherents to act in manifold ways which cannot be dismissed easily, especially when coupled with the potential of 'divine punishments in the life hereafter.'[45] These realities are largely beyond our sensory perception, they lack definitive accessible evidence and yet they can be seen to influence the actions of religious individuals in a substantial manner.

Religion then can be understood to contain transformative qualities.[46] When met with a spiritual reality, religious adherents can be personally transformed which can substantially alter their moral and intellectual framework and their orientation towards the society in which they live.[47] Writing about the concept of esotericism, Antoine Faivre described a religious form in which the adherent can be understood as a microcosm within a universal macrocosm; a concept which he addressed as universal interdependence.[48] Without expanding on his theory further, his concept describes a process wherein nature itself holds a spirit and the individual interacts with this.[49] Adopting such a view would expose the religious individual to a heightened sensory perception in a way that would substantially influence their behaviour. Religion can therefore be understood to open the mind to 'hidden dimensions of the inner self [and] to the relationship between the inner world and the transcendent world'.[50] These revelatory interactions with nature and humanity can cause fundamental human transformation of their behaviour and morality.

Penelhum states that belief 'makes demands for change in us.'[51] This demand is distinct from the inherent transformation which spiritual or religious modification may cause. It describes a logical response to the substance or rather content of a religious belief.

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[44] Sigmund Freud, 'The Future of an Illusion' in James Strachey (tr), *The Standard Edition of the Complete Words of Sigmund Freud, Vol. XXI (1927-1931): The Future of an Illusion, Civilisation and its Discontents and Other Works* (Hogarth Press 1974) 22.
[45] Frederick Mark Gedicks, 'An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions' (1998) 20(3) UALRLJ 562.
[46] Terence Penelhum, *Reason and Religious Faith* (Westview Press 1995) 71.
[47] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.
[48] Antoine Faivre, *Access to Western Esotericism* (State University of New York Press 1994) 10.
[49] See; Antoine Faivre, *Access to Western Esotericism* (State University of New York Press 1994) 1-19.
[50] Hubert Knoblauch, 'Spirituality and Popular Religion in Europe' (2008) 55(2) SC 144.
[51] Terence Penelhum, *Reason and Religious Faith* (Westview Press 1995) 71.

The religious adherent may be motivated by substantial fear to modify their behaviour. Faced with the prospect of death the religious adherent can be motivated to adopt positive measures to address this eventuality. Due to the influence of the religious conscience, for some, 'the world's evils are worse to the believer than to the unbeliever.'[52] This can cause the religious adherent to modify his or her behaviour against their self-interest, as understood by contemporary society, and may cause them to refuse education or food, suffer pain or isolation. Barry, a critic of unyielding religious belief,[53] observes that a religious person who was raised in 'some strict, puritanical sect according to whose tenets most pleasures are sinful...could, obviously, wish that the truth about the will of God was more accommodating'[54] yet at the same time 'so long as you continue to believe...you cannot regret believing it.'[55] Religious belief informs individual conscience to the extent that the desire to act in a way which is legally permissible and conventional to the majority may in fact be wrong to the adherent. It is the demand of religious conscience, supported with the promise of religion, which generates this transformative reaction.

3.2.1.ii The Emotional Response of the Religious Conscience

Returning to Freud, he perceived that religious belief was a product of a father-complex in order to explain the way in which religious adherents attach significance to a patriarchal concept which provides protection to them.[56] Religious transformations can generate substantial emotional responses for religious adherents.[57] The presence of such a 'benevolent Providence'[58] can generate 'deep emotions'[59] which compel the adherent to modify their behaviour in line with their modified conscience. On the narrow end of the

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[52] Terence Penelhum, *Reason and Religious Faith* (Westview Press 1995) 111.
[53] See; Brian Barry, *Culture and Equality* (Harvard University Press 2001).
[54] Brian Barry, 'Chance, Choice and Justice' in Robert E. Goodin and Philip Petit (eds), *Contemporary Political Philosophy: An Anthropology* (2nd edn, Blackwell 2006) 236.
[55] Brian Barry, 'Chance, Choice and Justice' in Robert E. Goodin and Philip Petit (eds), *Contemporary Political Philosophy: An Anthropology* (2nd edn, Blackwell 2006) 236.
[56] Sigmund Freud, 'The Future of an Illusion' in James Strachey (tr), *The Standard Edition of the Complete Words of Sigmund Freud, Vol. XXI (1927-1931): The Future of an Illusion, Civilisation and its Discontents and Other Works* (Hogarth Press; 1974) 22.
[57] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2009) 134.
[58] Sigmund Freud, 'The Future of an Illusion' in James Strachey (tr),*The Standard Edition of the Complete Words of Sigmund Freud, Vol. XXI (1927-1931): The Future of an Illusion, Civilisation and its Discontents and Other Works* (Hogarth Press; 1974) 18.
[59] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2009) 107.

spectrum, Jakelić recalls that this deep emotional connection in religious belief has caused some religious adherents to give up their lives rather than deviate from the prescriptions of their religious belief.[60] While this is not a prescriptive feature of universal religious belief the significance of the deep emotional connection which exists between the super-human or non-human entity has, at times, been neglected.[61]

Freud recognises the emotional response in religious belief as a contributory factor to the wider and inherent psychosis of religious belief.[62] Marx perceived this emotional response to be misplaced, perceiving religious belief rather as an illusionary consequence to economic oppression as opposed to a legitimate pursuit in its own merit.[63] Both commentators attempt to characterise religious belief as secondary, or within the superstructure of human society to borrow the Marxist construction, rather than basic in itself.[64] They perceive religious emotion as a reaction to something more foundational, mental or societal, yet both recognise this inherent emotional characteristic present in religious belief; this is central to the application of their scholarship to this examination. Other academics have determined that religious belief in itself can be a primary and independent characteristic as opposed to a reactionary construct.[65] The investigation of these arguments falls into the analysis of a definition of religion, a task undertaken in the first chapter of this thesis;[66] however, without relying on the substance of their individual definitions these commentators contribute to the interpretation of a deep emotional response to religious belief. These emotions are in response to the adherence or rejection of religious demands of conscience. They can also prompt an intentional behavioural response.

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[60] Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity* (Ashgate Publishing Limited 2010) 201.

[61] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2009) 8.

[62] Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Right: Introduction' in *Karl Marx and Friedrich Engels on Religion* (Schocken Books 1964) 42.

[63] Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Right: Introduction' in *Karl Marx and Friedrich Engels on Religion* (Schocken Books 1964) 42.

[64] Marx identified the need for water and food as among primary needs while secondary needs were only desirable when primary needs were satisfied. See; Frank E. Elwell, *Socio-Cultural Systems* (Athabasca University Press 2013) 319-326.

[65] See; C. G. Jung, *Civilization in Transition: The Collected Works of C. G. Jung* (vol. 10, 2nd edn, Princeton University Press 1970); Mircea Eliade, *The Sacred & The Profane: The Nature of Religion* (Harcourt, Brace & World 1959).

[66] See; s 1.2-1.3.

3.2.1.iii Reconciliation of the Religious Conscience with Atheism

It could be argued that the examination to this point has applied purely to a deific conceptualisation of religious belief to the exclusion of atheism. While an extensive analysis of this proposition is beyond this theory it is necessary for the present examination to reconcile atheism with the general theory in view of the subjective characterisation of religion established in the first chapter of this thesis,[67] which considered atheism as a religious belief for the purposes of Article 9.[68] The transformative characteristics of religious conscience and the emotional response of same are characteristics which can equally apply to the atheistic conscience. While atheism does not usually include a belief in the perpetuity of the spirit it can inform and construct a moral code which has the ability to transform the adherent in a comparative way with other religious individuals.[69] The desire to adhere to this belief can further generate a legitimate emotional response. While their religious conscience is not informed with reference to divine authorities or transcendent realities it can be advised by equally authoritative constructions.[70] These constructions can indicate the way through which humanity may achieve a more perfect social system. The philosophy of Durkheim is particularly helpful in the assertion that atheism indeed has a religious conscience.[71] His view of religious belief as an evolving concept leading to the advancement of rational and scientific thought is symbiotic with the nature of an atheistic conscience.[72] He perceives religious communities as contributing to a 'moral remaking'[73] which can transform the atheistic community in a comparable fashion to other religious constructions.

Atheism then can be understood to influence the moral conscience of an adherent and can generate personal transformation on that basis and can be said to generate similar

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[67] See; s 1.6.

[68] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L304/12, art. 10(1)(b).

[69] David O. Brink, 'The Autonomy of Ethics' in Michael Martin (ed), *The Cambridge Companion to Atheism* (CUP 2007) 162.

[70] The scholarship of James is particularly applicable in this regard, see; William James, *The Varieties of Religious Experience* (Random House 1994) 40.

[71] See; s 1.3.3.

[72] Émile Durkheim, *The Elementary Forms of the Religious Life* (Joseph Ward Swain (trs), George Allen & Unwin 1915) 427.

[73] Émile Durkheim, *The Elementary Forms of the Religious Life* (Joseph Ward Swain (trs), George Allen & Unwin 1915) 427.

emotional responses as evidenced in other religious adherents. Harris captures the presence of fear in atheism when confronted with death and the concept of the afterlife:

> 'We are terrified of our creaturely insignificance, and much of what we do with our lives is a rather transparent attempt to keep this fear at bay. While we try not to think about it, nearly the only thing we can be certain of in this life is that we will one day die and leave everything behind; and yet paradoxically, it seems almost impossible to believe that this is so.'[74]

This fear may be responded to in the rationalisation of death as the conclusion of existence. On this basis the atheist religious conscience does not share the fears of those prophetic religions which fear the possibility of spiritual damnation.[75]

The emotional response to the atheistic religious conscience can be understood as the response to the demands of subjective morality. In a comparable fashion to Ms Ladele, the atheist may not seek to impede the ability of individuals to practice their religion through public manifestations of religious worship but may legitimately seek to refrain from doing so themselves. This is particularly the case regarding religious oaths where the atheistic conscience may find a strong desire to refrain from participating in such manifestations.[76] Failure to absent themselves from such actions may amount to a feeling of compliance in an immoral act sharing similar anxieties with Ms Ladele.

Religious belief has the capacity to expose the adherent to a cosmic or moral system which may be impossible to fully comprehend from a legal perspective. It places them within a sphere outside the temporal system where the protection of the State is secondary to the authority of a super-human or non-human entity which governs and directs the life of the adherent.[77] McConnell suggests that this uniqueness makes religious belief distinctive and justifies its heightened protection.[78] The combination of the transformative aspect of religion and the emotional response makes this a uniquely compelling construction yet such

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[74] Sam Harris, *The End of Faith* (Norton 2005) 38.
[75] Laurence G. Sager 'The Moral Economy of Religious Freedom' Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 25.
[76] See; *Alexandridis v Greece* App no 19516/06 (ECtHR, 21 February 2008).
[77] Richard John Neuhaus, 'A New Order of Religious Freedom' in Stephen Feldman (ed), *Law and Religion* (New York University Press 2000) 95.
[78] Michael W. McConnell, 'Why Protect Religious Freedom?' (2013) 123(3) YLJ 784.

individuality does not necessarily justify heightened protection in and of itself. The following section addresses the immutability of religion as a counter-argument to that which would downplay the fundamental significance of religion. It proposes to demonstrate why immutable categorisation is important from the perspective of law and subsequently on what basis religion can be understood as an immutable characteristic.

3.2.2 The Immutability of Religion

While characteristics such as sex, race, and disability[79] are recognised as immutable characteristics others, including religious belief, have been the subject to disagreement and debate.[80] The following proposes to define immutability in view of contrasting theories for the purpose of this thesis and indicate the potential significance of a characteristic being defined as such. It proposes to establish religious belief as an immutable characteristic. This examination functions as a rebuttal to those commentators considered below who propose to downplay the significance of religious belief as fundamental to the life of adherents. While demonstrating that religion can be characterised as immutable this section concludes by stating that approaching immutability on a normative basis can detract from the reality of fundamental characterisation. Those commentators, discussed below, who attempt to characterise religion as a mutable characteristic fail to adequately understand the meaning of religion and the fundamentality of religious conscience in the life of adherents.

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[79] Andrew Hambler, 'Establishing Sincerity in Religion and Belief Claims: A question of consistency' (2011) 13 ELJ 146.

[80] See; Kwame Anthony Appiah, 'Identity, authenticity, survival: multicultural societies and social reproduction' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002); Paul Gilroy T*he Black Atlantic: Modernity and Double Consciousness* (Harvard University Press 1993); Stuart Hall, 'New ethnicities' in James Donald and Ali Rattansi (eds), *'Race' Culture and Difference* (Sage 1992), and; Bhikhu Parekh *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan 2000).

3.2.2.i The Definition of Immutability

The analysis of immutability is primarily characterised by a dichotomy between competing theories of 'biological immutability'[81] and 'fundamental immutability'.[82] Biological immutability is derived from the decision of the United States Supreme Court judgment of *Frontiero v Richardson*[83] where the court limited the definition of immutability to characteristics which were determined 'solely by the accident of birth.'[84] At once appearing as a narrow definition of immutability, Schmeiser suggests that the court never intended a definition limited to purely biological determinants on the basis that the judgment adopted a social rather than biological definition of race for the purposes of the case.[85] On this basis, academics have suggested that the court now operates in a post-*Frontiero* mentality[86] wherein other characteristics can be defined as immutable without recourse to biology.[87]

Fundamental immutability refers to a 'characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed.'[88] This definition, from the United States Board of Immigration Appeals, was cited with approval by the House of Lords in the case of *Islam v Secretary of State for the Home Department, Regina v Immigration Appeal Tribunal and Another ex parte Shah*.[89] In the Irish context, Hogan J defined immutability 'a defining feature of that very [human] identity.'[90] His statement has been subsequently cited with approval by Mac Eochaigh J in the judgment in *A.P. v The Refugee Tribunal and the Minister*

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[81] Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 376.

[82] This thesis recognises that immutability can be the subject of much further analysis; however, on the basis that such would be beyond the scope of the present analysis the definition has been narrowed to the centralised issues. For further analysis; see, Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 377.

[83] *Frontiero v Richardson* (1973) 411 U.S. 677.

[84] *Frontiero v Richardson* (1973) 411 U.S. 677.

[85] Susan R. Schmeiser, 'Changing the Immutable' (2009) 41 Conn.LR 1510.

[86] See; Susan R. Schmeiser, 'Changing the Immutable' (2009) 41 Conn.LR 1511; Osagie K. Obasogie, 'Can the Blind Lead the Blind: Rethinking Equal Protection Jurisprudence through an Empirical Examination of Blind People's Understanding of Race' (2013) JCL 719.

[87] Donald Braman, 'Of Race and Immutability' (1999) 46 UCLALR 1378.

[88] *In Re Acosta* (1985) 19 I. & N. 211, at 233.

[89] *Islam v Secretary of State for the Home Department, Regina v Immigration Appeal Tribunal and Another ex parte Shah* [1999] 2 AC 629.

[90] *S.A. (Algeria) v Minister for Justice, Equality and Law Reform* [2012] IEHC 78 [14] per Hogan J.

for Justice and Law Reform.[91] This definition has also featured outside of asylum law in the case of *Murphy v Ireland*[92] where O'Donnell J, speaking on behalf of the Supreme Court, defined immutable characteristics as 'central to [human] identity and sense of self.'[93]

In view of the fact that scholarship has moved beyond biological determination of immutability, in what could be addressed as a post-*Frontiero* context,[94] this thesis adopts the theory of fundamental immutability as the definition for further application. This theory, while not cited in express terminology in the jurisprudence of the Irish courts, appears to be consistent with the approach of O'Donnell, Hogan and Mac Eochaigh JJ in their respective decisions mentioned above.[95] The following looks to the significance of any characteristic being determined as such for the purposes of law.

3.2.2.ii The Significance of Immutability

While the concept of immutability has not achieved extensive judicial interpretation in the ECtHR[96] this concept has been the subject of advanced consideration in the jurisdiction of the United States of America particularly in the context of equality and discrimination law.[97] In the case of *Bowen v Gilliard*[98] the United States Supreme Court articulated a tripart test to determine when classifications must be analysed using heightened scrutiny in order to afford them greater protection.[99] The court employs a heightened scrutiny when the individual or individuals (i) as a historical matter has suffered discrimination; (ii) exhibit obvious, immutable, or distinguishing characteristics that define

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[91] *A.P. v The Refugee Tribunal and the Minister for Justice and Law Reform* [2013] IEHC 448.
[92] *Murphy v Ireland* [2014] IESC 19.
[93] *Murphy v Ireland* [2014] IESC 19 [34].
[94] See; Susan R. Schmeiser, 'Changing the Immutable' (2009) 41 Conn.LR 1511; Osagie K. Obasogie, 'Can the Blind Lead the Blind: Rethinking Equal Protection Jurisprudence through an Empirical Examination of Blind People's Understanding of Race' (2013) JCL 719.
[95] *S.A. (Algeria) v Minister for Justice, Equality and Law Reform* [2012] IEHC 78 [14] *A P. v The Refugee Tribunal and the Minister for Justice and Law Reform* [2013] IEHC 448.
[96] Robert Wintemute, *Sexual Orientation and Human Rights; The United States Constitution, the European Convention, and the Canadian Charter* (Clarendon Press 1995) 127.
[97] The determination of immutability is a feature of discrimination law; however, its establishment in this situation would suggest that it is afforded heightened protection both within discrimination law and within its own right in a similar way to gender equality.
[98] *Bowen v Gilliard* 483 U.S. 587 (1987).
[99] Jeremy B. Smith, 'The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation' (2005) 73(6) FLR 2774.

them as a discrete group, and; (iii) are a minority or derive from a politically powerless group.[100]

In the absence of similar judicial consideration in the domestic or European context Wintemute has suggested that immutable characteristics, such as sex and the determination of legitimacy and illegitimacy of birth children, could be candidates for heightened scrutiny in the European context.[101] Wintemute traces the origin of this proposition to *Abdulaziz v United Kindgom*[102] and *Inze v Austria*.[103] In the former, the European Commission of Human Rights noted that '... very weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention.'[104] In the latter this criterion of a 'weighty reason' was directly restated:

> 'The question of equality between children born in and out of wedlock as regards their civil rights is today given importance in the Member States of the Council of Europe...*very weighty reasons* would accordingly have to be advanced before a difference of treatment on the grounds of birth out of wedlock could be regarded as compatible with the Convention.'[105]

This jurisprudence has advanced in subsequent years and has begun to endorse a somewhat criticised 'hierarchy of equalities.'[106] The language of the ECtHR has suggested that a higher threshold may have to be established to justify any interference with a superior right of the Convention.[107] The terminology of the court has changed from 'weighty reasons', in the earlier case law, to the 'most careful scrutiny' in more contemporary judgments. In *McCann and Others v United Kindgom*[108] the ECtHR noted that 'in keeping with the importance of this provision [art 2] in a democratic society, the court must, in

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[100] Jessica Knouse, 'From Identity Politics to Ideology Politics' (2009)(3) ULR 774.
[101] Robert Wintemute, *Sexual Orientation and Human Rights; The United States Constitution, the European Convention, and the Canadian Charter* (Clarendon Press 1995) 126.
[102] *Abdulaziz v United Kindgom* (1985) Series A no 94.
[103] *Inze v Austria* (1987) Series A No 126.
[104] *Abdulaziz v United Kindgom* (1985) Series A no 94 [78].
[105] *Inze v Austria* (1987) Series A No 126 [41] (emphasis added).
[106] Dagmar Schiek, 'Organizing EU Equality Law Around the Nodes of 'Race', Gender and Disability' in Dagmar Schiek, Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 11.
[107] Dagmar Schiek, 'Organizing EU Equality Law Around the Nodes of 'Race', Gender and Disability' in Dagmar Schiek, Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 11.
[108] *McCann and Others v United Kindgom* App no 18984/91 (ECHR, 27 October 1995).

making its assessment, subject deprivations of life to the *most careful scrutiny.*'[109] This criterion was restated in the case of *Makaratzis v Greece*[110] where the court found that it must subject any alleged violation of Article 2 'to the *most careful scrutiny*'.[111] This requirement is further endorsed in *Nachova and Others v Bulgaria*.[112]

Accepting that analysis operates outside of the narrow biological approach of immutability in a post-*Frontiero* context enables immutability to adopt a more subjective perspective. The following proposes to demonstrate that religion is an immutable characteristic on the basis that it can be described as something which is fundamental to human identity and which is either incapable of change or of such personal significance that change cannot be made without considerable physical and psychological difficulty.[113] The protection of immutable characteristics lies at the core of human rights.[114] The classification of a human characteristic as immutable is an indication that this characteristic will be afforded superior protection by the law.[115] It can be representative of a higher goal in the community such as gender equality[116] but also due to the fact that distinct treatment on the basis of an unchangeable characteristic would be inherently unfair.[117]

3.2.2.iii Religious belief as an Immutable Characteristic

The first obstacle to any argument attempting to suggest that religious belief is an immutable characteristic is the fact that Article 9 ECHR and Article 18 UDHR explicitly recognise a right to change religious belief.[118] It is an empirical fact that individuals do

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[109] *McCann and Others v United Kindgom* App no 18984/91 (ECtHR, 27 October 1995) [150] (emphasis added).
[110] *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004).
[111] *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004) [59] (emphasis added).
[112] See; *Nachova and Others v Bulgaria* App nos 43577/98; 43579/98 (ECtHR, 6 July 2005) [93].
[113] Sharona Hoffman'The Importance of Immutability in Employment Discrimination Law' (2011) 52(5) WMLR 1512.
[114] Patricia Stirling, 'Use of Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organisation' (1996) 11(1) AUJILP 13.
[115] Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2007) 13(4) MJECL 450-451.
[116] See; *Adbulaziz v United Kindgom* (1985) Series A no 94; '...it can be said that the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention.'
[117] Laura S. Underkuffler, 'Odious Discrimination and the Religious Exemption Question' (2011) 32(5) CLR 2078.
[118] See; ECHR art 9(1); UDHR art 18.

change their religious affiliation through the processes of conversion and defection.[119] This is a fundamental argument for those commentators who challenge the immutability of religion.[120] Bedi notes that 'individuals do convert, leave particular faiths and even pick and choose which religious tenets to follow.'[121] It is his view that this fluidity with regard to religious identity, now witnessed in contemporary European society, is incompatible with immutability.[122] Bedi points to the argument of anti-primordialism which contends that religion is a 'paradigm of choice and contestability'[123] on the basis of the ability for religious practices to change;[124] however, this anti-primordial argument should be criticised on the basis that it attempts to impose an essentialised standard of religion purely with reference to occidental values and experiences.

Bedi states that 'far from being constrained by such [religious] affiliations, we create, change, affirm, fix and amend them...we determine them.'[125] This statement represents an inherently occidental conceptualisation of religious belief undoubtedly influenced by reformed Protestant theology which pervades modern discourse.[126] Bedi views religious belief as individualistic, self-determined and capable of modification without recourse to determined authority. His assertion that 'we determine' religious beliefs reflects a one-sided, subjective interpretation of religious belief further evidencing the reformed

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[119] Arvind Sharma, 'Hinduism and Conversion' in Lewis R. Rambo and Charles E. Farhadian (eds), *The Oxford Handbook of Religious Conversion* (OUP 2014) 440.

[120] See; Patricia Stirling, 'Use of Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organisation' (1996) 11(1) AUJILP 10; Margaret Chon and Donna E. Arzt, 'Walking while Muslim' (2005) 68 LCP 228; Sonu Bedi, 'Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15(2) JPP 237.

[121] Sonu Bedi, 'Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15(2) JPP 236.

[122] Carolyn Evans, 'Introduction' Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 11; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2013) 79.

[123] Sonu Bedi, 'Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15(2) JPP 237.

[124] See; Kwame Anthony Appiah, 'Identity, authenticity, survival: multicultural societies and social reproduction' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002); Paul Gilroy *The Black Atlantic: Modernity and Double Consciousness* (Harvard University Press 1993); Stuart Hall, 'New ethnicities' in James Donald and Ali Rattansi (eds), *'Race' Culture and Difference* (Sage 1992), and; Bhikhu Parekh *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan 2000).

[125] Sonu Bedi, 'Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15 JPP 236.

[126] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 7.

Protestant theology captured in the work of Max Weber.[127] This perception is not applicable to religious views which are unamenable to subjective interpretation. While Article 18 of the UDHR reflects the fact that individuals can change their religion the *travaux préparatoires* note that this premise was rejected by some Islamic territories.[128] As defection from Islam is considered as a form of apostasy or blasphemy, Islamic territories can be seen to view religious conversion in a manner which contrasts with their occidental counterparts.[129] The anti-primordial argument, which represents religion as a uniformly fluid construction, cannot be said to be compatible with a broad encapsulation of religious belief outside the Western sphere.

While the anti-primordial rejection of the immutable characteristic of religion must be rebutted on the basis of those religious systems which operate with strict adherence to Institutional systems, it can further be rejected due to the fact that it undervalues subjective religious beliefs. While fluidity of practice is not always a characteristic of religion the definition advanced in the first chapter advocated a broad stance to reflect the ability of religious adherents to define their religion subjectively.[130] When criticising the apparent divergence of practice among religious adherents as being 'subject to change' Parekh advances the proposition that religious adherence is voluntary.[131] Indeed, as he and others state, religious identification is no longer static and incontestable[132] yet this merely is indicative of the fact that the institutional conceptualisation of religious belief is declining and does not support the premise that religious belief is taken on a whim. Individuals can form their beliefs in an evolving manner alongside the maturation of their conscience. The inability of a religious adherent to identify with an orthodox and institutional conception of

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[127] Max Weber, *The Protestant Work Ethic and the Spirit of Capitalism* (Talcott Parsons (tr), Taylor & Francis 1992).

[128] See; Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 187-188: 'He [the representative of Saudi Arabia] concluded the presentation of his proposal by confirming that Saudi Arabia would be prepared to accept Article 16 [UDHR] if the express reference to the freedom to change religion or belief was omitted...there was an irreconcilable conflict between the Muslim States which were not prepared to accept the claim that all individuals were entitled to change their religious beliefs and others for whom this was an essential prerequisite...the phrase "this right included freedom to change his religion" was accepted by twenty-seven votes to five...the five States voting against all being Muslim.'

[129] Derek H. Davis, 'Evolution of Religious Freedom as a Universal Human Right' (2002) BYULR 229.

[130] See; s 1.6.

[131] Bhikhu Parekh *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan 2000) 148.

[132] See; Sonu Bedi, ''Debate: What is so special about religion? The dilemma of the religious exemption' (2007) 15 JPP 237.

religious belief is not synonymous with an unimportant religious belief. The essentialist construction, upon which this argument appears to been constructed, fails to sufficiently apply to contemporary religious practice.

Religious belief is not always something that has 'dogmas and rules and texts and authorities' but rather can be highly subjective and the result of 'a mix of motivations and influences, familial, ecclesiological, aesthetic and political.'[133] The failure of the religious adherent to conform to objective standards of religious identification cannot preclude their belief from being considered as immutable. Such an approach dismisses the value of popular piety present in many religions.[134] Similarly, the requirement that religious belief remain stagnant in order to be considered as an immutable characteristic is inconsistent with the evolving nature of religious belief in the lives of its adherents. Measures of orthodoxy are inappropriate for the characterisation of a religious belief as immutable.

The change which is referred to in both Articles 9 ECHR and 18 UDHR should not be so rigorously interpreted so as to exclude the natural evolution of conscience or indeed dismiss the significance which may lie behind such an action. Religion is capable of change only in the most 'mechanic and literal sense.'[135] While this analysis places little emphasis on the relevance of individuals who formally change their religious identification, the sheer percentage of individuals who engage in this practice further leads to the dismissal of mechanistic arguments built upon this premise.[136]

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[133] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 36.
[134] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 68.
[135] Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech' (2014) 62(3) AJCL 761.
[136] Statistics suggest that a high percentage of religious believers stay in the religious group into which they were born which forms the foundation of their ethnic, cultural and communal identity alongside establishing a belief system through which they orientate their life. In an analysis of the annual changes in Christianity in Brazil, China and the United Nations Areas the *World Christian Database* measured a 0.72% growth of Christianity due to conversions while also recording a 0.54% reduction due to defection. European statistics measured a 0.49% growth due to conversion and a 0.71% reduction due to defection yet these statistics continue to demonstrate the overall stability of religion for the vast majority of the global population. Jakelić criticises research which has attributed a disproportionate interest and focus to the volume of individuals who are 'born again' by their change of religion as opposed to those individuals who are born into a religion and remain within it. She notes that the majority of religious adherents 'experience their religion as ascribed to them rather than chosen by them, as fixed rather than changeable, despite and because of the fact that their religious identities are profoundly shaped by the historical and cultural particularities of their social location.' For further analysis, see; Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity*

Edge recognises the legal reality of choice in religious matters; however, he contrasts this choice with other commonplace decisions.[137] Drawing from the work of Price, Edge suggests that what in fact might appear as a choice is in actuality involuntary observing that: 'if I see a flame over there, on the far side of the room, I cannot help believing that the flame is hot'.[138] As the individual does not feel the warmth of the flame they have a choice to decide if that flame is hot or cold; however, this choice is illusionary as our instincts and experiences would teach us that it is indeed hot yet in the absence of feeling perhaps the individual would be correct in believing that the flame is cold. Sandel observes that religious adherents perceive themselves as 'claimed by dictates of conscience they are not at liberty to choose.'[139] This is a direct consequence of a religious conscience in the life of the adherent.

The religious conscience is not a static and unchangeable entity. Penelhum notes that 'we can choose to read books, attend lectures, look through microscopes, or ask awkward questions. All these may lead to the addition or subtraction of beliefs.'[140] These actions can stimulate or precipitate religious change and conversion; however, any conversion on this basis is not due to the fact that individuals chose to change their beliefs but due to the fact that they chose to expose themselves to information which could result in the involuntary confirmation, destruction or modification of belief.[141] The effect of this information on the conscience is not subject to choice. This is not to say that belief cannot change; merely, its modification is not a matter of voluntary decision making rather a process of evolution.[142] In the same line of thought, a person does not necessarily present consistent physical characteristics from birth to death in advanced years. A person may be born with light skin pigmentation and dark hair yet in old age may present modified skin pigmentation and white hair. Pringle comments that 'religious bearing...is not necessarily so

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(Ashgate Publishing Limited 2010); Todd M. Johnson, 'Demographics of Religious Conversion', in Lewis R. Rambo and Charles E. Farhadian (eds), *The Oxford Handbook of Religious Conversion*, (OUP 2014).

[137] Peter Edge, 'Religious Rights and Choice under the ECHR' (2000) 15 WJCLI.

[138] Henry H. Price, *Belief: The Gifford Lectures delivered at the University of Aberdeen in 1960* (Allen and Unwin 1969) 221.

[139] Michael Sandel, 'Religious Liberty – Freedom of Conscience of Freedom of Choice?' (1989) ULR 613.

[140] Terence Penelhum, *Reason and Religious Faith* (Westview Press 1995) 46-47.

[141] Terence Penelhum, *Reason and Religious Faith* (Westview Press 1995) 64.

[142] L. Bennett Graham, 'Defamation of Religions: The End of Pluralism?' (2009) 23 EILR 78.

different from racial identity as to merit completely asymmetrical treatment in discrimination law.'[143] Universal consistency from birth to death is not a characteristic of racial determination nor should it be for religious belief.

The final and central point to emphasise in this examination is the subjective approach to religious belief. Religious individuals state that their religion is immutable.[144] In his analysis of the definition of immutability Enrique points to the contemporary visibility of multiracial, intersex and transsexual individuals in order to prompt a reassessment of the importance of biological immutable characterisation.[145] He states that 'some people choose their race and sex after their birth.'[146] The increased plurality of the European community expands the possibilities of self-definition and enables individuals to choose if and how they are defined in the public square. [147] Asserting that religion is mutable is dependent on the acceptance that both race and gender are equally mutable.

Enriquez states that 'individuals should be free to choose the sex their own conscience dictates';[148] however, his argument, which appears to have been constructed upon individual autonomy, can be modified placing emphasis upon the individual freedom to subscribe to involuntary prescriptions of the human mind and conscience as opposed to prioritising the freedom to subscribe to choice which may not be an inherent feature of the demands of conscience. Returning to the work of Sandel, conscience is inalienable and incapable of being changed based on any voluntary choice.[149] Individuals do not choose to change their beliefs on the basis that they prefer other alternatives; rather, they accept or reject the orientation of their consciences. Enriquez states that the changeability of gender can be made with reference to intersex and transgender individuals; however, it is wrong to

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[143] Helen Pringle, 'Regulating Offense to the Godly: Blasphemy and the future of Religious Vilification Laws' (2011) 34(1) UNSWLJ 330.
[144] Michael Sandel, 'Religious Liberty – Freedom of Conscience of Freedom of Choice?' (1989) ULR 611.
[145] Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 377.
[146] Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 379.
[147] Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 377.
[148] Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 390.
[149] Michael Sandel, 'Religious Liberty – Freedom of Conscience of Freedom of Choice?' (1989) ULR 611.

state that through their adoption of positive measures to define their gender or alter their legally defined gender transsexuals are *choosing* their gender. Rather a transsexual is considered to adopt positive measures, such as surgery or hormone treatment, to *realign* themselves with their gender.[150] Transsexuals do not choose their gender; rather, when their physical characteristics do not correspond to the gender which they understand themselves to be they may choose to change these physical characteristics by medical means.[151] This often takes the form of *changing* their gender from a legal perspective but this change is merely the modification of outward appearances and not of internal beliefs.

The premise that religion is mutable is built on an occidental and essentialised conceptualisation of religion. The anti-primordial argument which emphasises that change happens easily neglects the real and extreme emotional responses of these individuals in the attempt to adhere to their religious conscience. The conversion of an individual from one religion to another is arguably a fundamental decision and one which should not be characterised as unconsidered, unimportant or rash.[152] It should be attributed the proper weight of a life-changing decision.

The definition of fundamental immutability derived from asylum law better reflects the importance which is attributed to religious conscience in the lives of religious adherents in the face of arguments which place emphasis on the reality of religious conversion and, as such, has been adopted for the purposes of this research.[153] Religious belief is capable of modification which does not necessarily alienate the central belief from the individual's conscience but alters their relationship with certain features of it. This may even include the separation of belief from the institutional religion through which it was instilled. The perception of religion as incapable of change is challenged by the clear legal recognition of

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[150] 'transsexualism', in Oxford Concise Medical Dictionary (8th edn, OUP 2010), <http://www.oxfordreference.com/view/10.1093/acref/9780199557141.001.0001/acref-9780199557141-e-10278?rskey=Jwrod1&result=1> accessed 17 July 2014.

[151] 'gender reassignment', in Oxford Dictionary of English (3rd edn, OUP 2010) <http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0994810?rskey=B4epts&result=1> accessed 17 July 2014.

[152] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12(3) ELJ 302.

[153] Anthony R. Enriquez, 'Assuming Responsibility for who you are: The Right to Choose "immutable" identity characteristics' (2013) 88(1) NYULR 377.

the right to change religion.[154] While it can be argued that this change is merely a modification of conscience and a change of institutional or doctrinal identification it does pose a problem for the definitive characterisation of religion as an immutable characteristic. While the assertion that religion is mutable can be criticised for being 'mechanic and literal'[155] this does not enable research to dismiss the counter-argument without some consideration. Indeed the immutability and mutability of religion 'is disputed by many on a variety of grounds';[156] however, even the action of changing religious identification must be recognised as a substantial decision which would have exceptional significance in the life of the adherent.[157]

Sandel distinguishes freedom of conscience from freedom to choose.[158] He justifies the separation with reference to the inalienability of the right to freedom of conscience, often referred to as the *forum internum* of the right of religious freedom in the jurisprudence of the ECtHR.[159] He notes that 'it is precisely because belief is not governed by the will that freedom of conscience is unalienable. Even if desirable, a person could not give up the freedom of conscience.'[160] On this basis choice is not compatible with religion; belief cannot be changed on the basis that individuals would prefer them to change.[161] This is true for the generation of individuals who have acted in accordance to their beliefs contrary to their desires, causing religious mothers and fathers to alienate their sons and daughters for failing to live in accordance with the precepts they have instilled in accordance with God's law.[162] It is due to the immutable construction of conscience that religious individuals feel that there is no ability to choose.[163]

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[154] L. Bennett Graham, 'Defamation of Religions: The End of Pluralism?' (2009) 23 EILR 78.
[155] Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech' (2014) 62(3) AJCL 761.
[156] Andrew Hambler, 'Establishing Sincerity in Religion and Belief Claims: A question of consistency' (2011) 13 ELJ 146.
[157] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12(3) ELJ 302.
[158] Michael Sandel, 'Religious Liberty – Freedom of Conscience of Freedom of Choice?' (1989) ULR 611.
[159] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 115.
[160] Michael Sandel, 'Religious Liberty – Freedom of Conscience of Freedom of Choice?' (1989) ULR 611.
[161] Brian Barry, 'Chance, Choice and Justice' in Robert E. Goodin and Philip Petit (eds), *Contemporary Political Philosophy: An Anthropology* (2nd edn, Blackwell 2006) 236.
[162] S. E. Mumford, 'The Judicial Resolution of Disputes Involving Children and Religion' (1998) 47 ICLQ 142.
[163] Michael Sandel, 'Religious Liberty – Freedom of Conscience of Freedom of Choice?' (1989) ULR 613.

3.2.3 Rationality and the Adherence to the Religious Conscience

Enhancing the protection afforded to religious expression could be contested by those who suggest that many such beliefs could be understood as harmful or irrational.[164] It is correct to observe that an adherence to the religious conscience can cause adherents to act in accordance with desires and prescriptions based upon unsubstantiated realities. This can influence the way in which adherents educate their children and manage their family affairs but can also compel them to enter into acts of terrorism and religiously inspired violence and suicide.[165] The following section proposes to address this argument with a view to demonstrating that religion must be perceived as a rational belief system for the purposes of law consistent with the subjective characterisation of religion and religious manifestation ascertained in the first two chapters of this thesis. This analysis addresses the possibility that religious belief is inherently irrational and thus incapable of deserving enhanced protection from the State on the basis that it would devalue the guarantees of Article 9 and 10 ECHR. This task is complicated by the way in which rationality is defined and applied in legal analysis as something which is 'reasonable.'[166] The philosophy of religion has examined this proposition with reference to the theories of rationalism, fideism and critical rationalism[167] and these are briefly addressed below. This proposes to suggest that these theories should function as a reference point for legal analysis as opposed to binding authority. In light of the subjectivity of religious experience it is unnecessary for the court to validate or refute the act of adherence to religious conscience; however, a defence against irrationality is appropriate for this present research.

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[164] Roger Trigg, *Equality, Freedom & Religion* (OUP 2012) 14.

[165] See; Ronald Wintrobe, *Rational Extremism* (CUP 2006); Eli Berman, David D. Laitin, 'Hard Targets: Theory and Evidence on Suicide Attacks', Working Paper 11740, Department of Economics, CISAC Stanford University, California, December 2006;

[166] See; 'rational' in Oxford English Dictionary <http://www.oed.com/view/Entry/270902?rskey=UrCD3j&result=1&isAdvanced=false#eid> accessed 16 November 2014– 'that which is rational or reasonable.'

[167] See; Michael Peterson, William Hasker, Bruce Reichenbach and David Basinger, *Reason & Religious Belief* (OUP 2013) 59-78.

Rationalism holds that 'for a belief system to be properly and rationally accepted, it must be possible to prove that the belief system is true.'[168] From a legal perspective this theory is inviting as it validates only those beliefs which can be proved with reference to an established body of facts. It is critical of a process whereby a man:

> 'holding a belief which he was taught in childhood or persuaded of afterwards, keeps down and pushes away any doubts which arise about it in his mind...and regards as impious those questions which cannot easily be asked without disturbing it.'[169]

Religious individuals entering into the public sphere requesting to act in accordance with such a belief are often asked to demonstrate on what basis their religion demands this.[170] Such beliefs may be the subject of divine revelation or the 'experience of God'[171] which cannot necessarily be demonstrated with reference to accessible evidence.[172] Such a proposition would be irrational on the basis of the theory of strong rationalism. Considering another position, perhaps the individual could be asked to address their request with reference to substantiated evidence in their religion through texts or authorities. Even this position is, at times, problematic for the religious adherent[173] and impermissible from the perspective of the ECtHR.[174]

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[168] Michael Peterson, William Hasker, Bruce Reichenbach and David Basinger, *Reason & Religious Belief* (OUP 2013) 61.

[169] William K. Clifford, 'The Ethics of Belief' in George I. Mavrodes (ed), *The Rationality of Belief in God* (Prentice-Hall 1970) 159-160.

[170] This is particularly the case in the bifurcated approach to the examination of ECHR art 9 outlined in the second chapter of this thesis, see; s 2.7.3. This thesis accepts the contrasting statement of *Eweida and Others v United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 15 January 2013) [82] wherein the ECtHR stated that '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'; however, it appears that necessity may be a consideration in any limitation examination, see; s 2.8.4 and the decision of *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012).

[171] Richard Swinburne, *The Existence of God* (OUP 1979) 249-252.

[172] In the words of Mill 'inaccessible to our faculties'; J.M. Robson (ed) *Three Essays on Religion; Collected Works of J.S. Mill* (University of Torento Press 1969) 405, see also; Avihay Dorfman, 'Freedom of Religion' (2008) 21(2) CJLJ 310.

[173] See; *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013).

[174] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 15 January 2013) [82]; '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'; however, it appears that necessity may be a consideration in any limitation examination, see; s 2.8.4 and the decision of *Gatis Kovaļkovs v Latvia* App no 35021/05 (ECtHR, 31 January 2012).

Demands of conscience may not necessarily reflect the demands of institutional religions.[175] Individuals who act outside of these rubrics and authorities may be described as irrational on the basis that they are acting in the absence of substantiated religious authority; however, Sullivan warns us against adopting such a perception towards understanding the substance of religious activities.[176] Adhering to religious conscience can be 'less intellectual and doctrinal than that often expressed by religious elites.'[177] Religious individuals would largely perceive of their beliefs as rational in light of evidence revealed through their conscience; however, accepting this would be impossible from the perspective of rationalism.

The theory of fideism advances the proposition that religious belief is not subject to rational evaluation on the basis that this theory does not address the significance of fundamental assumptions regarding religion gained through faith.[178] Fideism places no importance in the lack of accessible evidence or proof for religious belief but rather emphasises the significance of individual perception. The revelation of religion can cause the individual to subject themselves to 'idiosyncratic and arbitrary dictates'[179] which cannot be 'rationally explained to someone not in their grip.'[180] While Sager accepts that such adherence can in fact be explained, the fact that this explanation will be prefaced on inaccessible evidence derived from transcendental realities makes it impossible for non-adherents to relate to.

The theory of critical rationalism advances the proposition that religious belief is capable of rational criticism and evaluation but that conclusive proof for such a system is impossible.[181] This theoretical position rejects both strong rationalism and fideism and

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[175] It is relevant to cite that familiar quote of Cardinal Newman; 'there are extreme cases in which conscience may come into collision with the word of a Pope and is to be followed in spite of that word' see; Ian Ker, *Newman on Vatican II* (OUP 2014) 121.
[176] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 140.
[177] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 140.
[178] Olli-Pekka Vainio, *Beyond Fideism; Negotiable Religious Identities* (Ashgate 2010) 12.
[179] Laurence G. Sager 'The Moral Economy of Religious Freedom' Peter Cane, Carolyn Evans, Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 24.
[180] Laurence G. Sager 'The Moral Economy of Religious Freedom' Peter Cane, Carolyn Evans, Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 24.
[181] Michael Peterson, William Hasker, Bruce Reichenbach and David Basinger, *Reason & Religious Belief* (OUP 2013) 69.

consists of varied theoretical perspectives in order to analyse religious belief. One such theory is that of negative apologetics whereby it is not necessary to offer arguments in support of religious beliefs; however, the rational investigation is still a valid enterprise to support individual beliefs.[182] Strong rationalism, fideism and critical rationalism all investigate the substance of religious belief in order to determine the validity of such beliefs. While these theories are helpful in order to ascertain when a belief may be irrational it may not be a necessary or indeed appropriate task for legal scholarship, particularly mindful of the limitations rightly placed upon the judiciary.[183] It is preferable to base this analysis on the perspective of the individual, again placing emphasis on the demands of the religious conscience.

Reflecting upon the death of his wife, C.S. Lewis described religious belief as meaningless without risk:

> 'Bridge-players tell me that there must be some money on the game "or else people won't take it seriously". Apparently it's like that. Your bid – for God or no God, for a Good God or the Cosmic Sadist, for Eternal life or nonentity – will not be serious if nothing much is staked on it.'[184]

Lewis captures the essence of why rationality may not be relevant to the present study of religion. For religious adherents, the demands of their conscience are always entirely rational; they need not substantiate them with evidence beyond the very substance of their belief. They recognise a risk and trust that such a move will pay-off.[185] Belief is evidence alone. Penelhum observes that:

> '...if someone is converted to a faith or driven to apostasy by some crucial spiritual experience...it is altogether rational to do this and even prudentially unwise to go on hesitating...'[186]

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[182] Michael Peterson, William Hasker, Bruce Reichenbach and David Basinger, *Reason & Religious Belief* (OUP 2013) 70.
[183] See; *Moscow Branch of The Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006) [92].
[184] C.S. Lewis, *A Grief Observed* (HarperCollins ebooks 2012) < https://korycapps.files.wordpress.com/2012/11/cs-lewis-a-grief-observed.pdf> accessed 19 November 2014.
[185] Terence Penelhum, *Reason and Religious Faith*, (Westview Press 1995) 72.
[186] Terence Penelhum, *Reason and Religious Faith*, (Westview Press 1995) 141.

The conscience of the religious adherent provides an over-arching reference point for the construction of duties.[187] Often these reference points are impossible to comprehend for the neutral or non-religious observer. Such individuals may not see why it is necessary to circumcise a child or fast and abstain. For the religious adherent, their conscience tells them that this is the most appropriate thing to do and the necessity to adhere to this belief can be fundamentally significant.

While somewhat aligned with the theory of fideism, Tertullian's dictum '*credo quia absurdum est*'[188] captures the mysticism of religious belief and the perception found among believers that their belief is not a 'tentative, partial, "fingers-crossed" sort of thing'[189] in the absence of tangible evidence. Rather, adherents are reconciled to their conscience when religious belief comes into conflict with the revelations of time or science. Religious belief can be characterised as irrational from the perspective of philosophy or other disciplines yet the legal discipline, applying regulation to the lives of the community, cannot be so assertive.

It is fitting to recall that the definition of religion established in the first chapter of this thesis was inherently subjective, on the basis of the inviolability of the *forum internum* amongst other reasons.[190] Further, the judiciary are precluded from entering into an examination of the contents of religious belief. Such was noted in the case of *Conway v Independent Newspapers*[191] where it was stated that 'the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality '[192] Therefore, it is illogical to suggest that that judiciary could enter into any examination of the rationality of any religious belief in a context where it can be established that these views

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[187] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.

[188] 'I believe because it is absurd'. This dictum is perhaps falsely attributed to Tertullian in paraphrase of his statement 'prorsus credibile est, quia ineptum est' found within Tertullian, *De Carne Christi*.

[189] Michael Peterson, William Hasker, Bruce Reichenbach and David Basinger, *Reason & Religious Belief* (OUP 2013) 74.

[190] See; s 1.6.

[191] *Corway v Independent Newspapers* [1999] 4 IR 484.

[192] *Corway v Independent Newspapers* [1999] 4 IR 484 at 501. See also; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [78]; *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [117].

are sincerely held by an applicant.[193] On this basis rationality must be determined subjectively. Religious adherents are correct in their view that, on the basis of an unsubstantiated religious revelation, they must act in accordance with their conscience upon which their Eternal destiny or nonentity hangs. It is fundamental to accept that religious beliefs are subjectively rational in order to truly provide for diversity of religious opinion.

3.2.4 Appreciating the Significance of the Fundamentality of Religious Conscience and Challenges for Legal Systems

The first part of this chapter has attempted to illustrate the subjective importance which is attached to religious conscience. This concluding analysis of the first part purports to illustrate the obstacles which frustrate a broader protection of religious expression mindful of the fundamental importance of religious conscience in the life of the adherent. While domestic and international legal instruments have provided for individual religious liberty, the protestant bias which pervades the interpretation of religion in the European context has side-lined the embodiment of conscience in subjective forms.[194] This subjectivism, which should lie at the foundation of the freedom of religion and conscience,[195] is largely absent from the legal understanding of religious freedom.[196] Failure to appreciate the demands of the religious conscience from a subjective perspective amounts to the inability of individuals to claim their rights under law.

Locke contributed to the philosophical underpinnings of the freedom of expression in such an enduring manner so as to enable him to pervade into contemporary scholarship.[197] His writings regarding freedom of conscience, however, must be read in light of his own theological conception and the bias necessarily interpreted therefrom. His perception that 'the way to salvation not being any forces exterior performance but the

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[193] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 54.
[194] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89(2) CKLR 667.
[195] See; s 1.6.
[196] For the evolving nature of this theory see; s 2.7.
[197] Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (OUP 2001) 265.

voluntary and secret choice of the mind'[198] reflects a distinctly Christian reformed theological conception of religion. This conception, which emphasises an 'inner-worldly asceticism'[199] is characterised by a dismissal of mystical modes of behaviour.[200] On the basis that the modern religion-political arrangement is largely reflective of protestant culture[201] it is unsurprising to recognise in the Western sphere that the contemporary legal system has been positively disposed towards 'autonomous and private forms of religiosity identified with mainstream protestantism.'[202]

The protestant bias inherent in the legal system is particularly detrimental to minority cultures which are forced to defend their religious orientation in an attempt to carve out a segment of the permissible religious practice afforded in the public sphere in a time when boundaries are being reconsidered.[203] Barry's theoretical approach to liberalism asserts that; where an entity exists in the State, they are required to honour liberal principles and that failure to meet this standard does not force the State to tolerate this entity but to condemn it.[204] His view appeals to the 'reasonable citizen'[205] who views the activities of religious entities with scepticism. In many cases this sceptical view is not always without justification. Indeed there is a 'dark side' of religion which at times is 'inherently intolerant and persecutory.'[206] Religion can operate in a manner which is inconsistent with many basic liberties of a democratic system; however, such attacks on religious systems which do not conform to all democratic liberties may destroy the very religious nature of these entities.[207] This adopts a perception towards religious doctrine as one of outward

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[198] John Locke, 'An Essay Concerning Toleration' in J.R. Milton and Philip Milton (eds), *John Locke, An Essay Concerning Toleration and Other Writings on Law and Politics 1667-1683* (Clarendon Press 2006) 273.
[199] Max Weber, *Economics and Society* (Guenther Roth and Claus Wittich trs., University of California Press 1978) 547-548.
[200] Max Weber, *Economics and Society* (Guenther Roth and Claus Wittich trs., University of California Press 1978) 547.
[201] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 7.
[202] Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2013) 3(2) OJLR 236.
[203] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 58.
[204] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001).
[205] Denise Meyerson, 'Why Religion Belongs in the Private Sphere, not the Public Square', Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 45.
[206] William P. Marshall, *The Other Side of Religion* in S.M. Feldman (ed), *Law and Religion a Critical Anthology* (New York University Press 2000) 102.
[207] The judgment of Geoghegan J in the decision of *Greally v Minister for Education (No 2)* [1999] 1 IR 1 at 11, is relevant; 'The State could not adopt a funding scheme for secondary teachers which had the effect of destroying the denominational nature of schools requiring funding...if the State in fact decides to fund

political manifestation and not inherently conscientious or divine. This approach towards religious expression fails to appreciate the significance of religious conscience.

Many religious entities endorse moral positions with regard to gender and sexual orientation which are in stark contrast to a contemporary liberal understanding. It must be recalled that these moral positions are 'a matter of conscientious obligation, akin to a religious commandment.'[208] Religious adherents are compromised in contemporary legal systems where they are required to choose between disobedience to the law and disobedience to their conscience.[209] Their inability to choose, without suffering civil or spiritual repercussions, places an enormous 'moral burden...upon the shoulders of these people.'[210] Faced with a decision, upon which 'hangs his or her eternal destiny,'[211] the adherent of religious conscience does not feel that they in fact have any choice to make.[212] The contemporary legal sphere requires that citizens within a liberal democracy function mindful of their obligation to recognise the mutual dignity of their fellow citizens.[213] Translating this recognition into a requirement to act can be the subject of divergent understanding amongst religious entities which seek to act in accordance with their sincerely held beliefs in contradiction to contemporary value judgments.

The first part of this chapter addressed the significance of the religious conscience as an over-arching moral framework through which the religious adherent derived their orientation towards life.[214] Arguments surrounding religious choice have been dismissed on the basis of the preference which they exhibit towards essentialised constructions of

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secondary education by paying the salaries of teachers it cannot impose conditions to that funding which would effectively destroy the denominational nature of schools requiring funding.'

[208] W. Cole Durham, Jr., 'Facilitating Freedom of Religion or Belief Through Religious Association Laws', in Tore Lindholm, W. Cole Durham, Jr., Bahia G Tahzib-Lee (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 325.

[209] Javier Martínez-Torrón, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) EILR596.

[210] Javier Martínez-Torrón, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) EILR 596.

[211] Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech' (2014) 62(3) AJCL 739.

[212] Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity* (Ashgate Publishing Limited 2010) 203.

[213] This is considerate of the social contract theory, see; Jean-Jacques Rousseau, *On the Social Contract* (Paul Negri (ed), Dover Publications 2003) 11.

[214] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.

religion as understood from an occidental perspective. This approach placed insufficient emphasis on the reality of religious conscience and the fact that many adherents do not feel as if they have a choice to make.[215] Adherence to religious conscience must be understood as a rational decision from a legal perspective as to do otherwise would draw the judiciary into impermissible examinations of the substance of religious belief.[216] The extent of this part has been to demonstrate the fundamental significance of religious conscience in the lives of the religious adherent. The following examination attempts to construct a superior right to religious expression on the basis of a combination of the freedom of expression and the freedom of conscience. This attempts to give new vitality to the defence of religious rights in the domestic and European sphere.

3.3 The Freedom of Expression and the Freedom of Conscience: The Legal and Philosophical Underpinnings of the Right to Religious Expression

The second part of this chapter considers the proposition that the right to freedom of expression can include the ability to express opinions and beliefs of religious conscience and that the fundamental significance of religious conscience in the life of religious adherents elevates the protection to be afforded to the right to religious expression to the heightened level of core Article 10 expression. On this basis any proposed limitation of this right requires the most careful scrutiny on a comparative basis with political expression. While freedom of expression encompasses all beliefs and opinions the significance of religious beliefs require a heightened level of protection. On the basis of their fundamentality, religious beliefs informed by conscience, cannot be equated with commonplace opinion formation or choice. The combination of the heightened significance attributed to religious conscience and the broad protections under the freedom of expression elevate articulations of religious conscience above generic statements of opinion and fact. The combination of these rights purports to afford greater protection to the

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[215] Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity* (Ashgate Publishing Limited 2010) 203.

[216] David Harris, Michael O'Boyle, Colin Warbrick, Law of the European Convention on Human Rights (2nd edn, OUP 2009) 433.

religious expression of religious adherents mindful of the increasingly subjective approach to religious interpretation in the domestic and European spheres.

This second part of the chapter examines the domestic and European jurisprudence regarding the right to freedom of expression and, in similar fashion, addresses the right to freedom of conscience. This section then puts forward an argument for a right to religious expression on the basis of the collective fundamentality of both Articles 9 and 10 of the ECHR. It then examines the manifestation and expression of religion with a view of demonstrating that any such dichotomy on the basis of the construction of the Articles should not impede the heightened degree of protection for religious expression. This chapter concludes by arguing that the right to religious expression must be afforded the highest level of protection under Article 10 alongside political expression. This argument is primarily made with reference to Articles 9 and 10 of the ECHR due to the 'relative paucity' of judicial enquiry regarding their corresponding rights in the domestic legal system.[217]

3.3.1 Freedom of Expression

Freedom of expression can be considered as one of the definitive cornerstones of modern liberal democracy.[218] The following examines the scope of the right to freedom of expression with reference to the interpretation of the Irish Constitution and the ECHR in order to present a reconciled interpretation of the right as it is currently understood mindful of the dangers of subjective characterisation in the Western context[219] The right to freedom of expression is a foundational libertarian ideal and is traditionally articulated in the writings of John Stuart Mill who vigorously defended the free expression of beliefs and developed

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[217] See; Constitutional Review Group, 'Report of the Constitutional Review Group' (Pn2632, Stationary Office 1996) at 292.

[218] Leslie Pickering Francis, *Sexual Harassment as an Ethical Issue in Academic Life* (Rowman & Littlefield 2001) 29.

[219] It should be mentioned that the domestic Constitution protects the right to freedom of expression under Article 40.3.1° and Article 40.6.1°. This binary model in the domestic context 'strives to take seriously the logical and practical differences between different forms of expression.' See; Eoin Carolan, 'Constitutionalising Discourse: Democracy, Freedom of Expression and the Future of Press Regulation' (2014) 51 IJ 25. It should not be interpreted to diminish the expansive nature of freedom of expression for the purpose of this study which holds the 'highest order of importance' in the rights theory of the domestic society. See also; Tom Daly 'Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1°(i) of the Constitution' (2009) 31 DULJ 228,; Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) 1475-1477.

the concept largely referred to as the free marketplace of ideas.[220] This freedom enjoys universal recognition, having being encapsulated both within the UDHR[221] and the ECHR[222] and recognised in the former as 'a fundamental human right...the touchstone of all the freedoms';[223] however, Fish reminds that this right reflects the political system from which it arose.[224]

Mill wrote:

> 'If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.'[225]

He characterised freedom of expression broadly so as to even encompass those views which were unpopular or false on the basis that their articulation would contribute towards the further pursuit of truth.[226] Rawls included this right within his enumeration of basic liberties:

> 'The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly, liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; the freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.'[227]

A basic liberty can be described as fundamental, the infringement or limitation of which requires especially strong justification.[228] The domestic and European courts appear to

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[220] Jill Gordon, 'John Stuart Mill and the "Free Marketplace of Ideas"' (1997) 23(2) STP 235.

[221] Article 19, UDHR: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

[222] Article 10(1), ECHR: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

[223] Preamble, *General Assembly Resolution 59(1)*, 14 December 1946, A/RES/59(I).

[224] Stanley Fish, *There's No Such Thing as Free Speech* (OUP 1994) 102 – ['free speech is] just the name we give to verbal behaviours that serves the substantive agendas we wish to advance...Free speech...is not an independent value but a political prise.' See; s 4.7.2-4.7.3.

[225] John Stuart Mill, *On Liberty* (Hackett 1978) 16.

[226] John Stuart Mill, *On Liberty* (Hackett 1978) 123-127.

[227] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 61.

[228] Andrew Altman, 'Freedom of Speech and Religion' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (OUP 2005) 359; T. Scanlon, 'A Theory of Freedom of Expression' (1972) 1(2) PPA 204; Joshua Cohen, 'Freedom of Expression' in David Heyd (ed), *Toleration* (Princeton University Press 1996) 173-225.

similarly characterise the right to freedom of expression as one which would require especially strong justification, or weighty reasons, to limit.

In *Murphy v Independent Radio and Television Commission*[229] Barrington J described freedom of expression as one of the 'most basic rights of man.'[230] This judgment was later cited with approval in the case of *Holland v Governor of Portlaoise Prison*[231] where McKechnie J characterised this freedom as 'fundamental',[232] endorsing the comments of Lord Steyn in the case of *R v Secretary of State for the Home Department ex parte Simms*[233] when he stated: '[t]hat in a democracy the right to expression is the primary right: without it an effective rule of law is not possible...'[234]

> Article 10 of the ECHR provides the following:
>
> '(1) – Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) – The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'[235]

Article 10 of the ECHR is extremely broad and can apply to all forms of expression through any medium and with any content.[236] The ECtHR has similarly characterised the right to freedom of expression as fundamental, noting that it constitutes 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and

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[229] *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12.
[230] *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12, at 24.
[231] *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573.
[232] *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573 at 589.
[233] *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115.
[234] *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, at 125.
[235] ECHR art 10.
[236] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 435-436.

each individual's self-fulfilment.'[237] In stark contrast to Articles 40.3.1° and 40.6.1° of the Irish Constitution,[238] Article 10 has been the subject of expansive judicial consideration which has led to the creation of a hierarchy of protected expressions.[239] The jurisprudence of the ECtHR reveals that the most protected form of expression is political expression[240] on the basis that political debate is 'fundamental'[241] and at the 'very core of the concept of a democratic society'[242] the preservation of which is a core value of the Convention.[243] The ECtHR does not afford Contracting States a wide margin of appreciation in this context due to the fact that there exists a 'pan-European consensus' on the issue emphasising its fundamentality.[244]

This perception is shared in the domestic context where Hogan J noted that the 'right to educate (and influence) public opinion is at the very heart of the rightful liberty of expression.'[245] Positively, for the application of this theory, the court has demonstrated an interest in reconciling its approach towards this, and other rights, with the ECtHR. In the case of *Mirror Group Newspapers*[246] Denham J, as she then was, stated that the right to communicate, the right to information and the right to freedom of expression...are similar to the right of freedom of expression guaranteed by Article 10 of the ECHR.'[247] The

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[237] *Handyside v United Kindgom* (1976) Series A no 24 [49]; *Lingens v Austria* (1986) series A no 103 [41]; *Oberschlick v Austria* (1991) Series 1 no 204 [57]; *Castells v Spain* (1992) Series A no 236 [42]; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [31]; *Goodwin v United Kindgom* App no 17488/90 (ECtHR, 27 March 1996) [39]; *Busuioc v Moldova* App no 61513/00 (ECtHR, 21 December 2004) [58]; *Steel and Morris v United Kindgom* App no 68416/01 (ECtHR, 15 February 2005) [87]; *Monnat v Switzerland* App no 73604/01 (ECtHR, 21 September 2006) [55]; *Semik-Orzech v Poland* App no 39900/06 (ECtHR, 15 November 2011) [41]; *Mustafa Erdoğan and Others v Turkey* App no 346/04; 39779/04 (ECtHR, 27 May 2014) [33].

[238] This right has prompted very little judicial consideration in the domestic context prompting the Constitutional Review Group to note that 'the relative paucity of the case law in this area is such that not much would be lost if Article 40.6.1°(i) were to be replaced'. See; Constitutional Review Group, 'Report of the Constitutional Review Group' (Pn2632, Stationary Office 1996), at 292.

[239] Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, OUP 2012) 627.

[240] *Oberschlick v Austria* (1991) Series 1 no 204; *Vgt Verein Gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001).

[241] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Court of Human Rights* (4th edn, Intersentia 2006) 774.

[242] *Oberschlick v Austria* (1991) Series 1 no 204 [58].

[243] Jean-Paul Costa, 'The European Court of Human Rights and its Recent Case Law' (2003) 38 TILJ 458.

[244] Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) ICLQ 399.

[245] *Cornec v Morrice* [2012] IEHC 376 [66].

[246] *O'Brien v Mirror Group Newspapers* [2001] 1 IR 1.

[247] *O'Brien v Mirror Group Newspapers* [2001] 1 IR at 32.

interpretation of the right in the European context as such is significant for the domestic understanding.

The ECtHR has established a lower threshold for the protection of freedom of expression in the case of artistic and commercial expressions where it affords Contracting States a wider margin of appreciation in contexts of limitation;[248] however, this does not 'give the State an unfettered discretion to determine whether a restriction is proportionate.'[249] The margin of appreciation can only be applied when the State is not constrained by any primary principle such as legality, legitimacy or proportionality.[250] The limitation of the right to freedom of expression has been informed by the Harm Principle, derived from the writings of Mill, where the exercise of a basic liberty can be limited only in the context where it invades the rights of other persons in a disproportionate manner.[251] Understanding what exactly constitutes harm is inherently subjective and is complicated by normative perceptions towards morality and ideology. This classic liberal principle endangers a minority which must justify its conduct in the face of the perception of harm which the majority may infer from its conduct.

While freedom of expression undoubtedly encompasses the articulation of views which 'shock and disturb'[252] the court is tasked with examining this right in an increasingly liberal contemporary context. Contemporary scholarship has largely addressed this issue in circumstances concerning the objectification of women and children which could be considered to fall within the category of harmful expression.[253] Further, the nature of obscene or hate-speech, which has generated legislation in the domestic context,[254] poses a

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[248] Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, OUP 2012) 627.
[249] Malcolm D. Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 RHR 216.
[250] Douwe Korff, 'The Standard Approach under Articles 8-11 ECHR and Article 2 ECHR', < http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf > accessed 13 August 2014.
[251] John Stuart Mill, *On Liberty* (Hackett 1978) 9.
[252] *Handyside v United Kindgom* (1976) Series A no 24 [49].
[253] See; Catherine MacKinnon, *Only Words* (Harvard University Press 1993); Rae Langton, 'Speech Acts and Unspeakable Acts' (1993) 22 PPA 293-230; Wojciech Sadurski, *Freedom of Expression and its Limits* (Kluwer 1999) 132.
[254] Prohibition of Incitement to Hatred Act 1989.

substantial theoretical challenge to the contemporary interpretation of the right to freedom of expression.

The ECtHR has been prolific in the suppression of expression which can 'spread, incite, promote or justify hatred based on intolerance.'[255] In an effort to control forms of extremism the ECtHR has limited expression which could be considered offensive on the basis of 'racism, xenophobia, anti-Semitism, aggressive nationalism and discrimination against minorities and immigrants.'[256] Returning to Rawls, this has the potential to greatly diminish the freedom of expression rights in the European context where limitations are considered in a position external to his figurative veil of ignorance.[257] Interpreting the right to freedom of expression with reference to a predetermined set of ideals has the ability to greatly impinge on the true interpretation of freedom of religion.[258] This also has the potential to generate a clash with the domestic legal system which has pledged to buttress the internal discriminations which may flow from religion[259] as opposed to adopting a strategy which attempts to destroy their ethos.[260]

These restrictions reflect the Kantian perspective that the freedom of expression should be exercised responsibly; however, the determination of responsible restrictions would undoubtedly legitimise sectarian and racial bias and limit the scope of free expression in line with the normative perception regarding what is right and what is wrong.[261] A wider conceptualisation of freedom of expression with reduced limitation based on subjective values would provide for the pursuit of the truth, as advocated by Mill, in light of competing conceptions of the good and religion.[262] An exclusively occidental perception towards truth would be contrary to the very unobtainable nature of truth[263] and would frustrate the ability

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[255] *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) [56].
[256] Recommendation No R 97 (20) of the Committee of Ministers of the Council of Europe to Member States on 'hate speech', adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister's Deputies.
[257] John Rawls, *A Theory of Justice* (Harvard University Press 1999) 17.
[258] See; Marloes van Noorloos, 'Criminalising defamation of religion and belief' (2014) 22(4) EJCCC 351.
[259] See; *McGrath and Ó Ruairc v Trustees of Maynooth College* [1979] ILRM 166.
[260] See; *Greally v Minister for Education (No 2)* [1999] 1 IR 1.
[261] William Schweiker, *Responsibility and Christian Ethics* (CUP 1999) 79.
[262] John Rawls, *Political Liberalism* (Columbia University Press 2005) 179-180.
[263] Larry Alexander, *Is there a right to freedom of expression?* (CUP 2005) 129.

of individuals and adherents to pursue and express a belief whose views challenge the norm.

3.3.2 Freedom of Conscience

Freedom of conscience is fundamental in the system of basic liberties for a liberal democracy.[264] Similar to the right to freedom of expression, the right to freedom of conscience is encapsulated within the Irish Constitution,[265] the ECHR,[266] and the UDHR.[267] While the Irish Constitution guarantees 'freedom of conscience and the free profession and practice of religion' both the ECHR and the UDHR construct the guarantee as the freedom of thought, conscience and religion. An initial obstacle in the attempt to analyse the extent of these respective guarantees is the ambiguous definition of conscience and whether it can be interpreted independently of religion. On a basic understanding, it can be understood to pertain to a faculty containing moral commands and judgments inherent in each person.[268] Failure to establish this requires the analysis of conscience to have suitable recourse to religious belief and its protection in case law. Following on from this, an analysis of the case law of the ECtHR proposes to demonstrate a large corpus of cases concerning conscientious objections which illustrate the degree to which such views are valued in the European sphere.

Perhaps at the forefront of traditional articulations of the freedom of conscience are the writings of Locke, above mentioned.[269] His writings advance the premise that man is incapable of transforming the inward persuasion of his conscience and upon that basis he must be free to adhere to its directions in pursuit of truth.[270] He suggests that the State should not impose a uniform religious belief on its citizenry due to the fact that this could

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[264] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 411.
[265] *Bunreacht na hÉireann* art 44.2.1°.
[266] ECHR art 9.
[267] UDHR art 18.
[268] Nathan S. Chapman, 'Disentangling Conscience and Religion' (2013)(4) UILR 1457.
[269] See, s 3.2.4.
[270] John Locke, 'An Essay Concerning Toleration' in J.R. Milton and Philip Milton (eds), *John Locke, An Essay Concerning Toleration and Other Writings on Law and Politics 1667-1683* (Clarendon Press 2006) 273.

impede a more correct identification of the divine.[271] It appears that this philosophical perception is synonymous with the interpretation of conscience under the Irish Constitution. In the case of *McGee v Attorney General*[272] the applicant contended that, on the basis of Article 44.2.1°, she had a right to access contraception on foot of her understanding of what would be best in the interests of her husband and her family.[273] In dismissing the application under Article 44.2.1° Walsh J observed that:

> 'The whole context in which the question of conscience appears in Article 44 is one dealing with the exercise of religion and the free profession and practice of religion. Within that context, the meaning of s 2, sub-s 1, of Article 44 is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practise the religion of his choice in accordance with his conscience...that means contrary to one's conscience so far as the exercise, practice or profession of religion is concerned.'[274]

On the basis of this judgment freedom of conscience is confined to the religious context in the domestic sphere. While the Constitutional Review Group disagreed with the interpretation of Walsh J,[275] their supposition that his decision will not be followed has yet to be manifest.

In the recent judgment of *A.M. v The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform*[276] McDermott J observed that:

> 'Article 44.2.1 of the Constitution provides that "freedom of conscience and the free profession and practice of religion are subject to public order and morality, guaranteed to every citizen". Though the provision appears under the heading "Religion" and though the limited case law considering the provision has for the most part dealt with freedom of conscience in the religious context, it is difficult to contemplate a "freedom of conscience" excluding conscientious objection, which is

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[271] John Locke, 'An Essay Concerning Toleration' in J.R. Milton and Philip Milton (eds), *John Locke, An Essay Concerning Toleration and Other Writings on Law and Politics 1667-1683* (Clarendon Press 2006) 273.
[272] *McGee v Attorney General* [1974] IR 284.
[273] *McGee v Attorney General* [1974] IR 284 at 291.
[274] *McGee v Attorney General* [1974] IR 284 at 316-317.
[275] Constitutional Review Group, 'Report of the Constitutional Review Group' (Pn2632, Stationary Office 1996) 360.
[276] *A.M. v The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2014] IEHC 388.

> in itself an obvious exercise of conscience rooted in religious or other moral or philosophical convictions.'[277]

Instead of moving to interpret conscience as an independent philosophical conviction under Article 44.2.1°, as had been inferred previously by Hogan J,[278] McDermott J derived an independent right to freedom of conscience under Article 40.3 of the Constitution under the doctrine of unenumerated rights.[279] In the wake of the uncertainty which this judgment has generated, freedom of conscience must still be considered in complement to the guarantee of religious freedom under Article 44.2.1°. Barrington J described Article 44.1 as a 'significant addition' to the right of religious freedom in Ireland.[280] In *Temple Street v D*[281] Hogan J observed that 'Article 44.2.1° protects not only the traditional and popular religions and religious denominations...but perhaps just as importantly, it provides for minority religions and religious denominations whose tenets are regarded by many as unconventional.'[282]

> Article 9 of the ECHR provides the following:
>
> '(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.'[283]

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[277] *A.M. v The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2014] IEHC 388 [32].
[278] *Temple Street v D* [2011] IEHC 1 [27].
[279] *A.M. v The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2014] IEHC 388 [33].
[280] *Corway v Independent Newspapers (Ireland) Ltd*, [1999] 4 IR 484 at 500. Article 44 of the Constitution is distinct from its parallel provision within the 1922 Constitution of the Irish Free State, see; Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) 2029. Indeed the 'chief difference between de Valera's Constitution and the 1922 Constitution is that de Valera brought God in from the coldness of outer space and allocated him a role in the functioning of the machine.' See; Angela Clifford, *The Constitutional History of Eire/Ireland* (Athol 1987) 10.
[281] *Temple Street v D* [2011] IEHC 11.
[282] *Temple Street v D* [2011] IEHC 11 at 27.
[283] ECHR art 9.

Article 9 of the ECHR and Article 18 of the UDHR both guarantee freedom of conscience, alongside thought, belief and religion in comparative terms.[284] The *travaux préparatoires* of the latter[285] indicate that the interpretation and definition of this Article was the subject of much disagreement.[286] While some delegates felt that conscience was separate from religion[287] others argued that it was inseparable from the term religion.[288] In contrast to the approach of the domestic courts, it appears that the International perception towards freedom of conscience, as represented by the UDHR, does not currently require this right to be read in conjunction with the right to religious freedom.[289] On foot of this, Evans separates thought and conscience from religion and belief[290] which has the potential to influence the development of Article 9 ECHR; however, Wicks comments that the 'reluctance to investigate' in Article 9 affairs has led to the failure of the judiciary 'to make full use of the potential of Article 9'.[291] A reluctance to investigate on the part of the judiciary requires that freedom of conscience is to be read in light of religion.[292] The jurisprudence of the ECtHR has developed an evolving sympathy towards claims of conscience and in recent years case law, discussed below, has aligned itself more fully with the recognition that this is a fundamental right.

Claims of conscience often arise in the ECtHR in relation to compulsory military service where the beliefs of the individual come into conflict with the pursuit of a legitimate social aim.[293] The evolution of the case law in this area evidences a struggle in the

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[284] See; ECHR art 9(1); 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance', see also; UDHR art 18; 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

[285] This was discussed briefly during the course of the second chapter of this thesis, see; s 2.7.1.

[286] See; 2.7.1.

[287] See; Saudi Arabia UN Doc. A/C.3/SR.1021 [8]; Ceylon UN Doc. A/C.3/SR.1026 [18].

[288] See; Argentina UN Doc. A/C.3/SR.1025 [22]; Spain UN Doc. A/C.3/SR.1026 [2-5].

[289] Human Rights Committee, 'General Comment No 22 UN Doc HRI/GEN/1/Rev.1 at 35' (1994).

[290] Malcolm D. Evans, *Religious Freedom and International Law in Europe* (CUP 1997) 202-203.

[291] Elizabeth Wicks, 'Dying with conscience – the potential application of Article 9 ECHR to Assisted Dying' (2014) University of Leicester School of Law Research Paper no 14-26 11.

[292] For a more comprehensive discussion of the failure of the ECtHR to recognise claims of conscience see; Javier Martinez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1(2) OJLR 363.

[293] Robin C.A. White and Claire Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 416. This was briefly discussed in the context of an analysis of the jurisprudence of the United Nations Human Rights Committee during the second chapter. See; s 2.7.1.

interpretation of Article 9 and a clear reluctance to afford conscience extensive protection to the extent that it could limit the action of Contracting States.[294] The EComHR examined the issue of conscientious exemptions to military service first in the case of *Grandrath v Germany*.[295] The applicant, as a Jehovah's Witness, objected to military service on the basis that the compulsion to participate in military activity would violate his freedom of conscience and religion. The EComHR rejected the assertion that there existed a right to conscientious exemption and this came to be regarded as established case law.[296]

In subsequent years the ECtHR has had recourse to other rights in order to 'escape from their self-imposed strait-jacket'[297] in the attempt to provide some measure of protection to those who objected to military service on grounds of conscience. Thus, in the case of *Ülke v Turkey*[298] the court invoked Article 3, the protection against ill-treatment, to protect the rights of a conscientious objector who was repeatedly imprisoned for his refusal to wear a military uniform. In the recent case of *Bayatyan v Armenia*[299] the majority of the Grand Chamber overruled the decision of *Grandrath v Germany*[300] recognising that:

> 'opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9...'[301]

The reference to religion *or other* beliefs is significant as it advances the application of Article 9 to other philosophical beliefs where this had been resisted previously.[302] Regardless, this case demonstrates that the ECtHR has elevated the status of the right to freedom of conscience to such an extent as to be considered superior to other legitimate

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[294] See; s 2.7.1.
[295] *Grandrath v Germany* 10 YB ECHR 626 (1966).
[296] Nicolas Bratza 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights (2012) 14(2) ELJ 263.
[297] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights (2012) 14(2) ELJ 263.
[298] *Ülke v Turkey* App no 39437/98 (ECtHR, 24 January 2006).
[299] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).
[300] *Grandrath v Germany* 10 YB ECHR 626 (1966).
[301] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) [110].
[302] See; *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [82].

interests of Contracting States particularly when exercised in conjunction with religious interests.

The case law of the EComHR and the ECtHR concerning conscientious objection on religious grounds demonstrates the reservation of the judiciary generally towards claims of conscience. In the cases of *X v Denmark*; [303] *Knudsen v Norway*[304] and *Karlsson v Sweden*[305] the EComHR rejected the claim that individuals acted in accordance with their conscience in their refusal to perform work duties. In the cases of *Efstratiou v Greece*[306] and *Valsamis v Greece*,[307] discussed previously,[308] the applicants alleged that disciplinary action taken against their children on the basis of their refusal to participate in a military parade in accordance with their religious beliefs as Jehovah's Witnesses infringed their rights under Article 9. The court felt that the attendance of the children at the parade could not amount to a violation of their conscience.[309] This perspective has been criticised at length previously.[310] It remains to note that the court has adopted a conservative stance with regard to the protection of conscience under Article 9 of the ECHR. It has, at times, failed to sufficiently appreciate the reality of religious conscience and the subjective impact which it can hold in the life of the adherent.[311]

In their analysis of the judgment in *Eweida and Others v United Kingdom*,[312] Leigh and Hambler emphasise the significance of the dissenting opinion of judges Vučinić and De Gaetano in the contemporary context.[313] Both judges suggested that the establishment of a

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[303] *X v Denmark* (1976) 5 DR 157.
[304] *Knudsen v Norway* (1985) 42 DR 247.
[305] *Karlsson v Sweden* (1988) 57 DR 172.
[306] *Efstratiou v Greece* App no 24095/94 (ECtHR, 18 December 1996).
[307] *Valsamis v Greece* App no 21787/93 (ECtHR, 18 December 1996).
[308] See; s 2.7.3.
[309] *Efstratiou v Greece* App no 24095/94 (ECtHR, 18 December 1996) [38]; *Valsamis v Greece* App no 21787/93 (ECtHR, 18 December 1996) [37].
[310] The analysis of this case is contained within the second chapter of this thesis. See; s 2.7.3.
[311] Other cases concerning conscientious objection on the basis of Article 9 include; *Pichon and Sajous v France* App no 49853/99 (ECtHR, 2 October 2001); *Alexandridis v Greece* App no 19516/06 (ECtHR, 21 February 2008); *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010), and; *Lautsi v Italy* App no 30814/06, (ECtHR, 18 March 2011).
[312] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[313] Ian Leigh, Andrew Hambler, 'Religious Symbols, Conscience and the Right of Others' (2014) 3(1) OJLR 6-7.

genuine and serious conscientious objection could be regarded as an absolute right.[314] The observations of the judges in question prompt Leigh and Hambler to draw an analogy between the right to conscientious exemption and the *forum internum*.[315]

Freedom of religion is one of the 'foundations of a democratic State'[316] attributed to the fact that it is 'one of the most vital elements that go to make up the identity of believers and their conception of life.'[317] As such, the ECtHR has been proactive in the attempt to limit the involvement of Contracting States in religious matters[318] and has attempted to guarantee a robust freedom of religion as illustrated in the first chapter of this thesis.[319] When conscience is aligned with religion it creates an aspect of the *forum internum* of Article 9 and forms an absolute right which cannot be limited;[320] however, claims of conscience have not always been afforded their sufficient weight in the interpretation of Article 9 of the ECHR.[321] It will be demonstrated in the fourth chapter of this thesis that the ECtHR has placed emphasis on the institutional objective conceptualisations of religious belief which has been detrimental to the recognition of the fundamental value of subjective conscience.[322] The failure of the court to place emphasis on the subjective qualities of religious belief is detrimental to freedom of conscience as it endorses a more collective understanding of religious belief which may not sufficiently represent the subjective interpretation of the religious adherent in view of the demands of their conscience. The move towards a more subjective analysis, evidenced in contemporary case law, facilitates an attempt to address this deficiency.[323]

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[314] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) Joint Partly Dissenting Opinion of Judges Vučinić and De Gaetano [2].
[315] Ian Leigh, Andrew Hambler, 'Religious Symbols, Conscience and the Right of Others' (2014) 3(1) OJLR 7.
[316] *Kokkinakis v Greece* (1993) Series A no 260-A [31]; *Otto-Preminger Institute v Austria* App no 13470/87 (ECtHR, 20 September 1994) [47]; *Buscarini and Others v San Marino* App no 24645/94 (ECtHR, 18 February 1999) [34].
[317] Council of Europe, 'Overview of the Court's case law on freedom of religion' (31 October 2013).
[318] See; *Perry v Latvia* App no 30273/03 (ECtHR, 8 November 2007) [55]; *Hasan and Chaush* App no 30985/96 (ECtHR, 26 October 2000) [78].
[319] See; s 1.4.2.
[320] *Sinan Işık v Turkey* App no 21924/05 (ECtHR, 2 February 2010) [20].
[321] Council of Europe, 'Overview of the Court's case law on freedom of religion' (31 October 2013).
[322] See; s 4.7.1.
[323] See; s 2.7.3

Inherently, conscience is individualistic. A liberal freedom of conscience enables the religious adherent to pursue their own conception of the good[324] and it is on this basis that Rawls affords this right special status.[325] He asserts that individuals have both, a capacity for a sense of justice and a capacity to formulate their subjective conception of the good: freedom of conscience and freedom of expression are essential for this.[326] Freedom of religion and freedom of conscience in religious matters can be distinguished in this view. The latter can encompass a great variety of actions, fundamental and incidental. While the right to worship can be described as fundamental, religious freedom can also entail certain administrative qualities which facilitate institutional organisation in order to achieve the primary aims of the religious entity to worship, teach, practice and observe the prescriptions of their faith.[327] Conscience is inherently individualistic and contributes to the moral and life-orientation of a person.[328] It develops intellectual response and convictions in the matters of faith and value[329] which shape fundamentally the conceptualisation of the individual. Freedom of conscience can be considered as an integral feature of individual autonomy.[330]

The ECtHR has emphasised that the right to freedom of conscience cannot apply to trivial matters or beliefs which do not necessarily form fundamental aspects of the life of the individual.[331] This is similar to the observations of Walsh J in the judgment of *McGee v Attorney General*.[332] To be considered a basic liberty the substance of conscience must pertain to 'the individual's ultimate normative orientation towards life'[333] to the exclusion of other beliefs which, however strongly held, may not contribute centrally to the individual's conception of life. On this basis freedom of conscience is clearly 'a central rather than

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[324] John Locke, 'An Essay Concerning Toleration' in J.R. Milton and Philip Milton (eds), *John Locke, An Essay Concerning Toleration and Other Writings on Law and Politics 1667-1683* (Clarendon Press 2006) 273.
[325] John Rawls, *Political Liberalism* (Harvard University Press 1993) 293.
[326] John Rawls, *Political Liberalism* (Harvard University Press 1993) 293.
[327] See; s 2.3-2.6.
[328] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.
[329] David A.J. Richards, *Free Speech and the Politics of Identity* (OUP 1999) 23.
[330] Andrew Altman, 'Freedom of Speech and Religion' in Hugh LaFollette (ed), *The Oxford Handbook of Political Ethics* (OUP 2005) 376.
[331] See; *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) [110]; *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [82].
[332] *McGee v Attorney General* [1974] IR 284 316-317.
[333] Andrew Altman, 'Freedom of Speech and Religion' in Hugh LaFollette (ed), *The Oxford Handbook of Political Ethics* (OUP 2005) 377.

marginal' right.[334] Religious conscience cannot be considered as trivial for the way in which it can provide the foundation for the life of adherents.[335] Its role in the life of the sincere believer should not be underestimated and as such should continue to be endorsed as an integral aspect of individual liberty[336] by the domestic and European legal systems.

3.4 The Right to Religious Expression

The rights to freedom of religious conscience and freedom of expression are both fundamental rights within the jurisprudence of the Irish courts and the ECtHR. Their collective fundamentality places them within an essential rights category for the successful realisation of the demands of a democratic and plural Nation State.[337] These rights have, at times, been perceived to conflict with each other;[338] however, 'it is unhelpful to think in terms of a conflict between the freedom of religion or belief and the freedom of expression. They are best understood as complementary provisions.'[339] The right to freedom of expression does not need to be understood as a non-religious right but can protect and guarantee the interests of religious communities and individuals when they express matters of their religion. The following section proposes to assess what it means to link conscience and expression when conscience is religiously informed in order to advance the argument for a right to religious expression for the purpose of this thesis.

Certain obstacles must be overcome in order to successfully cause these rights to collaborate. The jurisprudence of the ECtHR has been largely unsatisfactory based on inconsistent and undependable judgments particularly concerning the right to religious

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[334] James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California University Press 1987) 141.
[335] Paul Tillich, *Dynamics of Faith* (Harper & Row 1957) 11.
[336] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 21.
[337] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 411, 435.
[338] It has been suggested that the rights of freedom of religion has clashed with the secular interpretation of the right to freedom of expression, see; Malcolm D. Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 RHR 197; Malcolm D. Evans 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights' (2010-2011) 26(1) JLR 345; Ellen Wiles, 'A Right to Artistic Blasphemy? An Examination of the Relationship Between Freedom of Expression and Freedom of Religion Through a Comparative Analysis of UK Law' (2006) 6 UCDLR 124.
[339] Malcolm D. Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 RHR 210.

freedom.[340] Further, the court has not considered the collaboration of these rights in any prominent case concerning religious expression leading to a deficit of case law in the area and evidencing an absence of theoretical engagement on the part of the judiciary. The following outlines the difference between 'manifestation' and 'expression' as suggested by the European court and considers if this is desirable or important for the collaboration of both rights. This has been necessitated by the failure of Article 9 to sufficiently guarantee the expression of religion.[341] This proposes to demonstrate how a renewed approach can enrich the jurisprudence of the courts and further protect the right of religious expression as a superior right within Europe and Ireland.

3.4.1 Manifestation or Expression: An unnecessary dichotomy?

The ECtHR has, to date, refused to be drawn into an argument whereby religious expression can be protected under both Articles 9 and 10 of the ECHR.[342] Where the court has determined that there has been a violation of Article 9 it has consistently concluded that it is either unnecessary to examine the issue consequently under Article 10 or that no separate issue has arisen under Article 10. This is indicative of a dichotomy between manifestation and expression in religious matters. At the same time this dichotomy has not resulted from any clear statement of the court but rather as a consequence of supposition which will be discussed in turn.

In 2009 the ECtHR ruled in favour of the applicant in the case of *Lombardi Vallauri v Italy*[343] in finding a violation of both Articles 6 and 10 of the ECHR. The case concerned a lecturer who had been employed on an annual basis at the Catholic University of Milan since 1976. His application for the 1998/1999 academic year was not considered on the basis that

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[340] *Lautsi and Others v Italy* App no 30814/06 (ECHR, 18 March 2011); *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

[341] David Harris, Michael O'Boyle, Colin Warbrick, Law of the European Convention on Human Rights (2nd edn, OUP 2009) 441.

[342] *Kokkinakis v Greece* (1993) Series A no 260-A – violation of Article 9, not necessary to examine Article 10; *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) – violation of Article 9, no separate issue under Article 10; *Agga v Greece (No. 2)* App nos 50776/99; 52912/99 (ECHR, 17 October 2002) – violation of Article 9, no separate issue under Article 10; *Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007) – violation of Article 9, not necessary to examine Article 10.

[343] *Lombardi Vallauri v Italy* App no 39128/05 (ECtHR, 20 October 2009).

the Congregation for Catholic Education, a division of the Holy See, had written to the college to suggest that, on the basis of some of the applicant's views, he should no longer teach there. The ECtHR did conclude in favour of the applicant; however, it did not consider it necessary to examine the alleged violation of Article 9.[344] At the same time religion was at the centre of the dispute, particularly demonstrated by the differences of opinion on matters of doctrine between the applicant and the Congregation for Catholic Education[345] which led to the failure to consider the candidacy of the applicant, and which, in turn, led to the dispute before the ECtHR. Cismas comments that 'while it considered that it was unnecessary to treat the issue under Article 9, it did not exclude that a violation of religious freedom may have occurred as well.'[346] If this observation is correct the failure of the court to consider Article 10 arguments may not necessarily be interpreted to mean that a violation of that Article had not also occurred.

In the case of *Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*[347] the applicants alleged that the criminal destruction of their religious literature and the failure of the Contracting State to impose any punishment on the perpetrators of the crime amounted to a violation of their right under Article 10 of the ECHR. In its judgment the ECtHR stated that 'these complaints are identical to those which the applicants submitted under Articles 3 and 9 of the Convention...the Court does not consider it necessary to examine the application' under Article 10. [348] Similarly to *Lombardi Vallauri v Italy*[349], the failure to consider these issues under this Article does not necessarily amount to a finding that the Article in question had not been violated. This observation is strengthened in this circumstance on the basis that the judgment considered Article 9 to be 'identical' with Article 10. [350] On the basis that a violation was found in the case of Article 9 it can be speculated that a violation in Article 10 would be similarly grounded. These exact

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[344] *Lombardi Vallauri v Italy* App no 39128/05 (ECtHR, 20 October 2009) [58].
[345] *Lombardi Vallauri v Italy* App no 39128/05 (ECtHR, 20 October 2009) [8].
[346] Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 136.
[347] *Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007).
[348] *Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007) [144].
[349] *Lombardi Vallauri v Italy* App no 39128/05 (ECtHR, 20 October 2009).
[350] *Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007) [144].

circumstances are replicated in the cases of *Agga v Greece*,[351] *Serif v Greece*[352] and *Kokkinakis v Greece*.[353]

The ECtHR has refused to expressly define the scope and contents of Article 10; namely the meaning of the freedom to 'hold opinions and to receive and impart them'[354] yet it is clear from the jurisprudence of the court to date that Article 10 offers a 'broad protection.'[355] This has enabled issues regarding medical secrets,[356] television commercials[357] and photographs[358] to be considered under Article 10. It appears also that the content of the expression is irrelevant for the application of Article 10 as the courts have affirmed that this freedom is fundamental to the successful operation of democratic society which is of itself a primary objective of the guarantee.[359]

Conscience can be both a mental process and may be instantiated in action. On the basis that Article 10(1) guarantees the freedom to impact the opinions which an individual might possess it is a corollary then to suggest that the conscience, wherein these opinions may have been formed or constructed with reference to, then can be imparted. The ways by which these opinions, which have been formed according to the precepts of human thought and conscience, may be articulated has not been exhausted by the ECtHR. The EComHR recognised the breadth of sources from which expression may be derived. It noted that Article 10 protected the expression of 'information or ideas'.[360] It is then logical to suggest that Article 10 would protect the sphere of thought and conscience wherein these expressions may originate. This is not a radical proposition. While through, conscience and religion are components of the *forum internum* which are absolute rights under the Convention, the expression of though and conscience are not similarly absolute. They are

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[351] *Agga v Greece (No. 2)* App nos 50776/99; 52912/99 (ECtHR, 17 October 2002) [63].
[352] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [57].
[353] *Kokkinakis v Greece* (1993) Series A no 260-A [55].
[354] ECHR art 10(1).
[355] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Court of Human Rights* (4th edn, Intersentia 2006) 779.
[356] *Éditions Plon v France* App no 58148/00 (ECtHR, 18 May 2004).
[357] *Vgt Verein Gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001).
[358] *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004).
[359] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Court of Human Rights* (4th edn, Intersentia 2006) 779.
[360] *Handyside v United Kindgom* (1976) Series A no 24 [48].

subject to the restrictions which naturally follow as part of freedom of expression generally contained under Article 10(2).

Conscience frequently has been a contributory factor in the expression of controversial or minority viewpoints. In a legal appraisal of the Danish cartoon affair, where a satirical depiction of the Prophet Mohammad was printed to enormous protest and reprisal, Sturges emphasises the role of conscience in the debate:

> 'The courage of such people and their role as keepers of the popular conscience remains as valid as it ever did. Every year numbers of journalists are intimidated, assaulted and killed in the exercise of their profession and protecting and supporting them is a vital aspect of freedom of expression activity.'[361]

Freedom of expression can not merely pertain to action of a political or social nature. To guarantee the expression of opinions to the detriment of expression of conscience would be to devalue the significance both of Article 10 and the fundamental significance of conscience in the life of the religious adherent. While opinions may be transient, conscience can be enduring. Article 10 can be understood in the broadest possible terms in comparison to the scope of 'manifestations' under Article 9. This category has been considered in depth as part of Chapter II of this thesis; however, some prompting comments can assist this explanation.

The freedom to manifest religion, under Article 9 of the ECHR, does not refer to the freedom of expression in general.[362] Article 9 guarantees 'freedom of thought, conscience and religion'. It further states that this right includes the freedom to 'manifest his religion'.[363] The manifestation of Article 9 then merely applies to one of the three guarantees listed in the first sentence; religion.[364] Article 9 does not protect manifestations

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[361] Paul Sturges, 'Limits to Freedom of Expression? Considerations arising from the Danish cartoon affair' (2006) 32(3) IFLA 186.

[362] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Court of Human Rights* (4th edn, Intersentia 2006) 759.

[363] ECHR art 9(1).

[364] ECHR art 9(1): Everyone has the right to freedom of *thought, conscience and religion*; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's *religion or beliefs* shall be subject only to such limitations as are prescribed by law and are

of thought or conscience; these rights are consequently guaranteed under Article 10 of the ECHR.[365] The freedom to manifest religion, under Article 9, is consequently limited to actions of 'worship, teaching, practice and observance' which form 'part of the practice of religion or belief in a generally accepted form.'[366] While these have been somewhat broadly interpreted[367] it does remain that the expression or manifestation of thought and conscience is not similarly limited.

The interplay between Articles 9 and 10 is due both to the construction of Article 9 and the jurisprudence of the courts;[368] however, it has contributed to confusion within rights theory surrounding religious expression. Some discrepancies have developed. In the case of *X v Sweden*[369] the EComHR found that messages against pornography, fornication and alcohol conveyed by word and displayed on a placard amounted to manifestations of religion. This can be contrasted with the decision of the EComHR in *Arrowsmith v United Kingdom*.[370] The applicant in this case claimed that her rights under Articles 5, 9, 10 and 14 of the ECHR had been violated due to her prosecution for distributing pacifist leaflets in conformity with and in pursuit of her beliefs. The EComHR accepted that pacifism fell within the scope of religion or belief under Article 9.[371] As mentioned above, only the manifestation of religion and belief, and not thought or conscience, fall within the scope of Article 9 yet in this context the EComHR felt that, as the content of the leaflets was not advocating pacifism objectively, the distribution of the leaflets fell under Article 10 of the ECHR. In *X v Sweden*[372] the conveyance of information on a placard was considered a manifestation of religion yet in *Arrowsmith v United Kingdom*[373] the provision of this

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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. (Emphasis added).

[365] Malcolm D. Evans, *Religiou Liberty and International Law in Europe* (CUP 1997) 289.

[366] *Pichon and Sajous v France* App no 49853/99 (ECtHR, 2 October 2001); *C v United Kindgom* (1983) 37 DR 142; *V v the Netherlands* (1984) 39 DR 267; *Vereniging Rechtswinkels Utrecht v The Netherlands* (1986) 46 DR 200.

[367] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Court of Human Rights* (4th edn, Intersentia 2006) 759.

[368] Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 285.

[369] *X v Sweden* (Unreported, European Commission of Human Rights App no 9820/82, 5 October 1982).

[370] *Arrowsmith v United Kingdom* (1978) 19 DR 5.

[371] *Arrowsmith v United Kingdom* (1978) 19 DR 5 [69].

[372] *X v Sweden* (Unreported, European Commission of Human Rights App no 9820/82, 5 October 1982).

[373] *Arrowsmith v United Kingdom* (1978) 19 DR 5.

information on a leaflet was considered a non-religious expression in a factual scenario which could be considered to be on all fours with the former.

This has prompted Evans to comment that 'the principal approach adopted by the Commission...centres upon the degree to which the activity in question represents a necessary expression of a religion or belief.'[374] This approach has been somewhat liberalised by the ECtHR in recent years[375] which leads to the observation that perhaps the dichotomy is no longer necessary in this purist form. It would be better for the courts to adopt a more informed approach to realise that manifestation and expression can be understood as synonyms and thus the rights contained within Articles 9 and 10 are complimentary. This approach risks affording greater protection to 'more severe and punitive religions where the consequence of non-compliance with religious rules'[376] may be perceived as more serious to the detriment of 'tolerant belief systems which are accepting of a plural society.'[377]

Evans reminds us that 'both rights are of value and should be enjoyed to the fullest extent possible'.[378] He provides a robust demonstration of the interaction between the freedom of religion and the freedom of expression which emphasises their interdependency. He notes that 'in light of Article 10...the subsequent cases share a common characteristic: they all involve expressions of belief.'[379] Belief causes expression yet the content of this belief under Article 10 is irrelevant.[380] The belief is important merely because it contributes to the furtherance of democratic regardless of whether it can 'offend, shock or disturb.'[381] Expressions are equally valued on this basis; however, religion is valued differently due to the fact that it forms part of the fundamentality of human existence in the lives of adherents and, for them, holds inestimable merit as a tool of self-identification.[382]

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[374] Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 307.
[375] See; 2.7.3.
[376] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12(3) ELJ 300.
[377] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12(3) ELJ 300.
[378] Malcolm D. Evans, 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights' (2010-2011) 26(1) JLR 352.
[379] Malcolm D. Evans, 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights' (2010-2011) 26(1) JLR 368.
[380] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Court of Human Rights* (4th edn, Intersentia 2006) 779.
[381] *Handyside v United Kindgom* (1976) Series A no 24 [49].
[382] Lucy Vickers, 'Is All Harassment Equal? The Case of Religious Harassment', (2006) 65 CLJ 591.

Democratic society is benefited too by the importance of religion on the basis that its contribution to plurality enriches society and is instrumental in the 'realisation of a common good.'[383]

The value of religious conscience can augment the importance of general expressions which are simply valued based on their contribution towards democratic society. In parallel to the freedom of expression, the significance of being able to adhere to the demands of conscience cannot be successfully appraised within academic literature regarding the rights of the believer.[384] This raises the status of expressions of thought and conscience and also those manifestations of religion which do not fall under the terms of 'worship, teaching, practice and observance.'[385] Articles 9 and 10 are interrelated[386] and collectively raise the status of their individual rights to one unified superior right when an individual carries out actions, expressions or manifestations of their genuinely held religious belief in adherence to their conscience. These rights collectively enhance the right of religious expression as a superior form of expression. It now falls to be demonstrated that the limitation of the right to religious expression requires the most careful scrutiny, to the same extent as political expression, as a core and integral Article 10 right.

3.4.2 Affording Religious Expression the Highest Level of Protection under Article 10 alongside Political Expression

Article 10 of the ECHR is said to 'constitute one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of

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[383] Malcolm D. Evans 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 RHR 200. See also; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 251; Raz affords religion special moral status on the basis of its role in fulfilling individual autonomy and also due to its ability to secure the existence of a public good. See; Ellen Wiles, 'A Right to Artistic Blasphemy? An Examination of the Relationship Between Freedom of Expression and Freedom of Religion Through a Comparative Analysis of UK Law' (2006) 6 UCDLR 137. This statement does not neglect the 'dark side' of religion, see; William P. Marshall, *The Other Side of Religion* in S.M. Feldman (ed), *Law and Religion a Critical Anthology* (New York University Press 2000) 102.
[384] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 138.
[385] ECHR art 9(1).
[386] Jim Murdock, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (Council of Europe, 2012) 16.

every man.'[387] It has been established that there is a hierarchy of expressions guaranteed under Article 10 of which political expression is generally afforded the highest level of protection;[388] however, it has been the purpose and function of this chapter to demonstrate that the right to religious expression should equally be afforded the highest level of protection alongside political expression. The following section proposes to demonstrate the extent of this hierarchy and the reasons for which political expression is afforded the highest level of protection in order to demonstrate that religious expression equally functions as an essential pursuit for society albeit in the ethereal as opposed to the temporal realm. This assertion then turns to the fundamental inability of the legal system to comprehend this construction of religion so to advocate a renewed theoretical approach towards religious expression considerate of its role in the life of the adherent.

The ECtHR has adopted a distinguishing methodology for the purpose of differentiating between contrasting expressions for the purpose of Article 10.[389] On the basis of this categorisation, the ECtHR will afford the Contracting State a greater margin of appreciation in the limitation of expressions with reference to domestic interests.[390] This hierarchical approach differentiates between 'high value' and 'low value' expressions and functions to limit the extent of judicial discretion in the former category due to its essential purpose in society.[391] It is accepted that political expression is afforded the highest level of protection within this hierarchy on the basis that it lies 'at the heart of constitutional concern' and functions to achieve the 'goal of creating a deliberative democracy.'[392] The emphasis which the court has placed on political expression is well established[393] due to the way in which it 'contributes towards social and political debate.'[394] The significance of this

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[387] *Handyside v United Kindgom* (1976) Series A no 24 [48].
[388] Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal' (2006) 6(1) HRLR 58.
[389] Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal' (2006) 6(1) HRLR 57.
[390] Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal' (2006) 6(1) HRLR 57.
[391] Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal' (2006) 6(1) HRLR 54.
[392] Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1995) 122.
[393] Stefan Sottiaux and Stefan Rummens, 'Concentric Democracy; Resolving the incoherence in the European Court of Human Rights' case law on freedom of expression and freedom of association' (2012) 10(1) IJCL 118.
[394] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 438.

categorisation is that Contracting States will be afforded 'little scope for restrictions' in this expression of Article 10.[395]

In light of the normative argument advanced in this chapter, religious expression is an equally 'high value'[396] expression on the basis of its fundamental significance in the life of religious adherents. These adherents can be said to orientate their life in accordance with the demands of their religious conscience[397] which causes them to respond in view of a system which they feel they may have no choice but to subscribe to.[398] It is accepted that political expression is afforded the highest level of protection on the basis that it functions to advance the social and political development of society[399] which is a core interest in the progress of every man.[400] Political expression is 'revered in the jurisprudence'[401] on the basis that it contributes most effectively to the development of man in the temporal sphere; however, it must be recalled that freedom of expression is a tool for 'each individual's self-fulfilment.'[402]

Correctly interpreted, the right to freedom of expression should enable individuals to fulfil the extent of their religious beliefs and advance their interests in the ethereal sphere. It is suggested that political expression provides the liberty to develop society in a civil sense while religious expression provides the liberty to develop it in the religious sense, beyond the temporal sphere and in the ethereal realm. This development is entirely subjective, with reference to individual beliefs and their requirements, but the secular interest of progression should not be interpreted as superior to the desire of religious adherents to equally fulfil the demands of their conscience and the prescriptions of their

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[395] Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal' (2006) 6(1) HRLR 58.
[396] Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal' (2006) 6(1) HRLR 54.
[397] Andrew Altman, 'Freedom of Speech and Religion' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (OUP 2005) 377; Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.
[398] Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity* (Ashgate Publishing Limited 2010) 203.
[399] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 438.
[400] *Handyside v United Kindgom* (1976) Series A no 24 [48].
[401] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012) 136-137.
[402] *Lingens v Austria* (1986) series A no 103 [41].

sincerely held religious beliefs and to advance their religious interest. Religious expression functions in the same capacity as political expression on the basis of self-fulfilment and advancement. It is, in every sense, deserving of the higher level of protection in comparative terms to political expression as a core right of Article 10; however, it does not appear that the legal system can comprehend this interpretation of religious expression.

The previous examination of the right to freedom of expression and freedom of conscience demonstrate that there is, at times, a contrast between the broad philosophical underpinnings of the law and its realisation. Rather than being interpreted for its subjective value, Dryzek, Honig and Phillips observe that 'religion has been discussed...mainly in the context of the problem'.[403] A significant proportion of contemporary discourse examines the balance between the claims of subjective culture and concepts of universal morality.[404] The interests of religious groups can be particularly complicated as they pertain to fundamental issues of morality.[405] This can lead to a conflict for the religious adherent who is forced, at times, to choose between their religious conscience and the requirements of the law and the State.[406] The legal analysis attempted to demonstrate that the theoretical underpinnings of the law, informed from the perspective of rights theory, has the potential to address these competing interests; however, this is further complicated where the law fails to appreciate what is at stake in the life of the religious adherent.

In her book, *The Impossibility of Religious Freedom*, Sullivan repeatedly illustrates the way in which the legal system fails to comprehend the subjective significance of religious conscience and religious belief.[407] Her writings demonstrate how the legal system at times fails to appreciate the motivations of an individual when they attempt to adhere to their conscience and transcend the boundaries established between religion and society.[408]

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[403] John S. Dryzek, Bonnie Honig and Anne Philips, 'Introduction' in John S. Dryzek, Bonnie Honig and Anne Philips (eds), *The Oxford Handbook of Political Theory* (OUP 2006) 25.
[404] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 12.
[405] Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity* (Ashgate Publishing Limited 2010) 203.
[406] Chandran Kukathas, 'Immigration' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (OUP 2005) 577.
[407] See; Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 9; 10; 36; 68; 144.
[408] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 151.

She states that the interpretation of the court and the provisions of statute 'fail to capture the nature of people's religious lives at the beginning of the twenty-first century, maybe of any century.'[409] Her theory is essentially that the law in the Western sphere is unable to truly comprehend religion in the lives of adherents.[410]

This aside into the theory of Sullivan emphasises the primary obstacle for law; its inability to succinctly address and codify the way in which religion functions through its adherents. The analysis of religious belief at the outset of this chapter emphasised that the demands of religious conscience can be far reaching and can generate a conflict between the adherence to a society or adherence to an ultimate reality which can give meaning and direction to their lives.[411] Legal instruments which purport to ascertain reasonable boundaries between religion and its expression will be inherently compromised should they fail to appreciate the subjective interpretation of these boundaries from the perspective of the adherent. This chapter has appealed to a wider rights theory analysis to address the protection of religious interests within a judicial context. It has not advanced the proposition that statute can realise this in view of the varied ways in which religion can operate in the lives of adherents. Indeed, the best way to comprehend the demands of religious conscience is to appeal to the individuals who adhere to it themselves.[412]

There also exists a fundamental complication in transcending the bias which may be present in society predicated on assumptions of religious beliefs. In the contemporary environment very real concerns have been raised regarding the influence of religion in acts of terrorism and insurgency.[413] Religion in this construction can be understood as harmful to society and thus is capable of restriction in line with the codified limitation of rights which is underwritten by the Millian Harm Principle.[414] Harmful religious entities have contributed to an understanding of religion as a dangerous and violent entity which stands in opposition to

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[409] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 10.
[410] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 138.
[411] Michael Peterson, William Hasker, Bruse Reichenbach and David Basinger, *Reason and Religious Belief* (5th edn, OUP 2013) 33
[412] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2006) 193.
[413] See; Ronald Wintrobe, *Rational Extremism* (CUP 2006) 150; Sara Jackson Wade and Dan Reiter, 'Does Democracy Matter? Regime Type and Suicide Terrorism' (2007) 51(2) JConR 329; Robert A. Pape, 'Dying to Win: The Strategic Logic of Suicide Terrorism' (2003) 97(3) APSR 343.
[414] John Stuart Mill, *On Liberty* (Hackett 1978) 9, see also; s 3.3.1.

democratic and liberal standards.[415] Words such as 'fundamentalism', 'radicalism' and 'extremism' attempt to polarise mainstream perception against religion and demonise those who legitimately and peacefully attempt to pursue their religion in accordance with their conscience. Rights interpreted according to the classic liberal harm principle in this context could be detrimental to religious interests. Glass suggests that Leviathan is a good example of the way in which paranoia defines philosophical choice and the use of reason.[416] Hobbes' appeal to the sovereign's authority in matters of faith is an attempt to diminish discord. Such a view of authoritarianism in religious matters would, of course, be incompatible with the liberal freedom afforded to individuals by virtue of contemporary democracy; however, contemporary democracies which attempt to provide a general freedom of religion while at the same time determining the boundaries of that religion are in fact imposing a religious ideology in itself.

The construction of the right to freedom of religion and freedom of religious conscience was fundamentally concerned with the right to be different.[417] In the aftermath of generations of religious conflict the purpose of these freedoms was to enable the minority to dissent, to depart from the majority view and to be placed beyond the reach of political suppression.[418] The freedom is understood as a fundamental aspect of individual liberty and a characteristic of the democratic system.[419] Cole Durham recalls that this freedom is not the product of a statutory regime but rather 'something that individuals and religious groups have simply by virtue of their human nature.'[420] In the codification of law, the legal system must recall that freedom is not the matter of legislative grace rather an

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[415] See; Simon Allison, 'What Makes a Terrorist?' *The Guardian* (London, 26 September 2014); David Gardner 'Saudis have lost the right to take *Sunnī* leadership' *Financial Times* (London, 7 August 2014).

[416] James M. Glass, *Paranoia and Political Philosophy in* John S. Dryzek, Bonnie Honig and Anne Philips (eds), *The Oxford Handbook of Political Theory* (OUP 2006) 734.

[417] Peter Cumper, Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) ELJ 139.

[418] Peter Cumper, Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) ELJ 139.

[419] Javier Martínez-Torrón and Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G Tahzib-Lee (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 234.

[420] W. Cole Durham, Jr., 'Facilitating Freedom of Religion or Belief Through Religious Association Laws', in Tore Lindholm, W. Cole Durham, Jr., Bahia G Tahzib-Lee (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 352.

enduring characteristic of liberal democracy.[421] Freedom to express religion in accordance with the demands of conscience must be considered as fundamental to this system. This is not to suggest that religious expression should be unfettered in the public domain; rather, the debate should be constructed from the position that asks 'why should the expression of religion be restricted?' as opposed to 'why religion should be allowed to express itself?'

Distinct from other forms of expression, the expression of religion is often not primarily concerned with the outward communication of beliefs; rather, its expression enables the religious individual to adhere to claims of conscience.[422] This was exemplified previously by Ms Ladele, the consistent exemplar of this chapter, in the case of *Eweida and Others v United Kingdom*.[423] Her claim did not concern any positive action to oppose the civil registration of homosexuals but was centred on her ability to avoid being involved in something that was contrary to the demands of conscience. This conflict was the product of an internal struggle to conform to the prescriptions of her civil obligations when faced with the fact that such action would be detrimental to her religious interests. The law should not be concerned with the rationality of such a conflict, instead it should adopt a Rawlsian perception that the religious adherent themselves stands in the best place to interpret their faith.[424] The law must be concerned with balancing rights from the understanding of the religious adherent as a conscientious objector and not a civil disobedient.[425]

The law must bring itself to engage with the substantive meaning of religion in the life of the religious adherent in order to give life and reality[426] to the guarantee, not only of Article 9, but Article 10 of the ECHR.[427] The previous examination in the first and second chapters of this thesis demonstrated that the ECtHR is increasingly adopting a subjective methodology with reference to religion and religious belief.[428] Should the jurisprudence

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[421] See; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995) 7; Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (OUP 2001) 19.
[422] Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) ICLQ 399.
[423] See; s 3.2.1.
[424] Andrew Altman, 'Freedom of Speech and Religion' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (OUP 2005) 377.
[425] John Rawls, *A Theory of Justice* (Harvard University Press 1999) 324.
[426] *Re Article 26 and the Employment Equality Bill 1996*, [1997] 2 IR 321.
[427] *Airey v Ireland* (1979) Series A no 32 [24].
[428] See; s 1.6 and s 2.7.3.

continue to develop in this way the ECtHR will increasingly validate the subjective interpretation of individual religious belief. This makes it unnecessary for the legal system to comprehensively understand religion, as any understanding would be predicated on bias or essentialist qualities, leading to functionalist and exclusive definitions and characterisations and compromising the positive development of the jurisprudence of the court to date. It is accepted that the hierarchy of equalities includes the right to political expression. In light of the normative arguments advanced in this chapter it is claimed that the right to religious expression is of parallel significance and must be afforded the highest level of protection under Article 10 ECHR.

3.5 Conclusion

This chapter has demonstrated that religious belief contains demands of conscience which fundamentally characterise the way in which an adherent will orientate themselves towards life and that the significance of conscience, informed by religious belief, elevates the general freedom of expression and creates the right to religious expression which can be afforded the highest level of protection under Article 10 of the ECHR alongside political expression. These provisions must not be understood to be in conflict with each other but are better understood to represent complementary provisions which are interrelated and which can collaborate to protect the rights of the religious community within Europe and Ireland. Religious acts, symbols and manifestations are conceived as powerful forms of expression on the basis of the fundamentality and significance of religious conscience. [429] Freedom of religion, like freedom of expression, is fundamental to democracy and contributes to the plurality of society and advances the common good. Its expression is distinct from general expression because it has an inestimable significance in the lives of adherents making it intrinsic for their participation in humanity. This significance, coupled with the fundamental importance of the freedom of expression, makes the right of religious expression a superior right from a Human Rights perspective.

[429] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?' (2011) 11(3) HRLR 499.

It has been demonstrated that this value is ascribed not only due to the immutability of religion but also its role in the lives of adherents which justifies higher scrutiny or indeed the most careful scrutiny in the examination of any alleged interferences with the enjoyment of the right to religious expression under Articles 9 and 10 of the ECHR and Articles 40.6.1°(i) and 44.1 of *Bunreacht na hÉireann*. Both the freedom of conscience and the freedom of expression must be conceived of as fundamental in their own right; however, collectively these rights must adopt additional significance within the democratic system on the basis of the primary importance of individual liberty. The respect with the democratic system affords to religious expression is a consequence of the significance of the religious conscience in the life of the believer. The right to religious expression enables individuals to pursue salvation and satisfaction with regard to the elementary and fundamental issues which affect human life and are responded to in religion.

The remainder of this thesis relies on the presumption that the right to religious expression, as guaranteed through the collaboration of the freedom of conscience and the freedom of expression, is a fundamental and superior right which can be afforded the highest level of protection alongside political expression in instances of alleged violation or limitation. This right is important as it realises the collective interests of advancing individual liberty, democracy, societal plurality and the significance of conscience in the lives of adherents. This theoretical approach challenges the current procedure of the ECtHR; however, it is evident that the interest of religious groups and the interplay between religion and society will continue to generate litigation in the coming years. This proposition is constructed so as to adequately consider *lacunae* in the jurisprudence of the courts but also so as to enable a clear and comprehensive encapsulation of the right of religious expression to emerge. The remainder of this thesis considers both the limitation of the right of religious expression and the provision of positive measures on the foot of the right of religious expression through two case studies which isolate the competing interests and demonstrate how this right may adequately function from the perspective of the ECtHR and the domestic court so as to inform future rights theory.

Part II

Chapter IV

The Limitation of Religious Expression: Restrictions on the wearing of the Islamic Veil

4.1 Introduction

McCrea observes that 'these are interesting times in the area of law and religion'[1] and this chapter acknowledges same with a view to addressing the legal limitation of religious expression. Perhaps more specifically, this is an interesting era for the law and the Islamic religion, the regulation of which continues to generate legal controversy in the European sphere.[2] In light of such, this chapter examines the limitation of religious expression through an examination of the wearing of the Islamic veil which has been the subject of major public debate in Europe in recent years.[3] Examination of the legal limitations of this form of religious expression has become a central concern for the study of religious expression in the legal context.[4] While specifically examining the limitation of an Islamic form of religious expression, the analysis contained within this chapter can apply to the general limitation of religious expression; yet, in the interest of brevity, the Islamic veil has been isolated for examination as an exemplar through which to explicate the present theory.

This chapter proposes to consider the arguments which attempt to characterise the veil as a political, cultural or religious symbol with a view to asserting the primacy of its religious function so as to define the veil as a form of religious expression consistent with

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[1] Ronan McCrea, 'Religion in the Workplace; Eweida and Others v United Kingdom' (2014) 77(2) MLR 277.
[2] Hilal Elver, *The Headscarf Controversy; Secularism and Freedom of Religion* (OUP 2012) 1; Susanna Mancici, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projections and cultural racism' (2012) 10(2) IJCL 414.
[3] Hilal Elver, *The Headscarf Controversy; Secularism and Freedom of Religion* (OUP 2012) 1.
[4] See; Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 58; Myriam Hunter-Henin, 'Why the French don't like the burqa: laïcité, national identity and religious freedom' (2012) 61(3) ICLQ 614.

the application of the second chapter of this thesis.[5] It proposes to discuss the primary arguments utilised for the legal restriction of the Islamic veil, namely; secularism or *laïcité*, gender equality and, the most recently determined obligation, to 'live together'.[6] These arguments are discussed with a view to diminishing the validity of the same broad ranging grounds for limitation in the majority of the Contracting States to the European Convention on Human Rights. This chapter has undertaken the analysis of these grounds of restriction from a primarily subjective perspective in order to underscore the fundamentality of religious belief in the lives of the religious adherent in any rights balancing exercise which is consistent with the contemporary approach of the ECtHR.[7] It suggests that the most recent judgment of the ECtHR in *S.A.S. v France*[8] further diminishes the theoretical potential of Article 9 and weakens the protections afforded to the right of religious expression in the European context.

The chapter turns from the consideration of specific grounds for the limitation of religious expression to an examination of theoretical considerations which can feature in any limitation exercise in the European sphere. It considers how the relationship between religion and the State can inform the interpretation of a qualified neutrality from the perspective of the State whereby certain religious conceptions can be seen to attract heightened protection to the detriment of minority groups. It places emphasis on the relevance of individual constitutional models which exist in the Contracting States for the determination of any restriction of the veil and speculates regarding the model which may currently be in operation in the Irish context. The chapter proposes to demonstrate that the interpretation of State neutrality in religious matters is informed by such constitutional models which give rise to the qualified neutrality; namely, the secular model, the multicultural model and the ethno-cultural or Christian Occidental model. Subsequently, this chapter considers the legality of provisions which restrict the wearing of the Islamic veil in the public and private sector and examines the distinct issues which arise in the course of a context specific restriction of the veil. It utilises the school as a legally complex venue for

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[5] See; s 2.8.
[6] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [142].
[7] See; s 2.7.3.
[8] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

religious expression and contrasts the divergent position of teachers and students regarding any proportionate grounds for limitation.

This chapter concludes by challenging the legal limitations imposed on the wearing of the Islamic veil on the basis of a failure to attribute sufficient weight to a subjective understanding of the veil. It is also emphasises that future decision making should be cognisant of the fact that the act of wearing the Islamic veil is not necessarily perceived as an autonomous action but rather can be characterised as an obligation on the basis of individual religious conscience.[9] Failure to afford appropriate weight to the importance of religious conscience as the motivation of the right to religious expression in any restriction of the Islamic veil should be considered as improper on the basis of Articles 9 and 10 of the Convention; as such, legal limitations which fail to take into account the subjective perceptions of the individual are compromised.

4.2 The Definition of the Islamic Veil

On the basis that this chapter seeks to examine the legality of provisions which impose restrictions on the expression of religion, with reference to the Islamic veil as an exemplar, it must overcome the initial obstacle of the inability to comprehensively clarify the meaning of such a generic term.[10] The 'Islamic veil' is a broad label which has been used to denote veiling from the *ḥijāb* to the *burqā*.[11] The *ḥijāb* is a piece of cloth which is worn about the head and neck. It takes different forms and is constructed of distinct materials; however, it is characterised primarily by the fact that it does not obstruct the wearer's face.[12] The *niqāb* is a veil which is worn, sometimes in conjunction with the *ḥijāb*. This

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[9] See; s 3.2.

[10] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 59.

[11] See; Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 59; Joppke, Christian, 'State Neutrality and Islamic Headscarf Laws in France and Germany' (2007) 36(4) TS 313; Ivekovic, Rada, 'The Veil in France: Secularism, Nation, Women' (2004) 39(11) EPW 1117; Jon Boone, 'Pakistan elections: Imran Khan and the charge of the lights-out brigade' *The Guardian* (London, 8 May 2013); 'Tunisia's Islamist Party Leader in Appeal for Calm' *The Irish Times* (Dublin, 29 October 2011), and; '200,000 protest at anti-Morsi demo' *The Irish Independent* (Dublin, 27 November 2012).

[12] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 4.

garment functions to cover the face of the wearer with the exception of the eyes.[13] Finally the *burqā* is a long and enveloping garment which covers the entirety of the body including the face. There is usually a transparent layer of fabric covering the eyes.[14] While there are a variety of motivations for wearing the Islamic veil, political and cultural as well as religious, many Islamic women are considered to wear the Islamic veil in order to comply with the religious obligation of modesty contained within the *Qur'ân* where it states: '[a]nd tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal.'[15]

Islamic scholars have disagreed regarding the way in which this obligation is to be discharged and in relation to which garment is best suited to satisfy this requirement.[16] Some have even adopted the view that veiling is no longer necessary in a contemporary environment;[17] however, it must be recalled that legal provisions cannot be prejudiced by the diversity of beliefs surrounding veiling in the wider Islamic community. The ECtHR has expressly restricted Contacting States from determining the legitimacy of any religious belief in the following terms:

> '...but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.'[18]

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[13] Amikam Nachmani, *Europe and its Muslim Minorities: Aspects of Conflict, Attempts at Accord* (Sussex Academic Press 2009) 70-71.

[14] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 5.

[15] *The Qur'ân* (OUP 2005) *Al-Nur* 31. See full passage: '[a]nd tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms accept to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as do attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believe, all of you, turn to God so that you may prosper.'

[16] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 8.

[17] Bouthaina Shaaban, 'The Muted Voices of Women Interpreters' in Mahnaz Afkhami (ed), *Faith & Freedom: Women's Human Rights in the Muslim World* (I.B. Tauris & Co Ltd, 1995) 71.

[18] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [78]. See also; *Fernández Martínez v Spain* App no 56030/07 (ECtHR, 12 June 2014) [129]

As such, religious individuals and communities are at liberty to determine their own beliefs[19] and the ability to decide which garment suitably enables them to discharge the Qur'anic obligation of modesty.

The Islamic veil has come to represent different interests in conjunction to its function as a religious garment.[20] It has been defined as a political and cultural symbol alongside, or separate to, its function as a method of religious expression.[21] The following analysis intends to demonstrate that, while the veil can be utilised as a political or cultural symbol, arguments which attempt to alienate the religious nature of the veil are not wholly persuasive.

4.2.1 Political Symbol

The Islamic veil has been characterised as a political symbol when it has been worn in association with oppositional movements in both oriental and occidental contexts.[22] In the Iranian Revolution of 1979, the Islamic veil became associated with opposition to the pro-Western reforms of the Shah.[23] Since 1935 the Shah had prohibited forms of Islamic dress which resulted in the prohibition of the Islamic veil in a radical overhaul of domestic social policy.[24] Women successfully took to the streets to protest against these prohibitions utilising the veil as symbol of resistance against, what Ayotte and Husain refer to as,

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[19] *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [123].

[20] Jeroen Temperman, 'Religious Symbols in the Public School Classroom' in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff 2012) 157.

[21] Nilüfer Göle, 'Islam in Public: New Visibilities and New Imaginaries' (2002) 14(1) PC 181, see also; Leila Ahmed, *Women and Gender in Islam* (Yale University Press 1992) 152.

[22] Valorie K. Vojdik, 'Politics of the Headscarf in Turkey: Masculinities, Feminism and the Construction of Collective Identities' (2010) HJLG 33(2) 661. See also; 'Yemeni women burn veils in protest' *The Irish Independent* (Dublin, 27 October 2011): women burnt the veil in this context in protest against the government's crackdown on protests which resulted in fatalities. The veil was burnt as a plea for help to native tribesmen, see also; Ruadhán Mac Cormaic, 'Five held after Paris protest against ban on veil' *The Irish Times* (Dublin, 12 April 2011).

[23] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 17.

[24] Fawzia Zouari, *Le voile islamique. Histoire et actualité, du Coran à l'affaire du foulard* [*The Islamic veil, History and today, from the Qur'ān to headscarf affair*] (Lausanne 2002).

Western cultural colonisation.[25] The use of the veil as a political tool was similarly witnessed in Turkey where the Islamic community has increasingly become politically mobilised in order to challenge and overturn secularist policies since the twentieth century.[26] The veil in that context comes to be understood as a signifier of the proper role of the genders; the validity of the secular State and, most importantly; the relationship between the West and Islam.[27] Research conducted by Göle has demonstrated that the veil, in Turkey, has been adopted by educated women who were raised in traditional and rural contexts.[28] He has suggested that the adoption of the veil by these women has functioned to translate rural values into urban and intellectual contexts.[29] He further states that the use of the veil by these women is evidence of the role of the veil in a larger political fundamentalist movement.[30]

The ECtHR has recognised the capacity of the Islamic veil to adopt political characteristics in the judgment of *Şahin v Turkey*[31] where the Grand Chamber endorsed the perception of the Chamber when it observed that '[the Islamic veil] has taken on political significance in Turkey in recent years'.[32] In this case Ms Şahin was refused admittance to her examinations at Istanbul University, where she was registered, as she wore an Islamic veil which was prohibited.[33] The court appears to endorse the perception that the veil, in this context, represented a political symbol which could be equated with fundamental Islam.[34] As such, it could be interpreted as a rejection of the democratic ideals and values of

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[25] Kevin J. Ayotte and Mary E. Husain, 'Securing Afghan Women: Neocolonialism, Epistemic Violence and the Rhetoric of the Veil' (2005) 17(3) NWSAJ 117. Abu-Odeh also contends that lower class women engaged in veiling during this time; Lama Abu-Odeh, 'Post-Colonialism and the Veil: Considering the Differences' (1991) 26(4) NELR 1528; '...the women who adopt the veil in terms of class...tend to belong to the urban lower and middle classes. The veil functioned to equalise women regardless of social status but beneath men.

[26] Zeynep Taydas, Yasemin Akbaba and Minion K.C. Morrison, 'Did Secularism Fail? The Rise of Religion in Turkish Politics' (2012) 5(3) PR 529.

[27] Valorie K. Vojdik, 'Politics of the Headscarf in Turkey: Masculinities, Feminism and the Construction of Collective Identities' (2010) HJLG 33(2) 663.

[28] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press 1996) 95-96.

[29] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press 1996) 95-96.

[30] Nilüfer Göle, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) SR 816.

[31] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

[32] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [115].

[33] See; Istanbul University Resolution no 11 of 9 July 1998; 'Students shall not wear clothes that symbolise or manifest any religion, faith, race, or political or ideological persuasion in any institution or department of the university, or on any of its premises...Photographs supplied by students to their institution or department [must be taken] from the front with head and neck uncovered...'

[34] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [115].

contemporary society.[35] Ideals and values such as gender equality and societal morality lie at the centre of this debate and the veil can function as a visual indicator of a wider resistance, or perhaps reluctance, to participate in society upon these or other particular terms.[36]

Of course, the oppositional movements which took place in the Iranian Revolution, and which are somewhat paralleled in Turkey, demonstrate large-scale and organised political protest against alien cultural constructs and ideologies; yet, the use of the Islamic veil can function as a form of protest in everyday life for individuals.[37] The veil can be an indicator of opposition to participate with other individuals in society in the absence of a shared morality, [38] a characteristic which is discussed further under the examination of the limitation of religious expression based on the requirement to live together.[39] It can function as an endorsement of the Islamic political movement.[40] This form of political Islam manifests a threat to domestic policies where 'the process of Islamisation is accompanied by moral vigilantism that poses a threat to existing civil liberties.'[41] The use of the veil in this circumstance has led some commentators to suggest that the veil can be alienated from its religious definition and characterised more generally.[42] Göle illustrates the shift from religious to political with a contrast between the term Muslim and the term Islamist indicating that the latter participates in 'a social protest movement'[43] working towards political change; however, it is suggested that this shift towards politics cannot divorce the Islamic veil from its primary religious characterisation.

The above demonstrates that the veil can function as a tool in political movements for the communication of opinions or belief; however, these beliefs and opinions are made with reference to the central religious purpose underlying the veil. The veil functions as a

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[35] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 17.
[36] John Borneman, 'Veiling and Women's Intelligibility' (2009) 30(6) CLR 2755.
[37] Pat Mule and Diane Barthel, 'The Return of the Veil: Individual Autonomy vs Social Esteem' (1992) 7(2) SF 327.
[38] Valerie Behiery, 'A Short History of the (Muslim) Veil' (2013) 16(4) IR 404-405.
[39] See; s 4.6.
[40] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 66.
[41] Murat Bonovali, 'Islamic Headscarves and Slippery Slopes' (2009) 30(1) CLR 2606-2607.
[42] See; Lama Abu-Odeh, 'Post-Colonialism and the Veil: Considering the Differences' (1991) 26(4) NELR 1527.
[43] Nilüfer Göle, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) SR 811.

tool to represent these religious ideals; opposition to policies perceived to be detrimental to the family, opposition to the modification of sexual ethics and opposition to the removal of religion from the political sphere.[44] These arguments are informed by the religious belief from which the obligation to wear the veil is derived. While it is accepted that the veil can function as a political symbol, this has to be characterised as secondary to, or dependent upon, the primary and religious characteristic of the veil. The use of the veil in political movements is in furtherance of the Islamic faith, its culture or its traditions.[45] While it may be used in addition to its function as a garment to comply with religious precepts it cannot be used without its primary religious belief. Religious belief is at the heart of the expression and accordingly any attempt to define the Islamic veil, used in a political process, independently of its religious function is futile.

4.2.2 Cultural Symbol

The opening chapter of this thesis considered prominent anthropological and philosophical definitions of religion as a cultural construction.[46] It is accepted from this that religion can be understood to contain a 'system of symbols'[47] which can convey information to individuals through aspects of culture.[48] The veil can at certain times come to represent cultural values; however, analysis along such lines must be wary of paternalistic and colonial arguments traditionally utilised to associate the cultural oppression of women with the Islamic veil.[49] The following examination considers the veil within the anthropological discourse surrounding migration with reference to the patterns of first, second and third generation migrants. This will demonstrate that, while the veil adopts a heightened cultural significance in early migration stages, this continues to diminish in favour of the dominant religious characteristic in respect of later generations.

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[44] Hamideh Sedghi, *Women and Politics in Iran; Veiling, Unveiling and Reveiling* (CUP 2007) 210.
[45] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 6.
[46] See; s 1.3.3.
[47] Clifford Geertz, 'Religion as a Cultural Symbol' in Clifford Geertz (ed), *The Interpretation of Cultures: Selected Essays* (Fontana Press 1993) 90.
[48] Daniel L. Pals, *Eight Theories of Religion* (2nd edn, OUP 2006) 270.
[49] See; Leila Ahmed, 'The Discourse of the Veil' in Gaurav Desai, Gajanan and Nair, Supriya (eds),*Postcolonialisms: an anthology of cultural theory and critics* (Rutgers University Press 2005) 323.

The perception of the veil as a cultural device utilised for the oppression of women has a long history.[50] This view is endorsed in contemporary discourse, particularly evident in feminist theory,[51] which seeks to demonstrate that the veil is conducive to patriarchy and oppression.[52] Arguments which attempt to define the veil culturally with reference to these factors are suggestive, in themselves, of a paternalistic interest in the protection of the vulnerable and impressionable rural women. They fail to attribute sufficient weight to the change in society whereby these, once rural and uneducated individuals, now can be seen to function as qualified and independent professionals.[53] Indeed, in the transition from rural and traditional contexts to urban settings, the veil continues to represent the religious interest common in both distinct cultural contexts; however, it is conceded that, in the initial period of this transitional stage, the veil can adopt heightened cultural properties.

Research pertaining to the values of migrants in foreign contexts has demonstrated the importance which migrants attribute to ancestral culture in new territories.[54] This assertion of tradition and heritage can be attributed to an attempt to find comfort in a foreign land and serves to bind minority communities around a common theme.[55] The veil, in this context, functions as an assertion of Islamic culture and represents a link with an ancestral homeland on the basis that 'religion can function as the bond of social cohesion'.[56] Gaspard and Khosrokhavar have noted that, in France, second-generation migrants have adopted the veil autonomously due to a 'desire to be French and Muslim, modern and veiled, autonomous and dressed in the Islamic way.'[57] This desire is representative of the internal conflict which occurs when a migrant transitions to become a citizen of the host territory and is faced with the conflict between what is normative and what is moral on the basis of their ancestral religion.

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[50] Leila Ahmed, *Women and Gender in Islam* (Yale University Press 1992) 152.
[51] Valerie Behiery, 'A Short History of the (Muslim) Veil' (2013) 16(4) IR 395.
[52] See; Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of a Postmodern Analysis* (Zed Books 1999).
[53] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press 1996) 96.
[54] Yanagisako, Silvia Junko, *Transforming the Past: Tradition and Kinship among Japanese Americans* (Stanford University Press 1985); Nancy Foner, 'The Immigrant Family: Cultural Legacies and Cultural Changes' (1997) 31(4) IMR 961.
[55] Tuomas Martikainen, *Religion, Migration, Settlement* (Martinus Nijhoff 2013) 91.
[56] Paul Cliteur, 'State and Religion Against the Backdrop of Religious Radicalism' (2012) 11(1) IJCL 141.
[57] Françoise Gaspard, Farhad Khosrokhavar, *Le Foulard et la république* (La Découverte 1995) 47.

Second-generation migrants, who are no longer familiar with their ancestral homeland, are challenged by the need to associate with past or present.[58] This association is either national or historical and, in this void, migrants assume the culture of one and the life of the other exemplifying the desire of second-generation migrants put forward by Gaspard and Khosrokhavar.[59] Fukuyama also demonstrates this duality with the inclusion of third-generation migrants; '[second and third-generation migrants are] stuck between two cultures with which they cannot identify.'[60] In this uncertainty of self-identity, third-generation migrants find comfort in the universality of religion on the basis of their ability to identify with it beyond their ancestral homeland.[61] Citing Roy, Fukuyama notes that 'Islam has become de-territorialised in such a way as to throw open the whole question of Muslim identity.'[62] From this point it can be stated that the wider Islamic identity is represented in the global membership of the *Ummah* and, as such, later generation migrants, who have a reservation about their host's culture, have the potential to participate in a universal Islamic culture.[63] Up until this point the veil may have functioned as a cultural symbol; however, it now transitions towards an exclusively religious expression without the cultural significance of a now historic homeland. Warren notes that these later migrants 'tend to think that culture is not very important but that religion is.'[64]

While accepting that the veil can be defined as a symbol of culture, like politics, it is suggested that such a characterisation is dependent on the fundamental religious properties of the veil. Migrants who use the veil to outwardly manifest their heritage do so with reference to, not only a national culture but, Islam as culture. Buchler states that Islamic practice is often characterised by this duality of 'culture and religion.'[65] The Islamic religion carries with it many cultural and social aspects which form part of the life of the believer as

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[58] See; 'Everything Old is New Again? Processes and Theories of Immigrant Incorporation' (1999) 31(4) IMR 1101; citing; Min Zhou, *Chinatown: The Socioeconomic Potential of an Urban Enclave* (Temple University Press 1992).
[59] Françoise Gaspard, Farhad Khosrokhavar, *Le Foulard et la république* (La Découverte 1995) 47.
[60] Francis Fukuyama 'Identity, Immigration and Liberal Democracy' (2006) 17(2) JD 11.
[61] Warren, Christie S., 'Lifting the Veil: Women and Islamic Law' (2008) 15(1) CJLG 64.
[62] Francis Fukuyama 'Identity, Immigration and Liberal Democracy' (2006) 17(2) JD 10.
[63] See; Tom Villis and Mireille Hebing, 'Islam and Englishness: Issues of Culture and Identity in the Debate over Mosque Building in Cambridge' (2014) 20(4) NEP 415.
[64] Warren, Christie S., 'Lifting the Veil: Women and Islamic Law' (2008) 15(1) CJLG 64.
[65] Andrea Buchler, 'Islamic family law in Europe? From dichotomies to discourse - or beyond cultural and religious identity in family law' (2012) 8(2) IJLC 208.

a complement to religion but not as a requirement of it.[66] This can be demonstrated with reference to artwork, clothing and food which draw their origin from Arabic tradition but have been assumed into Islamic culture.[67]

Islam as a cultural construct feeds into the concept of Islam as a group identifier which can be contrasted against notions of Christian individualism.[68] Pollis and Schwab have demonstrated that, in comparison to the Western understanding of religion, '...individualism is said not to be characteristic of Islam since the individual is conceived of as part of a greater whole or group.'[69] As such, these individuals are drawn into the religion as an all-encompassing system which has its own political and cultural manifestations.[70]

It can be said that Western Christians have forged a new relationship with religion since the reformation and enlightenment period where it became possible to hold dual identities in order to foster unity.[71] As such, it was possible for one to be German and Roman Catholic and for another to be German and Lutheran. In doing so, an individual shared the commonality of citizenship which was not dependent on religion. Accordingly, a national culture was fostered, at times, independently of a faith or religious tradition. The Islamic religion holds its own culture which has been assumed into the religion.[72] The veil is part of this culture for first and second-generation migrants yet, as the ancestral homeland becomes a distant memory and the migrant becomes a citizen of the host country, religion becomes the dominant attraction and the veil, and its culture, become shaped by religion and not by nationality. As such, where the veil can be understood as a symbol of culture it is dependant entirely upon its role as a method of religious expression.

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[66] Examples include Islamic music, architecture, artwork and literature which are shaped and perhaps validated by their association with Islam. While Islamic culture draws itself from the Arab tradition it has been carried into new territories with the expansion of Islam. This can been seen in the construction of Mosque and Islamic centres.

[67] Islamic feminist discourse has suggested that veiling is an example of a cultural phenomenon which has been adopted and legitimised by the Qur'anic interpretation of modesty, see; Nimat Hafez Barazangi, 'The Absence of Muslim Women in shaping Islamic Thought: Foundations of Muslims' Peaceful and Just Co-Existence' (2008-2009) 24(2) JLR 403.

[68] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 5.

[69] Pollis, A., Schwab, P. 'Human Rights: A Western Construct with Limited Applicability' in A. Pollis, P. Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (Praeger 1979) 8.

[70] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 6.

[71] This new relationship can be determined as early as perhaps the Treaty of Westphalia.

[72] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 6.

4.2.3 Religious Symbol

The Islamic veil can be characterised primarily as a religious symbol.[73] As previously demonstrated, the Islamic veil can at times represent political or cultural interests;[74] however, for a large majority of Islamic adherents it is considered a religious symbol and a tool for the preservation of feminine modesty as prescribed by the *Qur'ân* [75] and various Islamic *Ḥadīth*.[76] While the veil can adopt political or cultural interest, and can be utilised as a tool in the conveyance of ideals, it cannot alienate its central and enduring religious characteristic. For some religious adherents, the desire to wear the Islamic veil is not simply a political or cultural choice but a fundamental requirement of their religious belief.[77] It is this belief which assists in the construction of political opinion and cultural construction.

Arguments which defined the Islamic veil as a means of political and cultural expression are inconceivable without the cornerstone of religion. This is clearly manifested in the case of Ms Şahin in her protest against the secular policies of the Turkish government.[78] The applicant adopted an Islamic means of religious expression to symbolise her political opposition to the secular policies of the State on the basis that the State would understand her political opposition to be based on religious values. If the garment were not a means of religious expression then the protest would be baseless. The adoption of an Islamic form of religious expression as a cultural manifestation demonstrates that the

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[73] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 63.
[74] See; s 4.2.1-4.2.2.
[75] See; *The Qur'ân* (OUP 2005) *Al-Nur* 31. See full passage: '[a]nd tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms accept to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as do attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believe, all of you, turn to God so that you may prosper.'
[76] See; Abu Dawud, Book 27, *ḥadīth* Number 4089 'Narated By 'Aisha, Ummul Mu'minin : Safiyyah, daughter of Shaybah, said that 'Aisha mentioned the women of Ansar, praised them and said good words about them. She then said: When Surat an-Nur came down, they took the curtains, tore them and made head covers (veils) of them, and; Abu Dawud, Book 27, *ḥadīth* Number 4092, 'Narated By 'Aisha, Ummul Mu'minin : Asma, daughter of Abu Bakr, entered upon the Apostle of Allah wearing thin clothes. The Apostle of Allah turned his attention from her. He said: O Asma', when a woman reaches the age of menstruation, it does not suit her that she displays her parts of body except this and this, and he pointed to her face and hands.'
[77] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 66.
[78] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

wearer is aligning themselves with the Islamic culture, inconceivable without the religion itself.[79] This is distinct from adopting a symbol of Asian or Middle-Eastern culture unaligned with religion.

The second chapter of this thesis considered the characteristics of a religious manifestation for the purposes of Article 9 of the Convention and concluded that the ECtHR was required to define any such manifestation subjectively with reference to the sincerely held beliefs of the individual claimant.[80] Joppke observes that:

> 'the State has to be agnostic as to whether Islam really prescribes the veil for women. Accordingly, the veil, through the very fact of being considered a religious symbol by the woman wearing it, falls within the ambit of religious liberty rights.'[81]

Consistent with the theory put forward in the second chapter of this thesis, the Islamic veil must be characterised as a form of religious expression on the basis of the belief of the applicant. It is clear that many of the women who have brought applications to the ECtHR, discussed subsequently and during the course of the second chapter, characterised the veil as a medium for the expression of their religious beliefs.[82] A discussion of this case law is not replicated herein;[83] however, it is sufficient to state that this chapter aligns itself with the subjective interpretation of the individual at the centre of the action who, largely in the context of Article 9 applications, acts in accordance with their religious beliefs.

It is suggested that the use of the Islamic veil as a means of political or cultural expression cannot be understood without reference to the Islamic religion;[84] however, the use of the veil for religious purposes does not rely upon the aforementioned political or cultural forms. This is not to say that a court could not define the Islamic veil as a political or cultural symbol, as they have done in *Şahin*,[85] but that it would be almost impossible to

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[79] Andrea Buchler, 'Islamic family law in Europe? From dichotomies to discourse - or: beyond cultural and religious identity in family law' (2012) 8(2) IJLC 208.
[80] See; s 2.7.3.
[81] Christian Joppke, *Veil: Mirror of Identity* (Polity Press 2009) 12-15.
[82] See; s 2.5.1.
[83] See; s 2.5.1.
[84] Silvio Ferrari, 'Law and Religion in Europe' in Lisbet Christoffersen, Hans Raun Iversen, Hanne Petersen and Margit Warburg (eds), *Religion in the 21st Century* (Ashgate 2010) 150.
[85] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

alienate it from its fundamental and primary purpose as a symbol of religious expression. As such this chapter proposes to continue to examine the arguments for the limitation of the Islamic veil as an indication of the extent to which religious expression is curtailed in Europe and Ireland.

4.3 The Limitation of the Islamic Veil

The justifications for the limitation of the Islamic veil are diverse and include arguments based on gender equality,[86] secularism,[87] national security[88] and the obligation for citizens to 'live together'.[89] In recent years, Contracting States, such as France and Belgium, have adopted positive measures to restrict the use of the Islamic veil in their jurisdictions.[90] These have been found to be consistent with their obligations under the Convention in some circumstances.[91] In the interest of clarity this analysis will address three common justifications for the restriction of the Islamic veil, namely; those arguments in the interest of secularism or *laïcité*, gender equality and the obligation for citizens to 'live together'. These prominent and contentious justifications have stimulated a variety of academic discourse, the sum total of which cannot be discussed or analysed here. Consequently, this section purports to address a selection of the most prominent of these restrictions in an analytic fashion in order to consider the fundamental basis and consequences for such justifications. It proposes to indicate, in each sub-section, the way in which the Islamic veil has come to be perceived to obstruct each successive societal value and then, from this perspective, attempt to establish if in fact such values are proportionate to justify the limitation of the right of religious expression in the interest of others.

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[86] Alison Stuart, 'Freedom of Religion and Gender Equality: Inclusive or Exclusive' (2010) 10(3) HRLR 435.
[87] Ryan W. Hill, 'The French Prohibition on Veiling in Public Places: Rights Evolution or Violation' (2013) 2(2) OJLR 417.
[88] John Borneman, 'Veiling and Women's Intelligibility' (2009) 30(6) CLR 2756.
[89] Shaira Nanwani,'The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?' (2011) 25(3) EILR 1431; Jennifer Heider, 'Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights' (2012) 22(1) IICLR 95; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [121].
[90] See; France: Loi n° 2010-1192 du 11 octobre 2010 *interdisant la dissimulation du visage dans l'espace public*; Belgium: Projet de loi du 28 avril 2011 *visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*.
[91] See; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [157]; *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [78].

4.4 Secularism or Laïcité

Secularism can be understood as a constitutional model and a characteristic of the State[92] whereby religious interests are separated from the operation of the State in order to create a political system characterised by the absence of religion.[93] The definition of secularism is assisted with reference to the jurisdiction from which the constitutional model originates. This context informs the degree to which religion can operate within the State in order to preserve the political system predicated on the absence of religion. Jurisdictions which afford religious expression a high tolerance, such as the domestic context, are not often considered as flash-points for controversy regarding the limitation of religious expression. As such, this section purports to address both France and Turkey as low-toleration secular jurisdictions so to demonstrate how the Islamic veil can come into conflict with their particular constitutional models with emphasis on the distinct concept of secularism and *laïcité*. While not instantly applicable in the Irish context, this ground of limitation has attracted a large degree of varied commentary and, as such, should feature in the present analysis.

The nature of secularism and the challenges of the Islamic veil were set out clearly in the judgment of *Şahin v Turkey*[94] where the ECtHR set out the historical context from which the present case had arisen[95] demonstrating that the collapse of the Islamic Ottoman Empire gave way to the creation of a secular and democratic Republic of Turkey. The ECtHR emphasised that the creation of the Turkish Republic was accompanied with far-reaching advancements for the equality of the genders.[96] This was facilitated by the suppression of religious and cultural practices deemed detrimental to female advancement such as polygamy and the religious governance of matrimonial legal proceedings.[97] The secularisation of the Turkish State had been fraught with difficulty and military coups began

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[92] Rafael Palomino, 'Legal Dimensions of Secularism: Challenges and Problems' (2012) 4(2) CRLSJ 208.
[93] Charles Taylor, *A Secular Age* (Harvard University Press 2007) 2.
[94] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).
[95] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [30-35].
[96] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [31].
[97] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [31].

to erupt in the 1960s in opposition to secular nationalism.[98] The continued prohibition of the Islamic veil in Turkey was justified in response to the political significance which this garment had gained in the oppositional movement.[99] The ECtHR noted that those in support of secularism perceive the veil to be a symbol of political Islam.[100]

The political significance which the veil adopted led to its continued prohibition in the higher educational authorities. This significance was emphasised by the Turkish Administrative Court which held that the veil in itself had become a symbol for a vision which 'is contrary to the freedoms of women and the fundamental principles of the Republic.'[101] Göle suggested that, in this context, the meaning of the veil can transcend its religious significance.[102] The potential for the instability of democracy in Turkey gives rise to the special consideration of the restriction of the Islamic veil in that context. The militaristic insurgencies, along religious ideals, represent a distinct threat for liberal ideals and must be considered as distinguishing factors in the analysis of restrictions of the Islamic veil in more stable European contexts.[103] In the European mainland, secularism is most prominently demonstrated by the *laïcité* of France.

Ringelheim suggests that there can be at least two different conceptions of *laïcité*;[104] the first being a benevolent confessional neutrality towards religion,[105] and; the second pertaining to a protective exclusion of religion from public institutions in order to preserve religious neutrality.[106] She perceives the latter to contain a rather 'negative perception of

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[98] Rachel Rebouché 'The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate' (2009) 24 AUILR 715.

[99] Zeynep Taydas, Yasemin Akbaba and Minion K.C. Morrison, 'Did Secularism Fail? The Rise of Religion in Turkish Politics' (2012) 5(3) PR 529.

[100] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [35].

[101] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [36].

[102] Nilüfer Göle, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) SR 816.

[103] See; *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

[104] Julie Ringelheim, 'Rights, religion and the public sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca an Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 302.

[105] Pierre-Henri Prélot, 'Définir Juridiquement la laïcité' in Gérard Gonzalez (ed), *Laïcité, liberté de religion et Convention des droits de l'homme : actes du colloque organisé le 18 novembre 2005 par l'Institut de droit européen des droits de l'homme* (Bruylant 2006).

[106] Henri Peña-Ruiz, *Qu'est-ce que la laïcité* (Gallimard 2003).

religion.'[107] Daly further observes that this 'historically situated discourse'[108] requires religious tolerance and neutrality;[109] however, is will be suggested below that neutrality is not a concept which is synonymous with secularism. While the processes of *laïcité* can be argued, the purpose of the separation is largely to ensure the equal participation of every member of the State primarily as a French citizen which is perceived to enhance the concept of social fraternity.[110] While not instantly applicable in Ireland it is necessary to outline, in some detail, the secular interest of France for the restriction of the Islamic veil on the basis of the discourse which this has in itself generated.

In 2004 the French government passed the *loi n°* 2004-228[111] which restricted the overt manifestations of religion in public schools.[112] Later the government passed the *loi n°* 2010-1192[113] which prohibited the concealment of the face in public spaces. While the term *laïcité* does not appear in the legislation this concept frequently entered discourse surrounding the bill.[114] This most recent piece of legislation prohibited the wearing of the *burqā* and the *niqāb* in public places, in a revolutionary modification of the traditional understanding of French secularism by taking it 'out of the schools and on to the streets.'[115] The law of 2004 was constructed on the basis that, by removing ostentatious religious

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[107] Julie Ringelheim, 'Rights, religion and the public sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca an Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 302.

[108] Eoin Daly, 'Ostentation and Republican Civility: Notes from the French face-veiling debates' (2015) 14(3) EJPT 301.

[109] Eoin Daly, 'Restrictions on Religious Dress in French Republican Thought: Returning the Secularist Justifications to a Rights-Based Rationale' (2009) 31 DULJ 167.

[110] Christian Joppke, *Veil: Mirror of Identity* (Polity Press 2009) 122; '...there cannot be competition between Muslim (which is either ethnic or religious or both) and French (which is always political)', see also; Cécile Laborde, 'Secular Philosophy and Muslim Headscarves in Schools' (2005) 13(3) JPP 316: 'The public sphere (according to Rousseau) was to be protected from the interference of particular loyalties, identities or groups, lest it allow the general will to disaggregate into myriad conflicting private wills.'

[111] Loi n° 2004-228 *du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.*

[112] It should be noted that while religious rights are freely granted by the Convention each Member State is free to pursue a secular ideal should it so desire. This was demonstrated in *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) when the court considered at [114] the 'notion of secularism to be consistent with the values underpinning the Convention.'

[113] Loi n° 2010-1192 *du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.*

[114] French President Nicolas Sarkozy gave a passionate speech against the Islamic veil in an address to parliament shortly after the call was made for a parliamentary investigation into the Islamic veil in French territories. See; Emma Jane Kirby, 'Sarkozy stirs French burka debate' (BBC News Paris) <http://news.bbc.co.uk/2/hi/europe/8113778.stm> accessed 20 December 2012.

[115] Myriam Hunter-Henin, 'Why the French don't like the burqa: laïcité, national identity and religious freedom' (2012) 61(3) ICLQ 615.

symbols from public schools, students would not be so visually aligned with a religion and, as such, would be more open to interaction and participation with each other based on their French commonality.[116] This is clear by the application of the law to primary and secondary level educational institutions but not universities as younger students were considered more vulnerable to religious impressionism and required a greater degree of protection.[117] The law of 2010 had the effect of moving secularism out of the realm of public institutions and into the public square in a substantial curtailment of religious expression which the jurisdiction considered proportionate to the perceived threat of social stratification by religious communities practicing traditions which could be considered contrary to the republican ideal of equality.[118] The limitation of the religious expression of those members of the Islamic community was in order to encourage them to interact with society on a more common basis; in order to represent themselves as French and not as a member of any minority.[119]

French secularism can be described as a constitutional model entailing an aggressive separation of religion from the public sphere.[120] This is not synonymous with other secular Contracting States in how they order their relationship with religion and has contributed to the great variety of conceptions of religion in the European sphere.[121] Many of the

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[116] See; Cécile Laborde, 'Secular Philosophy and Muslim Headscarves in Schools' (2005) 13(3) JPP 307; '...limits on the exercise of religious liberties in the public square are necessary conditions for the maintenance of a system of equal liberties for all.' See; Uriya Shavit, 'Should Muslims integrate into the West?' (2007) 14(4) MEQ 13; 'For mainstream Muslim jurists, Islam is not a culture, a religion, or a tradition but rather an alternative type of nationality, which claims jurisdiction over all aspects of human activities.'

[117] This vulnerability of younger individuals to religious impressions was noted in *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001), see; 'Their [teachers] mere conduct may have a considerable influence on their pupils; they set an example to which pupils are particularly receptive on account of their tender age, their daily contact with them which, in principle, is inescapable and the hierarchical nature of this relationship', see also; Patrick Weil, 'Lifting the Veil of Ignorance' (2004) 3(1) PP (non-paginated) 19; '...in the schools where some girls are wearing the headscarf, the Muslim girls who do not wear it are subject to strong pressure to do so.'

[118] It should be noted that in the strict opinion of the French government secularism was not a feature of the 2010 bill. This was further noted in the Report, (n 25) 95-122, see also; *Report by the Conseil d'Etat*, (n 23) 17. Subsequent academic discourse has recognised the clear consequence of this law and as such it cannot be ignored in any discussion of French secularism. See; John Borneman, 'Veiling and Women's Intelligibility' (2009) 30(6) CLR 2746; '...it is assured that the larger role played by religion today in the public square is leading to a blurring of the distinction between public and private spheres.'

[119] It must be recalled that minorities are not recognised in the French Republic by virtue of Article 2 of the French Constitution. As such the French Government has expressed reservation for Article 27 of the *International Covenant on Civil and Political Rights* which concerns minority expression.

[120] Henri Peña-Ruiz, 'Laïcité: l'émancipation par l'universel' (2009) 31(1) LP 82-83.

[121] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [50].

Contracting States adopt forms of religious neutrality which could be considered to come under the category of secularism.[122] Neutrality, more generally, is a requirement placed upon all Contracting States in respect of religions, faiths and beliefs.[123] It must be reiterated that the Irish State is not a secular State; however, it does have obligations with regard to neutrality in religious matters in the interest of all citizens. A primary objective of religious neutrality is the equalisation of peoples by the prohibition of any advantage granted due to religious subscription. Religious neutrality is also an equalising concept which indiscriminately interacts with religion so as to allow faith to grow in a protected yet equal environment.[124] In contrast to the policies of secularism, neutrality will often foster religious expression indiscriminately as opposed to imposing broad restrictions.[125] While *laïcité* may justify the restriction of the Islamic veil in order to protect the perceived superior social good, the principle of religious neutrality is more likely to be applied indiscriminately in order to protect the minority faith.

In this distinction between secularism and neutrality, the observations expressed by Judge Power, in her concurring opinion in the decision of *Lautsi v Italy*,[126] are instructive:

> 'Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one. To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology amongst others. A preference for secularism over alternative world views – whether religious, philosophical or otherwise – is not a neutral option.'[127]

The respect for religion and contrasting world views which neutrality requires may, at times, be absent from secularism; further, with particular emphasis on the *laic* models of France, secularism may be constructed to have a negative perception of religion and may seek to

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[122] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (OUP 2012).
[123] *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007) [85-86].
[124] See; Christian Joppke, *Veil: Mirror of Identity*, (Polity Press 2009) 122; '...to be French is not defined ethically of religiously but politically, in terms of republicanism...'
[125] It should be noted that religious neutrality was considered as a political ideology similar to secularism which was not protected under the Convention in the concurring opinion of Bonello J in *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011): '...secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance. All of these represent superior democratic commodities which Contracting States are free to invest in or not to invest in, and many have done just that. But these are not values protected by the Convention...'
[126] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011).
[127] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) Concurring Opinion of Judge Power.

challenge its validity in the public sphere.[128] The opinion of Judge Power clarifies that secularism is not a neutral option but an ideological preference.

Accepting this, it is important to emphasise the subjectivity which might inherently be present in any system of perceived neutrality. While this was considered at length during the second chapter of this thesis, it is relevant to note that neutrality, as a concept, should be considered as an aspirational construction and should be viewed as an ideal which genuinely purports to advance equal treatment between competing interests and groups.[129] On the basis of the forgoing it is not clear, therefore, if secularism alone would be enough to justify a complete prohibition of the Islamic veil.[130] Perhaps due to this uncertainty, the French have tied their opposition to the concept of gender equality and duties toward others.[131]

In a prelude to the 2011 Act, resolutions were brought before the parliament, including that by Jacques Myard, which justified the prohibition of the veil by the need to maintain the secular ideals of the State and 'to fight against attacks on the dignity of women resulting from certain religious practices.'[132] These resolutions prompted an enquiry to investigate the motivations and consequences of wearing the *burqā* and the *niqāb*. It was constructed, in the words of the resolution, to 'identify recommendations to halt this communitarian drift contrary to our principles of secularism, our values of freedom, equality and human dignity.'[133] Other secular jurisdictions should note that, while a Contracting

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[128] Julie Ringelheim, 'Rights, religion and the public sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca an Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 302.

[129] See; s 2.7.4.

[130] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

[131] See; Leora Bilsky, 'Uniforms and Veils: What difference does a difference make' (2009) 60(1) CLR 2718; 'The wearing of the headscarf in France was taken as an unambiguous sign of the oppression and subordination of women in Islam, to which anyone supporting the republican ideal of equality must be opposed.'

[132] No 1121 – Bill of Jacques Myard MP, Proposition de Loi: visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses, 30 September 2008, available online: http://www.assemblee-nationale.fr/13/propositions/pion1121.asp accessed 13 February 2013.

[133] No 1725 – Proposition de Résolution tendant à la création d'une commission d'enquête sur la pratique du port de la burqa ou du *niqāb* sur le territoire national, 19 June 2009, available online: http://www.assemblee-nationale.fr/13/propositions/pion1725.asp accessed 13 February 2013.

State is entitled to maintain a secular characteristic and promote this policy, such values are not protected by the Convention to the same extent as the right to freedom of religion.[134]

This supremacy of religious freedom over secularist values was illustrated by the *Conseil d'Etat* when it published its report on the possible legal grounds for prohibiting the full veil on the 23 March 2010.[135] In response to the above mentioned resolution, the *Conseil d'Etat* published an extensive report wherein they concluded that 'there appears to be no legal basis firm enough to justify a general ban on the full face veil.'[136] As emphasised previously, the concept of *laïcité* was instructive in drafting the resolution underpinning the enquiry of the *Conseil d'Etat* and should be numbered among the various policy considerations examined against the prospective prohibition. To this end, the report observed:

> '[i]t would seem that a general ban on the concealment of the face in public places would have to be based on a broader conception of public policy as something that underpins the reciprocal demands and fundamental guarantees arising from life in society. But such a legally unprecedented conception would run a serious risk of constitutional or conventional censure, which is why it cannot be recommended. Nor would public policy, defined in terms of its traditional components alone, offer a firmer basis for a general ban...'[137]

The *Conseil* was mindful of the principles of secularism but also considerate of the jurisprudence of the ECtHR when arriving at its decision against any general prohibition in the following terms: 'secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space as indeed the ECtHR recently ruled [*Arslan v Turkey*[138]].'[139] It is clear from the foregoing that the *Conseil* did not consider that

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[134] See; *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [2.1] and [2.2].

[135] Couseil d'Etat Report and Studies Section, *Study for Possible Legal Grounds for Banning the Full Veil; Report adopted by the Plenary General Assembly of the Conseil d'Etat* (23 March 2010).

[136] Couseil d'Etat Report and Studies Section, *Study for Possible Legal Grounds for Banning the Full Veil; Report adopted by the Plenary General Assembly of the Conseil d'Etat* (23 March 2010) 19.

[137] Couseil d'Etat Report and Studies Section, *Study for Possible Legal Grounds for Banning the Full Veil; Report adopted by the Plenary General Assembly of the Conseil d'Etat* (23 March 2010) 19.

[138] *Arslan v Turkey* App no 41135/98 (ECtHR, 23 February 2010).

[139] Couseil d'Etat Report and Studies Section, *Study for Possible Legal Grounds for Banning the Full Veil; Report adopted by the Plenary General Assembly of the Conseil d'Etat* (23 March 2010) 20. See also; Couseil d'Etat Report and Studies Section, *Study for Possible Legal Grounds for Banning the Full Veil; Report adopted by the Plenary General Assembly of the Conseil d'Etat* (23 March 2010) 21 'The principle of secularism alone would not, therefore, provide a basis for a blanket ban on the full veil.'

social policies, influenced by secularism, could withstand the scrutiny of the ECtHR; however, such 'secularist justifications'[140] may have indirectly informed the social policy considerations afforded such significance in the decision of the ECtHR in *S.A.S. v France*[141] which is considered in further detail at a subsequent juncture in this thesis.[142] In the course of the judgment of the ECtHR in *S.A.S. v France*,[143] the court observed that '[a]mong all these cases concerning Article 9, *Ahmet Arslan and Others* is that which the present case most closely resembles...';[144] however, the court continued to distinguish the circumstances from the present case observing that 'the full-face Islamic veil has the particularity of entirely concealing the face'.[145]

It can be said that the direct applicability of this case, centrally concerning the secularist restriction of religious freedom and the continued citation of 'policy considerations' in the French context, must be read in view of the secularist policy considerations which lay at the heart of the determination of the *Conseil d'Etat*. To this end, it must be emphasised that the *Conseil* examined the prohibition of the Islamic veil on the basis of secularism as a mechanism to realise the social policy of 'living-together' which the judgment in *S.A.S.*[146] separately identified. It must be further recalled that the previous French limitations have identified secularism as a system to diminish social fragmentation.[147] This was a fundamental justification for the limitation of religious expression in public schools where ostentatious religious symbols were considered to interfere with community cohesion.[148] While the ECtHR found that the limitation of the right of religious expression on grounds of 'living together' was justified as opposed to secularism, such must be considered as inconsistent with the domestic determination of the *Conseil d'Etat* where secularism was fundamental to 'living-together'. Upon this basis, it can

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[140] Eoin Daly, 'Restrictions on Religious Dress in French Republican Thought: Returning the Secularist Justifications to a Rights-Based Rationale' (2009) 31 DULJ 154.
[141] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[142] See; s 4.6.
[143] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[144] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [136].
[145] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [136].
[146] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[147] Christian Joppke, *Veil: Mirror of Identity* (Polity Press 2009) 122. See also; Cécile Laborde, 'Secular Philosophy and Muslim Headscarves in Schools' (2005) 13(3) JPP 316.
[148] Patrick Weil, 'Lifting the Veil of Ignorance' (2004) 3(1) PP (non-paginated) 19; '...in the schools where some girls are wearing the headscarf, the Muslim girls who do not wear it are subject to strong pressure to do so.'

be considered that the social policy interests regarding secularism where of some applicability in the decision of the ECtHR; however, it cannot be said that such a constitutional model was sufficient to exclusively justify a general prohibition of the veil.

The following section proposes to consider the subjective interpretations of individuals who wear the Islamic veil in order to make a determination as to whether it can be interpreted objectively as an expression which is incompatible with the Convention. It will be demonstrated in greater detail that scholarship has neglected the argument that the Islamic veil can be a symbol of gender empowerment and gender equality and can be entirely consistent with the same values in the contemporary sphere.[149] It could be argued that the Islamic veil is entirely consistent with the values of secularism where the individual at the centre of the act does not propose to enable religion to disproportionately influence the political sphere nor does the individual desire the State to participate in their religious sphere.

Secularism has at its heart the equalising concept between peoples of varied backgrounds and, while perceived sometimes as an attack on religion, it may continue to evolve as a policy to foster religious expression. The veil could be seen as a religious expression which does not threaten secular values.[150] Indeed, religious expression is capable of protection under Articles 9 and 10 of the ECHR and accordingly must be considered as any other expression which is permissible in the increasingly varied demography of the Contracting States. Those same States which advance such social policy considerations are not justified in the limitations of expressions which merely 'offend, shock or disturb.'[151] While secularism can, at times, clash with religious interests it would be disproportionate to remove all religious expressions on this basis.[152]

Daly notes that '*laïcité* is not a coherent philosophy',[153] nor can it be stated that there is any pan-European consensus on secularism. Furthermore and most significantly,

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[149] See; s 4.5.1.
[150] The concept of 'threat' for the purposes of limitation is discussed subsequently. See; s 4.7.3.
[151] *Handyside v United Kingdom* (1976) Series A no 24 [49].
[152] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002) [60].
[153] Eoin Daly, 'Ostentation and Republican Civility: Notes from the French face-veiling debates' (2015) 14(3) EJPT 301.

secularism is not a right under the ECtHR.[154] It should not be afforded disproportionate weight in any balancing exercise against the right to religious expression. The French *laic* model, and potentially other secular models, may be adequate considerations in an examination of any potential limitation of religious expression based on their unique circumstances; however, it appears that, as a single ground for limitation, it may prove insufficient to justify such a restriction of the religious expressions of individuals. Further, a complete restriction of the Islamic veil based on secularism or *laïcité* would be insufficient to justify the enormous infringement on the rights of religious adherents. This thesis is of the view that the limitation of religious expression on the basis of secularism or *laïcité* would constitute a disproportionate interference with the right to religious expression.

4.5 Gender Equality

Gender equality is an important and living ideal for every European Member State.[155] While the right to equality generally is enshrined in Article 40 of *Bunreacht na hÉireann*, and codified in various domestic statutes,[156] Hogan and White comment that the 'jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped.'[157] As such, this section relies broadly upon the jurisprudence of the ECtHR, the European Court of Justice and the law of the European Union.

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[154] *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011, Concurring opinion of Judge Bonello [2.2]: '...secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance...are not values protected by the Convention and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion.'

[155] Yvonne Galligan and Sara Clavero, 'Formulating the Goods and Services Directive in the European Union: a lost opportunity for gender equality' in Yvonne Galligan (ed), *States of Democracy; Gender and Politics in the European Union* (Routledge 2015) 21.

[156] See; Employment Equality Act 1998, Equal Status Act 2000; both of which prohibit discrimination of any kind based on gender. See also; Irish Human Rights and Equality Commission Act 2014 which consolidates previous equality legislation and purports to, *inter alia*, protect and promote human rights and equality and develop a culture of respect for human rights.

[157] Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) [7.2.05]. See also; Alastair Purdy, *Equality Law in the Workplace* (Bloomsbury 2015) [3.01] 'Most equality initiatives in Ireland can trace their origin to EU Directives. The amount of policy development in the EU over the nine grounds varies considerably. In some areas, there is a long history of EU intervention and policy development, most notably in the area of gender equality. In other areas, however, such as family and sexual orientation, it is less so.'

The ECJ has observed that gender equality, unlike secularism, is a fundamental human right which must be protected.[158] Further, it has been observed that gender equality 'is the most highly developed aspect of the EU social policy and has long been considered a core right.'[159] The principle of gender equality can be evidenced in various European legal instruments. [160] In light of the most recent treaty, Burri and Prechal observe that '[t]he Lisbon Treaty emphasises even further the importance of the principle of non-discrimination and equality as fundamental principles of EU law.'[161] The second recital of the Treaty of the European Union now observes that Member States shall draw:

> 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, *equality* and the rule of law.'[162]

This amendment, emphasising the inviolable and inalienable right of equality, amongst others, illustrates the expanding significance of gender equality in the contemporary legal and European sphere.[163] The ECtHR has a special role in protecting against discrimination on the basis of gender.[164]

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[158] Case C-185/97 *Belinda Jane Coote v Granada Hospitality Ltd* [1998] ECR I-5199 [23]; Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; Koen Lenaerts, Piet van Nuffel, *European Union Law* (3rd edn, Sweet and Maxwell 2011) [7-057].

[159] European Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (Council of Europe 2007) 90.

[160] See; The Treaty on European Union art 2 – 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'; The Treaty on European Union art 3. – '...It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.' European Charter of Fundamental Freedoms art. 23 – 'Equality between men and women must be ensured in all areas...'; *Europe*an Commission, Strategy for Equality Between Women and Men 2010-2015 adopted September 2010 8 – 'Equality is one of five values on which the Union is founded. The Union is bound to strive for equality between women and men in all its activities. The Charter of Fundamental Rights provides for such equality and prohibits sex discrimination';

[161] Susanna Burri, Sacha Prechal, *EU Gender Equality Law Update 2013* (European Commission 2014) 3.

[162] Treaty of Lisbon art 1(1)(a). (Emphasis added)

[163] Evelyn Ellis, 'The Impact of the Lisbon Treaty pm Gender Equality' *European Gender Equality Law Review 2010-1* (European Commission 2010) 7-8.

[164] European Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (Council of Europe 2007) 90.

It is clear from the prescriptions of the *Qur'ān* that a greater burden of modesty is placed on women than upon men.[165] This does not automatically amount to discrimination yet circumstances may demonstrate that the operation of an adherence can be discriminatory on the basis of gender or can itself encourage discrimination. This interpretation may not exclusively be a consequence of the religious belief; indeed, while religion may be at the heart of the action, its manifestations may be impacted by cultural norms which are at odds with European principles previously outlined and disconnected from religious belief.[166]

This argument is complicated by the multiple definitions of equality.[167] The Council of Europe commissioned a report into gender mainstreaming which published its results in 1998.[168] This report devoted a short section to defining gender equality. It distanced itself from the objective concept that equality was limited to the legal guarantee of equal rights, opportunities, conditions and treatment for women and noted that equality should encompass subjective features which recognise the complementary nature of the sexes.[169] The report notes that this includes the right to be different.[170] This moves the concept of

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[165] The modesty requirement of Islam is incumbent on both men and women however it is clear from *Surah* 24, An-Nur, that this is prescribed to a lesser extent in the case of males. See; *The Qur'ān* (OUP 2005) *Al-Nur* 30 – '[Prophet], tell believing men to lower their glances and guard their private parts: that is purer for them. God is well aware of everything they do.'; *Al-Nur* 31'[a]nd tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms accept to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as do attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believe, all of you, turn to God so that you may prosper.'

[166] See; s 4.2.2.

[167] European Network of Legal Experts in the field of Gender Equality, McCrudden C, and Prechal S, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach'(European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, November 2009) <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9> accessed 2 December 2014.

[168] Council of Europe, 'Final Report of Activities of the Group of Specialists of Mainstreaming: Gender Mainstreaming; Conceptual framework, methodology and presentation of good practices' (Strasbourg, May 1998).

[169] Council of Europe, 'Final Report of Activities of the Group of Specialists of Mainstreaming: Gender Mainstreaming; Conceptual framework, methodology and presentation of good practices' (Strasbourg, May 1998); European Network of Legal Experts in the field of Gender Equality, McCrudden C, and Prechal S, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach'(European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, November 2009) <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9> accessed 2 December 2014.

[170] Council of Europe, 'Final Report of Activities of the Group of Specialists of Mainstreaming: Gender Mainstreaming; Conceptual framework, methodology and presentation of good practices' (Strasbourg, May 1998) 8.

equality towards an analysis of gender-based power evidenced in feminist jurisprudence.[171] It asserts that the differences in the genders can be both natural and positive and that the concept of equality should not attempt to make gender the same.[172] This focus on power and the relationship of power is challenging in the context of the veil because of the divergent and contrasting opinions regarding the substance of veiling. The European Commission recognised the varied and inconsistent interpretations of equality in a paper prepared by McCrudden and Prechel.[173] They note that 'despite there being many common definitions of the central concepts of gender equality law...there is a fair chance that the concepts are understood and applied differently and that confusion also exists here.'[174]

Feldman has identified several conceptions of equality which have been summarised by Hogan and Whyte in the following terms:

> '(a) to be treated equally by others (regardless of whether that leaves them in similar positions afterwards);
> (b) to be placed in a similar position (regardless of whether that involves unequal treatment);
> (c) to be equally free to exploit whatever abilities or property they may have without interference (which is very likely to lead to different results for each person); or,
> (d) to be assisted (unequally) so that they have an equal opportunity to exploit their different talents.[175]

It could tentatively be suggested that European Union law has envisaged equality in a comparative manner to the first ground identified by Feldman. Direct discrimination has been defined by the Gender Directive (recast) as 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable

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[171] Catharine MacKinnon, *Feminism Unmodified* (Harvard University Press 1987); Catharine MacKinnon, *A Feminist Theory of the State* (Harvard University Press 1989); M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell 2002) 1128.
[172] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell 2002) 1128.
[173] European Network of Legal Experts in the field of Gender Equality, McCrudden C, and Prechal S, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach'(European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, November 2009) <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9> accessed 2 December 2014.
[174] European Network of Legal Experts in the field of Gender Equality, McCrudden C, and Prechal S, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach'(European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, November 2009) <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9> accessed 2 December 2014.
[175] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002) 134; Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) [7.2.01].

situation.'[176] This Directive can assist the construction of a definition of equality whereby it is a corollary to suggest that one is equal where they are treated in a comparable fashion to another.

Discourse has also emphasised the value which European Union equality measures have ascribed to 'an equal and fair prospect to *access* opportunities'.[177] It is upon this basis that European Union law has been proactive in advancing gender equality as a social policy. Article 10 of the Treaty on the Functioning of the European Union emphasises that Member States have obligations to advance gender equality when implementing domestic policies in a view to advancing society. It states that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'[178]

It is clear that gender equality is a right and further that it is a fundamental concern of both the domestic and European institutions; however, there is no clear definition of equality. It is not the purpose of this thesis to attempt to define equality in conclusive terms in the midst of such varied and legitimate discourse; however, it is appropriate to note the prominent theories outlined above when embarking upon the present examination of the gender equality and the Islamic veil. While perhaps not universal in applicability, a version of equality largely witnessed in feminist jurisprudence based on power distribution may be most applicable to the present analysis.[179] As such, the consideration of equality herein is made with reference to this power orientated theory.

Many academics have successfully contributed to the discourse concerning the Islamic veil constructing their arguments on gender equality.[180] This thesis does not intend

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[176] Art 2(1)(a), Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
[177] European Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (Council of Europe 2007) 21. (Emphasis added).
[178] Treaty on the Functioning of the European Union art 10.
[179] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell 2002) 1128.
[180] See; Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7(1) MJIL 65; Myriam Hunter-Henin, 'Why the French don't like the burqa: laïcité, national identity and religious freedom' (2012) 61(3) ICLQ 613; Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66(3) CLJ 657.

to contribute to this already comprehensive field of study save to recognise its legitimacy within the wider arguments concerning the Islamic veil and its restriction in the public square. It is true that each Contracting State has inherent normative values which inform the debate in each context. These values place a burden on individuals to interact with them in a meaningful manner. The following proposes to consider, in more detail, the counterarguments of personal autonomy and coercion against the limitation of the veil based on gender equality and the objective understanding of the veil as an object of gender equality informed by wider European interests. It attempts to illustrate the complications surrounding restrictions of the veil constructed upon normative conceptualisations of gender equality. It takes into consideration the most recent judgment of the Federal Constitutional Court of Germany in the matters of BVerfG 471/10 and BVerfG 1181/10 regarding the veil and the observations therein pertaining to the limitation of the Islamic veil on the basis of gender equality.

4.5.1 Gender Equality and Personal Autonomy

Whilst this thesis has largely disregarded the impact of individual autonomy on the right to religious expression, this familiar liberal concept has been widely adopted for arguments concerning the Islamic veil and its limitation. [181] It is upon this basis that this section considers the claim of personal autonomy in adopting the Islamic veil. In the judgment of *Dahlab v Switzerland*[182] the ECtHR observed that the Islamic veil is 'hard to square with the principle of gender equality.'[183] The veil has long since contributed to the perception that Islamic women are inferior to their male counterparts on the grounds of

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[181] This thesis has considered the right to religious expression largely in the absence of personal autonomy due to the significance which it attributed to the ability of the religious adherent to conform, or act in accordance to, the prescriptions of their conscience. Autonomy places emphasis on the ability of the individual to exercise single authority over themselves. This is not consistently a characteristic of religious expression where individuals may feel that they have no choice but to submit to a divine or non-divine entity or conscientious orientation. This is not to suggest that arguments based on personal autonomy are invalid nor is it to be interpreted as a rejection of autonomy. It is to be interpreted as a willingness to approach the right to religious expression from the perspective of liberal political theory and with reliance upon pure rights arguments. This was advanced in the third chapter of this thesis. See; s 3.4.

[182] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).

[183] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].

gender.[184] Contemporary arguments for the restriction of the Islamic veil have regarded it as contributory to the oppression of women on the basis of its ability to restrict women's equal participation in the public sphere.[185] This perception was illustrated by French Immigration Minister Eric Besson who described the Islamic veil as a 'walking coffin';[186] yet, this approach can neglect the reality that wearing the veil can be primarily informed by autonomous conceptions of religious belief.[187] In this circumstance, the court must consider if the use of the veil can constitute an attack on the principle of gender equality and, if so, consider its ability to interfere with the religious freedom of individuals who seek to express their religion in this manner.

Mancini argues that the veil has been caught in a clash of values with the expansion of Islamic communities in Europe and that the label of gender inequality has been affixed to the veil to justify its restriction in order to 'restore normality' in the Western sphere.[188] She contends that 'this otherwise frankly racist discourse is camouflaged under the dialect of the insurmountability of cultural difference.'[189] Laborde makes the point that the veil, in fact, has the power to equalise men and women within a religious framework when adopted in the absence of coercion.[190] Recalling that the general construction of equality adopted for the purpose of this chapter is grounded in power distribution,[191] she claims that the *ḥijāb* 'is a symbol of individual empowerment, whereby young women assert their right to gain direct access to the sacred texts of Islam, without the mediation of male religious authorities'.[192] Her view is shared by Borneman who further contends that 'most women who veil do so in order to enter that public sphere on particular terms...'[193] Perceptions of

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[184] Valerie Behiery, 'A Short History of the (Muslim) Veil' (2013) 16(4) IR 389.
[185] Monica Mookherjee, *Women's Rights As Multicultural Claims: Reconfiguring Gender and Diversity in Political Philosophy* (Edinburgh University Press 2009) 131
[186] Nabila Ramdani, 'French *burqa* debate is a smokescreen', *The Guardian* (London, 8 July 2010).
[187] Valorie K. Vojdik, 'Politics of the Headscarf in Turkey: Masculinities, Feminism and the Construction of Collective Identities' (2010) 33(2) HJLG 671.
[188] Susanna Mancici, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projections and cultural racism' (2012) 10(2) IJCL 413-414.
[189] Susanna Mancici, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projections and cultural racism' (2012) 10(2) IJCL 414.
[190] Susanna Mancici, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projections and cultural racism' (2012) 10(2) IJCL 414.
[191] See; s 4.5.
[192] Cécile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10(2) IJCL 401.
[193] John Borneman, 'Veiling and Women's Intelligibility' (2009) 30(6) CLR 2755.

the Islamic female as victim[194] tend to deflect from the reality that an increasing number of Islamic women operate in the contemporary sphere as educated and veiled.[195] The veil functions to enable the individual to participate in the public sphere in an equal capacity with their male counterparts while adhering to the demands of their religious conscience. Veiling then could be considered as an action of gender assertiveness and, as such, can evidence the absence of suppression but illustrate a demonstration of feminine liberation and moral decisiveness.

The veil is capable of multiple interpretations when read from a subjective perspective.[196] Indeed the type of Islamic veil can impact on its categorisation as a tool for gender equality. Hannan conducted an empirical study regarding the Islamic veil and included information regarding the reasons for wearing, or indeed not wearing, the Islamic veil amongst Islamic women. Hannan's information tends to demonstrate that women who elect to wear the *ḥijāb* in opposition to other garments often perceive themselves to be empowered and found that they feel most drawn to the concept that the use of the *ḥijāb* identifies them with their belief.[197] Her research demonstrates that the women who wear the *niqāb* or *burqā* appear weaker and identified protection as a reason for wearing the veil.[198] This research is authority for the proposition that some women, namely those who wear the *ḥijāb*, do so in order to participate in society in accordance with their beliefs. This does not support the argument that the veil is inherently oppressive to women. While the indications of the second group are less positive, insofar as they perceive themselves to be in some degree of danger from men, the veil can function as a comfort to these individuals who are free to carry out reasonable measures to ensure their safety regardless of whether the majority view might dismiss the reality of such a threat.

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[194] Mohja Kahf, *Western Representations of the Muslim Woman: From Tergamont to Odalisque* (University of Texas Press 1999) 5-8.
[195] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press 1996) 95-96.
[196] Hilal Elver, *The Headscarf Controversy; Secularism and Freedom of Religion* (OUP 2012) 67.
[197] Rabiha Hannan (eds), 'An Exploration of the Debates Pertaining to Head Covering and Face Veiling of Women in the British Muslim Context' in Theodore Gabriel and Rabiha Hannan (eds), Isla*m and the Veil: Theoretical and Regional Contexts* (Continuum International Publishing Group 2011) 93.
[198] Rabiha Hannan (eds), 'An Exploration of the Debates Pertaining to Head Covering and Face Veiling of Women in the British Muslim Context' in Theodore Gabriel and Rabiha Hannan (eds), Isla*m and the Veil: Theoretical and Regional Contexts* (Continuum International Publishing Group 2011) 91.

While Laborde's comments that the veil can be a symbol of empowerment are significant, her garment specific analysis must be considered in any application of her research of the full face veil.[199] Her research also focused on a more important concept of individual autonomy as a defence against the veil being prohibited on the grounds of gender equality. As a person is guaranteed their autonomy, they have the autonomous right not to exercise same and take on a symbol of heteronomy freely.[200] From this it can be asserted that a person is equal and their right to be equal is guaranteed regardless of gender; however, this same person can refuse to monopolise on the guarantees of this right freely and accept that, while their gender equality is guaranteed, they do not assert claims of equality in lieu of a perceived higher purpose of religious purity. This thesis has transcended this argument based on autonomy and asserted that, for many, religious expression is not a choice but a personal requirement informed by the fundamental significance of the religious conscience in the life of the adherent.[201] The authority of such a right is highly significant in any limitation based on perceived gender equality where a belief is freely subscribed to.

The Federal Constitutional Court of Germany has given judgment in the matters of BVerfG 471/10 and BVerfG 1181/10.[202] This case was grounded on an application on behalf of two Islamic women who alleged that the restriction on wearing the Islamic veil during the course of their employments, as a social worker and a teacher respectively, was a disproportionate interference with their right to freedom of religious expression. The observations of the court at para 64 are significant:

> *'Das Kopftuchverbot habe eine diskriminierende Wirkung. Es treffe ausschließlich Frauen und unter ihnen wiederum nur diejenigen, die ein Kopftuch trügen. Auch habe das Gesetz dazu geführt, dass die tatsächliche Durchsetzung der Gleichberechtigung für Kopftuch tragende Frauen nicht nur im Schulbereich unmöglich geworden sei und*

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[199] Laborde's analysis is exclusively constructed around the *ḥijāb*.

[200] Cécile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10(2) IJCL 403-409; at 400 Laborde identifies the veil as a symbol of heteronomy by the current understanding of the republican view. The irony exists that a symbol of difference is at the same time identified by removing the features from which we derive our difference.

[201] Brian Barry, 'Chance, Choice and Justice' in Robert E. Goodin and Philip Petit (eds), *Contemporary Political Philosophy: An Anthropology* (2nd edn, Blackwell 2006) 236.

[202] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

> *dass Nachteile geschaffen worden seien, die es zuvor nicht in dieser Ausprägung gegeben habe. Schließlich seien muslimische Frauen insoweit benachteiligt, als anderen Religionen das Kopftuch als Teil der Religionsausübung unbekannt sei. Das Kopftuchverbot habe aus selbstbewussten, integrierten und ökonomisch unabhängigen Frauen verunsicherte, ausgegrenzte und abhängige Frauen gemacht; es habe solche, die ein nicht-traditionelles Rollenbild gelebt hätten, in ein traditionelles gezwungen und muslimischen Schülerinnen, die ein Kopftuch tragen wollten, gezeigt, dass sie sich zwischen Kopftuch und Karriere entscheiden müssten.'*[203]

The decision of the Federal Court is instructive with regard to any subsequent limitation of the veil in view of gender equality. It was the view of the court that, not only is a limitation of the Islamic veil discriminatory against women on the grounds of their gender but, it functions to turn 'self-confident, integrated and economically independent women into insecure, excluded and dependent.'[204]

Consistent with the research advanced by Göle discussed earlier[205] this judgment is in agreement with the view that the Islamic veil can no longer be exclusively understood as a tool to exploit the uninformed religious adherent but functions to translate sincerely held and carefully appraised religious beliefs into the contemporary and urban contexts.[206] Any general limitation of the Islamic veil based on an objective understanding of the veil as a generic tool for gender inequality cannot be reconciled with contemporary academia which recognises the ability of individuals to take on the veil freely, mindful of their equality and that of others in the absence of coercion.[207] This is captured within the judgment of the

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[203] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [64], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html> 'The "headscarf ban" has a discriminating effect. It exclusively applied to women and among them exclusively those who are wearing headscarves. Furthermore, the ban had the result that the establishment of equality for women who wear the headscarf became impossible in schools and that it led to disadvantages for them that did not exist in the same way before. Muslim women are insofar disadvantaged, as wearing headscarves is not part of exercising religion in other confessions. The "headscarf ban" turned self-confident, integrated and economically independent women into insecure, excluded and dependent women and showed female muslin pupils, who wanted to wear headscarves, that they have to decide between wearing a headscarf and having a career.

[204] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [64], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[205] See; s 4.2.1.

[206] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press 1996) 95-96.

[207] Cécile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10(2) IJCL 403-409.

German Federal Constitutional Court which illustrates that general limitations can disproportionately infringe the freedom of individuals who seek to express their religion consistent with the values of society, encapsulated in the Convention; however, limitation may be justified in certain contexts where the 'neutrality of the State is endangered in concrete terms by substantial conflicts.'[208]

4.5.2 Gender Equality and Coercion

Individuals can be influenced by a vast range of circumstances when choosing to express their religious beliefs; however, at times it can be demonstrated that this influence can transcend the free will of an individual and can function to coerce them into performing specific behaviours. This coercion can come from 'spouses, family, communities, religious leaders or the State.'[209] Individuals who are coerced into wearing the Islamic veil can also be deprived of their equality on the basis of their gender.[210] It is clear that vulnerable individuals are particularly susceptible to coercion and require additional protection.[211] Furthermore, it is clear from the *travaux préparatoires* of Article 18 of the UDHR that the right to religious freedom was specifically crafted mindful of the required protection of individual belief against coercion.[212] Taylor suggests that participating States were particularly anxious to guard against the coercion in faith propagation, missionary activities or social action.[213] The final category is of particular application in the present examination where it has been expressed by local courts in the Contracting States that insular social

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[208] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [114], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html> see; '*Wird in bestimmten Schulen oder Schulbezirken aufgrund substantieller Konfliktlagen über das richtige religiöse Verhalten bereichsspezifisch die Schwelle zu einer hinreichend konkreten Gefährdung oder Störung des Schulfriedens oder der staatlichen Neutralität in einer beachtlichen Zahl von Fällen erreicht, kann ein verfassungsrechtlich anzuerkennendes Bedürfnis bestehen, äußere religiöse Bekundungen nicht erst im konkreten Einzelfall, sondern etwa für bestimmte Schulen oder Schulbezirke über eine gewisse Zeit auch allgemeiner zu unterbinden.*'

[209] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 14.

[210] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 14.

[211] Stijn Smet, 'Freedom of Religion v Freedom from Religion: Putting Religious Debates of Conscience (Back) on the Map' in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff 2012) 134.

[212] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 60-61.

[213] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 61.

groupings can coerce individuals, on a local basis, into acts of religious expression against their desire or interest.[214]

While the Islamic veil may have implications for the way in which the genders interact, it must be asserted that the ability to wear the veil in adherence to a sincerely held belief must be afforded fundamental protection in accordance with the right to religious expression;[215] however, the limitation of this religious expression could be justified in a situation where individuals are coerced to wear the veil or where a decision to wear the Islamic veil could coerce others to wear it against their liberty. A legitimate anxiety exists in certain Contracting States regarding the development of insular social groupings which collectively function in opposition to the liberal values which emanate from the State.[216] While an individual is free to hold a belief which may negatively impact on objective perceptions of their own gender equality, they would be legitimately restricted in any attempt to express their religious belief, through the outward display of religious symbols, were it to deprive others of that same right. The following considers the restriction of the religious expression of individuals who reject the liberal values contained within a democratic system and further the legitimate restriction of those individuals who manifest this belief coercively in order to deprive others of the benefits of liberalism within the European sphere.

Society can be said to be governed by a social contract upon which individuals collectively determine the conditions upon which they are resigned to live together.[217] Locke envisaged that humanity is capable of living in liberty; however, this does not mean that individuals have license to behave howsoever they might decide.[218] As such, certain limitations of freedom are valid when they restrict individuals from harming others in their

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[214] See; BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [114], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html> [114], see also; *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 [18].

[215] See; s 3.4.

[216] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 [18].

[217] Rawls, John, *A Theory of Justice* (Revised Edition, Harvard University Press 1999) 11.

[218] John Locke, *Two Treatises of Government* (Peter Laslett (ed), CUP 1970) 271.

life, health, liberty and possessions.[219] This concept of the social contract of rights can suggest that individual liberty is dependent on mutual respect and acceptance of the rights of others. To borrow the Rawlsian constructions; all individuals stand behind a wall of separation in order to determine what is just and fair.[220] Should an individual plead liberty in order to adhere to the demands of religious conscience it is necessary that they should recognise the parallel right of others to liberty and indeed the right to equality. Should individuals coerce others to wear the veil in order to deprive them of their right to gender equality then a restriction of the right to religious expression, in that context, could be well founded.

As mentioned at the outset of this section, gender equality is a principle shared by the Member States and a fundamental objective shared by the European Community.[221] It is a right guaranteed to every person and individual, organisations and States themselves have an obligation to protect this right against attack.[222] The failure to assert this right is distinct from the rejection of the existence of this right which can constitute an attack on a fundamental component of European citizenship. This distinction was observed in France when the application for citizenship on behalf of Faiza Silmi, who qualified on the grounds of her marriage, was rejected on the basis of her manifest belief in women's fundamental inequality with men.[223] In this circumstance a Moroccan woman's religious views were found to be incompatible with the principles of the Republic and, as such, she failed to meet the conditions of assimilation vital for any declaration of citizenship.[224]

While Western democracy is a liberal form of governance which is tolerant of debate, the ECtHR has permitted aggressive or militant democracy where a fundamental principle of law is rejected and has the ability to threaten stability.[225] In *Refah Partisi and*

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[219] John Locke, *Two Treatises of Government* (Peter Laslett (ed), CUP 1970) 271.
[220] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 12.
[221] See; s 4.5.
[222] See; s 4.5.
[223] *Conseil d'Etat* N. 286798 (17 June 2008). For facts of the case see; Charlotte Skeet, 'Globalisation of Women's Rights Norms: The right to manifest religion and Orientalism in the Council of Europe', (2009) 4 PS 34-73.
[224] *Conseil d'Etat* N. 286798 (17 June 2008), '...elle ne remplit pas la condition d'assimilation posée par l'article 21-4 précité du code civil.'
[225] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 62.

others v Turkey[226] the court was asked to determine if the applicant's freedom to associate had been violated by the Turkish State by its order that the party be dissolved and its assets transferred into the State treasury. The political party promoted the implementation of theocracy in Turkey and the facilitation of Sharia law.[227] The ECtHR found that the applicant's freedom of association had been infringed; however, the interference was proportionate due to the threat which the party manifested to the principles of democracy.[228] Democracy, like gender equality, is a founding principle of the European Union and by the authority of this judgment, an organisation which directly challenges these foundational principles can be curtailed so as to maintain the stability of the Union.

In the case of *Refah*[229] the party leaders had been restricted domestically from holding office for five years and this was again upheld by the ECtHR as 'necessary in a democratic society'.[230] The principles illustrated in this case are significant for individuals who coerce others into wearing the veil. In this circumstance, the court has authorised the limited interference with the personal freedoms of individuals to protect the freedoms of others;[231] however, it must be demonstrated that the actions are such that they pose a fundamental threat to society. The actions of *Refah Partisi* were militant and organised. As such their restriction could logically be justified as necessary to protect social order. A solitary individual may themselves find it impossible to represent a similar threat to society; however, were individuals to orchestrate themselves in common or participate in a movement which may organise them, then it is foreseeable that they could represent a similar threat to the rights of others.[232]

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[226] *Refah Partisi and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003).
[227] *Refah Partisi and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) [127].
[228] Article 5 of the Constitution of Turkey states that democracy is a fundamental aim of the State. Article 2 of the *Treaty of the European Union* also states that the 'Union is founded on...democracy...' theocracy is a basic form of government which is in opposition to democracy.
[229] *Refah Partisi and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003).
[230] *Refah Partisi and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) [135].
[231] *Refah Partisi and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) [92].
[232] See; s 4.2.1.

In this circumstance, the characterisation of the veil as a symbol of resistance is significant as it could serve to unite a corpus of individuals into one organisation which may represent a legitimate threat for the individual liberty of others. This analysis does not suggest that an organisation may need to mobilise on a national level. An organisation may simply represent the majority in a minority context.[233] The concept of an organisation exerting pressure on individuals can be seen in local minority communities which have manifested their influence on schools and social institutions. In this context, a small but organised group can legitimately exert social pressure on individuals which may endanger their fundamental equality.[234] A limitation of religious expression in this context may be advisable.

Restricting the Islamic veil when it is used in a coercive manner contrary to the gender equality of others is most successful when considering the style of protectionist democracy practiced by the Contracting States to the European Convention. As previously stated, movements which have the rejection of a primary consequence of democracy as their objective can be suppressed and their individuals sanctioned when to do so is a justified and proportionate limitation of their right to assemble and express their beliefs. The authority for this rests with the European judgment of *Refah Partisi and others v Turkey*[235] yet the axis of application lies in the potential for instability. In the *Refah* case, the political party had the potential of succeeding to power and renouncing democracy; however, it does not follow that individuals who lead a life in opposition to democracy can potentially destabilise it to the same extent.

This could also be linked to the circumstances in *R (Begum) v Head teacher*[236] in which the brother and litigant friend of the applicant was part of the Islamic group *Hizb ut-Tahrir*, a 'party of liberation', which aims to unify the world under the Islamic State or Caliphate. This theocratic movement took a fundamental and conservative approach to

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[233] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [3-4].
[234] See; *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.
[235] *Refah Partisi and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003).
[236] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

Islam and, while it cannot be stated that the purpose of the expression of the applicant was political, it should be considered alongside the judgment's limitation. A rejection of gender equality has the potential to destabilise democracy in two circumstances; the national and the local. While it cannot be said that a movement consisting of one hundred people has the capacity to destabilise democracy on a national level it can constitute a considerable threat within a local community. This movement would have a greater impact in minority communities which have distinguished themselves on cultural, ethnic or religious grounds. As in *R (Begum)*[237] the local community and its religiously fundamental components were having a large impact on the girls of the school. In these circumstances a comparatively small group constituted a dangerous threat to democracy on a local level.[238]

The sentiment of this judgment was echoed in the decision of the Federal Constitutional Court of Germany in the case of BVerfG 471/10 and BVerfG 1181/10[239] where it recognised that limitations of religious expression, or 'preventative locally orientated action', could be justified in specific contexts where it had become apparent that the rights of others had become endangered.[240] The court stated that:

> *'Wird in bestimmten Schulen oder Schulbezirken aufgrund substantieller Konfliktlagen über das richtige religiöse Verhalten bereichsspezifisch die Schwelle zu einer hinreichend konkreten Gefährdung oder Störung des Schulfriedens oder der staatlichen Neutralität in einer beachtlichen Zahl von Fällen erreicht, kann ein verfassungsrechtlich anzuerkennendes Bedürfnis bestehen, äußere religiöse Bekundungen nicht erst im konkreten Einzelfall, sondern etwa für bestimmte Schulen oder Schulbezirke über eine gewisse Zeit auch allgemeiner zu unterbinden. Einer solchen Situation kann der Gesetzgeber insoweit auch vorbeugend (vgl. BVerfGE 108, 282 <306 f.>) durch bereichsorientierte Lösungen Rechnung tragen. Dabei hat er, gerade in großen Ländern, die Möglichkeit, differenzierte, beispielsweise örtlich und zeitlich begrenzte Lösungen vorzusehen, gegebenenfalls etwa unter Zuhilfenahme*

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[237] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

[238] *(on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [18].

[239] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[240] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [114], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

> *einer hinreichend konkretisierten Verordnungsermächtigung. Auch im Fall einer solchen Regelung wird im Interesse der Grundrechte der Betroffenen zunächst eine anderweitige pädagogische Verwendungsmöglichkeit in Betracht zu ziehen sein.'*[241]

The court recognised that, while limitations may be appropriate, these must be made in limited locally orientated contexts with reference to a specific threat. It is clear that coercion is a specific threat to individual liberty;[242] however, it could be argued that the limitation of religious expression on this basis may in fact be understood to amount to coercive ideological assimilation on the part of a Contracting State.

Paragraph 4 of the UNHRC's General Comment No 22 was discussed during the course of the second chapter of this thesis.[243] Certain aspects of paragraph 5 of that same comment are applicable in the present context:

> '...Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by Article 25 and other provisions of the Covenant, are similarly inconsistent with Article 18.2...'[244]

Scheinin suggests that a limitation of religious expression, in the present circumstances regarding the Islamic veil, could in itself amount to coercive behaviour, on behalf of the

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[241] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [114], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html> 'If it becomes apparent that certain schools or school districts show a substantial number of cases in which the peace of the school system or the neutrality of the State is endangered in concrete terms by substantial conflicts over adequate religious conduct, there may be a constitutionally acknowledged requirement for limiting or forbidding external expressions of religion for specific schools or districts (this becomes relevant even before a time when individual cases make this a concrete requirement). In such cases the legislature may preventively (vgl. BVerfGE 108, 282 <306 f.>) take locally oriented action. The lawmaker has the possibility to differentiate between locally targeted and temporary solutions, especially regarding bigger federal states; this may be established with the aid of appropriate, concrete authority to apply directives. In those cases, the lawmaker will act respecting the basic rights of affected parties and will consider alternative pedagogical steps first.'

[242] Robert Audi, 'Natural Reason, religious conviction and the justification of coercion in democratic societies' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012) 66.

[243] See; s 2.7.1.

[244] United Nations Human Rights Committee, *General Comment No 22* (UN Doc HRI/GEN/1/Rev.1 at 35 (1994)) [5].

State, within the meaning of Article 18(2).[245] He posits that a limitation of religious expression which would deprive an individual of 'education, medical care, employment or the rights guaranteed by Article 25 and other provisions of the Covenant' would, in itself, amount to coercion on the basis that it would cause an individual to have to choose between their religious conscience or the ability to actively participate in society.[246]

It is accepted that coercion can be widely interpreted to the extent that many of the realities of life can be understood to coerce certain forms of behaviour. Indeed many external forces can influence the expressions of individuals, or more particularly women in the present examination, from social peers to the wider fashion industry; however, to return to the opening statement of this section, coercion must be understood as a transcendence of influence. It requires a degree of limitation to be placed on the individual to functionally make free and informed decisions. It requires a general deprivation of liberty. Where this liberty is not deprived, any limitation of the religious expression influenced by social action or religious leaders would be a disproportionate infringement of the rights of the individual under Article 9 or 10 of the Convention or indeed under Article 18 or 19 UDHR where applicable.

The State would be justified in its locally oriented restriction of the Islamic veil in circumstances where it can be demonstrated that individuals were being coerced into wearing same and deprived of their right to gender equality.[247] These circumstances would occasion compelling justification for the restriction of the veil; yet, the court must satisfy itself that the decision to wear the veil facilitates the coercion of others to do the same to such an extent that these individuals feel deprived of the protections of the liberal system in

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[245] Martin Scheinin, 'International Human Rights Law and the Islamic Headscarf: A Short Note on the Positions of the European Court of Human Rights and the Human Rights Committee' in W. Cole Durham Jr, Rik Torfs, David M. Kirkham and Christine Scott (eds), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012) 85-86.

[246] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [64], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[247] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [64], accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

which they reside. This high threshold test could rarely be satisfied on a broad national basis.

4.5.3 Gender Equality and Objectivity

The previous sections have demonstrated that the legal restriction of the Islamic veil is compromised when it fails to take into account the value of individual autonomy, when asserted and applicable, and the subjective importance of religious expression in the lives of the religious adherent. It has accepted that restrictions are compatible with the Convention where the fundamental rights and values of society are undermined by the veil or in circumstances where it is used as a coercive tool to subjugate women within the European sphere. However, restrictions on the foot of such anxieties would require a high degree of scrutiny and could perhaps only be proportionate within limited contexts and perhaps not throughout any jurisdiction. The following purports to illustrate how discourse, which has emphasised the oppressive qualities of the Islamic veil, has failed to consider the use of the veil as a gender affirming tool in a context where the substance of gender equality and individual liberty are questioned.

The writings of Mancini were referred to earlier when she suggested that the prohibition of the Islamic veil is a consequence of the clash of values between the occidental and oriental spheres.[248] Discourse which suggests that the veil is a symbol of gender equality at times fails to sufficiently appreciate the real clash of values between Islamic, religious and a neutral Europe. It could be suggested that, within the European sphere, the veil functions to affirm the equality of women in the face of competing interests which could be considered as liberal to some observers and harmful to others. Feminist scholarship has often misrepresented gender equality and consequently 'othered' Islamic women until recent years.[249] Blore reminds us that this misguided perception of feminism 'leads to the

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[248] Susanna Mancici, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projections and cultural racism' (2012) 10(2) IJCL 413-414.

[249] See; Kent Blore, 'A Space for Feminism in Islamic Law? A Theoretical Exploration of Islamic Feminism' (2010) 17(2) ELMUEJL 5: Blore notes how 'Western feminists espoused the universality of patriarchal oppression, but in so doing imposed generalised Western experience on, and 'othered', the non-Western world.' He further reminds us that this misguided perception of feminism 'leads to the erroneous belief that women's rights are the exclusive domain of the West.

erroneous belief that women's rights are the exclusive domain of the West.'[250] Feminist thinking has to reappraise its motivations in seeking to change the position of women in the East.[251]

Those in opposition to the veil have at times misunderstood the objectives of 'veiled' women. This scholarship has omitted the fact that the veil facilitates the separation of men from women and that this separation is intermittently supported and desired by females.[252] The veil can be re-characterised as a tool for the dignity of females who function in a sphere that can be harmful to religious interests. There is a clash between the West and the East in how to realise true gender equality and there are divergent views on what actions an individual should participate in on the basis of their gender. Western feminism has characterised feminine equality as the 'struggle for free and equal interaction with men in a free play of sexuality.'[253] Borneman notes that 'the veil often enters here as a symbol of resistance to the sirens of Western sexuality, with its generalised exchange and incitement to sex.'[254]

To consider but one cultural divergence, it cannot be overlooked that the occidental perception of sexual interaction is liberal in comparison to that in the Islamic orient. The comparatively recent sexual revolution has brought into the open air subjects once confined to the privacy of the marital bedroom.[255] Further the liberal attitude to sex and its expression can be attributed to the greater societal facilitation of sex from the widespread recognition of pornography to the normality of contraceptives encouraging a more gratuitous and enjoyable form of sex.[256] In many cases this stands at odds with traditional

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[250] Kent Blore, 'A Space for Feminism in Islamic Law? A Theoretical Exploration of Islamic Feminism' (2010) 17(2) ELMUEJL 4.
[251] Susan M. Edwards, 'No burqa we're French! The wide margin of appreciation and the ECtHR burqa ruling' (2014) 26 DLJ 257.
[252] Nilüfer Göle, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) SR 816: 'Veiling is a religious symbol inscribed on the body; it is carried personally but also conveys social information to others.'
[253] Lama Abu-Odeh, 'Post-Colonial Feminism and the Veil: Considering the Differences Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity' (1991-1992) 26(4) NELR 1535.
[254] John Borneman, 'Veiling and Women's Intelligibility' (2009) 30(6) CLR 2755.
[255] Dagmar Herzog, *Sexuality in Europe: A Twentieth-Century History* (CUP 2011) 121.
[256] Dagmar Herzog, *Sexuality in Europe: A Twentieth-Century History* (CUP 2011) 121.

religious teaching. In this regard '[European authorities] persist in the assumption...that everyone feels the same way about their bodies as the majority do.'[257]

Traditional religious adherents, in many circumstances, stand in opposition to the gratuitous form of sexual expression.[258] The veil therefore can, in some circumstances, be understood as a legitimate symbol of the rejection of the sexuality of society. Any demand placed on Islamic adherents to modify their normative values in pursuit of perceived equality through the acceptance of the sexualisation of society could be perceived as a movement to coercively change their understanding of the meaning of gender and indeed equality.[259] The feminist logic therefore fails to present sufficient argument for the total prohibition of the veil as the discourse has been tainted by the Western perception of what actually constitutes equality and consequently any coercive action to liberate these women would in fact be to disregard their liberty and their views regarding their own gender. Any restriction of the Islamic veil on the ground of gender equality would have to consider if such a restriction would function in order to coerce religious individuals to adopt a more liberal, sexual and moral viewpoint. Such actions would be contrary to the freedom of belief contained within the first proviso of Article 9 of the Convention; the inviolable *forum internum*, and incompatible with Article 18(2) of the UDHR.

There are obvious complications with the attempt to justify the restriction of the Islamic veil on grounds of gender equality. Principal amongst them would be the extent and reliability of evidence of social instability and the coercion of others through the veil which the State would be obliged to satisfy in any examination of proportionality or necessity. It is in this context that the ECtHR, in its most recent judgment of *S.A.S. v France*,[260] expressed reservation as to whether a restriction on this ground would be compatible with the

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[257] Gareth Davies, 'Banning the Jilbāb' (2005) 1(3) ECLR 527.

[258] Ralph W. Hood, Peter C. Hill and Bernard Spilka, *The Psychology of Religion: An Empirical Approach* (4th edn, Guilford Press 2009) 158; John K. Cochran, Mitchell B. Chamlin, Leonard Beeghley and Melissa Fenwick, 'Religion, Religiosity, and Nonmarital Sexual Conduct: An Application of Reference Group Theory' (2004) 74(1) SI 102; Jeremy E. Uecker, 'Religion, Pledging, and the Premarital Sexual Behaviour of Married Young Adults' (2008) 70(3) JMF 728.

[259] It can be argued that the pursuits of radical feminism often seek to change the inalienable characteristics of the female gender in pursuit of perceived equality and consequently opponents to this form of feminism can correctly state that they are unwilling to sacrifice the very nature of their gender for its perceived elevation.

[260] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

Convention.[261] It emphasised that cultural difference must be a mitigating factor when attempting to understand distinct cultural and social values such as nudity and decency.[262] As such, any potentially successful restriction of the Islamic veil based on gender equality must be predicated on compelling social circumstances supported by substantive evidence.

While this section has largely been devoted to the consideration of the fundamentality of gender equality, it must also be recognised that parallel rights exist with regard to religious equality. European Union law similarly prohibits the unequal treatment of individuals based on their religion[263] which forms part of a 'range of protections in Europe for religious interest.'[264] Hill writes that '[p]roperly nurtured, the principle of equality need not result in a retreat into secularism, but can actively promote religious liberty...'[265] Equality is not solely guaranteed by reference to gender but also to the eight other grounds commonly identified in the domestic context with reference to the Employment Equality Act 1998 to 2011.[266] Arguments constructed upon gender equality should be mindful of the parallel interests of religious adherents and organisations who may seek to express their belief legitimately and lawfully. The right or gender equality must be considered alongside the right of religious equality and both concepts, gender and religion, should not be viewed in opposition but rather in complement from the perspective of liberal political rights theory.

Gender equality is a right recognised by the ECJ and, in contrast to secularism,[267] a fundamental value of the Union.[268] So also is the right of religious expression.[269] It is the view of this thesis that any general limitation of religious expression, through the medium of the Islamic veil, in order to promote gender equality is a disproportionate interference with

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[261] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [118-120].
[262] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [120].
[263] See; *inter alia*, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
[264] Lucy Vickers, *Religion and Belief Discrimination in Employment – the EU Law* (European Commission, November 2006) 38.
[265] Mark Hill, 'Tensions and Synergies in Religious Liberty' (2013) 3 BYULR 550.
[266] Employment Equality Acts 1998 to 2011.
[267] See; s 4.4.
[268] Case C-185/97 *Belinda Jane Coote v Granada Hospitality Ltd* [1998] ECR I-5199 [23]; Koen Lenaerts, Piet van Nuffel, *European Union Law* (3rd edn, Sweet and Maxwell 2011) [7-057]; Treaty of Lisbon Art 1(1)(a).
[269] See; s. 3.4.

the Convention rights of religious adherents and an illegitimate ground for restriction, unnecessary in a democratic society and disproportionate to the aim pursued. Any such restrictions fail to appreciate the reality of women who wear the veil mindful of their gender equality which is exemplified by the number of women, who have initiated proceedings challenging veil bans, who are independent, assertive and active participants in society. In that subjective view the veil becomes a symbol of gender empowerment.[270]

It is accepted that a limitation of religious expression would be justified where evidence suggests that individuals are being coerced into adopting an expression which impedes them from exercising their rights under the Convention; however, mere suggestions that coercion is present is insufficient: 'they must be supported by concrete examples'.[271] At the same time coercion is a broad concept which is arguably present throughout society and extends to the reality that individuals are, at times, heavily influenced by a multitude of external factors from their social group and the fashion industry to political and religious leaders.[272] Contracting States must be further mindful that any restriction may be interpreted as a disproportionate coercion of religious individuals to disregard the directions of their religious conscience.[273] In light of the recent decision of the Federal Constitutional Court of Germany in the matters of BVerfG 471/10 and BVerfG it appears that this ground of limitation is largely circumscribed in the contemporary legal sphere.[274]

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[270] Cécile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10(2) IJCL 403-409.
[271] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) Dissenting opinion of Judg Tulkins.
[272] Dominic McGoldrick , *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006)14.
[273] Martin Scheinin, 'International Human Rights Law and the Islamic Headscarf: A Short Note on the Positions of the European Court of Human Rights and the Human Rights Committee' in W. Cole Durham Jr, Rik Torfs, David M. Kirkham and Christine Scott (eds), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012) 85-86.
[274] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

4.6 'Living Together'

The judgment of *S.A.S. v France*[275] endorsed the view that the Islamic veil can, in specific circumstances, be incompatible with the obligation placed upon all citizens to live together.[276] This introduced a not unknown but previously unexploited way in which religious expression, through the medium of the Islamic veil, could be restricted in the European sphere to the jurisprudence of the European Court. The ECtHR accepted the view of the French jurisdiction that:

> '...the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.'[277]

The following accepts that the Islamic veil can, in specific circumstances, obstruct the direct and indirect communication of opinion or belief.[278] It is mindful of the fact that Islamic women may themselves feel that the face veil poses no barrier to communication;[279] however, it is faced with the reality that other individuals in the public sphere may feel obstructed by this religious expression. In that vacuum of dialogue, the objective interpretation of the veil may have a particular consequence for the wearer.

S.A.S. v France[280] is now authority for the legitimate restriction of religious expression under Article 9 of the Convention on the basis of social policy issues determined by a Contracting State such as those pertaining to visual transparency and social interaction

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[275] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[276] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [122].
[277] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [122].
[278] See; the observation of the Employment Tribunal in the case of *Azmi v Kirklees Metropolitan Borough Council*, [2007] ICR 1154, [69].
[279] Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaib, Victoria Vandersteen and Jogchum Vrielink, 'The Belgian "burqa ban" confronted with insider realities' in Eva Brems (ed), *The Experience of Face Veil Wearers in Europe and the Law* (CUP 2014) 101.
[280] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

issues, presently applicable. The second chapter of this thesis examined the interpretation of Article 9[281] and emphasised the inconsistency in case law regarding the permissible limitation of religious manifestation.[282] *S.A.S.*[283] is authority for the continued diminishment of the protections of Article 9 and justifies the recourse toward the right of religious expression under Article 9 in conjunction with Article 10 of the Convention.[284] In that light, the following proposes to examine the theoretical complications with regard to the restriction of the Islamic veil due to the interests of 'living together' upon reflection of this most recent judgment of the ECtHR. In response, and in order to consider the potential merits of the decision of the ECtHR, this section continues to consider whether the restriction of the veil on the grounds of 'living-together' is appropriate in circumstances that the veil could function as an offensive expression. In that regard, it places emphasis on the discourse of McCrea who has stated that the veil could be understood to constitute offensive speech[285] and this proposition will be examined in order to determine to what extent the interest of others, under the guise of 'living together', can justify the limitation of the religious expression of sincere believers.

It is accepted that the Islamic veil can constitute a physical barrier between citizens and can function to impede communication; however, the interests of the community regarding the ability to communicate with an individual without obstruction in every context should not be afforded greater significance than the right of religious expression. According to the Millian view, individuals cannot be restricted in the exercise of their freedom save in the evidence of harm.[286] The judgment of the ECtHR in *S.A.S. v France*[287] demonstrates the danger of interpreting harm with sole reliance upon normative values and without recourse to the substance of liberal rights generally. Marshall recalls that, while there is no right to live a life of one's own choosing, democracy protects the liberty of all and enables citizens to

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[281] See; s 2.8.
[282] Bernadette Rainey, Elizabeth Wicks and Clare Ovey (eds), Jacobs, White & Ovey: The European Convention on Human Rights (6th edn, OUP 2014) 434.
[283] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[284] See; s 2.8.
[285] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 63.
[286] See; John Stuart Mill 'On Liberty' in Stefan Collini (ed), *J.S. Mill; On Liberty and Other Writings* (CUP 2003) 13.
[287] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

make decisions regarding their own welfare.[288] This is not to suggest that the ability to clearly communicate or visually examine an individual is not necessary in specific contexts, indeed such requirements are essential for security and perhaps even the fair administration of procedures; however, this is not a sufficient justification to generally restrict the freedom of an individual, as part of a minority, in the interest of the majority.

Perceptions of harm can be tainted by objective standards and normative positions which can be threatened by alien religiosity. Edwards recalls that the potential prescription regarding appropriate social interaction, interpreted in view of the decision of the ECtHR, has been abused by the court and the Contracting State to impose 'paternalist benevolence' on Islamic women in order to foster conduct which it regards as appropriate.[289] It disregards the freedom of individual communities to live with reference to alternative cultural norms.[290] Daly observes that such normative conceptualisations of harm lie in perceptively neutral and secularist policies of France. He states that:

> 'secularist appeals for religious "discretion" demarcate public and private boundaries along implicitly ethno-cultural lines, notwithstanding the neutralist republican verbage in which these duties may be presented.'[291]

Restrictions on the basis of harm have been exploited to the detriment of minorities and those who are unable to find reference to prescribed institutional norms. Law, in this context, has determined that the Islamic belief is unreasonable and further harmful without recourse to the subjective characteristics of veiling which could be held by the believer. This method of reasoning should be eschewed and a neutral appraisal endorsed.[292]

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[288] Jill Marshall, 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14(3) RP 177-178.

[289] Susan M. Edwards, 'No Burquas we're French! The wide margin of appreciation and the ECtHR burqa ruling' (2014) 26 DLJ 257.

[290] See; Bikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press 2000).

[291] Eoin Daly, 'Ostentation and Republican Civility: Notes from the French face-veiling debates' (2015) 14(3) EJPT 307.

[292] This thesis should be mindful of the aspirational character of neutrality discussed previously. See; s. 4.4.

The dissenting opinion of Judges Nussberger and Jäderblom in *S.A.S.*[293] is instructive in this regard and emphasises the significance which must be afforded to human rights as opposed to 'abstract principles':[294]

> '...we cannot share the opinion of the majority as, in our view, it sacrifices individual rights guaranteed by the Convention to abstract principles. It is doubtful that the blanket ban on wearing the full-face veil in public pursues a legitimate aim. In any event, such a far-reaching prohibition, touching upon the rights to one's own cultural and religious identity, is not necessary in a democratic society. Therefore, we come to the conclusion that there has been a violation of Articles 8 and 9 of the Convention.'[295]

The dissent continues to emphasis that 'the general concept of "living together" does not fall directly under any of the rights and freedoms guaranteed by the Convention'.[296] It can be said that the weight which the majority of the ECtHR attributed to the concept of 'living together' has been disproportionate and to the detriment to the right of religious expression as guaranteed under Article 9 and 10 of the Convention. It has interpreted Conventional rights in view, not of the liberal political system which underpins them but, according to normative and transient societal values and anxieties. As such, this thesis is of the view that the decision of the majority in this regard has been detrimentally influenced by normative standards impacting the characterisation of harm and has wrongly facilitated a general prohibition of religious expression to the detriment of sincere believers.

Accepting the above, it is necessary to recognise that this concept is now enshrined in the jurisprudence of the ECtHR. As such, this section continues to consider the merits of the prohibition in contexts where the veil could be interpreted as an offensive expression. As stated previously, the veil can facilitate the communication of political viewpoints.[297] Futher, the veil can be used as a symbol of the rejection of liberal values fostered within the

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[293] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[294] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) Dissenting Opinion of Judges Nussberger and Jäderblom [2].
[295] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) Dissenting Opinion of Judges Nussberger and Jäderblom [2].
[296] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) Dissenting Opinion of Judges Nussberger and Jäderblom [5].
[297] See; s 4.2.1.

European context.[298] Indeed a cultural divergence can be detected between certain European standards of morality and religious morality more generally.[299] Contemporary issues such as adoption, marriage, sexuality and euthanasia all function as flashpoints of controversy between the State and religious communities. In a highly charged political atmosphere the veil could be seen as a protest against the perceived moral degeneration of the European sphere enabling an analogy to be drawn with the protests which took place in the Iranian Revolution in 1979. The veil could also function as a rejection of liberal democracy and the society in which it is practiced. [300] In the limited circumstances where a community was to reject the liberty of its fellow citizens and openly manifests this rejection in the Islamic veil then the veil could be considered as an offensive expression against the rights and freedoms of others and could be argued to constitute a form of offensive speech which is capable of restriction.[301]

McCrea notes that '...while one has an almost absolute right to private autonomy, when we enter into public space certain requirements can be placed upon us.'[302] It is indeed correct that there are conditions upon which individuals enter into the public sphere; they must obey the rules of the road; they must adhere to regulations for their safety and the safety of others; generally they must refrain from conduct which would harm another individual or limit the rights and freedoms of others; however, this does not justify an absolute right to unimpeded interaction. McCrea continues to state that individuals have a duty to respect the laws and participate in the society where they reside.[303] In the absence of legislation restricting the veil then of course it is asserted that the veil cannot constitute a rejection of the law of the State; however, the degree to which an individual must be expected to participate in their society must be questioned particularly in such circumstances which may give rise to a right to interact with others in a general sense.

One of the most prominent theorists on the concept of the public sphere was Habermas who felt that the participation in politics enabled citizens to 'take positions at the

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[298] See, s 4.5.2.
[299] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008) 9.
[300] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 85.
[301] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 63.
[302] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 95.
[303] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 95.

same time on the same topics of the same relevance.'[304] Participation in the political process furthers the basic ideals of liberal democracy, reflecting the desire for fundamental truth but also providing for fairness in decision-making. The veil perhaps could function as a symbol of rejection of this political participation in circumstances outlined previously;[305] however, in the general sense participation in society cannot be understood to require the religious adherent to act in opposition to their conscience in the interest of others who may or may not want to speak with them in an unobstructed manner in the public sphere. A restriction of the veil in that context would then be disproportionate.

Indeed, the inability of individuals to openly interact with others wearing the veil has resulted in conjecture regarding what the veil is in fact symbolising.[306] As discussed in the first part of this section, restrictions of the Islamic veil can be understood to be, at times, informed by normative positioning and value judgments regarding what is proper and what is not. The veracity of a value judgment is not always susceptible to proof.[307] Thus restrictions based on perceptions without substantive evidence is demonstrative of a wider anxiety regarding alteration of normativity and the effect of increased multiculturalism. Value-based judgments with reference to overarching rights supported social policy issues can support the restriction of offensive conduct.[308]

Where a society places a value on equality, based on gender, sexuality and race, these can be considered to form part of the normative morality of that jurisdiction. This equality is guaranteed under the Convention and the Treaty of the European Union, as discussed previously,[309] as consequently can be considered as rights supported social policy issues. Were it demonstrated that the Islamic veil coercively functioned to obstruct the rights of others, in frustration of the wider obligation placed on society to live together, then it could be argued that the veil was a manifestation of offensive speech. In the first

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[304] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998) 306.
[305] See; s 2.5.2-2.5.3.
[306] Gareth Davies, 'Banning the Jilbāb' (2005) 1(3) ECLR 520.
[307] Pieter van Dijk, Fried van Hoof, Arjem van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 795.
[308] Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech' (2014) 62(3) AJCL 753.
[309] See; s 4.5.

instance, this speculative scenario would require a high burden of proof; however, were the circumstances, which took place in the Iranian Revolution, to be replicated in the European sphere, such a claim may be possible; yet, this gives rise to parallel arguments of the legitimate political movement for societal modification. Characterising the Islamic veil as an offensive expression in and of itself would not justify its restriction. Individuals enjoy freedom of expression, under Article 10, to views which are offensive; which shock, disturb and offend.[310] This was re-emphasised by Judges Nussberger and Jägerblom in their dissenting opinion in the case of *S.A.S.*[311] Individuals are at liberty to engage in expressions which can rightly challenge others by the presentation of assertive and potentially controversial viewpoints.[312] The freedom is expansive. While this was considered in greater detail during the course of the third chapter of this thesis, the breadth of this freedom can be illustrated in the present circumstances with reference to the judgment of the ECtHR in *Hashman and Harrup v United Kingdom*.[313] In that case, the ECtHR protected the rights of protesters to disrupt a fox hunt and deflect dogs with the use of horns as part of their freedom of expression.[314] While the ECtHR does permit the restriction of offensive conduct, it has only done so where it could be demonstrated that the conduct does not 'contribute to any form of public debate of furthering progress in human affairs.'[315]

The limitation of religious expression based on the requirement of 'living together' has arguably marked the nadir of the Article 9 ECtHR jurisprudence and is the most far reaching and extensive ground of limitation discussed during the course of this present examination. It has been demonstrated that the limitations based on secularism or *laïcité* are exclusively applicable in contexts which fundamentally uphold these constitutional values; however, the same limitation is frustrated by the fact that these are 'not values protected by the Convention'[316] which is contrasted to the right to religious expression, guaranteed under Article 9 and 10 of the Convention.

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[310] *Handyside v United Kingdom* (1976) Series A no 24.
[311] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) Dissenting opinion of Judges Nussberger and Jägerblom [7].
[312] Pieter van Dijk, Fried van Hoof, Arjem van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 780.
[313] *Hashman and Harrup v United Kingdom* App no 25594/94 (ECtHR, 25 November 1999).
[314] See; *Hashman and Harrup v United Kingdom* App no 25594/94 (ECtHR, 25 November 1999).
[315] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [49].
[316] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [2.1] and [2.2].

Each individual is somewhat required to live together in social fraternity;[317] therefore, it is necessary that individuals are limited in the exercise of their freedom in specific contexts so as to promote such a social policy where such is a rights based fundamental goal of a Contracting State. It may be justifiable to limit the religious expression of individuals in highly contentious local contexts in order to promote social order; further, it may be necessary that the expression of religion be limited where it manifests in order to deprive others of their rights under the Convention. It is clear that such limitations would be susceptible to a heightened degree of scrutiny.[318]

In the circumstance that the veil would be restricted as an offensive expression, contrary to the values of society and detrimental to the interests of others with regard to their ability to live in fellowship, the ECtHR would have to take into consideration that argument that the veil could then be seen as a legitimate political expression in objection to the state of contemporary society. Such actions must be seen as positive contributions to human affairs. Simultaneously, it should be noted that this thesis has broadly adopted the view that the veil is primarily a religious expression and should be afforded the proper consideration as such.

The act of veiling can be in furtherance of many goals. The frustration which it causes to transparent communication and the restriction it places on others with regard to their ability to interact with their fellow citizens should not be afforded excessive protection against the right of the individual to adhere to their religious conscience in the adoption of the veil. While the veil can be interpreted broadly, an objective attempt to define the veil without recourse to the subjective perceptions of the believer, is insufficient based on the consequences which such a limitation would have on any individual. Currently, objective standards and broad prohibitive measures which have limited the use of the Islamic veil fail to appreciate the motivation of the adherent and the continued use of inference to define

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[317] Rawls, John, *A Theory of Justice* (Revised Edition, Harvard University Press 1999) 11.

[318] See; s 3.5.

the motivations of a large corpus of opinion can only be considered as misguided for further application.

This section concludes by emphasising that the general prohibition of the Islamic veil afforded disproportionate weight to the normative perceptions of harm in the French and Western context. Further, it observes that, even in contexts where it was demonstrated beyond doubt that the veil was adopted to undermine these normative values, such can be protected by the right of expression and the value which debate and diversity of opinion should be afforded in society. The prohibition of the Islamic veil, and accordingly to the right of the individual to express religious belief, was justified on the basis of the concept unrecognised under the Convention and has compromised the freedom of citizens to an enormous extent. The following analysis turns to consider broader theoretical considerations regarding the limitation of religious expression under the European Convention.

4.7 Theoretical Considerations Regarding the Context Specific Limitation of Religious Expression

Context specific limitations of religious expression undoubtedly give rise to actionable limitations of individual rights under Article 9 and Article 10 of the Convention; however, the exercise of these rights is largely not absolute and it has been demonstrated that divergent contexts give rise to distinct grounds for justified limitation. This following section proposes to consider in what manner the relationship which exists between religion and the State can influence the potential limitation of the right to religious expression. In doing so, it proposes to consider the way in which certain outwardly neutral limitations of religious expression, through the mechanism of the margin of appreciation, have disproportionally enabled the majority and institutional religions to succeed to the disadvantage of minority and non-traditional religious entities.

A further factor may be the constitutional model in operation in any given jurisdiction. It has been demonstrated previously that certain European Contracting States,

namely France and Turkey, operate strict secular regimes where religion is not necessarily understood to be a public good but a tool for social disharmony.[319] Other jurisdictions, such as the United Kingdom and Denmark, have established religions which indicates a supportive attitude towards the practice of religion as also evidenced in case law.[320] The United Kingdom is representative of a multicultural regime where religious diversity is promoted.[321] Understanding political systems and policies towards religion assists the examination of case law and informs speculative judgments in this regard. It is not clear into which category the domestic jurisdiction currently falls. The following section purports to suggest that the failure of the Irish State to address multiculturalism as an official social policy may have contributed to the classification of the State as subscribing to a Christian-Occidental or ethno-cultural model. This position is analysed in view of contemporary societal developments and legal changes in the State. This analysis concludes examining the legal possibilities of a context specific restriction of the Islamic veil.

4.7.1 Relationship between the State and Religions

The relationship which exists between the State and religion can influence the way in which religious expression is limited within any Contracting State. In recent years the rising number of cases concerning religious expression in the public sphere challenges the established boundaries which exist between the State and religion.[322] Religion can have a role in the sphere of public opinion making, particularly within the realm of morality,[323] at the same time this participation must not be exercised in such a way that would interfere with the enjoyment of the rights of others.[324] It must be recalled that scholarship has inferred a 'protestant bias' towards the interpretation of religion which places emphasis on

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[319] Michael D. Driessen, *Religion and Democratization: Framing Religious and Political Identities in Muslim and Catholic Societies* (OUP 2014) 130-131.
[320] See; s 2.7.1, see also; *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[321] John W. Berry, David L. Sam, 'Multicultural Societies' in Verónica Benet-Martínez and Ying-Yi Hong (eds), *The Oxford Handbook of Multicultural Identity* (OUP 2014) 103.
[322] Council of Europe, 'Overview of the Court's case law on freedom of religion' (31 October 2013) [8].
[323] Jürgen Habermas, *L'avenir de la nature humaine: Vers un eugénisme libéral?* (Gallimard 2002).
[324] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [130].

the individual in isolation.[325] This has at times relegated the manifestation of religion to the private sphere and emphasised this position as the preferred 'neutral concept' of religious manifestation.[326] At the same time, the variety of permissible relationships between the State and religion under the ECHR, must be interpreted to contribute towards the inconsistency of theory currently present in the jurisprudence of the ECtHR.[327] Analysis will demonstrate that the Commission and ECtHR have championed the rights of religious communities from interference in their religious expression by the State. Further, it has extended itself to protect the autonomy of religious organisations in order to preserve institutional harmony in orthodox terms. This strand of case law demonstrates that the ECtHR prefers the articulation of religious claims from institutional perspectives. This supports the subsequent analysis which challenges the inherent bias present in the rationale of the ECtHR.

4.7.1.i The Variety of Permissible Relationships between the State and Religion as an Obstacle to a Cohesive Theory

The absence of consensus regarding the relationship between the State and religion within the European sphere has resulted, or been occasioned by, Contracting States reaching their own conclusions regarding the proper role of religion in the State. The court in turn could be said to be influenced by these national characteristics when seeking to apply the margin of appreciation in circumstances of conflict. The permissible expression of religion, in those individual contexts, is defined with reference to 'a very real set of assumptions'[328] which may not be in harmony with other Contracting States. These assumptions can be made with reference to the preferred constitutional model in any given Contracting State ranging from the requirement of strict secularism[329] to the Establishment of Churches,[330] both acceptable from the perspective of the ECtHR and discussed

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[325] Lourdes Peroni, 'The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review' (2014) 89 CKLR 667.
[326] Julie Maher, 'Eweida and Others: A New Era for Article 9?' (2014) 63 ICLQ 233.
[327] See; s 2.7.1.i.
[328] Malcolm D. Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 313.
[329] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [114].
[330] *Darby v Sweden* (1990) Series A no 187 [35].

subsequently.[331] The Establishment of a religious community is indicative of a greater role which that religion will manifest in the public sphere and in collaboration with the State. In the case of the United Kingdom the Church of England plays an active role in the public manifestations of the State such as in the appointment of its bishops to participate in the Houses of Parliament as Lords Spiritual and its role as solemniser at occasions of State interest such as the coronation of the monarch. The Establishment of the Church of England would suggest 'that religion has a role to play in the public sphere.'[332]

The constitutional significance attached to secularism in Turkey was instructive to the ECtHR when it enabled and justified the expansive restriction of religion in the public sphere.[333] The willingness of the ECtHR to grant Contracting States a wide margin of appreciation in this area has led to a diversity of approaches towards the role of religion in European society. Further, it is not clear that the variety of practice across different Contracting States within a single legal framework is acceptable.[334] By 'wilfully closing its eyes to existing relationships between state signatories and churches'[335] it has not only created a theoretical problem with regard to the appropriate limitation of religious manifestation but has also contributed to varied approaches in local European contexts which has the potential to effect the 'free movement of persons'[336] and impact other European ideals.

The ECtHR has permitted the State to distinguish between recognised and non-recognised religions.[337] This sanctions regulatory processes in order for the State to determine the authenticity of the religious community[338] which enables the State to make

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[331] Carolyn Evans, Christopher A. Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) BYULRev. 706.

[332] Charlotte Smith, 'A very English affair: establishment and human rights in an organic Constitution' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 182.

[333] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [114].

[334] Lucy Vickers 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) JL&P 596.

[335] Charlotte Smith, 'A very English affair: establishment and human rights in an organic Constitution' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 183.

[336] Lucy Vickers 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) JL&P 596.

[337] Carolyn Evans, *Freedom of Religion ynder the European Convention on Human Rights* (OUP 2001) 104.

[338] *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova* App no 12282/02 (ECtHR, 14 June 2005) [1].

certain determinations on the permissible actions of religion including its perception of the correct relationship between the State and the religious community.[339] In *Hasan and Chaush v Bulgaria*,[340] the ECtHR recognised that 'participation in the life of the community is thus a manifestation of one's religion.'[341] This case departed from the earlier judgment of the Commission in the case of *X v Austria*.[342] Previously the Commission had found no violation of the Convention when the religious organisation in question, a division of the Unification Church,[343] had been dissolved by the Contracting State. It stated that it had 'not been substantiated by the applicant that there has been any interference with his religion.'[344] The Commission found that the applicant was unrestricted in practicing religion in the absence of a legal association.

The departure from this narrow interpretation of Article 9 and the protection which it affords religious communities was welcome and advanced a consistent body of case law which protected religious communities from the arbitrary interference of the State. The institutional organisation of religion, as such, can obtain the protections of Article 9 in conjunction with Article 11.[345] These decisions and judgments emphasise the freedom which religious organisations must have from State interference.

The ECtHR has permitted the State to make suitable enquiries into the conduct of religious communities which may be seeking official recognition in the interest of public safety. In the case of *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova*[346] the court stated that it was legitimate for the State to determine the authenticity of a religious organisation so as to establish if it presented any danger to

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[339] In the case of *Refah Partisi v Turkey* App nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) the ECtHR stated that the dissolution of the religiously-motivated political party was merited on the basis of an improper interpretation of the permissible relationship between the State and religion.
[340] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000).
[341] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [62].
[342] *X v Austria* (1981) 26 DR 89.
[343] Also referred to as 'Moonies'.
[344] *X v Austria* (1981) 26 DR 89 [5].
[345] *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [118].
[346] *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova* App no 12282/02 (ECtHR, 14 June 2005).

democratic society.[347] The court further endorsed the process of the State regulation of religion and the ability of the State to distinguish between recognised and non-recognised religious groups[348] thus following the precedent established earlier by the Commission in the case of *X v Austria*.[349] This process of State inquiry is not such as to endanger its duty of 'neutrality and impartiality'[350] When attempting to determine the acceptable grounds of limitation of the religious expression the State has to refrain from making any subjective analysis of the objects of the religious community. Further, the State is restricted from making decisions which it believes would be in the best interest of the religious community.[351] The court emphasises that the role of the State 'is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.'[352]

4.7.1.ii The Preference of the ECtHR towards Institutional Religion

The jurisprudence of the court has indicated a clear preference for the protection of the right of collectives, primarily organised in a religious institution, above the protection of individual rights.[353] Religious organisations are capable of initiating proceedings under Article 9 of the Convention.[354] Case law concerning their registration and freedom to worship demonstrates the high level of scrutiny which the Commission and the ECtHR apply to the limitation of the religious expression of the religious community by the State. Further, the court has approved limitations on the rights of individuals within religious communities in order to preserve the orthodoxy of that religious community. This demonstrates that the ECtHR positively responds to religious organisations as cohesive and uniform structures and neglects to appreciate the reality of diversity within religious groups.

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[347] *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova* App no 12282/02 (ECtHR, 14 June 2005) [1].
[348] *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova* App no 12282/02 (ECtHR, 14 June 2005) [1].
[349] *X v Austria* (1981) 26 DR 89 [93].
[350] *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007) [113].
[351] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002) [60].
[352] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002) [60].
[353] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) JLR 335.
[354] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14 ELJ 261.

The ECtHR has emphasised that the right to 'religious freedom is primarily a matter of individual conscience',[355] however; this does not preclude religious organisations from the guarantee of rights under Article 9 of the Convention. In fact, acts such as worship[356] and teaching,[357] as listed within Article 9, predominantly generate communal activities. The case law of the Commission and ECtHR has demonstrated that religious organisations can successfully articulate right-based claims under Article 9 though it may be more difficult than in the case of a natural person.[358] On the basis that the right to religious freedom belongs primarily to individuals, the right of religious organisations is derived from the individual guarantee.[359]

Religious organisations can often be in the best position to articulate the claims of individual members whose collective right to religious freedom may be violated by the actions of the Contracting State. The ability of the ECtHR to engage with one organisation as opposed to several individuals is preferable to simplify proceedings. The court has demonstrated that it is comfortable in the defence of the religious manifestation of religious organisations in a way which it is not regarding individual applicants.[360] The Commission and ECtHR have adopted a higher level of scrutiny in instances whereby the religious rights of religious organisations have potentially been infringed.[361]

The preference which the ECtHR exhibits towards institutional religion can be exemplified with reference to those cases which guard the autonomy of religious

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[355] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [125]; *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012) [34]; *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [105].

[356] *Manoussakis v Greece* App no 18748/91 (ECtHR, 26 September 1996); *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova* App no 12282/02 (ECtHR, 14 June 2005); *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007).

[357] *Kokkinakis v Greece* (1993) Series A no 260-A; *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006); *Leela Förderkreis EV and Others v Germany* App no 58911/00 (ECtHR, 6 November 2008).

[358] Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 286-289.

[359] Javier Martínez-Torrón, Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 228.

[360] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) JLR 335.

[361] Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) JLR 335.

organisations from the interference of the State. In the judgments of *Serif v Greece*,[362] *Hasan and Chaush v Bulgaria*,[363] *Metropolitan Church of Bessarabia and Others v Moldova*,[364] *Agga v Greece*,[365] *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova*,[366] *The Moscow Branch of the Salvation Army v Russia*,[367] *Svyato-Mykhaylivska Parafiya v Ukraine*[368] and most recently in *Magyar Keresztény Mennonita Egyház and Others v Hungary*,[369] the ECtHR has demonstrated that it will adopt a higher degree of scrutiny in instances where the State attempts to interfere with the religious expression of religious communities. Religious organisations appear to have their Article 9 rights defended to a greater degree than individual applicants. Ringelheim comments that:

> 'the court seems most comfortable when it has to scrutinise cases that can be seen either as an attempt by the State to control a religious community, or as endeavours by a religion to take control over the State; in other words, where the problem is that of preserving the boundary between religion and public authority.'[370]

These instances consist of straight-forward factual scenarios whereby the religious organisation is in a position to succinctly articulate its doctrinal position regarding the religious expression of its individuals. From this perspective, cases dealing with religious organisations are simplified for the ECtHR. The success rate of applications on the submission of religious groups as opposed to individuals would indicate the court's clear preference for the collective dimension of the right.

The court has also been willing to buttress the unity of religious organisations by enabling the limitation of the rights of religious dissenters within a community in the interest of preserving orthodoxy. In the case of *X v Denmark*[371] the State commenced

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[362] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999).
[363] *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000).
[364] *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001).
[365] *Agga v Greece* App no 50776/99 (ECtHR, 17 October 2002).
[366] *Carmuirea Spirituala a Musulmanilor din Republic Modlova v Moldova* App no 12282/02 (ECtHR, 14 June 2005).
[367] *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006).
[368] *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007).
[369] *Magyar Keresztény Mennonita Egyház and Others v Hungary* App nos 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12 (ECtHR, 8 April 2014).
[370] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureann (eds), *Law, State and Religion in the New Europe* (CUP 2012) 294.
[371] *X v Denmark* (1976) 5 DR 157.

disciplinary proceedings against a cleric in the State Church for his refusal to abandon his personal requirement that parents of children undergo lessons in religious instruction in advance of the baptism of their child. The applicant submitted that such a compromise was a violation of his rights under Article 9. The Commission took the view that his complaint did not fall under Article 9 of the Convention as the clergyman was free to adhere to his conscience outside the State Church. It stated that his right to leave the State Church guaranteed his right to religious freedom.[372]

The Commission arrived at a similar judgment in the case of *Karlsson v Sweden*[373] which concerned the refusal of the State Church to appoint a cleric who stood in opposition to its views concerning the ordination of women. The Commission recalled that the right under Article 9 does not enable any applicant to practise 'a special religious conception'[374] within a religious community and that their rights are guaranteed by their ability to leave the organisation to which they were affiliated. The Commission and the ECtHR has consistently recognised the ability of individuals to leave religious communities or to renounce their membership in relevant mediums.[375] The court's preference for religious unity is in complete disregard for the reality of internal dissent within religious organisations. Vickers recalls that 'even adherents of the same religion may not agree'[376] on issues such as compulsory Church attendance, or more contemporaneously, on the status of the family.

It must be repeated that the ECtHR has stated that 'the role of the authorities...is not to remove the cause of tension by eliminating pluralism'[377] This case law straddles a fine line between the right of a religious organisation to regulate its internal affairs and maintain its established beliefs and the right of individuals to pursue religious freedom in accordance with their conscience. It is significant to note that in this scenario of competing views the ECtHR has supported a homogenous encapsulation of religious expression which is an

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[372] *X v Denmark* (1976) 5 DR 157 [1].
[373] *Karlsson v Sweden* (1988) 57 DR 172.
[374] *Karlsson v Sweden* (1988) 57 DR 172.
[375] *Gottesmann v Switzerland* (1984) 40 DR 284.
[376] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 99.
[377] *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [116].

indicator of the court's preference towards religious organisations which can present clear and authoritative statements regarding the religious expression of its individuals.

4.7.2 State Neutrality and Equality

An explanation of the distinction between State neutrality and equality is required before proceeding to consider the substance of Christian Occidentalism as a political model. Raz devotes a section of his treatise *The Morality of Freedom* to the question of neutrality.[378] He defines neutrality with reference to the writings of Montefiore observing that 'to be neutral...is to do one's best to help or to hinder the various parties concerned in an equal degree.'[379] Neutrality is a concept which can easily become intertwined with the concept of equality whereby individuals are treated on the same basis without discrimination.[380] Neutrality is distinct as it often pertains to political or governmental decision-making. In this way, a neutral State is one which actively aspires to make no distinction between competing conceptions of the good in its interaction with the public.[381]

It can be argued that the inability of individual to wear the Islamic veil can constitute discrimination on the basis of religious belief.[382] This line of reasoning is not pursued in this thesis. Neutrality, however, pertains to a governmental impartiality in competing conception of the good or in competing value systems in order to afford fair procedures to all citizens in their encounter with the State. Reflecting upon the Rawlsian concept of the veil of ignorance, State neutrality encourages a system whereby justice is distributed according to fairness.[383] Where State systems are blind towards competing value systems the civil service in the public sector can provide the best treatment to all users. Unfortunately, neutrality such as this is often qualified with regard to religion. Contrasting

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[378] Joseph Raz, *The Morality of Freedom* (OUP 1986) 110-133.
[379] Alan Montefiore (ed), *Neutrality and Impartiality* (CUP 1975) 5.
[380] This thesis does not purport to enter into an examination of the definition of equality to any large extent, a concept which is applied and understood differently across the Contracting States of the European Convention. See; European Network of Legal Experts in the field of Gender Equality, Christopher McCrudden, and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach'(European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, November 2009). See; s 4.5.
[381] Joseph Raz, *The Morality of Freedom* (OUP 1986) 111.
[382] Hilal Elver, *The Headscarf Controversy; Secularism and Freedom of Religion* (OUP 2012) 7.
[383] John Rawls, *A Theory of Justice* (Revised Edition, Harvard University Press 1999) 11.

political regimes adopting secular, multicultural or ethno-cultural models can be understood to adopt forms of qualified neutrality whereby neutrality carries certain caveats. In the case of the militant secular French State, this carries an anti-clericalism which does not necessarily characterise religion as a conception of the good.[384] In the case of the multiculturalist United Kingdom, this demonstrates a predisposition towards the accommodation of minority religion.[385] In the absence of a clear Irish model this thesis examines the nature of ethno-cultural nationalism and considers in what way this model qualifies governmental neutrality and whether the State can be characterised as such.

4.7.3 Ethno-Cultural Nationalism: Christian Occidentalism

Christian Occidentalism is an ethno-cultural nationalist constitutional model which relates to culture, liberalism and impacts on the construction of religious neutrality.[386] It is a political model which views the nation as a culturally homogenous community and which has the consequence of promoting the dominant religion or ideology from a historical perspective.[387] In the German context this was interpreted to mean that, while the State remained neutral towards religion, individual *Länder* were able to regulate their relationship with individual religions[388] which led to the preference of traditional German religions; primarily under the auspices of Christianity.[389] This has amounted to the protection of Christian religious expression in contrast to Islamic expression and has been critically highlighted for its different approaches to religious veiling in the classroom.

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[384] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2642.
[385] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2642.
[386] Christian Joppke, 'Immigration, Citizenship and the Need for Integration' in Roger M. Smith (ed), *Citizenship, Borders and Human Needs* (University of Pennsylvania Press 2014) 169.
[387] Sawitri Saharsa, 'Headscarves: A Comparison of Public Thought and Public Policy in Germany and the Netherlands' 2007 10(4) CRISPP 516.
[388] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2642.
[389] Christian Joppke, *Veil: Mirror of Identity* (Polity Press 2009) 70-80.

Five German *Länder* have adopted laws which prohibit Islamic religious expression in the public sector while permitting Christian expressions.[390] In Baden Württemburg teachers have been restricted from exercising political, religious, ideological or similar expressions; yet, at the same time the exhibition of Christian and Occidental educational and cultural values does not contradict such prohibitions.[391] This is on the basis that the Christian religion has contributed towards the formation of the occident that its expressions also embody cultural and social significance.[392] Recently the Federal Constitutional Court of Germany, in the matters of BVerfG 471/10 and BVerfG 1181/10, stated that this constitutional model could operate with discriminatory effect.[393] It concluded that the limitation of non-Christian religious expression on this basis was incapable of being recognised.[394] At the same time, it did not declare this model unconstitutional and contrasted it from a ground of general limitation.[395] It can be stated that this model still represents a value system for the German State and, upon this basis, can be applied in the limited context of the present examination.

The Irish State has demonstrated its preserved association with the Christian traditions of the Island in the Constitution and jurisprudence of the courts.[396] The

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[390] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2653; Christian Joppke, *Veil: Mirror of Identity* (Polity Press 2009) 76.

[391] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2653.

[392] Lorenzo Zucca and Camil Ungureann, *Law, State and Religion in the New Europe* (CUP 2012) 167.

[393] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [129] accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[394] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [129] accessed online 27 March 2015, available at < https://www.bundesverfass'ungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html> 'Tragfähige Gründe für eine Benachteiligung äußerer religiöser Bekundungen, die sich nicht aufchristlich-abendländische Kulturwerte und Traditionen zurückführen lassen, sind nicht erkennbar.' 'Convincing reasons for a disadvantaging based on exterior religious expressions of faith which are not based on Christian-Occidential cultural values and traditions cannot be recognised.'

[395] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110 [136] accessed online 27 March 2015, available at < https://www.bundesverfass'ungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[396] See; *Ryan v A.G.* [1965] 1 IR 294 per Kenny J: 'I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State.' See also; the definition of marriage pronounced by Costello J in the case of *Murray v Ireland* [1985] IR 532 which was adopted in the case of *T.F. v Ireland* [1995] 1 IR 321 by the Supreme Court – '...the Constitution makes clear that the concept and nature of marriage, which

preferential approach to the Christian tradition in the accommodation of religious expression in the uniform of the armed forces and An Garda Síochána may suggest that the State is inadvertently following a style of 'ethnic national' preference or Christian Occidentalism as had been exhibited in Germany.[397] At the same time, contemporary modifications in the legal and societal sphere have demonstrated a shift away from this traditional preference which must be considered in any examination of the continued impact of Christian Occidentalism or Ethno-Cultural Nationalism in the domestic context.

The restriction of minority religious expression in opposition to the facilitation of the dominant religious expression can be based in the perception that alien religiosity is 'threatening'.[398] Minority religious expression can be threatening to the normative values of the State while perhaps also being threatening to the national security and the guarantee of human rights.[399] The Irish jurisdiction has not plainly indicated any constitutional or political model which it seeks to implement; whether secular, multiculturalist, ethno-cultural or indeed any other; however, certain interpretations can be made regarding what the State considers threatening from the limitation of religious expression to date. It is, first, argued that the State does not find many aspects of the Christian religion threatening to its impartiality on the basis that it has facilitated its expression in the uniforms of both the armed forces and An Garda Siochána by directly permitting the wearing of the membership badge of the Pioneer Total Abstinence Association, an organisation of the Roman Catholic Church.[400] Simultaneously it has refused to accommodate the religious expression of members of the Sikh community.

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it enshrines, are derived from the Christian notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship.' Also; Declan Costello 'Natural Law, the Constitution and the Courts' in Patrick Lynch and James Meenan (eds), *Essays in Memory of Alexis FitzGerald* (Incorporated Law Society of Ireland, 1987) 108 – 'If the Constitution is one which has been adopted for a Christian people, it would be reasonable to conclude that the theory of law which it has adopted and the philosophical basis for the fundamental rights which it sought to protect should be in accord with the views of Christian philosophy rather than those of Roman lawyers or 18th Century rationalist thinkers.'

[397] Christian Joppke, *Veil: Mirror of Identity*, (Polity Press 2009) 54. This concept is discussed subsequently; see, s 4.8.2.

[398] See; Robert Gould, 'Alien Religiosity in Three Liberal European States' 2013 14(2) PRI 173.

[399] Robert Gould, 'Alien Religiosity in Three Liberal European States' 2013 14(2) PRI 175.

[400] An Garda Siochána: John J. Dunne, *The Pioneers* (Pioneer Publications 1981) 105: 'In a circular to the Garda, he wrote: 'Young men of the Civil Guard – a ray of hope in these dark and dreary days – ask yourselves the question: 'When the day of trial comes shall I stand or fall'? Certainly you can. You can provide yourself with an impenetrable shield against any such attack. Become a Pioneer of the Total Abstinence Association of the Sacred Heart. Wear your badges as you are entitled to do, proudly and publicly. It is a decoration of real merit

In 2007 Garda Commissioner Noel Conroy rejected an application by a Sikh adherent to modify the garda uniform to permit the wearing of a religiously mandated turban. He justified his position as 'attempting to firmly retain an image of impartiality while providing a State service to all citizens.'[401] The Chief Administrator of An Garda Siochána stated that members of the force 'leave their own personal beliefs outside the organisation.'[402] The member of the minority religious community initiated proceedings in the High Court alleging that the refusal of An Garda Siochána to facilitate his request to wear the turban amounted to discrimination based on his religious beliefs;[403] however, the substantive issue was not addressed on the basis that members of An Garda Reserve did not qualify as employees for the purposes of the Employment Equality Acts 1998-2008.[404] In any case the refusal of the State to facilitate this minority religious expression on the grounds of impartiality would suggest that the turban and the religious expression of Sikhism were considered as 'threatening' from a legal perspective.

In France, legislation which prohibits the wearing of ostentatious religious symbols does not consider small personal crucifixes to constitute the same degree of religious expression as the wearing of the Islamic veil or the kippah.[405] Further, in *Lautsi v Italy*[406], the

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– the outward sign of a sterling straight man – it will prevent even the attempt to undermine your character as a public servant, or your manhood as one of Ireland's sons. Become a Pioneer – it is an order of merit.' The Defence Forces: Oscar Traynor, 'Minister of Defence, Order 1adh Meán-Fhómhair 1943' (1 September 1943). Letter to Rev. McCarron, S.J. 'I have now given full consideration to the representations made by Senator Miss Pearse and yourself and the late Father Flynn on the question of Army Personnel wearing the Pioneer Badge of the Total Abstinence Association and I have decided that the badge may be worn by Army Personnel on their uniform. This decision will be regarded as taking effect as from today and I have instructed the Army Authorities accordingly.'

[401] Garda Síochána Press Office, 'Garda Uniform, Statement of August 23, 2007' <http://www.garda.ie/Controller.aspx?Page=3155&Lang=1> accessed 21 August 2012.

[402] Cormac O'Keeffe, 'Force only 'partially open' to minorities' *Irish Examiner* (Cork, August 12 2012).

[403] *Commissioner of An Garda Síochána v Oberoi* [2013] IEHC 267 [2.1].

[404] *Commissioner of An Garda Síochána v Oberoi* [2013] IEHC 267 [10.1].

[405] See; *Commission de Reflexion sur l'Application du Principe de Laicite dans la Republique, 'Rapport au President de la Republique', 11 décembre 2003*, p. 68; *'Les tenues et signes religieux interdits sont les signes ostensibles, tels que grande croix, voile ou kippa. Ne sont pas regardés comme des signes manifestant une appurtenance religieuse les signes discrets que sont par exemple médailles, petites croix, étoiles de David, mains de Fatma, ou petits Coran'* [The clothing and religious signs which are ostensible signs are large crosses, the veil or the kippah. Those which are not regarded as manifesting a religious membership are discreet signs, for example medals, small crosses, stars of David, the Khamsa or small *Qur'âns*.] See also the relevant legislation; *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*.

[406] *Lautsi v Italy*, App no 30814/06 (ECtHR, 18 March 2011).

crucifix in the classroom was considered to manifest a remarkably small degree of religious expression as it was submitted and accepted to constitute part of the cultural fabric of Italy.[407] Some German Länder have also replicated this religious division between culturally significant and culturally destructive religious symbols. In a case concerning the presence of the crucifix in the classroom the Bavaria Supreme Court reasoned that:

> 'Representations of the cross...are...not the expressions of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian Occidental tradition and common property of the Christian Occidental cultural circle.'[408]

At the same time, many German Länder have enacted limitations of the religious expression of non-Christians in the classroom.[409] Such limitations may now be declared as impermissible in view of the recent decision of BVerfG 471/10 and BVerfG 1181/10.[410]

These small examples demonstrate the division between what is familiar and what is alien; what is culturally affirmative and what is culturally destructive.[411] Claims to alter the cultural fabric of any jurisdiction through the facilitation of minority religious expression can be seen as threatening to the normative system. Christian religious expression is a recognisable aspect of the Irish jurisdiction owing, in part, to the fact that this is the dominant religion in the jurisdiction and also on the basis that the majority of the citizens of the State have been educated in schools under Christian patronage.[412] As such, the symbols and expressions are passive and largely too familiar to be offensive.

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[407] *Lautsi v Italy*, App no 30814/06 (ECtHR, 18 March 2011) [36].

[408] Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] 3 June 1991, 122 Bayerische Verwaltungsblatter [BayVBI] 751 (751-754) (F.R.G.) *reprinted in* Lorenzo Zucca an Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 168.

[409] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2653.

[410] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[411] See; Gareth Davies, 'Banning the Jilbāb' (2005) 1(3) ECLR 526: 'when considering the effect of religious clothing on the environment it is important to remember how much of the reaction is not because it is religious but because it is strange...Many Europeans are used to Christian costume, but not to Muslim, and it disturbs them.'

[412] Central Statistics Office, 'Census 2011: Profile 7 Religion, Ethnicity and Irish Travellers' (Stationary Office 2012).

Symbols of other faiths can be viewed as constituting a threat to the normativity of society by representing an allegiance to a different morality (or conception of the good)[413] which in itself is an assertion of difference and a challenge towards that which is native.[414] In the German context this was explained popularly in a comparison by Mahrenholz when she stated: '[t]he essence of the bill [to restrict the Islamic veil in schools] is that the VfB Stuttgart [the local first-division soccer team] is the traditional club here, and one is allowed to wear its dress...the dress of other teams is not allowed.'[415] Bilsky also comments that 'the power of the headscarf or uniform as a symbol is related to the unresolved tension in the heart of democratic culture between covering and transparency'.[416] The veil therefore becomes the public assertion of difference and can be perceived as a powerful threat to normativity.[417] On the basis that it constitutes a challenge to the stability of domestic normativity, the Islamic veil and the religious expression of minority religious groups can, on that basis, be considered as 'threatening' in the Irish context in the first instance.

In the Irish State the permission which currently is granted to the members of the military and paramilitary organisations may be explained with reference to this potential for threat. As the Irish population has largely exhibited a familiarity with the Christian tradition it could be claimed that interacting with the State in the presence of Christian religious expression would not constitute a threat to neutrality; however, interacting with the State in the presence of an unfamiliar and non-Christian form of religious expression may constitute such a threat to a greater degree. This perception would be in favour of the majority of citizens; however, it fails to appreciate the views of non-Christians when interacting with the State in the presence of Christian symbols or the current attitude exhibited by the State towards religion.

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[413] Joseph Raz, *The Morality of Freedom* (OUP 1986) 111.

[414] For analysis in the British jurisdiction see; Sevgi Kiliç, 'The British Veil Wars', (2008) 19(4) SP 450; 'The *niqāb* is seen as a form of resistance against Britishness and an implied criticism of the hosts – or at least a refusal to accept their customs of dress are good or better than where they came from.'

[415] *Beschlussempfehlung und bericht des ausschuss für jugend, schule und sport* (Drucksache 13/3071), 30 March 2004 3.

[416] Leora Bilsky, 'Uniforms and Veils: What difference does a difference make' (2009) 60(1) CLR 2722.

[417] See; Murat Borovali, 'Islamic Headscarves and Slippery Slopes'(2009) 60(1) CLR 2596.

This is indicative of a qualified standard of neutrality.[418] Faced with a request to alter the uniform of An Garda Síochána the Commissioner replied that such a modification could not be facilitated based on the requirement of impartiality or neutrality placed upon the force. The Christian religion is not seen as a competing conception of the good against other religious entities in this context. It is seen as a cultural value and thus exists in a separate category to be balanced against the interests of minority religious groups. In simplest terms, neutrality would imply the equal facilitation of religion; however, the Christian religion has so strongly informed the cultural fabric of Irish society that its removal visually is not possible. The Irish State has demonstrated that it is not religiously neutral; yet, in the public sector, a legitimate obstacle to the equal facilitation of religious expression is the cultural predisposition towards Christianity which is 'common property'[419] of both the State and the religious communities.

This common property continues to be evidenced in the jurisprudence of the Superior Courts in the domestic context. In the decision of the Supreme Court in *DPP v J.C.*,[420] wherein that court overturned the longstanding exclusionary rule pertaining to the law of evidence in criminal matters in a monumental decision of that same court, Hardiman J had recourse to scripture and the natural law in deriving the source of the evidentiary prohibition:

> 'The canonical principle "*ne bis in idem*" is regarded as a principle of natural law based on St Jerome's commentary on the prophet Nahun who said in Part I of his book which is part of the Old Testiament: "*Deus non indicat bis in id ipsum*" [God does not adjudicate on the same matter twice].'[421]

In an earlier, yet similarly noteworthy authority, of the Supreme Court in the case of *North Western Health Board v H.W.*,[422] Keane CJ emphasised the Christian theological concepts which underpin Article 41 of the *Bunreacht na hÉireann*:

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[418] See; s 4.7.2.
[419] Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] 3 June 1991, 122 Bayerische Verwaltungsblatter [BayVBI] 751 (751-754) (F.R.G.) *reprinted in* Lorenzo Zucca an Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 168.
[420] *DPP v J.C.* [2015] IESC 31.
[421] *DPP v J.C.* [2015] IESC 31 Hardiman J [54].
[422] *North Western Health Board v H.W.*, [2001] 3 IR 622.

> 'What is beyond argument is that the emphatic language used by the Constitution in Article 41 reflects the *Christian belief* that the greatest of human virtues is love which, in its necessarily imperfect human form, reflects the divine love of the creator for all his creation. Of the various forms which human love can take, the love of parents for their children is the purest and most protective, at least in that period of their development when they are so dependant on, and in need of, that love and protection.'[423]

These decisions illustrate the judicial familiarity and comfort with Christian constructs which inform natural law thinking in the domestic context; however, Hogan and Whyte suggest that the natural law reasoning is conventionally used solely for illustrative purposes or 'as a mechanism of avoiding an unpalatable result in any case where this might be produced by a stark, literalist interpretation of the Constitution...'[424]

Hogan and Whyte continue to observe that this style of judicial reasoning 'has waned somewhat since the mid 1980s'[425] and they attribute this to an increase of 'judicial awareness.'[426] This judicial awareness evidences what could be said to constitute the largest counter argument to the perception of ethno-cultural nationalism in the domestic context along Christian-Occidental lines. It must be accepted that there has been a cultural and societal shift in the domestic context. Such can be traced to various socio-political events; however, emphasis can be placed upon the impact of the Northern Ireland Peace Agreement, commonly referred to as the Good Friday Agreement, in the domestic context regarding pluralism.[427] As part of this agreement the Irish State amended Article 3 of the Constitution in the following terms:

> 'It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the *diversity of their identities and traditions*...'[428]

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[423] *North Western Health Board v H.W.*, [2001] 3 IR 622, at 687.
[424] Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) [1.1.56].
[425] Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) [1.1.55].
[426] Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) [1.1.55].
[427] It is accepted that this statement could be considered contradictory on its face due to the clear Christian underpinnings of the commonly identified title of the agreement 'Good Friday'; however, the content of the document is at issue herein.
[428] *Bunreacht na hÉireann* Art 3(1). (Emphasis added).

Further, the State undertook to take 'further steps to strengthen the protection of human rights in its jurisdiction' and more specifically to 'demonstrate its respect for the different traditions in the island of Ireland.'[429]

This agreement evidences a willingness on the part of the State to adopt an increased pluralist approach with regard to human rights. While this agreement was written in view of a conflict which was impacted by competing Christian ideologies, the pluralist undertakings of the Irish State cannot be so narrowly interpreted. Indeed the observations of Walsh J in the decision of *McGee v Attorney General*[430] must be considered. During the course of his judgment he wrote that:

> 'in a pluralist society, such as ours, the court cannot as a matter of constitutional law be asked to choose between the differentiating views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law.'[431]

It can be accepted that the court found it inappropriate to be advised with regard to the content of natural law and, as such, it appears to suggest that any natural law reasoning should adopt a pluralist approach to such rights where they are said to exist. His comments foreshadow the judicial awareness of subsequent generations and the move away from Christian interpretation of law.[432]

Irish society has further transformed since the decision of *McGee v Attorney General*[433] and the continued emphasis on individual liberty by both the Oireachtas and the court has contributed to the modification in law pertaining to the provision of abortion in the jurisdiction. This particular societal issue was marked from the outset as a legal issue, divorced from religious interests. In the case of *Re Article 26 and the Regulation of*

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[429] Northern Ireland Peace Agreement 19.
[430] *McGee v Attorney General* [1974] IR 284.
[431] *McGee v Attorney General* [1974] IR 284, at 318.
[432] Gerard Hogan, Gerry Whyte, *J.M. Kelly The Irish Constitution* (4th edn, Tottel 2003) [1.1.55].
[433] *McGee v Attorney General* [1974] IR 284.

Information (Services outside the State for Termination of Pregnancies) Bill 1995[434] the Supreme Court noted the following:

> 'It is fundamental to this argument that, what is described as "natural law" is the fundamental law of this State and as such is antecedent and superior to all positive law including the Constitution...The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution.'[435]

The evolution of the law surrounding the provision of abortion in the domestic context demonstrates the tension which can be said to exist in society regarding the appropriate level of pluralism and individual liberty and normative values which may be said to exist in the jurisdiction since the early 1980s.[436] Society has demonstrated a willingness for modification of the existing laws against the opposition of the Christian religion which has heavily contributed to the cultural and moral instruction of the population.

Further, in the contemporary sphere, legal developments with regards to discrimination and marriage have demonstrated the largest cultural shift towards pluralism and away from Christian-cultural conceptualisations. With regards to discrimination, the Employment Equality (Amendment) Bill 2015 is currently before the Oireachtas with a view to provide for equality for employees of education, medical and other services under the direction of a religious organisation. S 37(1) of the Employment Equality Act 1998 enables an organisation run under religious direction to discriminate in circumstances where individuals may be seen to compromise the values of their institutions. This has led to anxiety for employees in schools and hospitals who have obtained a divorce, obtained an abortion or are homosexual. The Bill of 2015 proposes to remove this facility for religious organisations. This amendment has far reaching implications for religious organisations and could potentially interfere with their respective freedoms under Article 44 of the Constitution. Such freedom justified s 37 of the Employment Equality Act 1998 and the

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[434] *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

[435] *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 at 38-43.

[436] Sonya Donnelly, 'A, B and C v Ireland: Will the European Court of Human Rights Address Irelands Restrictive Abortion Laws?' (2010) 16(1) MLJI 20.

move away from such religious interests evidences a further stratification of the cultural unity which existed between the Christian tradition and the State.

Additionally, the Marriage Act 2015 removed the legal impediment to marriage for parties of the same sex. The cultural consequences of the passing of the Act are so recent to have escaped academic appraisal; however, it can be said to be a demonstration of the State realising its commitments under the Northern Ireland Peace Agreement to respect different traditions and diversity in the island of Ireland.[437] It further evidences the social change in the domestic context and the legal willingness to endorse same. It must be stated that two challenges were brought before the Superior Courts challenging the validity of the referendum which led to the Marriage Act 2015. In matters of *Lyons v Ireland and Ors*[438] and *Walshe v Ireland and Ors*[439] the Supreme Court determined that no further appeal of the matter should be heard by the court. During the *ex tempore* judgment of the Court of Appeal in these linked matters, the court cited with approval the decision of the Supreme Court in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995*[440] where it was recognised that the natural law is not superior to the Constitution. Such religiously informed challenges were not acceptable before the court which directed itself towards legal arguments. [441]

It can be said that societal modifications in the domestic sphere have diluted the strength of the argument which would evidence Christian-Occidental ethno-cultural nationalism herein. It cannot be said that the dominant Christian religion continues to enjoy the influence which it once wielded in the legal sphere. At the same time, while the State continues to adopt pluralist strategies it may do so mindful of the 'cultural continuum'[442] which exists in Ireland and which has shown a historical connection with religion generally and the Christian denominations specifically. This cultural continuum continues to influence normative and objective determinations of threat which influences the qualified

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[437] *Bunreacht na hÉireann* art 3(1).
[438] *Lyons v Ireland and Ors* (Unreported, Supreme Court, 16 September 2015).
[439] Walshe v Ireland and Ors (Unreported, Supreme Court, 16 September 2015).
[440] *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.
[441] *Walshe v Ireland and Ors* (Unreported, *ex tempore*,Court of Appeal 30 July 2015).
[442] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) Concurring Opinion of Judge Bonello [1.1.].

interpretation of neutrality in any given jurisdiction. In this regard the characteristics of ethno-cultural nationalism may impact on future decision making regarding Islamic expression in the public and private sectors.

In the domestic and European contexts, where Christianity is a dominant religious and cultural entity, Islamic religious expression may face restriction where it may continue to pose a 'threat' to the normative values of a Contracting State or where it functions politically or religiously to bring about change which are understood to be contrary to the values of the State such as gender equality. At the same time, while alien religiosity may not be interpreted consistently as against familiar creeds, this does not extend the Contracting State extensive authority to diminish diversity with a view to producing cultural homogeny. Such States have obligations towards minority culture and ethnic groups under Article 151 of the EC Treaty.[443] The respective constitutional models discussed herein function to explain the interpretation of qualified neutrality in the public sphere which is of relevance in any restriction imposed on the Islamic veil specific to the restricting Contracting State and in the application of the margin of appreciation by the ECtHR.

4.8 Context Specific Restriction of the Islamic Veil

The extent of the chapter so far has demonstrated that certain rights balancing exercises frustrate the legitimate restriction of religious expression, through the medium of the Islamic veil, in the broad European sphere. Principal amongst them is the claim that restrictions of general application are disproportionate to the desired aims of promoting secularism, gender equality or indeed living together. While such restrictions have been permitted within certain jurisdictions in the European sphere[444] it could not be envisaged that the Islamic veil in the Irish context has the ability to occasion the required level of social instability in order to justify restriction. The present analysis purports to examine the proportionality of context specific restrictions of the Islamic veil in both public and private institutions. The employees and agents of such institutions are often the visual representation of that institution. The facilitation of religious expression on the part of the

[443] Treaty Establishing the European Community art 151.
[444] See; the jurisdictions of France and Turkey discussed s 4.4.

institution may convey an outward religious message which is either at odds with the institution or incompatible with its requirements regarding neutrality. Certain other context specific restrictions could be examined such as in the context of providing evidence within the courtroom or indeed in order to pass border security; however, such legitimate examinations are particularly nuanced and, as such, lie beyond the limited parameters of this present study.

Rafaeli and Pratt note that 'dress attributes convey central, distinctive and enduring values of [an] organisation.'[445] The outward display of religious expression on the part of any employee or agent has the ability to influence public perception regarding the values of such an institution.[446] It is a reality of employment that certain restrictions are placed on individual liberty as a consequence of contract. The imposition of sartorial limitations exists as a daily reality for most individuals of working age within the European sphere. Such limitations or indeed prescriptions are a consequence of contract upon which the employment may rest;[447] however, religious adherents may feel bound to comply with the requirement to dress in accordance with a perceived alternative religious 'dress code'.[448] The ability to act in accordance with conscience in religious matters has been stressed from the outset and must be afforded proper weight in both the public and private sector with the affirmation that both spheres can generate distinct issues.

4.8.1 The Private Sector

Private commercial bodies generate distinct concerns from their public colleagues in the accommodation of religious expression.[449] With the expansion of business in the form of multinational trading private institutions, private bodies may encounter difficulties regulating their policies in order to be consistent with the territories into which they have

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[445] Anat Rafaeli, Michael G. Pratt, 'Tailored Meanings; On the meaning and impact of organisational dress' (1993) 18(1) AMR 41.
[446] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 158.
[447] Alison Lurie, *The Language of Clothes* (Random House 1981) 18.
[448] Peter Danchin, 'Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law' (2008) 33(1) YJIL 6.
[449] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 92.

expanded whilst living up to their duties under international law.[450] When creating a uniform for its staff, private bodies have to be aware of their obligations pursuant to European Directives[451] and domestic equality and anti-discrimination legislation.[452] This legislation has made religious discrimination impermissible in most contexts[453] and has required corporate bodies to guarantee equal treatment for its employees regardless of gender. Employees in private institutions have a right to express their religion;[454] however, their employers have a competing ability to restrict this expression when justified.[455] Aside from the legislation currently in place, there is no case law which directs the domestic analysis. Accordingly, this examination draws precedent from the European context.

The right to religious expression guaranteed under Article 9 of the ECHR does not contain a right to waive contractual obligations on foot of religious belief.[456] Individuals who freely enter into contracts for work are obliged to discharge their duties fully even if this has the ability to limit the expression of religious belief. The Commission outlined this in its decision of *X v United Kingdom*[457] where it was submitted by the applicant that the refusal of his employers to enable him to absent himself during normal work hours to attend Friday prayers at a Mosque constituted an infringement of his rights under Article 9 of the ECHR. The Commission stated that; 'a mere contractual obligation cannot excuse absence – a man cannot willingly put himself into a position where he cannot attend.'[458] The Commission took the view that the applicant in question was not at liberty to behave howsoever he might desire due to the contractual obligations which he agreed to.[459] By virtue of the fact that the applicant had voluntarily entered into the work environment, upon the conditions

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[450] Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) YLJ 111(3) 508.
[451] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303 (Equality Directive).
[452] See; Equality Act 2004; Unfair Dismissals Act 1977.
[453] A religious, medical or educational institution who is under the direction of a body established for religious purposes is not deemed to have discriminated against a person under the Act where they elect to give more favourable treatment to an employee on the grounds of religious belief or where they take action to prevent an employee from undermining a religious ethos; see Employment Equality Act 1998 s 37(1). This section the subject of a proposed abolition by virtue of the Employment Equality (Amendment) Bill 2015.
[454] Megan Pearson, 'Offensive Expression in the Workplace' (2014) 43(4) ILJ 433.
[455] Megan Pearson, 'Offensive Expression in the Workplace' (2014) 43(4) ILJ 431.
[456] Pieter van Dijk, Fried van Hoof, Arjem van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 766.
[457] *X v United Kingdom* (1981) 22 DR 27.
[458] *X v United Kingdom* (1981) 22 DR 27 [8].
[459] *X v United Kingdom* (1981) 22 DR 27 [7].

outlined within the employment contract, it was not available to him to seek a modification of terms to facilitate his religious obligations. The Commission found that the ultimate guarantor of the right to religious expression was in the applicant's ability to leave were his employer to interfere with his religious obligations.[460]

This line of reasoning continued into the jurisprudence of the ECtHR in the cases of; *Stedman v United Kingdom*;[461] *Kosteski v Former Yugoslav Republic of Macedonia*;[462] *Francesco Sessa v Italy*, and;[463] *Eweida and Others v United Kingdom*.[464] In each of the above cases the applicant(s) alleged that their contractual obligations constituted an interference with their religious expression under Article 9 of the Convention. In the second most recent case; *Francesco Sessa v Italy*,[465] discussed during the second chapter of this thesis,[466] the applicant submitted that the refusal of the judicial authority to adjourn a hearing, which had been listed on a Jewish holiday, restricted him from appearing in his capacity as a legal representative and infringed his right under Article 9 of the Convention. The decision of the ECtHR placed emphasis on its perception that the applicant would have been able to discharge his religious obligations while also attending to his professional duties. It stated that, in the absence of evidence demonstrating how the workplace attempted to change his religious beliefs or prevented his religious manifestation,[467] there had not been a violation of Article 9 of the Convention.[468]

The jurisprudence of the ECtHR could be said to have liberalised somewhat in the seminal judgment of *Eweida and Others v United Kingdom*.[469] The named applicant in proceedings had submitted that the refusal of British Airways to permit her to display her

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[460] *X v United Kingdom* (1981) 22 DR 27 [15].
[461] *Stedman v United Kingdom* (Unreported, European Commission of Human Rights, App no 29107/95, 9 April 1997).
[462] *Kosteski v Former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR, 13 April 2006).
[463] *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012).
[464] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[465] *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012).
[466] See; s 2.3.3.
[467] *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012) [37].
[468] *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012) [39].
[469] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013). See Ronan McCrea, 'Religion in the workplace: Eweida and others v United Kingdom', (2014) MLR 77(2) 287.

crucifix, in a modification of the prescribed uniform, was an infringement of her religious beliefs. The decision of the ECtHR is significant for the restriction of religious expression in the public sector primarily on the basis that religious interests can give rise to the modification of contractual obligations and also due to the fact that a corporate image cannot be held to be more important than a religious belief. The decision is also theoretically significant on the basis that the understanding of the belief should be subjectively determined above any perceived institutional understanding of what acts constitute a method of religious expression.[470]

The ECtHR accepted that the desire of the first named applicant to wear a crucifix in addition to her uniform was a request to modify her contractual obligations in accordance with her religious beliefs.[471] In finding that the domestic authorities had infringed the applicant's rights under Article 9, the court observed that an improper balance had been struck between the applicant's right to religious expression and the company's right to manage its corporate image.[472] When attempting to balance these interests the domestic authorities had been disproportionate in their accommodation of a corporate image without affording sufficient weight to the 'value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.'[473] This judgment is significant for the rights of religious employees in the public sector for the way in which it modifies the benchmark for potential litigation. It no longer appears that the ultimate guarantee of religious freedom is vested in the employee's right to leave their employment therefore the operation of Article 9 could give rise to the modification of contractual obligations by virtue of the judgment in *Eweida and Others v United Kingdom*.[474] While the decision to enter into a voluntary contract which would require an individual to

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[470] See; s 2.7.

[471] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [93].

[472] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [94].

[473] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [94].

[474] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013). See Ronan McCrea, 'Religion in the workplace: Eweida and others v. United Kingdom', (2014) MLR 77(2) 287.

act in opposition to their conscience would be factually significant for any determination[475] it can no longer be stated that the entrance into the workplace necessitates an absolute dismissal of individual religious liberty.

At the same time it cannot be envisaged that the change to the jurisprudence of the ECtHR is anything more than modest;[476] in reality, it is said by Wintemute, that the decision making of the court could be described as particularly reliant upon the particular circumstances of the employment of the first named applicant.[477] This thesis is in agreement with this position due to the fact that the ECtHR placed emphasis upon countervailing considerations in the case of the second named applicant which were considered to be more important than the ability of the applicant to express her religious belief through the same medium; the crucifix. In a hospital context, greater weight was afforded to the interests of health and safety which justified the restriction of Article 9.[478] The decision of the court could not be considered to herald extensive liberty for religious adherents in workplace environments surpassing those guarantees in equality legislation presently. The case confirms, however, that the right to religious expression must be afforded due weight in any circumstance whereby interests must be balanced.

While the decision of the ECtHR in *Eweida and Others v United Kingdom*[479] can be viewed as a positive shift in the Article 9 jurisprudence[480] the decision has contributed to the further judicial speculation regarding the nature of religious symbols in distinct religious communities; particularly the advancement of the alienation of Islamic expression in the workplace. As stated above, the application of *Eweida* is most likely contingent upon its facts. The decision of the court placed emphasis on the fact that the crucifix was discreet

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[475] Mark Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v United Kingdom' (2013) ELJ 15(2) 199.
[476] Ronan McCrea, 'Religion in the workplace: Eweida and others v. United Kingdom', (2014) MLR 77(2) 288.
[477] Robert Wintemute, 'Accommodating religious beliefs: harm, clothing or symbols, and refusals to serve others' (2014) MLR 77(2) 231.
[478] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [99].
[479] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[480] Julie Maher, 'Eweida and Others: A New Era for Article 9?' (2014) ICLQ 63(1) 230.

which made it unable to detract from an outward professional appearance.[481] This can be contrasted against the view of the Grand Chamber in *S.A.S. v France*[482] where it was stated that the Islam veil was perceived as strange[483] and previously in the case of *Kurtulmuş v Turkey*[484] where it was noted as ostentatious.[485]

A final point must be made for the difference in rights prioritisation which occurs between the public sector and the private sector. The public sector has a greater obligation to uphold the values contained within its applicable domestic Constitution or laws and manifest them in its neutral service, however so qualified.[486] A different standard is placed upon private bodies. These bodies are not expected to hold the same values as the State and are under no obligation to be neutral in religious matters insofar as the organisation complies with its obligations under domestic law.[487] This was recognised in Germany where the Labour Court of Dortmund, in its decision of 16 January 2000, held that 'an employee under private contract of employment is not as such a representative of the State as a public servant is.'[488] Here a playschool teacher had been excluded from employment on the basis that she wore the Islamic veil which her employers considered as a religious expression which could compromise their neutral image. The judgment endorses that view that private bodies do not have to manifest religious neutrality to the same extent as the State and accordingly cannot restrict religious expression save in the presence of legitimate countervailing interests.

The right to religious expression can result in the modification of contractual obligations freely entered into between parties by virtue of the decision of the ECtHR in *Eweida and Others v United Kingdom*.[489] Private bodies are not under the same obligations

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[481] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [94].
[482] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[483] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [120].
[484] *Kurtulmuş v Turkey* App no 65500/01 (ECtHR, 24 January 2006).
[485] *Kurtulmuş v Turkey* App no 65500/01 (ECtHR, 24 January 2006) [1].
[486] Robert Wintemute, 'Accommodating religious beliefs: harm, clothing or symbols, and refusals to serve others' (2014) MLR 77(2) 235. See also; s 4.4.
[487] See; Employment Equality Act 1998 s 37(1).
[488] Dagman Schick, 'Just a Piece of Cloth? German Courts and Employees with headscarves' (2004) 31(3) ILJ 71.
[489] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

of religious neutrality as the public sector therefore distinct opposing interests will have to be measured in any potential restriction of religious expression. The decision of the ECtHR in *Eweida*[490] is significant for the Christian religious communities and those communities which can adequately manifest their religion 'discreetly'; however, it may not find consistent application in any case regarding the Islamic veil. Further, the liberalisation of the European jurisprudence is not analogous to suggesting that individuals are free to enter into contracts relying on their religious beliefs as a method of avoiding the discharge of such obligations. It cannot be envisaged that individuals will be permitted to widely absent themselves, in violation of agreed contractual conditions, on foot of the demands of conscience.

The court should also afford proper weight to the modification of circumstances such as those represented by the third applicant in the case of *Eweida*[491] who was designated as a registrar of civil partnerships after having entered into a contractual agreement with Islington Borough Council. It could be argued that Ms Ladele had never agreed to enter into a contract which would require her to act in contravention to her conscience; however, the deferral of the court towards the margin of the Contracting State frustrates the advancement of this point save to emphasise that which was previously laboured during the course of the third chapter.[492] The following section outlines the distinct issues which arise in the context of employment in the public sector.

4.8.2 The Public Sector

The term public sector can be interchangeably used with the civil service and refers to that category of service provided to the citizens of the State by that same State. Unlike the private sector, the public sector is not only required to orchestrate the realisation of the objectives of the State but must represent the same values in their interactions with service users. As such, employees of the State are bound in a special way to demonstrate outward impartiality in all neutral matters and service users can expect to receive this neutrality in

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[490] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[491] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[492] See; s 3.4.2.

return. Employees within the public sector, addressed as civil servants, have an obligation to separate their private opinions from the public enterprise of the State; as such, civil servants can expect to be limited in the expression of their religious beliefs in a greater way than employees of the private sector. The restriction of religious symbols and expressions has the very result of separating individual identity from the public enterprise.[493] The following section proposes to demonstrate how the ECtHR has demonstrated a disposition towards the limitation of the religious expression of public employees to a greater degree than private employees. This illustrates the greater emphasis to be placed on neutrality within the public sector.[494]

Returning again to *Eweida and Others v United Kingdom*,[495] it has already been observed that the second and third named applicants were employees in the public sector. The second named applicant, Ms Chaplin, submitted that disciplinary action taken against her for her insistence upon wearing a crucifix infringed her rights under Article 9 of the Convention. While the applicant in question was indeed a member of the public sector it was not submitted that the refusal to facilitate her religious manifestation was in anyway motivated by State neutrality. Indeed the Contracting State submitted in evidence that the hospital in question had provided for the Islamic veil in restricted form[496] and also had offered to facilitate the applicant's request through a cross in the form of a brooch which could be attached to her uniform.[497] In this context the interest of health and safety were of paramount concern.

The third named applicant, Ms Ladele, has been discussed in the context of chapter three.[498] Her case is distinct from the others in that, not only was she a public servant seeking to withdraw from certain contractual obligations, but she did so in a context where the conditions of her employment had been altered as a consequence of statute. The

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[493] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 95.
[494] See; s 4.4.
[495] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[496] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [19].
[497] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [98].
[498] See; s 3.4.2.

significance of this was emphasised in the previous chapter.[499] Importantly, the ECtHR recognised that the local authority, as a branch of government, had an auxiliary role in the protection of the rights of others.[500] In the balance of religious interests against gender and sexuality interests the court afforded the Contracting State a margin of appreciation which it used to support the latter interests to the detriment of the third named applicant.[501]

The decision of the ECtHR in *Eweida*[502] is significant when considering the limitation of religious expression because it recalls that each Contracting State can deal divergently with competing Convention rights which can influence the way in which the employees of the public sector are permitted to appear. Distinct from private sector employees, public sector employees are required to manifest the ideals of the State which include the promotion of the rights of others and which can, in turn, have consequences on the way in which they are permitted to dress in the performance of their duties.[503] Where there are competing Convention rights the employees are required in a special way to promote the values of the domestic jurisdiction and users of this sector are entitled to receive such value based execution.

This thesis takes the example of the school as a *prima facie* public institution and examines a proposed restriction of the Islamic veil on the part of the teachers and contrasts such against the restriction of students. It proposes to demonstrate that any context specific restriction of the Islamic veil in a school cannot be justified without appreciating the divergent interests and positions of teachers and students and indeed without appraising the level of such education and the degree of influence which the person in authority may have over them. It is accepted that the vast majority of schools in the domestic context are under the patronage of the Roman Catholic Church. The primary analysis examines any restriction upon a school under the direct patronage of the State which can be replicated in the European context. A provision will be made, in the closing segments, purporting to take

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[499] See; s 3.4.2.
[500] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [106].
[501] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [106].
[502] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[503] *Kurtulmuş v Turkey* App no 65500/01 (ECtHR, 24 January 2006) [2].

into consideration the effect of religious patronage and the consequences of such in any restriction of the Islamic veil.

4.8.3 State Schools: Contrasting Teacher with Student

The Civil Service Human Resources Policy Directorate Helpdesk has noted that 'the Irish Civil Service or public service does not have any specifications with regard to uniform and/or costume instruction.'[504] Generally, civil servants are often restricted from incorporating religious symbols into their uniform in an attempt to separate one's personal identity from their State function.[505] School teachers are called in a special way to realise the objectives of the State through fostering such values in the education of children. Their personal convictions should not necessarily be a component of their work as such beliefs could be misconstrued to be the opinion of the State. This was at issue in the case of *Dahlab v Switzerland*[506] where the court took account of the applicant's role as a representative of the State[507] when restricting the applicant from wearing an Islamic veil whilst carrying out her role as a teacher in a non-denominational State school. Such an interference with the religious expression of Ms Dahlab was 'justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents, and by the breach of the principle of denominational neutrality in schools.'[508]

It was recognised that, while the right of religious expression was 'one of the most vital elements that go to make up the identity of believers and their conception of life',[509] her actions in a school, as an official of the State in which the State valued non-denominational education, contradicted the values of the State and as such could be limited. It was recognised by both the applicant and the court that this conspicuous manifestation of religious expression amounted to a 'powerful religious symbol by a teacher

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[504] Helpdesk Civil Service Human Resources Policy Directorate, Response to information request, 14 August 2012.
[505] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 95.
[506] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[507] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].
[508] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).
[509] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).

at a State school'[510] as such an expression was in clear contradiction to the values of the Swiss State it was deemed permissible for the State to restrict the religious expression of Ms Dahlab. Authority is crucial in understanding this judgment as the teacher is held to possess more authority and hold greater potential for impression than fellow students at this juncture of their lives.[511]

Other European jurisdictions have drawn a distinction between the Islamic veil which covers the face and the veil which covers the hair. Accepting that *Dahlab* is often cited as the authority in this matter it is interesting to note the different approaches between individual Contracting States. In *Azmi v Kirklees Metropolitan Borough Council*[512] the applicant, a teaching assistant in a junior school, initiated proceedings for discrimination against the educational authority for refusing to permit her to wear the *niqāb* whilst carrying out her teaching duties. Ms Azmi had requested to wear the *niqāb* in the presence of male teachers, while moving about the school and in the grounds of the school. The situation was complicated due to the fact that Ms Azmi had presented to interview, before a panel including males, wearing the *ḥijāb* and had given no indication of the special treatment which she would require on employment.

The tribunal noted that there was an actual barrier to sufficient communication in that Ms Azmi had to raise her voice while attempting to assist teaching in conjunction with the face veil.[513] They also recognised the educational authority's submission that her performance was starkly different when Ms Azmi was wearing the veil and in circumstances where she was not.[514] This lead to their conclusion that she had not suffered discrimination as a consequence of the restrictions places upon her and also that, while her religious expression had been limited in this context, it was proportionate. This case made no reference to any difficulty arising from Ms Azmi potentially wearing a *ḥijāb* as the grounds

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[510] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001). See also; the duty of State neutrality, favoured through the non-denominational approach to education in Switzerland, is recognised as a legitimate aim of the State through European case law, see; *Church of Scientology Moscow v Russia* App no 18147/02 (ECtHR, 5 April 2007) [72]; referred to the 'State's duty of neutrality and impartiality' towards religion, particularly in the determination of the legitimacy of any faith based organisation.

[511] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1].

[512] *Azmi v Kirklees Metropolitan Borough Council*, [2007] ICR 1154, [2007] UKEAT 0009/07/3003.

[513] *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154 [69].

[514] *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154 [69].

for her restriction was based on performance issues; specifically, her ability to communicate which was an integral component of her position.

A similar attitude with regard to the *ḥijāb* was noted in a case before the Commission for Equal Treatment in The Netherlands. In that case a trainee teacher would not remove her veil while carrying out her practice and as such was restricted. The Commission in their finding noted that the trainee 'believes in a religion and expresses this by wearing a headscarf [which] does not preclude her from having an open attitude and being capable of teaching in accordance with the character of the school as a public educational institution.'[515] In such a context the Islamic veil was not considered a threat to equality and was permissible as these tribunals had the benefit of establishing the subjective components in each case.

The above cases compound the point made previously regarding the curtailment of religious expression in the presence of 'threat'.[516] It is clear from the judgment in *Dahlab* that the Islamic veil is a 'powerful symbol.'[517] The jurisprudence of the ECtHR evidences a willingness to consider the manner in which a Contracting State may orientate itself towards religion and how subjectively it may determine threat when analysing the margin of appreciation in a limitation exercise. Powerful, however, does not necessarily mean dangerous. When understood and familiarised these symbols can be neutrally appraised and a determination can be made regarding their positivity or negativity. This familiarisation demonstrates the local perception to the Islamic veil as considered in the United Kingdom and the Netherlands, both jurisdictions which have exhibited traditional multiculturalist policies. Both cases considered restrictions to the Islamic veil yet neither case considered the veil as anything other than a form of religious expression which was comparable with other forms of expression in other religions. With familiarity comes understanding and accordingly neither case considered if the veil was a threat to gender equality or a threat to society.

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[515] Commissie Gelijke Behandeling [Commission for Equal Treatment] 'Onderscheid op grond van godsdienst door stagiaire niet toe te staan in de klas een hoofddoek te dragen', ['Discrimination on grounds of religion by not allowing trainee in the class to wear a headscarf'] Oordeelnummer [Judgment] 1999-18: s 4.5.

[516] See; s 4.7.3.

[517] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).

The position of teachers is distinct from that of their students due to the authority which they carry; however, students themselves, while having less potential authority to impact younger students, can be said to carry a larger influence on their social group in adolescence.[518] It has been demonstrated that religious expression has been restricted in the context where it has been shown to impact negatively on the student themselves and on the lives of their peers.[519] The school uniform has at its heart a unifying quality in that it makes all members of the community the same regardless of economic status, social class or ethnicity.[520] Often these inexpensive and durable garments are considered with reference to the desires of the patron and the parents. The Islamic veil is not a component of the mainstream school uniform and as such applications to wear it are often considered as a request to alter the uniform with the consequence that the individual may be more easily identified with a belief rather than the ethos of a school.

It is due to this that the French government in its law of 2004 prohibited the Islamic veil in the school context as it had the effect of identifying an individual with a different community then their French community.[521] This purpose was legitimised in the ECtHR judgment of *Dogru v France*[522] where the restriction on the religious expression of students was considered proportionate to the aim of the French government in their attempt to achieve secular equality.[523] It is important to recognise, when considering authorities in the French context, that secularism is understood there in a specific manner. It is accepted that the objective of State secularism is not shared in the Irish context; therefore, schools would

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[518] See; Elizabeth Weiss Ozorak, 'Social and Cognitive Influences on the Development of Religious Beliefs and Commitment in Adolescence' (1989) JSSR 28(4) 448.

[519] A considerable weight was afforded to this in its judgment, see; *R (Begum) v Headteacher* [2006] UKHL 15 [98]; '...girls have subsequently expressed their concern that if the *jilbāb* were to be allowed they would face pressure to adopt it even though they do not wish to do so.' This was also cited strongly as a justification in the French context, see; Patrick Weil 'Lifting the Veil of Ignorance' (2004) 3(1) PP (non-paginated) 19 – '...in the schools where some girls are wearing the headscarf, the Muslim girls who do not wear it are subject to strong pressure to do so.'

[520] Todd A. DeMitchell. Richard Fossey and Casey Cobb, 'Dress codes in the public schools: principals, policies, and precepts' (2000) 29(1) 31.

[521] Loi n° 2004-228 du 15 mars 2004.

[522] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008).

[523] This purpose was also domestically upheld by the *Conseil d'Etat* in its judgment of *Chain v France*, Conseil d'Etat, N° 285394, 5 December 2007, and; *Bessam v France*, Conseil d'Etat, No. 295671, 5 December 2007.

have to take special circumstances into consideration when proposing a context specific prohibition as discussed previously.[524]

In the English jurisdiction, the decision of *R (Begum) v Head teacher*[525] gave weight to the concept of peer pressure and demonstrated that a movement, which encouraged a form of religious dress, was exerting pressure on young women to sacrifice the freedom which the State guaranteed for them. It was noted in the judgment that the school 'was entitled to consider that the rules about uniform were necessary for the protection of the rights and freedoms of others.'[526] This was also an approved component of the French State's submission in *Dogru*[527] that the limitation on the student's right to religious expression was justified in response to the perceived threat of religious groups. The judgment made reference to *Şahin*[528] and the proportionality of restrictions to religious expression in the context of 'external pressure from extremist movements.'[529] This component of external pressure was also alluded to in the Dutch case of the trainee teacher[530] where the school submitted that it had an unofficial policy which deterred Islamic girls from wearing the veil in school as it found that without it they were freer and more likely to interact with the group.[531] The judgments note the common justification of communal fraternity and social cohesion as an appropriate ground for the limitation of the Islamic veil.

The Irish jurisdiction has failed to make any official decision with regard to the Islamic veil in State schools. In 2008, following a request by Gorey Community School for advice on uniform regulation and the Islamic veil, the Department of Education and the

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[524] See: s 4.4.

[525] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 [2006] UKHL 15.

[526] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 [2006] UKHL 15 [58].

[527] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008).

[528] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

[529] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [66].

[530] *Commissie Gelijke Behandeling* [Commission for Equal Treatment] *'Onderscheid op grond van godsdienst door stagiaire niet toe te staan in de klas een hoofddoek te dragen',* ['Discrimination on grounds of religion by not allowing trainee in the class to wear a headscarf'] *Oordeelnummer* [Judgment] 1999-18.

[531] *Commissie Gelijke Behandeling* [Commission for Equal Treatment] *'Onderscheid op grond van godsdienst door stagiaire niet toe te staan in de klas een hoofddoek te dragen',* ['Discrimination on grounds of religion by not allowing trainee in the class to wear a headscarf'] *Oordeelnummer* [Judgment] 1999-18: s 3.5.

Department of Integration issued guidelines.[532] This document recommended that individual schools should be aware of their commitment not to discriminate yet at the same time enabled schools to formulate policies on a local level. This recommendation places the decision in the hand of local school boards in a comparable situation to France and the United Kingdom with their respective *ḥijāb* controversies beginning in 1989. Hickey makes the comparison between both jurisdictions and demonstrates that the lack of consistency in this policy led to the prescriptive act of the French central government to entirely prohibit outward manifestations of religious expression in 2004.[533] Making reference to the first French Islamic headscarf controversy in Creil, in the *département* of Oise,[534] he notes the comments of Laborde that the 'nuanced ruling proved difficult to implement in practice, as it left it to heads of schools to settle issues locally, on a case-by-case basis...it is this legal uncertainty that provided the most immediate incentive for the convening of the Stasi Commission and the drafting of the 2004 law.'[535] The practice in Ireland is sure to follow the same path on the basis of the growth of the Islamic population.

The issue of the school uniform for pupils is distinct from the situation of school teachers in the State.[536] The children within these schools are not called to represent the same values which their teachers are. Students are vulnerable in two distinct ways to the impressions around them. They are impressionable as young children by the actions of their teachers in authority above them;[537] yet, in adolescence they are impressionable by the actions of their peers around them.[538] The representations of the teacher of young children can be understood to more easily influence the perceptions of those under their care. In

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[532] Minister for Integration Conor Lenihan TD, Minister for Education Batt O'Keefe TD, Report on the need for a Guidance Note to Schools when Reviewing their Policies on School Uniforms <http://www.education.ie/servlet/blobservlet/uniform_recommendations.doc> accessed 13 July 2012.
[533] Tom Hickey, 'Domination and the Hijab in Irish Schools' (2009) 31(1) DULJ 131.
[534] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) [20]-[21].
[535] Cecile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (OUP 2008) 52.
[536] This perception was shared by the decision of the *Counsel d'Etat* in 27 November 1989 when it argued that 'laïcité meant different things for teachers and students: for teachers it meant neutrality...for students if meant freedom of conscience which allowed them to express their religious affiliation in public schools.' See; Christian Joppke, *Veil; A Mirror of Identity* (Polity Press 2009) 38.
[537] See; *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) [1]: 'the applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect...'
[538] See; *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [93] and [95].

that circumstance the objective interpretation of the Islamic veil is significant as impressionable infants may come to derive their own conclusions regarding the veil. That need not, however, be an exclusively negative conclusion and would largely be impacted by external factors and the influence of their parents, the primary and natural educators of the child.[539]

In the second instance, in adolescence, children are greatly impressionable and curious about many things leading them to change their beliefs in some matters in response to their peer group.[540] Baroness Hale referred to the transient nature of these religious views during the course of her judgment in *R (Begum) v Head teacher*.[541] Forms of external pressure among the peer group of the applicant in this case was instrumental in the restriction of the veil as some students indicated that they would be pressured into wearing the garment contrary to their wishes but in conformity with the desires of a community around them.[542] Pressure exerted in an oppressive manner against children can lead to the justification for a context specific restriction of the Islamic veil. This was similarly endorsed to in the decision of BVerfG 471/10 and BVerfG 1181/10.[543]

The consideration of both vulnerabilities leads to their application in the Irish context. While the argument based in absolute secularism is not applicable a justification could be raised from it regarding religious neutrality. Adjacent to this is the ideal of social fraternity which could potentially be damaged by the presence of the Islamic veil. According to the 2011 Census there are 49,204 members of the Islamic community living in Ireland.[544] Amongst this number there does not appear to be a publicised extremist community which is attempting to change the normative values of Irish society by coercive and oppressive

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[539] *Bunreacht na hÉireann* art 42.1.

[540] Roger J. R. Levesque, *Not by Faith Alone: Religion, Law and Adolescents* (New York University Press 2002) 46.

[541] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [92].

[542] *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [92]; [65].

[543] BVerfG 471/10 and BVerfG 1181/10; ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, accessed online 27 March 2015, available at < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html>

[544] Central Statistics Office, 'Census 2011: Profile 7 Religion, Ethnicity and Irish Travellers' (Stationary Office 2012) 16.

means upon its own community; however, it has recently come to light that Ireland has been used as a training venue for radical Islamic jihadists which indicate reasons for caution in this regard.[545]

A final note must be made to reconcile this study with the fact that the Roman Catholic Church is patron over the vast majority of schools within the jurisdiction with other religious communities, such as the Church of Ireland, similarly offering patronage to schools. Students wishing to attend such schools do so by way of a subscription to the religious ethos of that school. An analogy can be drawn between this and the contractual obligations discussed previously in the private sector. Individuals attending any religious school consent to certain conditions being imposed upon them such as an environment predisposed towards the encouragement of one religious organisation over another. Distinct from regular contractual obligations, however, is the overarching importance that can be attributed to religion and the protection afforded to such communities, by virtue of Article 44.2.5°,[546] to govern and manage their own affairs. Further, statute permits a discriminatory disposition in religious institutions in order to foster religious belief[547] which has been affirmed in case law; per Henchy J in the case of *McGrath and O'Ruairc v Maynooth College*.[548] At this present time schools have not raised further objection to the joint-ministerial guidelines issued in 2008 and the Roman Catholic Church, patron of the vast majority of schools in the jurisdiction, has published its own opinion on the matter permitting the Islamic veil in its forms which do not conceal the face which demonstrates its current satisfaction with the matter.[549] It is understood that the Church of Ireland is currently in a consultation stage in the construction of a similar guideline.[550]

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[545] *Damache v DPP and Ors* [2015 IEHC 339.
[546] *Bunreacht na hÉireann* art 44.2.5°.
[547] Employment Equality Act 1998 s 37(1).
[548] *McGrath and O'Ruairc v Maynooth College* [1979] ILRM 166.
[549] Aiveen Mullally 'Guidelines on the Inclusion of Students of Other Faiths in Catholic Secondary Schools' (Joint Managerial Body/Association of Management of Catholic Secondary Schools, April 2010)15.
[550] S 37 of the Employment Equality Act 1998 is the subject of a proposed amendment in the Employment Equality (Amendment) Bill 2015 which would withdraw the ability of religious organisations to discriminate in employment for the protection of the values of their organisations. This would impact the jurisprudence of the courts as evidenced in *McGrath and O'Ruairc v Maynooth College* [1979] ILRM 166 and would suggest that these institutions may be further fettered in the administration of their affairs by future equality and equal access provisions.

4.9 Conclusion

The Islamic veil is a form of religious expression capable of protection under Articles 9 and 10 of the European Convention.[551] The veil has also become associated with oppositional political[552] and cultural movements;[553] however, the primary definition of the Islamic veil must be religious in order to give reality to the subjective approach towards the construction of religious expression adopted for the purposes of this thesis.[554] While political and cultural movements can utilise the veil for the advancement of their respective purposes this cannot be done to the alienation of the primary religious identification of the object. The very attempt on behalf of western jurisprudence demonstrates its inability to fully comprehend the substance of the Islamic veil in a cultural system so much attuned to the substance of the Christian faith. Islam is an all-encompassing religion in which any distinction between religion, politics and culture may not, at all times, be said to exist;[555] all can be informed by reference to God. The veil is a visible symbol of the substance of religion in the public sphere and any attempt to alienate the religious foundation from political and cultural expressions are largely impossible.

There are numerous Contracting States to the European Convention which have considered the limitation of religious expression, here examined through the medium of the Islamic veil. Most prominent amongst these include France, Belgium and Turkey; however, other Contracting States including Italy, Denmark and Switzerland are similarly concerned with the potential danger of the Islamic veil in their respective jurisdictions. This chapter has considered three prominent arguments for the restriction of religious expression, principally with reference to the veil; secularism, gender equality, and the requirement of 'living together'. Secularism is a constitutional model yet the concurring opinion of Judge Bonello in the decision in *Lautsi and Others v Italy*[556] is pertinent regarding secular values. He observed:

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[551] See; s 3.5.
[552] Nilüfer Göle, 'Islam in Public: New Visibilities and New Imaginaries' (2002) 14(1) PC 181.
[553] Leila Ahmed, *Women and Gender in Islam* (Yale University Press 1992) 152.
[554] See; s 2.8.
[555] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 6.
[556] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011).

> 'The Convention enshrines the protection of freedom of religion and of conscience (Article 9). Nothing less, obviously, but little more.
>
> In parallel with freedom of religion, there has evolved in civilised societies a catalogue of noteworthy (often laudable) values cognate to, but different from, freedom of religion, like secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance. All of these represent superior democratic commodities which Contracting States are free to invest in or not to invest in, and many have done just that. But these are not values protected by the Convention, and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion.'[557]

Due to the fundamental significance which the ECtHR attributes to Article 9, as 'one of the most vital elements that go to make up the identity of believers',[558] secularism cannot be viewed as a proportionate ground for the limitation of the religious expression of genuine believers.

The limitation of the religious expression on the basis of gender equality is fundamentally complex due to the normative impact upon any such definition of gender equality;[559] however, distinct from secularism, it is a right and a fundamental value of the European Union Member States.[560] This chapter has been of the view that any restriction of the veil in the circumstances where an autonomous action on the part of an individual was defined as detrimental to their gender equality from the perspective of the normative values of the Contracting State would be disproportionate. A restriction would be proportionate where circumstances would suggest that the Islamic veil was being utilised coercively as a tool to deprive individuals of their rights to gender equality in a liberal system. It must be recalled that any paternalistic approach on the part of the Contracting State should be avoided which may ground an argument that the Contracting State is also engaging in coercive behaviour by limiting individuals in their attempt to express their religion in view of their religious conscience.

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[557] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [2.1] and [2.2].
[558] *Kokkinakis v Greece* App no 14307/88 (ECHR, 25 May 1993) [31].
[559] Kevät Nousiainen, Anne Maria Holli, Johanna Kantola, Milja Saari and Linda Hart, 'Theorizing gender equality: perspectives on power and legitimacy' (2013) 20(1) SP 55.
[560] See; s 4.5.

Women have demonstrated themselves to be capable of making their own informed decisions regarding veiling.[561] Not all acts of veiling can be understood as an exploitation of those said to be 'ignorant'. This section concluded by addressing the argument that the limitation of the Islamic veil on the basis of gender equality is attributable to the clash of values which the veil symbolises. The veil can be understood as a symbol of opposition to normative values and facilitates members of the religious community to enter into the public sphere on their own terms, whether or not these are representative of the majority.[562] Anything more than a locally orientated limitation of religious expression on the basis of a fundamental threat to social order would be disproportionate on the basis of gender equality.

In the judgment of *S.A.S. v France*[563] the ECtHR emphasised that the condition of 'living together' was a legitimate aim of the French State.[564] This chapter proposed that this decision demonstrated the continued dilution of the fundamental protections of Article 9 of the European Convention and strengthens the requirement for a theoretical reconfiguration of the right to religious expression guaranteed under both Articles 9 and 10 of the Convention and explicated during the third chapter of this thesis.[565] McCrea is correct in his assertion that certain requirements can be placed upon individuals as they enter the public sphere;[566] however, to indicate that the right of society at large to communicate with individuals without obstruction in general terms and in the public sphere is not only contrary to the rights of religious freedom but those pertaining to bodily integrity and privacy. While individuals have an obligation to participate in the society in which they reside through the democratic process they cannot be compelled and restricted in the exercise of fundamental freedom in the absence of real harm to others and upon the desire of the majority in oppression of the minority. The restriction of the Islamic veil in these terms is further evidence of the clash of values, as argued by Mancini, whereby the religious

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[561] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press 1996) 95-96.
[562] Nilüfer Göle, 'Manifestations of the Religious-Secular Divide: Self, State and the Public Sphere' in Linell E. Cady and Elizabeth Shakman Hurd (eds), *Comparative Secularisms in a Global Age* (Macmillan 2010) 47.
[563] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[564] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [122].
[565] See; s 3.5.
[566] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 95.

expression of the Islamic community is limited on the basis of its contrasting religious manifestations with the majority in the public sphere.[567]

This thesis concludes that this ground of limitation of religious expression afforded disproportionate interest to social policy and normative conceptions of harm to the detriment of sincere believers. It does not consider that any general limitation, provided for by law, would be necessary in a democratic society or proportionate to achieve the value of social fraternity; rather, the judgment has alienated the Islamic community by depriving them of their legitimate rights under the Convention and limited the theoretical scope of Article 9 reducing its capabilities significantly.

Context specific limitations of the Islamic veil, when provided by law, are proportionate against the interest of religious expression in when they are necessary in a democratic society with particular emphasis on local circumstances. Individuals are not at liberty to contravene all contractual obligations on the basis of religious belief.[568] Individuals must recognise that, on the basis that employment is voluntarily taken, freedom to vacate that employment continues to be an enduring guarantee of religious expression; [569] however, the ECtHR in the decision of *Eweida and Others v United Kingdom*[570] liberalised the standard somewhat placing an emphasis on the employer in question to demonstrate upon what basis they are compromised by any religious expression. Potential damage to commercial image does not necessarily justify a restriction of the religious expression of an individual.[571]

There is a distinction between the public and private sector on the basis that the outward viability of the civil servant has an impact on the representation of the State. It was

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[567] Susanna Mancici, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projections and cultural racism' (2012) 10(2) IJCL 413-414.
[568] Pieter van Dijk, Fried van Hoof, Arjem van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 766.
[569] See; *X v Denmark* (1976) 5 DR 157; *Knudsen v Norway* (1985) 42 DR 247; *Karlsson v Sweden* (1988) 57 DR 172.
[570] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[571] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [94].

argued that the constitutional model as adopted in a Contracting State would be relevant to any consideration. Certain theoretical considerations also have been discussed which may influence the limitation of religious expression in the European Sphere. It suggests that the individualisation of religious experience, familiar in the occidental context, can be incompatible with other religious entities and can frustrate the development of a cohesive theory for the permissible limitation of religious expression.[572] The State is called to be neutral and impartial in matters regarding religion;[573] however, the constitutional model in operation in any given Contracting State informs the nature of neutrality and shapes such in what can be called qualified neutrality.[574]

In a similar way to equality, neutrality is subjectively understood with reference to the Contracting State. Three models were considered herein; the secular model, the multicultural model and the ethno-cultural or Christian Occidental model. It is the view of this chapter that the Irish State previously exhibited tendencies which would enable it to fall tentatively into this latter model on the basis of its general acquiescence towards the facilitation of Christian religious expression in the operation of the State against the limitation of minority religious expression;[575] however, societal modification in the last twenty years has demonstrated a shift towards pluralism and diversity which frustrate the categorisation of the Irish State as operating under this constitutional model in the contemporary sphere. It is suggested that the Christian religion continues to feature within the 'cultural continuum' in the domestic context and impacts the normative interpretation of religion and the delineation of the civil and religious realms.[576]

The normative values and cultural practices of any State inform the substance of 'threat' which may further inform the limitation of religious expression. Religion for the secular model is threat and so also can minority religion be for the ethno-cultural model. Any limitation of religious expression on the basis of such a threat must indeed be substantial and justify the interference with a serious and significant requirement of

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[572] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 5.
[573] *Savez crkava "Riječ života" and Others v Croatia* App no 7798/08 (ECtHR, 9 December 2010) [88].
[574] See; s 2.7.4.
[575] See; *Commissioner of An Garda Síochána v Oberoi* [2013] IEHC 267.
[576] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [1.1]

religious belief within the lives of the religious adherent. In examining proportionality, sufficient weight must be afforded to the fundamentality of religious conscience in the life of the adherent and the substance of religious requirements upon that basis.[577] Any examination of the context specific limitation of the Islamic veil must be made from a subjective and not objective perspective. Recent events within Europe have demonstrated that the continued complexity of religious fundamentalism in the Islamic community continued to risk the freedom of others; however, it must be remembered that there is a distinction between the Islamic community and the Islamist.[578] The violent and dangerous Islamist should not be confused with the genuine and authentic belief of the Islamic community in an atmosphere of heightened anxiety. Roy observes that 'traditional cultures are fading away'[579] and as Europe enters a post-secular age the enduring liberal values must be affirmed and re-emphasised in order to realise the obligation to truly live together mindful of difference and considerate of history.

[577] See; s 3.8.
[578] Göle, Nilüfer, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) SR 815.
[579] Olivier Roy, 'Secularism and Islam: The Theological Predicament' (2013) 48(1) IJIA 6.

Chapter V

The Provision for Religious Expression: Legislating for Islamic Finance

5.1 Introduction

Since the decision of the Commission in *Marckx v Belgium*[1] the European Courts have recognised positive obligations under almost every Convention right.[2] This chapter argues for a wider application of the positive rights theory to the right of religious expression, through the medium of Islamic finance which has 'grown considerably in importance and visibility in recent years',[3] on the basis of its fundamentality within the rights hierarchy of the Convention.[4] Once considered the exception rather than the rule,[5] positive rights theory has advanced to the extent that the court will now recognise such in order to protect the practical and effective guarantee of the Articles of the Convention.[6] In similar terms to the fourth chapter of this thesis,[7] the theory advanced during the course of this chapter can be applied to other forms of religious expression. Islamic finance has been used in order to place the theory within an applicable context so as to illustrate the theory. While this theory is applied to the Irish State, this research has primarily relied on the Convention due to the development of the rights theory therein.

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[1] *Marckx v Belgium* (1979) Series A no 31.
[2] Janneke Gerards and Eva Breams, 'Introduction' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 10, see also; Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publications 2004).
[3] Nicholas H.D. Foster, 'Islamic Finance as an Emergent Legal System' (2007) 21(2) ALQ 171.
[4] See; s 3.4.2.
[5] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 102.
[6] *Sisojeva and Others v Latvia* App no 60654/00 (ECtHR, 16 June 2005) [104].
[7] See; s 4.1.

Accepting that Islamic finance is a topic of increasing familiarity it has been considered necessary to explicate, in some detail, the substance of this economic model as a prelude to the theoretical analysis. The first part of this chapter considers the religious origins of the economic model and discusses the four central prohibitions in order to inform the subsequent discussion of the structures which facilitate Islamic finance in the contemporary sphere. This detailed analysis enables the examination to isolate what legislative measures the Irish State must adopt in order to provide for Islamic finance in the domestic context. While a comprehensive analysis of Islamic finance is necessary and appropriate for the present examination this chapter does not purport to consider the substance of Islamic finance beyond the scope of present application.[8] This section turns to consider the argument that Islamic finance is an acceptable form of religious expression for the purposes of this thesis, Articles 9 and 10 ECHR and Articles 40.6.1° and 44.2.1° of the Constitution.

The second part of this chapter examines the nature of rights in the jurisprudence of the Western sphere in order to demonstrate that the right to religious expression contains positive obligations. It considers the dichotomous relationship between positive and negative rights and looks to the jurisprudential foundations of liberal theory in order to justify a right to assistance under the Convention and the Constitution so as to provide for Islamic finance on the basis of the right to religious expression. This theoretical analysis then addresses the case law of the domestic and European legal systems in order to demonstrate the context in which positive obligations have been recognised on the basis of rights more generally. This demonstrates that, while the theory is growing in this area, both Irish and European legal spheres have been reluctant to endorse a general positive rights theory. It concludes by arguing that, on the basis of the expansion of the domestic and European rights theory, the State has a positive obligation to provide for

[8] For a more comprehensive consideration of Islamic finance in the Irish context see; Edana Richardson, 'The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges' (PhD thesis, Trinity College Dublin 2012).

religious expression in order to give real and practical effect to this fundamental human right.

5.2 Islamic Finance

The following section considers the fundamental tenets of Islamic finance, its financial structures and outline what legal obstacles frustrate the development of this religiously informed financial model. This detailed aside into the principal research question is necessitated by the economic complexities of the financial model and also to form a basis for the further application of this theory. The conclusion of this section outlines those legislative measures required by Islamic finance which the State will need to provide for in order to effectively guarantee the right to religious expression.

5.2.1 Religious Origin and the Four Prohibitions

Islamic law derives its origins from four distinct sources which can be considered as the roots of jurisprudence, or the *uṣūl al-fiqh;*[9] (i) the prescriptions of the *Qur'ân* ; (ii) the divinely inspired conduct of the Prophet contained in the *Sunna* and the *ḥadīth*; (iii) reasoning by analogy, or *qiyās*, and; (iv) the consensus of opinion, or *ijmā*.[10] The content of the body of law and juristic interpretation forms *Sharī'a* law which governs Islamic financial transactions.[11]

The *Qur'ân* is considered by the Islamic faithful as the direct word of God and is not subject to dispute or error.[12] Its revelation to the Prophet and subsequent transcription took place over many years.[13] Scriptural verses often address individual

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[9] David M. Eisenberg 'Sources and Principles of Islamic Law' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 17.
[10] Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 76.
[11] Jonathan Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets* (CUP 2015) 1.
[12] Edana Richardson, 'The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges' (PhD thesis, Trinity College Dublin 2012) 19.
[13] Islamic history suggests that the Prophetic revelations took place over twenty-two years.

problems for the community at a specific time.[14] This can be demonstrated by the periodic revelations on the subject of alcohol which eventually lead to its prohibition.[15] The *Sunna* in Islamic law refers to the sayings and doings of the Prophet and can be considered as the prescribed model of life for Islamic adherents.[16] The *Ḥadīth* of the Prophet consist of his recorded sayings in response to both complex and ordinary problems.[17] It is important to ascertain the authenticity of given *Ḥadīth*, some of which have been the subject of dispute and allegations of falsehood.[18] This can be attributed to the fact that many *Ḥadīth* were recorded several years after the death of the Prophet.[19] Collectively, the *Qur'ân* and the *Sunna* are considered to form the corpus of *Sharī'a* law from which Islamic financial regulatory codes are extracted.[20] The *Sharī'a*, consisting of these two branches, is considered as Divine law and is incompatible with human contradiction.[21]

Qiyā (analogical reasoning) and *ijmā* (juristic consensus) are important tools for the understanding and development of laws regarding Islamic financial transactions.[22] Islamic scholars have used *qiyā* to draw an analogy between various conducts for the purpose of determining laws. *Qiyā* has been particularly helpful in the confrontation of Islamic finance with the contemporary financial world.[23] While profit-driven commercial activity existed at the time of the Prophet the vast compliment of modern commercial transactions are not directly considered in the

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[14] John L. Esposito, *The Oxford History of Islam* (OUP 1999) 118-120.
[15] See; *The Qur'ân* (OUP 2005) *Al-Baqara* 219: 'They ask you [Prophet] about intoxicants and gambling: say, "There is great sin in both, and some benefit for people: the sin is greater than the benefit".' See also; *The Qur'ân* (OUP 2005) *Al-Nisa* 43: 'You who believe, do not come anywhere near the prayer if you are intoxicated'. See also; *The Qur'ân* (OUP 2005) *Al-Ma'ida* 90: 'You who believe, intoxicants and gambling, idolatrous practices and [divining with] arrows are repugnant acts – Satan's doing – shun them that you may prosper'.
[16] Hans Visser, *Islamic Finance: Principles and Practice* (2nd edn, Edward Elgar Publishing 2013) 12.
[17] While many *Ḥadîth* are of daily importance in the lives of Muslims, such as the preparation for prayer amongst others, some *Ḥadîth* are of abstract importance such as the conduct of exercise and running sanctioned in *Ḥadîth* concerning the fast walking pace of the Prophet.
[18] Vesey-Firzgerald S.G., 'Nature and Sources of the Sharī'a' in Majid Khadduri, Herbert J. Liebesny (eds), *Law in the Middle East* (Middle East Institute 1955) 93.
[19] See; Edana Richardson, 'The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges' (PhD thesis, Trinity College Dublin 2012) 22-24.
[20] Jonathan Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets* (CUP 2015) 1.
[21] Edana Richardson, 'The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges' (PhD thesis, Trinity College Dublin 2012) 19.
[22] Hans Visser, *Islamic Finance: Principles and Practice* (2nd edn, Edward Elgar Publishing 2013) 14.
[23] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 12.

Sharī'a.[24] Previously *qiyā* has been used by scholars to determine that the Qur'anic prohibition of 'grape-wine' should, by analogy, apply to all intoxicants derived from the process of fermentation.[25] *Qiyā* has been used to permit the *istiṣnā* contract.[26] This is a contract for the manufacturing of goods which are not yet in existence. This type of sale would ordinarily generate an unacceptable amount of *gharar*; however, Islamic scholars have reasoned by analogy with permitted contracts to specify certain conditions in the *istiṣnā* sale which renders it permissible in Islamic law.[27] Individuals attempting to enter into an *istiṣnā* agreement must be as specific as possible regarding the conditions of sale, specifying the fixed price and also establishing a date of delivery. It is desirable that there is a high degree of certainty to legitimise this transaction. Where the above conditions are satisfied scholars have reasoned that such an agreement is subject to the same law as other permissible contracts.[28]

Islamic scholars have also used *ijmā* to enumerate previously unspecified law in the *Sharī'a*. This is possible when a consensus of agreement is reached between scholars in response to a given issue. Such authority is derived from the *ḥadīth* that the 'community will never agree in an error.'[29] *Ijmā* allows scholars to determine laws in response to modern circumstances.[30] This tool has been used to appraise modern financial norms and establish certain universal understandings. *Ijmā* functions to further the law in line with the tradition established by the community in Medina. In contemporary contexts it has often been used in order to modernise certain aspects of Islamic law.[31] It has been used by the *OIC* (*Organisation of Islamic*

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[24] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 29.
[25] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 43.
[26] Hans Visser, *Islamic Finance: Principles and Practice* (2nd edn, Edward Elgar Publishing 2013) 55.
[27] See; 5.2.1.iii.
[28] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 47-48.
[29] Ibn Abi 'Asim, *as-Sunna*, quoted in 'Abd ar-Rahman Doi, *Sharī'a: Islamic Law* (Ta-Ha Publishers 2008) 99.
[30] Hans Visser, *Islamic Finance: Principles and Practice* (2nd edn, Edward Elgar Publishing 2013) 13. Scholars disagree upon who represent the community of agreement for the purpose of the *ḥadīth*. It is arguable that in an Islamic State the parliament would have this function, see; Izzud-Din Pal, *Pakistan, Islam and Economics: Failure of Modernity* (OUP 1999) 146.
[31] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 15-16.

Conferences) when adopting the positions of the *International Islamic Fiqh Academy* in matters of Islamic law. It has also been used by the AAOIFI (*Accounting and Auditing Organisation for Islamic Financial Institutions*) to establish certain banking standards in line with Islamic law. The process by which scholars approach contemporary problems can have a significant impact on trade and will be considered during the course of this chapter. It should be noted that in reasoning by analogy *istiḥsān*, or judicial preference, can be exercised to select the best source of law.[32] This advanced method of legal thought is used to develop the law in financial matters; however, it is capable of exploitation so as to enable individual scholars to develop law in their self-interest.[33]

A distinction exists between universal and contextual Islamic laws and their application. The sources discussed above are used to determine the Divine law. As previously stated, such law is universal in prescription, infallible and not subject to human contradiction.[34] At the same time discussion and dissent is present in minor matters of the law which then can form the subject of contextual laws. These minor disagreements have been referenced when relevant in the following section; however, it should be noted that parochial nuances of Islamic law are not the subject of this thesis and have not been considered comprehensively where irrelevant to the broader research question. The Islamic financial code can be understood to consist of four universal prohibitions; (i) *ribā*, or the taking of interest; (ii) *ḥarām*, or forbidden actions; (iii) *gharar*, or excessive uncertainty, and; (iv) *maysîr*, or gambling. In order to fully understand the interpretations of these four principal prohibitions the following subsections will consider each in turn.[35]

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[32] Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 40.
[33] Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 60.
[34] Edana Richardson, 'The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges' (PhD thesis, Trinity College Dublin 2012) 19.
[35] Ibrahim Warde, 'Status of Global Islamic Finance Industry' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 4, see also; David M. Eisenberg 'Sources and Principles of Islamic Law' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 45.

5.2.1.i Ribā

Ribā refers to the taking of an unjustified increase on a financial transaction otherwise understood as the taking of interest or the participation in usury.[36] Transactions which incur or facilitate interest are prohibited by *Sharī'a* law on the basis that they operate contrary to Islamic principles of partnership, equity and risk-sharing.[37] The generation of interest commonly arises when money is used for the generation of more money which creates profit in the absence of work; this too is prohibited in Islamic finance.[38] The prohibition of *ribā* is accepted universally in Islam on the basis that it is condemned directly in the *Qur'ân* and unchallenged by contrasting *Ḥadīth* found within the *Sunna*.[39] The prohibition of *ribā* is contained within several verses of the *Qur'ân* :[40] of particular note is *Al-Baqara* 275:

> 'But those who take usury will rise up on the Day of Resurrection like someone tormented by Satan's touch. That is because they say, "Trade and usury are the same" but God has allowed trade and forbidden usury.'[41]

While the express prohibition of *ribā* is accepted the substance of this prohibition is open to a degree of interpretation in the absence of a precise definition.[42]

Opinions differ between liberal and orthodox members of the Islamic community concerning acceptable *ribā* with the former advocating a relaxed interpretation which would prohibit usury but not all forms of interest.[43] This approach takes its understanding from the Qur'anic prohibition of the historical

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[36] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 62, see also; Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 904.
[37] Barbara L. Seniawski, 'Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law' (2001) 39(3) CJTL 728.
[38] Hesham M. Sharawy, 'Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds' (2001) 29(1) GJICL 161.
[39] Muhammad Ayub, *Understanding Islamic Finance* (John Wiley & Sons Ltd. 2007) 44.
[40] *The Qur'ân* (OUP 2005) *Al-Baqara* 275; 276; 278; 279; *Al-'Imran* 130; *Al-Nisa* 161; *Al-Rum* 39.
[41] *The Qur'ân* (OUP 2005) *Al-Baqara* 275.
[42] Hesham M. Sharawy, 'Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds' (2001) 29(1) GJICL 163.
[43] Traute-Wohlers-Scharf, *Arab and Islamic Banks: New Business Partners for Developing Countries* (Development Centre Studies 1983) 75.

practice of *ribā* or 'doubling' in pre-Islamic Arabia whereby lenders secured a large amount of return from defaulting debtors.[44] Modernists argue that a subjective understanding of the Qur'anic revelations at the time of the Prophet demonstrate that certain prohibitions must be re-evaluated in line with the spirit of the law.[45] This interpretation, while increasingly gaining support, has not been accepted by the vast majority of the Islamic population which has preferred not to distinguish between prohibited usury and commercial interest.[46] This conflict of interpretation takes place in the context of the wider debate regarding the orthodox and the liberal interpretation of the *Sharī'a*. At this time the consensus of the community has adopted a strict understanding of *ribā* which has justified Islamic banks to trade in the absence of commercial interest universally.[47]

5.2.1.ii Ḥarām

Ḥarām is translated as conduct which is forbidden in Islamic law and, unlike actions which are *mubâḥ* (considered juristically indifferent) or *makrûh* (disapproved), *ḥarām* refers to those actions or activities from which Islamic adherents are absolutely restricted on a religious basis.[48] Activities which are declared *ḥarām* can later be declared *ḥalāl* on the basis of judicial reconsideration. As such they are distinguished from universal aspects of *Sharī'a* discussed earlier. They can be contrasted with restrictions of a civil or criminal nature on the basis of punishment where often, in the case of *ḥarām* activities, punishment for participation or reward for avoidance occurs in the afterlife.[49] All members of the Islamic community are obliged to refrain from participating in any activity which

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[44] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 73.
[45] Fazlur Rahman, 'Islamic Modernism: Its Scope, Method and Alternatives' (1970) 1(4) IJMES 329.
[46] See; Edana Richardson, 'The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges' (PhD thesis, Trinity College Dublin 2012) 58.
[47] Hesham M Sharawy, 'Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds' (2001) 29(1) GJICL 163.
[48] Noel. J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 84.
[49] Noel. J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 12-13.

facilitates, gives rise to or encourages *ḥarām* activities.[50] Islamic finance is a permitted activity in opposition to conventional financial transactions which can be considered as *ḥarām*; however, Islamic finance itself, as a permitted activity, cannot participate in a prohibited action by way of investment or transaction.

Understanding what is *ḥarām* is complicated due largely to the fact that some activities are universally accepted as being *ḥarām* and others are disputed on the basis of subjective interpretation. One universally accepted *ḥarām* activity would be the consumption of non-*ḥalāl* meats outside of an emergency.[51] *Ḥalāl* meats are those taken from animals which have been slaughtered pursuant to Islamic practice.[52] The consumption of some meats is considered *ḥarām*, such as that taken from swine. Consequentially, it is impermissible for Islamic finance to participate in a transaction which facilitates the non-Islamic slaughter of animals, potentially through pre-slaughter stunning, or in the participation in a transaction in the trade of pork.

As widely recognised in the previous chapter, the Islamic religion is not characterised by the universality of governance or by the explicit codification of the *Sharī'a,* therefore; it falls to local communities to interpret what is *ḥarām* in specific contexts. Some communities may argue that due to the Prophet's advocacy of peace that investment in the arms trade is *ḥarām* and incompatible with Islamic investment.[53] Others could argue that due to the Prophet's disapproval of alcohol that alcohol is in itself *ḥarām* and investment within this trade is impermissible. More so than *ribā*, *ḥarām* activities are divided between universal and local interpretations and this gives rise to a multiplicity of difficulties for Islamic financial institutions. In jurisdictions were a governmentally approved *Sharī'a* is not in place, local institutions must interpret the *Qur'ân* with reference to a specific school of

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[50] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 897.

[51] *The Qur'ân* (OUP 2005) *Al-Baqara* 173 permits the consumption of *ḥarām* meats in the case of necessity [*darūra*].

[52] This practice would consist of cutting the animal's throat swiftly and draining all the blood amongst other prescribed activities.

[53] 'Theological Economics: The Details of Islamic Law in Contemporary Financial Instruments' in *The Report: Abu Dhabi* (Oxford Business Group 2010) 82.

fiqh; however, this can still generate disagreements regarding which school to follow.

Islamic financial institutions usually appoint a *Sharī'a* Advisory Board consisting of trained jurists qualified to issue *fatwās* to consider certain investment paths and advise if they are compatible with Islamic precepts.[54] Appointing such a board will inevitably lead to a version of Islam being adopted in preference to other Islamic schools of thought. This is problematic in jurisdictions containing a varied and multi-ethnic Islamic community such as the United Kingdom.[55] As this jurisdiction draws its Islamic community from a mixture of schools of thought it would be impossible for a financial regulatory body to stipulate a specific code in which to follow. This leads to problems when an institution professes to practice Islamic finance and participates in an activity which some groups consider *ḥarām*. Such institutions would need to adopt a specified school of Islamic jurisprudence prior to contract. At a later juncture the regulatory challenges of *Sharī'a* Advisory Boards will be further discussed.[56]

A final issue which arises in the interpretation of *ḥarām* activities is the proportion of such prohibited activities permissible in any enterprise, trade or investment. Contemporary businesses often participate in diverse trading, some of which may be *ḥarām* for Islamic investors; yet, this cannot limit Islamic participation in this business in every sense.[57] It is important then to determine the primary business activity of any corporation before excluding Islamic investment in that

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[54] Nizam Yaquby, 'Requirements to be fulfilled when Conventional Banks set up Islamic Banks, Windows or Funds', in *Proceedings from Third Harvard University forum on Islamic Finance: Local Challenges, Global Opportunities* (Cambridge Massachusetts Centre for Middle Eastern Studies 1999) 134.

[55] On this basis the UK Financial Services Authority indicated that it would not judge between different interpretations of the *Sharī'a* as between different *Sharī'a* Advisory Boards, see; Financial Services Authority Discussion Paper, 'Islamic Finance in the UK: Regulation and Challenges' (November 2007) 13, see also; Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 917.

[56] See; s 5.2.3.ii.

[57] Rodney Wilson, 'Islamic Finance and Ethical Investment' (1997) 24(11) IJSE 1332: 'Purists could argue that all investment in Western markets and those of most Muslim countries is unacceptable...'

entity.[58] Scholars have argued for a percentage based approach to this which has been adopted influentially by the *Dow Jones Islamic Market Indices*[59] and the *FTSE Sharī'a Global Equality Index*.[60] They suggest that trade in alcohol, tobacco, pork-related products, conventional finance, weapons for purposes other than defence and entertainment (of which hotels, casinos, cinema and pornography are included) is *ḥarām* and impermissible for Islamic investment; however,[61] they stipulate that investment in companies participating in such activities is permissible when these activities contribute to no more than 5% of income revenue.[62] Such criteria are inherently arbitrary.[63]

Allowing for such percentages enables Islamic adherents to participate in largely upright industries such as airlines and travel. [64] While airlines often sell alcohol on their flights, which generates income from *ḥarām* activities, this cannot be considered the main activity of the business; therefore, any excessive restriction of investment in this area would be disproportionate. Investment in supermarket chains would appear a much more complicated structure which generates income from the sale of *ḥarām* meats, alcohol and potentially pornographic materials.[65] Islamic investment would purify funds from the participation in the permitted *ḥarām* activities by donating their profit in the proportion of the *ḥarām* percentage to

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[58] Rodney Wilson, 'Islamic Finance and Ethical Investment' (1997) 24(11) IJSE 1333.
[59] S&P Dow Jones Indices, *Guide to the Dow Jones Islamic Market Indices*, 2012, available online at https://www.djindexes.com/mdsidx/downloads/rulebooks/Dow_Jones_Islamic_Market_Indices_Rulebook.pdf, accessed 4 December 2013.
[60] FTSE, 'Ground Rules for the Management of the FTSE Sharī'a Global Equality Index' (2012), available online at http://www.ftse.com/Indices/FTSE_Shariah_Global_Equity_Index_Series/Downloads/FTSE_Shariah_Index_Series_Ground_Rules.pdf, accessed 4 December 2013.
[61] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 906.
[62] S&P Dow Jones Indices, *Guide to the Dow Jones Islamic Market Indices*, 2012, 4, available online at https://www.djindexes.com/mdsidx/downloads/rulebooks/Dow_Jones_Islamic_Market_Indices_Rulebook.pdf, accessed 4 December 2013. See also; FTSE, 'Ground Rules for the Management of the FTSE Sharī'a Global Equality Index' (2012), 9, available online at http://www.ftse.com/Indices/FTSE_Shariah_Global_Equity_Index_Series/Downloads/FTSE_Shariah_Index_Series_Ground_Rules.pdf, accessed 4 December 2013.
[63] Rodney Wilson, 'Islamic Finance and Ethical Investment' (1997) 24(11) IJSE 1333.
[64] Rodney Wilson, 'Islamic Finance and Ethical Investment' (1997) 24(11) IJSE 1333
[65] Pornographic materials here could be considered as magazines ranging from soft to hard core materials. Some of which is widely available in mainstream supermarkets.

charity by way of *zakāt*. As such the determination of the exact percentage of *ḥarām* profits is important for investors as it affects the balance sheet of the project.

5.2.1.iii Gharar

Gharar is understood as a prohibition from participating in financial transactions which have excessive uncertainty or excessive risk.[66] Economic transactions often possess risk to a certain degree. Risk can be understood as that which is unknown which is capable of producing an adverse outcome.[67] For Islamic finance this degree is important as the greater the degree the more likely the financial transaction will be in contradiction with religious precepts and thus void *ab initio* or voidable.[68] While the prohibition of *gharar* is accepted in *Sharī'a* the acceptable level of uncertainly is subject to interpretation in each given circumstance.[69] Islamic finance permits transactions containing risk, recognising that without risk regular basic financial transactions would be impossible; however, it prohibits risk which may give rise to dispute.[70] Such activities could be conceived as the exploitation of parties contrary to the rules of partnership and the generation of wealth from the unfair disadvantage afforded to others.[71] As previously stated, principles of Islamic finance are divided between those which are universal and those which are subject to interpretation and dispute and often 'substantial disagreement exists regarding the details and application of general principles.'[72]

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[66] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 904.
[67] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 904.
[68] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 91.
[69] Babback Sabahi, 'Islamic financial structures as alternatives to international loan agreements: Challenges for U.S. financial institutions' (2005) 24 ARBFL 491 at note 18.
[70] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 47.
[71] David M. Eisenberg 'Sources and Principles of Islamic Law' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 45.
[72] Babback Sabahi, 'Islamic financial structures as alternatives to international loan agreements: Challenges for U.S. financial institutions' (2005) 24 ARBFL 497.

The prohibition of *gharar* arises out of interpretations of the *Ḥadīth* rather than the *Qur'ân* which remains silent on the issue.[73] This is not to say that its prohibition is not sanctioned by the *Qur'ân* but that its prohibition is not explicitly contained within the content of verses.[74] While the prohibition of excessive risk and uncertainty is universal in Islamic finance the degree of excess has been the subject of dispute among the various schools of Islamic thought.[75] Abdul-Rahim Al-Saati has provided a helpful breakdown of the various interpretations of *gharar* and it has been helpful to quote from his work in full:

> 'In jurisprudential terms *gharar* has many definitions which can be summarised under three headings:
> (i) *Gharar* means doubtfulness or uncertainty as in the case or not knowing whether something will take place or not; this excludes the unknown. Ibn Abidin defined *gharar* as uncertainty over the existence of the subject matter of sale. This definition is shared by the *Ḥanafī* and *Shāfi'ī* Schools.
> (ii) *Gharar* also means ignorance and this can be whether the subject of sale is unknown. This view is adopted by the *Zāhiri* School alone. According to Ibn Hazin, *gharar* in sale occurs when the purchaser does not know what he has bought and the seller does not know what he has sold.
> (iii) *Gharar* means both the unknown and the doubtful. According to Al-Sanakhsi, *gharar* obtains where consequences are concealed. This view is shared by most jurists.'[76]

Al-Saati outlines the dominant Islamic perception to the interpretation of *gharar* clearly and demonstrates the fundamental aspects of confusion and the potential for exploitation causing distress which could give rise to dispute. Where the seller is not aware what they have sold they cannot appreciate the value of the object and where a purchaser does not know the content of the bargain then he cannot be confident that it is worth his money. Al-Satti outlines a selection of examples of agreed upon representations of a *gharar* transaction:

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[73] David M. Eisenberg 'Sources and Principles of Islamic Law' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 45.
[74] Mahmoud Amin El-Gamal, *A Guide to Contemporary Islamic Banking and Finance* (Rice University 2000) 6.
[75] Frank E. Vogel, Samuel, L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 64.
[76] Abdul-Rahim Al-Saati, 'The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) JKAUIE 3-19.

(i) The pebble, touch or toss sale;[77]
(ii) Selling the unborn animal without its mother;
(iii) Selling foetuses and embryos;
(iv) Selling an unborn animal;
(v) Selling the find of a diver in advance of his return;
(vi) Selling the object of unknown origin, and;
(vii) Selling an object the price of which is to be determined at a later date.[78]

The above transactions are high in risk and have the potential to cause dispute in the eventuality of a negative outcome. Ethical considerations also are a feature above, with specific reference to the sixth criterion due to the fact that it may be stolen or of questionable quality.

There exists some dispute over the selling of an object which has yet to be in existence, in advance of creation or realisation.[79] Such a prohibition would frustrate contemporary trade dealing with items which are not yet realised or manufactured.[80] Advance purchase is common in conventional financial transactions. In order to reconcile this potential conflict with contemporary business practice, Islamic scholars have reasoned by analogy (*qiyā*) to legitimise the sale by *istiṣnā,* which can be understood as a sale for manufacturing.[81] This form of contract is permitted by the *Ḥanafī* School and does not bind either party in the transaction until the goods are made and accepted by the buyer.[82] While a theoretical distinction exists between *istiṣnā* and *salam* it is generally agreed that these

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[77] This form of transaction occurred when money was paid for an object which was determined by tossing a pebble. It was found in the Middle Eastern areas from which the Islamic religion arose. A large degree of risk was present in this transaction and it further contravened the prohibition on gambling.
[78] Abdul-Rahim Al-Saati'The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) JKAUIE 9.
[79] Mahmoud Amin El-Gamal *A Guide to Contemporary Islamic Banking and Finance* (Rice University 2000) 17.
[80] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 89.
[81] Mahmoud Amin El-Gamal, *A Guide to Contemporary Islamic Banking and Finance* (Rice University 2000) 17.
[82] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 146.

manufacturing contracts can follow the rules of *istiṣnā* as a broader concept.[83] The reasoning of the scholars in this area has demonstrated that a moderate degree of risk is permissible in trade which may be in consideration of the contemporary means of trading and the increasing pace at which commercial transactions take place.[84]

The rules of *Gharar* are divided between that which is permissible, prohibited, acceptable and mandatory and different schools of Islamic jurisprudence interpret these individual instances distinctly with a generally conservative approach.[85] Permissible *gharar* are those transactions which have a certain degree of risk which is not harmful or likely to cause dispute or place an unreasonable burden on the seller or the purchaser. Such a transaction would be the purchase of a coat without the examination of its lining or the purchase of a house without the examination of its foundations.[86] Both of these possess a degree of risk however when considered they are of small significance in comparison to the potential burden placed on the individuals concerned.

A prohibited *gharar* has been outlined clearly above as that which possesses a large degree of risk or uncertainty which would cause the transaction to be void or voidable.[87] Such examples would include the trading of future speculations in companies. Acceptable *gharar* is that which is calculated to be acceptable on the balance of probabilities. Such transactions are treated with caution and rejection by Islamic jurists as a balance of probability can give rise to gambling.

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[83] Workshop on the Harvard Islamic Finance Project, Islamic Research and Trading Institute, Islamic Development Bank, Jedda, 23 September 1993.
[84] See; s 5.2.1.
[85] David M. Eisenberg 'Sources and Principles of Islamic Law' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 47, see also; Babback Sabahi, 'Islamic financial structures as alternatives to international loan agreements: Challenges for U.S. financial institutions' (2005) 24 ARBFL 497.
[86] Abdul-Rahim Al-Saati, 'The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) JKAUIE 9-10.
[87] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 91.

Finally mandatory *gharar* comes from the understanding of the *Ottoman Commercial Courts* which recognised that 'a person who obtains the benefit of a thing takes upon himself also the loss from it.'[88] Such risks are inherent in contracts such as the risk that the owner of a car will have to pay for its repair should the engine get damaged in a crash. *Gharar* then is that which is possessive of excessive risk and uncertainty, having the potential to cause dispute, contrary to the rules of partnership and equality and prohibited in Islamic finance.[89]

5.2.1.iv Maysīr

Maysîr is the Qur'anic expression for gambling and is expressly prohibited in various verses of the *Qur'ân*.[90] *Qimâr* also can be found in Islamic jurisprudence to denote gambling but both terms possess distinct characteristics.[91] *Maysîr* is understood as the acquisition of wealth by chance whether or not this has been at the expense of another party directly.[92] *Qimâr* is used in Islamic jurisprudence to denote those transactions conducted by chance in which the individual benefits at the expense of another party.[93] These transactions are inequitable and contrary to the principles of partnership and fairness. For the purposes of this section the term *Maysîr* will be used when reference is made to gambling unless it is necessary to make reference to the more specific term; *Qimâr*.

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[88] Charles Robert Tyser, D.G. Demetriades and Ismail Efendi, *The Majelle: Being an English Translation of Majallah el-Ahkam-i-Adliya and a Complete Code of Islamic Civil Law* (Lahore: Law Publishing Company 1967) art 87.

[89] For a complete account of *Gharar* prohibitions in Islamic finance see; Al-Ameen Al-Dhareer SM, 'Al-Gharar in Contracts and its Effect in Contemporary Transactions' (Eminent Scholar Lecture Series No 16; Islamic Development Bank and Islamic Research and Training Institute, Jeddah, 1997).

[90] See; *The Qur'ân* (OUP 2005) *Al-Ma'ida* 90 'You who believe, intoxicants and gambling, idolatrous practices and [divining with] arrows are repugnant acts – Satan's doing – shun them that you may prosper.' See also; *The Qur'ân* (OUP 2005) *Al-Baqara* 219 'They ask you [Prophet] about intoxicants and gambling: say, "There is great sin in both, and some benefit for people: the sin is greater than the benefit".' See also; *The Qur'ân* (OUP 2005) *Al-Ma'ida* 91 'With intoxicants and gambling, Satan seeks only to incite enmity and hatred among you, and to stop you remembering God and prayer. Will you not give them up?'

[91] Zamir Iqbal, Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (John Wiley & Sons 2011), see; glossary.

[92] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 905.

[93] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 905.

Gharar and *Maysîr* possess some similarities which make contrast difficult.[94] By its very nature, a transaction which concerns gambling possesses risk and excessive uncertainty yet *Maysîr* can be considered a specific form of *gharar* which warrants its own category, by virtue of its explicit Qur'anic prohibition. As noted above, Islamic jurists are in dispute about the degree of excess which would make the risk excessive.[95] Such dispute has caused the various jurisprudential schools to differ in their understanding of this topic with no full agreement emerging;[96] however, *Maysîr* is always excessive and no degree of gambling can be permitted. This impacts Islamic finance particularly in the quick trading of stocks and shares where the investor makes constant trades with a high risk and the potential for a high earning.

The predominant way in which this prohibition affects finance is the way in which potential investors interact with the market and the ability for Islamic adherents to obtain insurance of any kind.[97] Insurance has a fundamental component of chance whereby individuals pay a premium in order to receive a form of payment in compensation in the event of a stipulated action.[98] Individuals can receive a disproportionate payment in comparison to the funds which they have paid in premium; further, individuals can contribute to insurance and never receive a payment thus receiving no benefit from their investment.[99] There is no certainty that any event may occur which will occasion the pay-out; such is considered gambling for the purposes of Islamic finance and is prohibited.[100] Some commentators have advocated for a contract understanding of the interaction between the Islamic

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[94] David M. Eisenberg 'Sources and Principles of Islamic Law' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Law and Finance: Law and Practice* (OUP 2012) 45.
[95] See; s 5.2.1.iii.
[96] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 64.
[97] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 151.
[98] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 151.
[99] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 150.
[100] Renat I. Bekkin, 'Islamic Insurance: National Features and Legal Regulation' (2007) 21(1) ALQ 19.

community and insurance companies as a considered payment for the adoption of risk. This was advocated by Mustafa Ahmad al-Zarqa in 1962;[101] however, this line of reasoning has not been widely adopted and consequently contemporary insurance structures were largely prohibited in preference to Islamic Insurance or *takâful* insurance.[102] These are considered to have a more acceptable level of risk and do not occasion *ribā*.

The four prohibitions considered above are the main factors which distinguish Islamic finance from contemporary finance. The presence of at least one of these prohibitions in contemporary financial structures serves to exclude Islamic investors who attempt to orchestrate their financial matters in accordance with their religious beliefs. Islamic adherents are forced to seek alternative financial structures in order to enable them to operate in the contemporary commercial world while at the same time adhering to their religious beliefs. These alternative financial structures are developments of conventional financial structures which remove the presence of any of the four prohibitions. The following section considers some of the more well-known financial models which facilitate Islamic finance. It should be noted that the examples are discussed in order to provide the reader with a general yet detailed understanding of Islamic financial law. It is not the purpose of this thesis to consider the efficiency of these models or to provide every possible structure which caters for Islamic investment.

5.2.2 Structures which facilitate Islamic Finance

Contemporary financial structures have developed mechanisms by which individuals can conduct their personal and business finances. These structures, which have evolved in line with the developments in commercial trade, are often incompatible with Islamic financial regulation. Such structures often give rise to the accrual of interest, can contain excessive risk and often can be considered as a form

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[101] Mustafa Ahmad al-Zarqa, *Nizam al-ta'min* (Damascus 1962).

[102] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 151.

of gambling. Often too, institutions offering finance and investment can participate in prohibited activities which would compromise the integrity of Islamic investment. As such Islamic investors can be excluded from participating in the financial market when Islamic finance is not adequately provided for.[103]

Due to the growth in Islamic economies, Western investors have been eager to facilitate Islamic investment and have assisted in the amendment of contemporary financial structures to facilitate their use by the Islamic community.[104] These structures remove any prohibitions which may be present and offer a religiously compliant alternative to contemporary structures. The creation of these parallel Islamic religious structures enables Islamic investors to express their religion in the financial market. The following sections consider some structures which are popularly utilised in Islamic finance. These structures consider ways by which Islamic adherents may obtain a religiously compliant housing, personal or business loan and also demonstrate some ways by which they can invest in the bond market while complying with religious authorities in a contemporary context.

5.2.2.i Murabāha

Murabâha is a financial construct devised in Islamic finance to facilitate borrowing while avoiding interest (*ribā*) which is commonly found in contemporary financial structures.[105] In this construction the borrower approaches the lender with the intention of purchasing an asset. The lender (*y*) agrees to purchase the asset from party (*z*) for the purchase price and then sell the asset to party (*x*) for a higher fee over instalments. This higher fee is arrived at by the combination of the purchase price and the lender's profit margin which must be declared.[106] While in fact operating in a similar way to contemporary long term financial structures, such as

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[103] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 184-185.
[104] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 907.
[105] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 908.
[106] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 140.

mortgages, the construction of finance in this way avoids the accrual of interest. The operation of this financial construction is a circumnavigation of the prohibition of interest as the effect is in fact similar to contemporary financial constructions. Vogel and Hayes note that 'in law, if not in economics, there are substantial differences'.[107]

This credit structure is importantly contrasted with contemporary forms of financing by the amount of transactions which accrue within the structure and their consequential tax liability. In a *murabâha* transaction an asset is purchased twice while in contemporary transactions it is purchased once. In the former then tax liability occurs twice. This has a significant impact on the purchase of real property where stamp duty will be charged twice. In a transaction for the purchase of a house valued at €400,000 stamp duty will be charged at 1%, costing €4,000.[108] As this transaction occurs twice in a *murabâha*, Islamic compliant transaction, the purchaser will have to pay stamp duty twice, costing €8,000 in this transaction. The *murabâha* structure enables Islamic investors to obtain finance without generating *ribā*. Such is preferable to the religiously prohibited contemporary loan.

5.2.2.ii Ijarā

An *ijarâ* can be understood as a mechanism for short, medium or long term credit in Islamic finance which is interpreted to mean the transfer of something in return for rent.[109] While similar to a contemporary financial hire-purchase scheme it differs slightly. In this transaction ownership of the asset does not transfer to the purchaser until the termination of the *ijarâ* period,[110] as such the relationship between financier and purchaser is that of a leasor and leasee.[111] The individual (*x*) who requires finance to purchase an asset approaches institution (*y*) who owns the

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[107] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 141.
[108] Stamp Duties Consolidation Act 1999 s 70.
[109] Craig R. Nethercott, 'Istisna and Ijara' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 240.
[110] Monzer Kahf, 'The Use of Assets Ijara Bonds for Bridging the Budget Gap' (1997) 4(2) IES 89.
[111] This is contrasted with the *murabaha* finance for purchase whereby ownership of the asset is transferred immediately.

asset. The leasee, individual (*x*), leases the asset for a fixed period at a fixed price and enjoys the use of this item.

The leasor, institution (*y*), receives the payments in instalments for the use of their asset. They retain full ownership over the asset and are responsible for its maintenance should the item be in need of repair beyond the fault of the leasee.[112] At the end of this fixed period the leasee acquires ownership of the asset from the leasor. Until this point *Sharī'a* permits the acquisition of assets in this way; however, the way in which ownership is transferred is the subject of debate. When the transfer of ownership is guaranteed upon the successful completion of fixed payments this transaction is considered as an *ijarâ wa iqtinâ*, translated as lease and ownership. [113] Some schools of Islamic jurisprudence consider this akin to contemporary interest-based financial structures and prohibit them.

The *OIC Fiqh Academy* stipulates three potential conclusions to a *ijarâ* contract in order to ensure compliance with the *Sharī'a*; (i) to extend the lease term; (ii) to return the leased property to the lessor, or; (iii) to purchase it for its current market price.[114] *Sharī'a* law stipulates that different transactions must be contained within distinct contracts as multiple aspects dependant on future conditions may constitute *gharar*.[115] As such a contract for leasehold and a contract for the transfer of ownership must be distinct. A combination of these actions within one instrument would be impermissible in *Sharī'a*. In order to make this form of financing compatible with Islamic precepts it is required that the transfer of ownership not be the natural outcome at the completion of the fixed repayments. It is necessary then that two documents are drawn up at the outset; one stipulating the fixed repayments and the other for the sale of property for a fixed price or for free. Often the repayments are connected to interest rates which are variable and this can fall foul of contemporary Islamic jurists who see this as a distortion of financing laws.

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[112] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 191.
[113] Ridha Sadaalah, 'Trade Financing in Islam', in M. Kabir Hassan, Mervyn K. Lewis (eds), *Handbook of Islamic Banking* (Edward Elgar Publishing Ltd 2007) 117.
[114] Decision 6, fifth session (1988), *Fiqh Academy Journal* 2763.
[115] Noor Mohammed, 'Principles of Islamic Contract Law' (1988) 6(1) JLR 121.

The *ijarâ* structure is differentiated from the contemporary hire-purchase structure principally by the absence of interest. In a hire-purchase scheme the lessee is paying the eventual purchase price plus interest in instalments while enjoying the use of the asset. In *ijarâ* structures the lessee is paying a price for the use of the asset and not its eventual purchase. As such interest does not arise.

5.2.2.iii Diminishing Mushāraka

The diminishing *Mushâraka* is another form of credit which can be used for the purchase of assets or for the acquisition of capital to fund a business which is compatible with Islamic finance. It differs from a regular *Mushâraka* arrangement whereby the equity in the business shifts in proportion to periodic instalments.[116] The disposition of funds is shared in proportion to these shifting interests.[117] It is important to note that the division of profit must reflect the equitable investment of each party and does not consider other matters.[118] It can be understood as a four stage partnership process.

Party (*x*) wishes to purchase a property from party (*z*) but lacks the funds to do so directly. Party (*x*) approaches lending institution (*y*) with the intention of entering into a partnership arrangement for the purposes of purchasing the asset from party (*z*). In the first stage both parties, here parties (*x*) and (*y*), enter into a partnership for the purposes of purchasing an asset. It is necessary that both partners provide a capital sum in the investment. The second stage is the purchase of the asset at the division of shares based on the capital supplied. For the purposes of this example party (*z*) agrees to sell his asset at €400,000. Partner (*x*) contributes €80,000 and partner (*y*) contributes the remainder; €320,000. This results in partner

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[116] Julian Johansen and Atif Hanif, 'Mushāraka and Mudaraba' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 180.

[117] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 195.

[118] Muhammad Taqi Usmani, 'The Concept Mushâraka and its Application as an Islamic Method of Finance' (1999) 14(3) ALQ 207.

(*x*) owning a 20% share in the asset and partner (*y*) owning an 80% share. Partner (*x*) then pays rent to partner (*y*) for his use of the property in line with his ownership. The third stage of the diminishing *Mushâraka* is the incremental purchase of the property by party (*x*) from partner (*y*) on a fixed term basis. In this example party (*x*) agrees to purchase a 10% share in the property every 12 months; €40,000. This would periodically alter the share ownership dynamic between both partners with the ownership of party (*x*) increasing and the rent which is due to party (*y*) decreasing. The fourth and final stage in a diminishing *Mushâraka* is the conclusion of the partnership which arises from party (*x*) purchasing the entire asset and the ownership fully vesting in him thus concluding any rents payable to partner (*y*).

This transaction is least similar to a conventional mortgage in contemporary financing and possesses no interest or interest like semblances. They increasingly specify a fixed time determination and enable enterprises or potential homeowners to purchase their asset incrementally.[119]

5.2.2.iv Mudāraba

A *Mudâraba* contract can be considered as a form of trustee financing between two partners; the *rabb al-mal*, which is the bank or financer, and the *mudârib*, which is the agent.[120] In this interaction the *rabb al-mal* provides the capital for the venture and the *mudârib* supplies the labour.[121] The *rabb al-mal* may specify the form of business in which the *mudârib* partakes as a condition of the investment but interaction with the business is limited to this pre-contractual negotiation. Both parties agree to divide the profit of the business on a pre-determined ratio.[122] In this form of financing the *rabb al-mal* bears the entirety of the venture's liability while the *mudârib* merely acts as agent and exclusively loses

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[119] Rodney Wilson, 'Islam and Business' (2006) 48(1) TIBR 111.
[120] Julian Johansen and Atif Hanif, 'Mushāraka and *Mudâraba* in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 184-185.
[121] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 131.
[122] Julian Johansen and Atif Hanif, 'Mushāraka and *Mudâraba* in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 185.

the sum of his time and labour in a venture which fails.[123] Extending the liability of a failure to the *mudârib* is only permissible in the case of wilful negligence or gross financial misconduct.[124]

Such a form of financing incurs risk for the *rabb al-mal*, or financier, and as such, is treated with caution and reserve. Further there is no consensus of agreement that a *Mudâraba* contract is *Sharī'a* compliant as the partnership can be alternatively understood as capable of an inequality between the *rabb al-mal* and the *mudârib* due to the freedom of the agent and the potential for inequality in the profit ratio in favour of the financier. Such an interaction may then be understood as the interaction of two parties with the use of monies to generate further money which is impermissible in *Sharī'a*.[125] While certain reservations exist surrounding the *Mudâraba* the *OIC Fiqh Academy* has upheld this contract[126] and it is used regularly in Islamic financial transactions.[127]

The *Mudâraba* contract is an Islamic form of business partnership. While Islamic investors would be able to participate in some forms of contemporary financial partnership structures these may at times fall foul of the strict equality component between partners. This equality must not be understood as equity-ratio equality but equality in dignity which gives rise to certain conditions specific to the *Mudâraba* contract, such as the ability of any partner to withdraw at any stage. While contemporary financial partnerships can be constructed in such a way so as to be *Sharī'a* compliant this is an acceptable Islamic model.

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[123] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 909.
[124] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 909.
[125] Hesham M. Sharawy, 'Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds' (2001) 29(1) GJICL 161.
[126] Decision 5, fourth session (1988) *Fiqh Academy Journal*.
[127] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 139.

5.2.2.v Sukūk

A *sukūk* is otherwise translated as an Islamic bond.[128] This can be contrasted with a conventional bond. The principal difference separating *sukūk* and conventional bonds is the subject of ownership. In a *sukūk* the purchaser acquires a percentage of ownership of the asset, or the usufruct of that asset, in proportion to their investment.[129] In a conventional bond the purchaser acquires debt which must be repaid.[130] The holders of *sukūk* receive payments in the form of profit based on their percentage of ownership.[131] The holders of conventional bonds receive interest on their debt. The performance of the bond is of real concern to *sukūk* holders as they only receive a percentage of the profit. This performance is of no concern to conventional bond holders who receive periodic interest payments until the completion of the bond period. The automatic repurchase of the bond by the bond issuer is not guaranteed in *sukūk* but the repayment of the debt is expected in conventional bonds. Due to the presence of *ribā* Islamic adherents are unable to participate in conventional bonds. Further, due to the imbalance of risk and the inequity of partnership they may be prohibited from participating in these conventional transactions. As such the following *sukūk* models have been formed in order to enable Islamic investors to participate in the global capital market on par with contemporary investors but in compliance with their religion.

Sukūk transactions have been authorised by the Fiqh Academy of the Organisation of the Islamic Conference since February 1988;[132] however, no such bonds were issued until the Malaysian Government issued the premier *sukūk* in 2002.[133] Since their inception the *sukūk* has grown in popularity with the global

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[128] Jonathan Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets* (CUP 2015) 190.
[129] Atif Hanif and Julien Johansen, 'Sukūk in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 258.
[130] Atif Hanif and Julien Johansen, 'Sukūk in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 259.
[131] Atif Hanif and Julien Johansen, 'Sukūk in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 258.
[132] Decision 5, fourth session (1988) *Fiqh Academy Journal*.
[133] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 63.

sukūk issuances valued at $130 billion in 2012.[134] *Sukūk* issuances often take the form of other financial mechanisms outlined previously and the most common are outlined below, this list is not exhaustive and bond issuers are free to create new forms of *sukūk* once free of *ribā* and *gharar*. It is also important to note that investment is limited to that which is *ḥalāl* and excludes the investment into industries which may be prohibited for Islamic adherents. As the use of money for the generation of money is prohibited in *Sharī'a*, *sukūk* are often tied to a real asset or the development of a specified asset which secures the bond.[135]

Sukūk al-ijarâ

These take two forms; (i) sale-leaseback, and; (ii) head lease-sublease.[136] The former model occurs when the finance raised by the bonds is used to purchase land from the bond issuer, such as the government, for a fixed duration. The bond issuer then rents the land from the bond holders thus generating a profit. At the termination of the *sukūk* the land is repurchased at the nominal value of the original *sukūk* and remains unaffected by market rates. The latter occurs where the bond issuer leases their land to the bond holder and returns rent on the asset. This is in contrast to the former in that ownership is not transferred in this scenario. This form of *sukūk* is considered controversially by some jurists and in 2005 the AAOIFI (*Accounting and Auditing Organisation for Islamic Financial Institutions*) issued a standard that the bond issuer cannot guarantee to the bond holder not to repurchase the asset at the nominal value rather than at the market rate; this was endorsed by a *fatwā* delivered in 2008.[137] As such the original bond value cannot be guaranteed to remain compliant with *Sharī'a* since such a guarantee would make the periodic return of the *sukūk* almost identical to the issuance of interest.

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[134] KFH Research Ltd, 'Global Research Report 2013' (23 January 2013).
[135] Mustafa Mohd Hanefah, Akihiro Noguchi, Muhamad Muda 'Sukūk: Global Issues and Challenges' (2013) 16(1) JLERI 107.
[136] Atif Hanif and Julien Johansen, 'Sukūk in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 261.
[137] Accounting and Auditing Organization for Islamic Financial Institutions, *Shariah Standard on Sukuk* (Bahrain February 2008).

Mudâraba sukūk

This construction replicates the standards found within a *Mudâraba* contract whereby the bond holder takes the place of the *rabb al-mal* and the bond issuer acts as *mudârib*. Here the *sukūk* finances an initiative of the bond issuer in return for a specified profit. The profit ratio is predetermined between *rabb al-mal* and *mudârib* and then in the event that the *rabb al-mal* consists of many bond holders it is subsequently divided according to proportion of investment.

Sukūk al-Mushâraka

Here the bond issuer supplies part of the credit in a joint venture with the bond holder who has provided the remainder of the credit through the *sukūk*.[138] Unlike a diminishing *Mushâraka* used commonly in housing finance each party retains their original stake in the venture and divides the profits accordingly. Unlike the *Mudâraba* construction, liability for profits and losses is shared between partners according to their original speculation.[139]

5.2.3 Current Provision of Islamic Finance in Ireland, Specific Challenges and Future Requirements

Ireland has indicated its aspiration to become a centre of excellence for Islamic finance in order to attract foreign investment.[140] In order to bring this about, the State has adopted positive measures for the facilitation of Islamic financial structures in limited contexts.[141] These positive measures are contained within amendments to the domestic Finance Acts and also within the Guidance Note on the

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[138] Atif Hanif and Julien Johansen, 'Sukūk in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 262.
[139] Mustafa Mohd Hanefah, Akihiro Noguchi, Muhamad Muda, 'Sukūk: Global Issues and Challenges' (2013) 16(1) JLERI 111.
[140] Enda Kenny, 'Speech to the IFIA Annual Conference' (National Convention Centre, Dublin, 2 June 2011).
[141] The Irish Revenue, *Guidance note on the Tax Treatment of Islamic Financial Instruments* (October 2010).

Tax Treatment of Islamic Financial Instruments distributed by the Irish Revenue Commissioners. Further to this, the State has engaged in a series of double-taxation agreements with a purpose of extending our capacity to facilitate Islamic fund transactions. The State currently holds double-taxation agreements with sixty-nine countries with a purpose to encourage trade and investment.[142] These treaties inhibit the double charge of capital gains tax across jurisdictions which would largely frustrate and limit trade and investment. At the present time, the modification of legislation has fallen short of the required amendments to facilitate Islamic finance in an operable manner in the domestic context.[143]

5.2.3.i Current Provision for Islamic Finance

The Finance Act 2010 amended a number of provisions of the domestic tax law with a view to facilitating Islamic financial structures.[144] These amendments enabled tax to be charged on the excess of Islamic financial transactions between the financial undertaking and the borrower on an equal basis with conventional interest which accrues between a financial undertaking and the borrower. S 29 of the 2010 Act legislated for 'Specified financial transactions'. Specified financial transactions cater for Islamic financial transactions through; deposit transactions which can apply to Islamic deposits; credit transactions which apply to financing transactions, and; investment transactions which apply to *sukūk*.[145] This amendment has impacted positively upon *murabāha*, *ijarā* and *Mudāraba* transactions.

Previously, the 2009 Tax Briefing confirmed that *takāful*, *retakāful* and family *takāful* will be subject to the same taxation as their conventional complementary

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[142] Among these recently added jurisdictions is Egypt, signed in 2012 and yet to be effected; Kuwait, signed in 2010 and yet to be effected; Malaysia, signed in 2009 and yet to be effected; Qatar, signed in 2012 and yet to be effected; Saudi Arabia, signed in 2011 and effected from January 2013, and; United Arab Emirates, which has come into effect since 2009.

[143] Edana Richardson, 'Islamic Finance for Consumers in Ireland: A Comparative Study of the Position of Retail-Level Finance in Ireland' (2011) 31(4) JMMA 539.

[144] Edana Richardson, 'Islamic Finance for Consumers in Ireland: A Comparative Study of the Position of Retail-Level Finance in Ireland' (2011) 31(4) JMMA 534.

[145] Finance Act 2010 s 39.

structures without the necessity of legislative supplementation.[146] The Finance Act 2010 recognised that in Islamic transactions the disposal of assets occurs more frequently which increases the potential for taxation and accordingly therefore, in s 267 the taxation system was amended so that capital gains tax would not occur in the disposal of assets in the course of the transaction.[147]

Islamic financial structures can often fall outside of the scope of regulatory measures.[148] In the absence of regulation Islamic consumers are in a precarious position in a context where financial structures are facilitated in the absence of State supervision. The Customer Credit Act 1995 offers protection to individuals obtaining finance for the purchase of a home. This Act defines a 'housing loan' as 'an agreement for credit on the security of a mortgage on a freehold or leasehold estate or interest in a house.'[149] The mortgage is understood to including a charge.[150] Three factors are necessary to obtain the protection of the Act: (i) the receipt of credit; (ii) the grant of security, and; (iii) the transfer of ownership. These three factors are present in a *murabāha* housing loan and as such this Islamic structure falls under the protection of the Consumer Credit Act 1995. While the *Mudāraba* partnership structure is appropriate for raising finance it is considered to be inappropriate for raising finance on a retail level for the purchase of a house.[151]

The Finance Act 2010 provided for some limited use of Islamic finance in the State; however, there are numerous outstanding measures which are required so as to enable Islamic finance to effectively and safely operate in the State. The following section outlines specific challenges for necessary legislative reform, principally in the

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[146] Irish Revenue Commissioners, 'Islamic Finance' (2009) 78 Tax Briefing available at http://www.revenue.ie/en/practitioner/tax-briefing/archive/78/ accessed 22 January 2015.
[147] Finance Act 2010 s 267P.
[148] See; Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance; Religion, Risk and Return* (Kluwer International Press 1998) 12; 'Egypt is usually credited with being the cradle of Islamic banking...but insufficient government regulation helped create conditions that led to massive fraud...' see also; Rodney Wilson, *Legal, Regulatory and Governance Issues in Islamic Finance* (Edinburgh University Press 2012) 160; 'There remains however a dearth of regulation in most jurisdictions...'
[149] Consumer Credit Act 1995 s 2(1).
[150] Edana Richardson, 'Islamic Finance for Customers in Ireland: A Comparative Study of the Position of Retail-Level Islamic Finance in Ireland' (2011) 31(4) JMMA 543.
[151] Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance; Religion, Risk and Return* (Kluwer International Press, 1998) 194.

area of stamp duty taxation, but including other demonstrations of how previous insufficient legislative drafting has unnecessarily limited the ability for Islamic finance to operate. It concludes by addressing some legal and regulatory challenges posed by *Sharī'a* law and the *Sharī'a* Advisory Board.

5.2.3.ii Outstanding Requirements for Islamic Finance and Specific Challenges

The Finance Act 2010 regretfully refrained from amending the way in which stamp duty may be charged on transactions for the purchase of land. Stamp duty is currently charged on the disposal of property or in the disposal of an interest in property.[152] This would arise in any Islamic financial transaction which concerned real property or the interest in such property. In the absence of an amendment to the Finance Acts such a charge would occur twice in Islamic financial transactions as opposed to once in contemporary financial transactions. This poses a real obstacle for the practical operation of Islamic financial transactions in the jurisdiction and frustrates the use of the diminishing *Mushāraka* and *sukūk* alongside the potential to frustrate the operation of other Islamic financial structures. As previously stated, Islamic financial transactions are commonly constructed containing a specified asset in order to ensure their *Sharī'a* compliancy.[153] Real property assets then can cause further costs for the transaction which place it on an unequal footing with contemporary structures.

The justification for this refusal to bring the stamp duty charge in line with other amendments, while not expressly stated by the Revenue, could be attributed to an administrative cost of land registration. Stamp duty is distinct from Capital Gains Tax as it does not place an administrative burden on the State to the same extent. On this basis it is logical and equitable to amend this charge to keep it on the same basis with contemporary structures. Islamic finance requires the registration of

[152] Mary Condell, *Capitol Taxation for Solicitors* (OUP 2010) 147.
[153] Mahmoud El-Gamal, *Islamic Finance; Law, Economics and Practice* (CUP 2006) 101.

land at least twice in the majority of cases.[154] While the transfer of ownership occurs almost instantaneously in some Islamic financial transactions, such as in the case of a *murabāha* transaction, other forms such as *ijarā* transactions will result in the finance undertaking holding the title of the property for a long duration before eventual disposal to the borrower. If the Finance Acts were amended to allow financial undertakings to refrain from registering the land until such time as the conveyance is completed then the land would either be unregistered, which is undesirable, or registered in the name of the previous owner, which is impermissible.

A logical position then exists that the financial undertaking would be able to register the land or the interest in land without a charge yet an administrative action still does take place. It can be argued that the charge is not representative of the actual cost of registration as stamp duty is calculated as a percentage of the cost of the asset. Ascertaining the real cost of administration may allow a fair and reasonable charge to occur. The way in which stamp duty is charged remains an obstacle for the operable use of Islamic finance in the domestic context. Importantly, it limits the Islamic community from being able to conduct their finances in accordance with their religious beliefs on a practical and effective basis. This obstacle was amended in the jurisdiction of the United Kingdom by virtue of the Finance Act 2003 which prevented the double charge of Stamp Duty Land Tax in relation to Islamic transactions.[155]

Separately, many Islamic finance structures do not fall under the Customer Credit Act 1995. Three required factors, which are necessary to obtain the protection of the Act[156], are not present in the *ijarā* or the diminishing *Mushāraka* housing loan structures. In both cases a delay exists in the transfer of ownership to the purchaser which, in the case of the *ijarā*, cannot be considered automatic. This places these structures outside of the regulation financial framework and further places the

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[154] See; s 5.2.2.i.

[155] Finance Act 2003 s 73 (UK).

[156] Edana Richardson, 'Islamic Finance for Customers in Ireland: A Comparative Study of the Position of Retail-Level Islamic Finance in Ireland' (2011) 31(4) JMMA 543.

consumer at a dangerous disadvantage. The UK has brought these structures under regulatory protection by extension of the Finance Act 2006 whereby it brought 'Home Purchase Plans' under the regulation of the Financial Services Authority.[157] This Home Purchase Plan category was formulated with a mind to include these irregular Islamic structures which previously could not be considered under the original definition of a regulated mortgage activity.

The issue of *Sharī'a* law is at the centre of Islamic finance and, as an overarching concept, must be adhered to as a fundamental aspect of the financial system;[158] however, there is no comprehensive legal codification of *Sharī'a* law which garnishes any consensus. As such the legal regulation of this legal system poses a specific challenge for the provision for Islamic finance. As mentioned at the outset of this chapter, while certain aspects of Islamic law are universal their interpretation can be the subject of local dispute.[159] The position of one *Sharī'a* Advisory Board may determine that specific trade is permissible while another may equally prohibit it.[160] This is a freedom enjoyed by the communities who can still, for the purposes of the law, be understood to be adhering to the *Sharī'a*; however, in a contractual disagreement where two contesting interpretations of *Sharī'a* are offered the courts must determine which party has been misled and impose liability for any potential breach of contract. In the jurisdiction of England and Wales, Potter LJ's remarks regarding the enforceability of *Sharī'a* are of particular note:

> '...so far as the "principles of...*Sharī'a*" are concerned, it was indeed the evidence of both experts that these are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought which the court may have to concern itself with in any given case before reaching a conclusion upon the principle or rule in dispute.'[161]

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[157] SI 2006 No 2383 Financial Services and Markets (UK).
[158] John Esposito, *Islam: The Straight Path* (3rd edn, OUP 1998) 87-88.
[159] See; s 5.2.1.
[160] Tarek S. Zaher and M. Kabir Hassan, 'A Comparative Literature Survey of Islamic Finance and Banking' (2001) 10(4) FMII 188.
[161] *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals*, [2004] EWCA Civ 19 [55].

Ensuring *Sharī'a* compliance throughout the product life of the Islamic contract is necessary.[162] Failure to observe *Sharī'a* law throughout the product life of the financial structure can void a contract or can significantly affect the balance sheet of a company through the necessity to purify funds.[163] Where *Sharī'a* law has not been adhered to in a way which has generated profit for the company it is largely considered necessary that this money must be purified.[164] Purification will transfer the money from a profit to a loss and can instantaneously affect the liquidity of the company.[165] S 848 of the Taxes Consolidation Acts 1997, as amended, makes the payment of such purification funds tax-free.[166] The requirement to purify funds potentially occasions a substantial alteration to a company balance sheet which can force the company to trade outside of its permitted liquidity levels contrary to the Companies Acts. Further, such extreme measures for purification may query the extent to which the company directors have acted in the best interest of the company.[167] The State is not the arbiter of religious truth.[168] Determining the content of *Sharī'a* law, therefore, is a specific challenge for the provision of Islamic finance by the State.

The *Sharī'a* Advisory Board will consider whether proposed investments comply with Islamic law.[169] Their decisions are often considered binding and significantly affect the operation of the business. S 6(a)(g) of the Value-Added Tax Act 1972 provides that management costs of this nature are tax exempt provided that the services are of an integral part to the management of the company.[170] Scholars participating on such boards must be of a highly-respected religious and

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[162] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 897.
[163] Kilian Bälz, 'Islamic Finance Litigation' in *Islamic Finance; Instruments and Markets* (Bloomsbury Publishing 2010) 49.
[164] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 115.
[165] Ibrahim Warde, 'Status of the Global Islamic Financial Industry' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 8.
[166] Taxes Consolidation Act 1997 s 848.
[167] See; *Tralee Beef and Lamb Limited: Kavanagh v Delaney and Others* [2008] IESC 1; common law duties of loyalty applicable to company directors upheld.
[168] *Corway v Independent Newspapers* [1999] 4 IR 484 [34].
[169] Andrew Henderson, 'Islamic Financial Institutions' in Craig R. Nethercott and David M. Eisenberg (eds), *Islamic Finance; Law and Practice* (OUP 2012) 62.
[170] Value-Added Tax Act 1972 s 6(a)(g).

intellectual character and as such are in short supply. Consequently they often participate in the *Sharī'a* Advisory Boards of many corporations which can lead to a conflict of interest on the basis that they have a significantly prominent role in the management and direction of the company.[171] These individuals, if fixed with liability as directors, may find themselves acting beyond their qualifications in companies which yield significant financial interests. While specific qualifications are not required of company board members it is important to recall that, in the absence of qualifications, poor decisions may be made and, in the event of 'gross negligence', board members can be fixed with liability.[172]

Finally, the governing contract law is a persistent concern for Islamic finance. Islamic financial contracts may state that the law governing the contract is *Sharī'a* law.[173] This is an irregular situation as such a body of law is not ordinarily codified. Where contracts elect to be determined with reference to a specific legal system it is usual to specify a national law as a comprehensive system of reference. As *Sharī'a* law is a fluid concept subject to interpretation, the courts may find obstacles in imposing this law while also adhering to its limitations regarding the determination of religious beliefs. A reference point could be the law of Saudi Arabia; yet, this is a codified context specific subset of *Sharī'a* law and on the basis that Islamic law may be determined distinctly beyond this jurisdiction.[174] Considerate of the issues identified in the previous subsections, this section concludes with a recognition of that which is required for Islamic finance to effectively operate in the State.

5.2.3.iii Legislative Measures which the Irish State must take to Effectively Provide for Islamic Finance

Several significant obstacles lie in the path of the adequate provision of Islamic finance in the Irish State, many of which have been outlined in the previous

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[171] Siti Faridah Abdul Jabbar, 'Financial Crimes' (2010) 17(3) JFC 289.
[172] *Re: Brazilian Rubber Plantations and Estates Limited* [1911] 1 CH.
[173] *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals*, [2004] EWCA Civ 19.
[174] *Al-Bassam v Al-Bassam* [2002] EWHC 2281 (Ch) [31].

passages. The State is required to address these obstacles by supplementing the Finance Acts principally through the enactment of legislation. Failure to address these legal and regulatory issues not only makes these permitted structures cost inefficient in relation to contemporary financial models but prevents indirectly prohibited structures. The Islamic community have a right to this positive legislative supplementation by virtue of their right to religious expression.

Consistent with the approach of the jurisdiction of the UK, the Stamp Duties Consolidation Act 1996 must be amended to conclude the double-charge of stamp duty in Islamic transactions. Similarly, the domestic jurisdiction would be required to extend regulatory oversight to Islamic structures which currently do not fall under the Consumer Credit Act 1995. This could be brought about, in large part, through the supplementation of the Central Bank Reform Act 2010. While the Tax Brief of the Irish Revenue Commissioners 2009, previously mentioned,[175] viewed that current legislation would be applicable to Islamic insurance models it cannot be viewed as a definitive response. Legislative supplementation to date has eschewed the usage of Islamic financial terms which has unnecessarily complicated matters. Further, the impetus to amend legislation to date has largely been based on commercial financial possibilities; it should be noted that the right to religious expression does not merely apply to the wealthy. In the absence of a dedicated Islamic Finance Act, amendment and supplementation should be mindful of retail-level finance with a view to enabling non-commercial individuals to avail of practical and regulated finance in adherence of the mandates of their religion.[176]

The State, further, must adopt a position with regard to *Sharī'a* law which may be influenced by the position articulated in the Court of Appeal in the jurisdiction of England and Wales where the Appellate Court concluded that contracts must be governed by a clearly identifiable legal system.[177] While the *Sharī'a* Advisory Board does generate distinct issues regarding the proper

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[175] See; s 5.2.3.i.

[176] While every effort has been made to state the law as it stands to date, in the absence of economic or accountancy specialisation this section has been completed with the upmost scrutiny.

[177] *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] EWCA Civ 19.

administration of companies, it does not appear necessary to develop a legislative response to this issue; rather, companies are to be accepted to operate in accordance with statute and any infringement, on the basis of *Sharī'a* law must only be seen to generate a justification for the breach which may be necessitated in given circumstances.

This section has identified the way in which the State has responded to Islamic finance and has identified what measures are necessary to be provided for its effective and safe operation. In the absence of legislative supplementation the Irish State does not facilitate Islamic financial transactions on a par with the conventional finance model.[178] The following argues for the characterisation of Islamic finance as a form of religious expression so as to place a positive obligation upon the State to provide for these legislative measures on the basis of the right to religious expression.

5.3 Islamic Finance as a Form of Religious Expression

Islamic finance began to institutionalise in the mid-to-late twentieth century when corporations began to facilitate financial transactions on the basis of *Sharī'a* law.[179] It can be understood as the system by which individuals conduct their financial transactions in compliance with the *Qur'ân* , the teachings of the Prophet Muhammad[180] and Islamic principles.[181] It is necessary for the Islamic community to adhere to this financial system in opposition to the conventional financial model on the basis of their religious belief.[182] Consistent with the subjective approach which

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[178] Edana Richardson, 'Islamic Finance for Consumers in Ireland: A Comparative Study of the Position of Retail-Level Finance in Ireland' (2011) 31(4) JMMA 539.

[179] Isolated initiatives to produce Islamic compliant banking are recorded as early as the 1930s in India however private banking following Islamic principles began in 1975 offered by the Dubai Islamic Bank and later in 1977 in the Faisal Islamic Bank in Egypt. See; Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 94.

[180] Frank E. Vogel, Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) 1-2.

[181] Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 144.

[182] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 897. For a general summery of the interpretation of the Islamic world powers on the necessity of Islamic finance, see; Hans Visser, *Islamic Finance:*

this thesis adopted in order to characterise religious expressions for the purposes of Article 9 of the Convention,[183] the use of Islamic finance can be understood to be a living-out of a religious belief from the religious adherent.[184] Upon this basis the following addressed the religious foundations for this belief and the counterarguments to such.

It must be accepted that alternative definitions of Islamic finance exist which downplay or dismiss the religious characteristic of Islamic finance. El-Gamal prefaces his book with an anecdote comparing 'Christian shoes' with 'Islamic finance':[185]

> 'A cobbler was said to have asked Luther how he could serve God within his trade of shoe making. Luther's answer was not that the cobbler should sell a "Christian shoe," but rather that he should make a good shoe and sell it at a fair price...The term "Islamic finance" brings to mind an analogy to the concept of a "Christian shoe" rather than to good products that are fairly priced.'[186]

El-Gamal suggests, in this analogy, that Islamic finance is really a distortion of the requirements of Islam and that attempts to emphasise the Islamic nature of the financial system is a competitive concept in the pattern of conventional financial systems.[187] In recent years the interest in Islamic financial options has increased largely on the basis of the commercial potential of this system.[188] On that basis Western commercial firms have expanded in recognition of the opportunity for growth within this market.[189]

Principles and Practice (Edward Elgar Publishing 2009) 5-9. Divergent opinions are expressed among the main Muslim schools of thought on the ability of Muslims to deviate from strict *sharia* in Muslim minority countries. The *Ḥanafî* School would widely allow Muslims to avail of financial instruments containing interest in Muslim minority jurisdictions, allowing them to avail of *darūna*, or necessity. *Ḥanbalî*, *Malikî* and *Shafiî* interpretations are less lenient, see; Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 21.

[183] See; s 2.7.3.

[184] Elaine Housby, *Islamic Financial Services in the United Kingdom* (Edinburgh University Press 2011) 189.

[185] Mahmoud A. El-Gamal, *Islamic Finance; Law, Economics and Practice* (CUP 2006) 1.

[186] Mahmoud A. El-Gamal, *Islamic Finance; Law, Economics and Practice* (CUP 2006) 1.

[187] Mahmoud A. El-Gamal, *Islamic Finance; Law, Economics and Practice* (CUP 2006) 2.

[188] Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance; Religion, Risk and Return* (Kluwer International 1998) 1.

[189] Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance; Religion, Risk and Return* (Kluwer International 1998) 1.

Islamic finance can also be used by individuals independently of religion.[190] Contrasting definitions have suggested that this financial system is more akin to ethical investment models not necessarily religious in character.[191] This is in part due to the weight which it attributes to ethical considerations and also due to the fact that the Islamic financial investment market has been considered as one of the fastest growing industries in recent years.[192] While the system is capable of being utilised by a religiously diverse community it is proposed that such does not dilute the central religious characteristic of this financial model.

Islamic finance is governed by the characteristics outlined in the opening sections of this chapter; that all transactions must be free of *ribā*, *gharar*, *Maysīr* and *ḥarām* activities. These limitations are not constructed from an ethical view point but from the *Sharī'a* as the permissible and preferred ordinances of God in financial matters.[193] It is on this basis that scholars have frequently endorsed its practice as a form of religious adherence.[194] Further, banking and financial institutions practicing Islamic finance have demonstrated a unity with religion and have at times utilised religious passages in marketing and promotional materials.[195] The very structure of Islamic finance is rooted in the *Qur'ān* [196] and accordingly it is of no surprise that

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[190] Such ethical investment models have been pursued in the Domini 400 Social index (DSI) and the FTSE4Good index. See also; Takek S. Zaher, M. Kabir Hassan, 'A Comparative Literature Survey of Islamic Finance and Banking' (2001) 10(4) FMII 164: 'Western banks offering Islamic instruments...are now more active in Islamic leasing, and the leasing funds have been raised from both Muslim and non-Muslim investors.' See also, *ibid* at 167: 'Some non-Muslims are also participating in Islamic banking because they consider it to be commercially sound.'

[191] Valentino Cattelan, 'Introduction. Babel, Islamic Finance and Europe; preliminary notes on property rights pluralism' in Valentino Cattelan (ed), *Islamic Finance in Europe: Towards a Plural Financial System* (Edward Elgar 2013) 5.

[192] F. di Mauro, P. Caristi, S. Couderc, A. Di Maria, L. Ho, B. Kaur Grewal, S.Masciantonio, S. Ongena, S. Zaher, 'Islamic Finance in Europe' (European Central Bank Occasional Paper Series no. 146, Frankfurt am Main, Germany, 2013).

[193] Rodney Wilson, *Legal, Regulatory and Governance Issues in Islamic Finance* (Edinburgh University Press 2012) 19.

[194] Rodney Wilson, 'Islamic Finance in Europe' (RSCAS Policy Papers; no. 2007/02, San Domenico di Fiesole, Italy, 2007) 10.

[195] Shotwan Al-Banna Choiruzzad, 'More Gain, More Pain: The Development of Indonesia's Islamic Economy Movement (1980s-2012)' (2013) 95 I 126.

[196] Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance; Religion, Risk and Return* (Kluwer International 1998) 1.

financial institutions would emphasise the religious authority at the centre of the system.

While it may be argued that Islamic finance is an alternative ethical form of financial system not necessarily reliant upon religious compliance it cannot be stated that this financial system can be understood without reference to the Islamic religion. Similarly to the Islamic veil discussed in the fourth chapter of this thesis,[197] this form of financial system cannot be defined without reference to its primary religious characteristic. Vogel and Hayes state that:

> 'Islamic finance is not an invention of this century's Islamic extremist political movement but stems from injunctions found in the *Qur'ān* and the sayings of the Prophet Muhammad. These inspired central tenets in the religious law of Islam conveying commercial dealings are as much a part of the religion as is marriage.'[198]

Further, not only is Islamic law a primarily religious expression but one which is obligatory for the Islamic community on the basis that it is perhaps the only financial model constructed in view of the *Sharī'a*.[199] It is on this basis that Islamic finance must be understood as a primarily religious manifestation and an obligatory expression for the Islamic community.

Contrary to alternative ethical investment models which may be informed with an 'injection of religious values as a moral constraint',[200] religious adherents have demonstrated that they utilise strictly Islamic financial models where available 'since Islamic banking is characterised by observing *Sharī'a* requirements.'[201] Henderson suggests that the system functions to realise the objective of removing the barrier between temporal and religious matters so as to make all things

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[197] See; s 4.2.
[198] Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance; Religion, Risk and Return* (Kluwer International 1998) 4.
[199] John Esposito, *Islam: The Straight Path* (3rd edn, OUP 1998) 87-88.
[200] Valentino Cattelan, 'Introduction. Babel, Islamic finance and Europe; preliminary notes on property rights pluralism' in Valentino Cattelan (ed), *Islamic Finance in Europe: Towards a Plural Financial System* (Edward Elgar 2013) 5.
[201] Pejman Abeditar, Philip Molyneux, Amine Tarazi, ''Risk in Islamic Banking' (2013) 17(6) RF 2048.'

religious.[202] Islamic finance therefore enables the Islamic community to express their religion beyond the mosque and in the public sphere. This financial model enables them to adhere to religious teachings over which they have no control in a contemporary commercial environment where participation in banking and financial services has become an essential feature of life.[203] Islamic finance cannot be understood without reference to its central and religious characteristic and on this basis it can be asserted that it can be defined as a form of religious expression capable of guarantee under Articles 9 and 10 of the ECHR and Articles 40.3 and 44 of the domestic Constitution.

5.4 Interpreting Convention Rights with Practical Effect

The characterisation of Islamic finance, in the above section of this chapter, brings to a conclusion the detailed analysis of this expanding financial system[204] which was necessary for the application of Islamic finance to the present theory. The following examination, in the second part of this chapter, looks to the central research question of the chapter; namely, upon what basis can it be asserted that a positive obligation exists upon the State to provide for Islamic finance in order to give effect to the right to religious expression.

The analysis is prefaced with a consideration of the dichotomous relationship between positive and negative rights in order to demonstrate that a strict governmental forbearance does not, in fact, realise the rights guaranteed by the Convention. This gives way to an analysis of the liberal theory underlining the rights theory in order to derive a right of assistance through positive measures to realise

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[202] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 897.

[203] The European Parliament and the European Council have adopted a Directive on the transparency and comparability of payment account fees, payment account switching and access to a basic payment account which purports to give rise to a right to a bank account: Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees and related payment accounts, payment account switching and access payment accounts with basic features. Such a directive was promoted on the basis of the fundamental necessity of banking in contemporary society.

[204] Nicholas H.D. Foster, 'Islamic Finance as an Emergent Legal System' (2007) 21(2) ALQ 171.

the rights presently guaranteed by the Convention. It suggests that duties are a fundamental characteristic of rights realisation and that, when these duties are necessary for the realisation of the primary right and proportionate to competing interests, they are necessary leading to the assertion that the right to religious expression contains positive obligations to provide for religious belief.

5.4.1 The Right to Religious Expression: Positive or Negative Right?

The right to religious expression is an interest, protected by an organised society, implying a legal power[205] which can be wielded over others[206] to facilitate the performance of, or the forbearance from, certain actions.[207] Rights are guaranteed to every citizen and exercisable by them on the basis of the liberal society in which they reside.[208] A right, therefore, is also a demand as it guarantees to the citizen a certain freedom which they cannot be arbitrarily deprived of.[209] Within the liberal tradition, rights discourse has been marked by the dichotomy which exists between positive and negative rights.[210] The right to religious expression is generally conceived as a negative right[211] which is satisfied through forbearance on behalf of the State.[212] This section proposes to demonstrate that

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[205] F. Schoeman, 'Bentham's Theory of Rights', in Bhikhu C. Parckh (ed), *Jeremy Bentham: Critical Assessments* (Routledge 1993) 756, endnote 33.
[206] Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) 16-17.
[207] 'Rights' in *Stanford Encyclopaedia of Philosophy* <http://plato.stanford.edu/entries/rights/> accessed 4 February 2014.
[208] F. M. Kann, 'Rights', in Jules Coleman and Scott Chapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 476.
[209] 'Rights' in *Stanford Encyclopaedia of Philosophy* <http://plato.stanford.edu/entries/rights/> accessed 12 December 2013.
[210] This dichotomy is evolving; See; Holly Cullen, 'Is the European Social Charter a Charter for Children?' (2005) 40 IJ 60-85; 'Until recently analysis of the obligations undertaken by States in respect of international human rights tended to make the simple distinction between negative and positive obligations...A more nuanced and flexible account of the implementation obligations of States has emerged over the past two decades...'
[211] Anat Scolnicov, *The Right to Religious Freedom in International Law: Between group rights and individual rights* (Routledge 2011) 67.
[212] Carlo Panara, 'Back to the basics of fundamental rights: an appraisal of the Grand Chamber's judgment in Lautsi in light of the ECHR and Italian constitutional law' in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff 2012) 302.

such an interpretation is not consistent with the real capacity of this fundamental right to adopt both positive and negative characteristics.

A positive right is that which entitles the rights holder to have a certain action performed for them in order for them to achieve a certain state of being.[213] A negative right is that which entitles the holder to non-interference or forbearance on the part of others in the pursuit of a certain action or a certain state of being.[214] The State is commonly identified as the duty bearer in human rights discourse in these interactions; however, it is also possible for the State to ascribe duties to individuals. As such, positive and negative rights can occur vertically and horizontally.[215] The liberal tradition is marked by a constitutional and legal predisposition towards negative rights which has informed the characterisation of religious expression as such.[216] Liberalism itself is characterised as a system of freedom within which the State interferes in the least possible way with its citizens so as to enable them to live out whatever life they so choose.[217] A State is considered as liberal by the level of forbearance which it exercises in the public sphere through recognition of such rights as freedom of speech, religion, politics, assembly etc. Liberalism is juxtaposed with authoritarianism which is the greatest degree to which the State will interfere in the lives of its citizens.

Rights can be said to exist within a hierarchy which separates those which are complex from those which are basic.[218] This rights hierarchy is specific to each

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[213] Susan Bandes, 'The Negative Constitutional: A Critique' (1990) 88(8) MILR 2272. See also; Jenna MacNaughton, 'Positive Rights in Constitutional Law: No need to graft, best not to prune' (2001) 3(2) JCL 750. See also: 'Rights' in *Stanford Encyclopaedia of Philosophy*, <http://plato.stanford.edu/entries/rights/> accessed 4 February 2014.

[214] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange Ltd 2002) 15. See also; 'Rights' in *Stanford Encyclopaedia of Philosophy* <http://plato.stanford.edu/entries/rights/> accessed 4 February 2014.

[215] Hans W. Michlitz, *Constitutionalisation of European Private Law* (OUP 2014) 35.

[216] This has been recognised in the judgements of the ECtHR in its growing advocacy for the positive application of rights. See; *Marckx v Belgium* (1979) Series A no 31 [31].

[217] Michael Walzer, 'Liberalism and the Art of Separation' (1984) 12(3) PT 316.

[218] Rights can also be distinguished in the hierarchy of (i) specific rights, and (ii) principles. This was distinguished in the Charter of the Fundamental Freedoms of the European Union. While principles, which must be observed, are distinguished from rights, which must be respected, Alston suggests that this does not indemnify Contracting States from resisting such positive obligations which could reasonably realise the principle: 'But even if a positive obligation to take all available measures to

individual jurisdiction which can determine what is basic with reference to its own economic and social abilities. An impoverished society would have a lower threshold in determining what constitutes a basic right than a wealthy society.[219] Rawls defines basic rights as:

> 'those that must be met if citizens are to be in a position to take advantage of the rights, liberties and opportunities of their society. These needs include economic means as well as institutional rights and freedoms.'[220]

Shue provides an equally generous definition when he states that 'the basic idea is to have available for consumption what is needed for a decent chance at a reasonably healthy and active lifestyle...'[221] His subjective approach towards the characterisation of basic rights is most applicable in a varied jurisdictional analysis. It can be argued, upon that basis, that determining basic rights is context specific.[222]

In the Irish context fundamental aspects of society are provided for, such as; health[223], education[224] and the elevation of the poor[225] in the Constitution and statute. As these fundamental rights have been provided for, through both legal and constitutional means, basic rights in Ireland can expand to encapsulate those rights integral to a liberal democracy. Religion has occupied a preeminent position in Irish

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promote realisation of a right is considered to be going too far...this would still not rule out the need for positive measures to be taken to remedy violations...the term "observe" thus should not be under-estimated.' See; Philip Alston, 'The Contribution in the EU Fundamental Rights Agency to the Realisation of Economic and Social Rights' in Philip Alstom and Oliver De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, (Hart Publications 2005)163.

[219] See; Stephen Holmes, Cass C. Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) 120: 'It is perfectly obvious that people cannot lead decent lives without certain minimum levels of food, shelter and health care. But calling the crying need for public assistance "basic" may not get us very far. A just society would ensure that its citizens have food and shelter; it would try to guarantee adequate medical care; it would strive to offer good education, good jobs, and a clean environment. But which of these goals should it pursue by creating rights, legal or Constitutional? ...everything depends on context.'

[220] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 38.

[221] Henry Shue, *Basic Rights: Subsistence; Affluence and U.S. Foreign Policy* (Princeton University Press 1980) 23.

[222] Samantha Besson, 'Justifications' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 40.

[223] *Health Act* 1970 s 45: Recognises that persons are fully eligible to obtain these services when to excuse them would result in 'undue hardship.'

[224] *Bunreacht na hÉireann* art 42.

[225] Social Welfare Consolidation Act 2005.

society, which has been recognised both in case law[226] and the Constitution;[227] therefore, the basic right to religious expression is fundamental in the Irish jurisdiction. Significantly, from the perspective of the European sphere and this research, participation in financial structures and models has been considered as an 'essential condition for participation in...social life.'[228]

It could be stated that the Irish government has upheld the religious liberty of the Islamic community by not actively obstructing adherents in their attempt to trade and extract finance in accordance with their religious beliefs. Yet this fails to appreciate the real and substantive barriers which exist frustrating the fair operation of Islamic finance on a par with contemporary banking systems as outlined previously.[229] While individuals are at liberty to lawfully enter into Islamic finance, it cannot be stated that, forcing individuals to engage in an unregulated financial market on an unmerited higher cost basis which deprives ordinary users from accessing this religious finance model, is sufficient guarantee for the right to religious freedom.

It has been demonstrated above that the State's stance of forbearance does not enable members of the Islamic community to fully realise the benefit which they draw from the freedom of religious expression.[230] The State is required to discharge certain positive measures in order to enable the practice of religious expression in financial matters. The following section will examine the theory surrounding the competing understandings of positive and negative rights and exposes their complex construction which may give new vitality to the rights discourse currently utilised by the courts. It proposes to consider the contributions of various legal philosophers with a purpose of extending the understanding of negative rights in our Constitution. While accepting that a liberal system is of unparalleled importance for the fair

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[226] *Quinn's Supermarket v The Attorney General* [1972] I.R. 1 at 23.
[227] See; *Bunreacht na hÉireann*, Preamble, see also; *Bunreacht na hÉireann* art 44.
[228] European Commission, 'Commission Staff Working Document; Executive Summary of the Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment account with basic features' COM(2013) 266 final.
[229] See; s 5.2.3.
[230] See; s 5.2.3.iii.

realisation of rights, any strict understanding, excluding the realisation of positive rights, is rejected and a more moderate version is to be reconciled in this study. From this emanates the right to reasonable assistance which requires the Irish State to positively legislate for Islamic finance on a par with contemporary models.[231]

5.4.2 Liberal Theory and the Right to Assistance

The following proposes to outline how liberal rights theory is capable of transcending the positive and negative rights discourse with a view to realising the real and practical effect of the right to religious expression. It emphasises the significance of duties for the practical realisation of the central purpose of individual rights. Such a theory gives way to a duty of assistance whereby religious adherents can be facilitated by way of positive measures in order to give effect to the right to religious expression. A reconciliation of the work of the various commentators proposes to demonstrate that it is reasonable and proportionate to place positive obligations upon the State to legislate to provide for Islamic finance on the basis of the enhanced theoretical capacity of the right to religious expression

The principal objection to this is the fact that rights in the liberal democratic tradition are often conceived in a negative fashion.[232] Thomas Hobbes encapsulates such a view of the libertarian theory in his following statement: 'A freeman is he that, in those things which by his strength and wit he is able to do, is not hindered to do what he has will to do.'[233] This has been interpreted, predominantly in the United

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[231] A theory exists which states that as individuals possess rights by virtue of their humanity then they must insure that other individuals which whom they interact enjoy the same rights. This theory, the Principle of Generic Consistency, advocated by Gewirth, could justify the provision of Islamic finance on a comparable basis to contemporary finance yet has not been comprehensively considered due to the essential moral dimension of the argument. Such an exploration would lie outside the parameters of this study. See; Alan Gewirth, *Reason and Morality* (University of Chicago Press 1978) 218.

[232] 'Jellinck explains the idea of negative states in the following oft-cited words: "Thus the member of the State requires a status in which he is master, a sphere free from the State in which the right to govern is denied. It is the individual sphere of freedom, the negative status (*status liberitatis*), in which purely individual purposes are satisfied by the free act of the individual."' See; Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers (tr), OUP 2010).

[233] Thomas Hobbes, *Leviathan* Ch. XX1: Of the Liberty of Subjects (London 1651) 129 1 <http://socserv.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf> accessed 1 September 2013.

States of America, to mean that a man must not be restricted in his attempt to achieve his legal pursuits; [234] however, in the contemporary context it is not necessary to interpret Hobbes so narrowly. The above statement contains two important halves; first that the freeman is not hindered in doing what he has will to do and secondly that that which he aims to do must be done by his strength and wit. The second statement, which can be interpreted to preclude positive liberties, does not necessarily preclude the State from giving assistance towards the realisation of rights.[235] A freeman can have the wit to achieve his goal but may be restricted in his attempt to realise it. Such is very often the case with those under the direct care of the State in institutions and prison facilities.[236]

Hobbes should not be interpreted to suggest that an unassisted freeman must have the means or power to realise his rights. It would be impossible to suggest that man must hold the means to provide for those things which are conceived as basic within a society, such as his own safety from attack.[237] An interpretation of Hobbes which rejected the responsibility of the State to positively provide for the realisation of fundamental rights would be incompatible with a basic society as contemporaneously understood. If individual man was responsible for the funding of his own security then the strongest man would dominate the weak. Without the assistance of the State individuals could be threatened with violence when trying to enjoy their rights; this would compromise its guarantee.[238] Placing positive obligations upon the State is not inconsistent with liberalism.

Accepting that the State has an obligation to provide for basic rights, such as physical security, through positive measures leads to the recognition that some positive obligations are necessary in the discharge of negative rights. Rights contain duties 'in the sense that one way of justifying holding a person to be subject to a

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[234] Susan Bandes, 'The Negative Constitutional: A Critique' (1990) 88(8) MILR 2272.
[235] Assistance in this context is not exclusively referring to economic assistance but to any such tasks which may be required, actual, financial or legislative.
[236] Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011) 61.
[237] Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) 90.
[238] Henry Shue, *Basic Rights: Subsistence; Affluence and U.S. Foreign Policy*, (Princeton University Press 1980) 21.

duty is that this serves the interest on which another's right in based.'[239] In the present examination it is argued that the right to religious expression places a duty upon the State to legislate on the basis that failure to recognise such obligations would circumscribe the purpose of the guarantee of religious expression under the Constitution and the Convention; as such, an analysis of duties is essential for the purposes of this research. Hohfeld demonstrated that rights contain four basic components, aptly called the Hohfeldian incidents. [240] Hart has further elaborated upon these components to demonstrate how rights contain duties.[241] These duties can be positive or negative and are essential for the realisation of a right.

5.4.2.i Duties

Positive rights and negative rights contain positive duties and negative duties. It is suggested that the failure to identify the right to religious expression as a positive or negative right is insignificant on the basis that both rights contain positive duties. Duties can be considered as the means through which any human right is practically realised;[242] further, the failure to recognise this complex construction of rights could lead to the guarantee of the human right being rendered redundant. A true right is only a right when it is capable of being realised.[243] A right which is incapable of being realised is no more than suggesting that 'an airplane schedule is a flight'.[244] Shue provided this analogy in his thesis advocating the right to subsistence as a basic right in contradiction to traditional liberal theory. With a view to giving rights their practical effect he asserts the following theory:

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[239] John Raz, *The Morality of Freedom* (Clarendon Press 1986) 183.
[240] John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 24.
[241] Allen Thomas O'Rourke, 'Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law' (2009) 61(1) SCLR 15-16.
[242] Finnis argues that the classical interpretation of duties as inferior to rights is incorrect: 'it does not follow, as some have supposed, that in yeah classical view duty is conceptually or otherwise prior to right(s). Duties to others are...the willingness to give to others their right(s).' See; John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 24.
[243] 'It is fraudulent to comfort people with liberties that they cannot actually enjoy.' See; Henry Shue, *Basic Rights* (Princeton University Press 1996) 69.
[244] Henry Shue, *Basic Rights* (Princeton University Press 1996) 15.

(i) Everyone has a right to something.
(ii) Some other things are necessary for enjoying the first thing as a right, whatever the first thing is.
(iii) Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right.[245]

His first statement recognises the basic rights which people can expect to possess within a liberal society such as the right to religious freedom. His second and third statements concern some other thing (ii) which is necessary for the realisation of the first right (i). Without the recognition of (ii) the operation of (i) would be hindered and as such would be impossible to exercise.

This 'other thing' referred to in Shue's theory is a duty which is necessary for the realisation of the right.[246] His theory echoes the sentiments of the ECtHR in their judgment in *Airey v Ireland*[247] from which commentary derives the principle that rights are required to be practical and effective not theoretical or illusory.[248] This 'other thing' is non-specific and identifiable only on the basis that it is necessary for the identified human right. It is accepted that, upon this basis, duties generate complex problems in legal theory due to their evolving and unenumerated character;[249] however, rights discourse accepts their essential nature as Raz comments that 'one may know of the existence of a right and of the reasons for it without knowing who is bound by duties based on it or what precisely are these duties.'[250] His observations are consistent with the observations of Holmes and Sunstein that rights are also context specific.[251]

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[245] Henry Shue, *Basic Rights* (Princeton University Press 1996) 31.
[246] Narveson also advances the theory that duties are fundamental to rights and that these duties contain positive acts without which the right cannot be achieved. See; Jan Narveson, *The Libertarian Idea* (Temple University Press 1989) 45-46: 'The connection between a right and a duty is not incidental but essential...for you to recognise that I have a right over you is for you to acknowledge that you have a duty of the relevant kind.'
[247] *Airey v Ireland* (1979) Series A no 32.
[248] *Airey v Ireland* (1979) Series A no 32 [24].
[249] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 186.
[250] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 184.
[251] Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) 120.

It is further important to recognise that 'changing circumstances can generate new duties'.[252] This theoretical underpinning has already been witnessed in the jurisprudence of both the Irish Courts[253] and in the ECtHR[254] they having recognised that the respective Constitution and Convention are capable of being interpreted in line with present day conditions. This perception enables rights to evolve in line with present day circumstances and transforms the right to religious expression from mere forbearance to the recognition of positive obligations upon the State. It can be viewed that both judicial institutions would endorse the perception that participation in banking and basic finance is an essential component of contemporary society and, as such, those of religious conscience must be facilitated in their desire to act in accordance with religious precepts in this regard.[255]

In the Irish and European context circumstances are positively inclined toward the increased recognition of positive duties.[256] The increased recognition of positive obligations will generate the recognition of 'new duties with changing circumstances';[257] however, it must be acknowledged that positive duties often come at a cost.[258] A clear counter argument against the recognition of positive obligation on the basis of duties under negative liberties would suggest that such an approach gives rise to 'human rights inflation'[259] which would place strains on the economic abilities of the Executive; however, this is a secondary matter pertaining to the realisation of the human rights in question. Economic capabilities of individual

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[252] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 185-186.
[253] See; *McGee v Attorney General* [1974] IR 284 at 319.
[254] *Tyrer v United Kingdom* (1978) Series A no 26 [31].
[255] To date, the European Parliament and the European Council have jointly adopted the Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees and related payment accounts, payment account switching and access payment accounts with basic features. Such a Directive was promoted on the basis of the fundamental necessity of banking in contemporary society. It should be noted that this argument is capable of being advanced from the perspective of equality or discrimination law; however, this present examination has limited itself with its concern for the significance and limitation of religious expression specifically.
[256] This will be considered in greater detail subsequently. See; s 5.5-5.6.
[257] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 186.
[258] See; Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) Appendix: Some Numbers on Rights and Their Cost; 233-236.
[259] Lauren Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECtHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 173.

States cannot diminish the content of human rights; rather, they may inform their limitation. Lavrysen states that any claim regarding the enumeration of a human right should first address if, on the basis of the Convention, such a right exists and only then should it address whether such a right should be extended to individuals on the basis of the capabilities of a Contracting State.[260] An extended analysis of this theory is beyond the scope of the present examination; however, it is sufficient to state that the theory emphasises that economics should not determine the content of human rights.

Returning to Shue, he explicates his theory with reference to the right to physical security stating 'a right to physical security is...a demand to be protected against harm. It is a demand for positive action.'[261] This positive action is consistent with the complex definition of rights as duties and he recognises this later in his book stating that 'the complete fulfilment of each kind of right involves the performance of multiple kinds of duties.'[262] He suggests the following:

> '...with every basic right, three types of duties correlate:
> (i) duties to avoid depriving;
> (ii) duties to protect from deprivation, and;
> (iii) duties to aid the deprived.'[263]

Combinations of positive and negative duties form the fundamental components of every right. While the first two duties could be interpreted negatively the third places positive obligations on the State. This positive obligation may require the State to legislate in order to discharge the positive obligation. Shue can be understood as suggesting that the recognition of all rights is contingent on the right to subsistence.

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[260] Lauren Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECtHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 163; Lavrysen refers to this as the bifurcation of human rights.
[261] Henry Shue, *Basic Rights* (Princeton University Press 1996) 38-39.
[262] Henry Shue, *Basic Rights* (Princeton University Press 1996) 52.
[263] Henry Shue, *Basic Rights* (Princeton University Press 1996) 52.

5.4.2.ii Subsistence

Subsistence can be understood as that which relates 'to the maintenance and support of life.'[264] It has been further defined, from a sociological perspective, as pertaining to those things which may be 'necessary to ensure survival and the basic necessities of life'.[265] In legal terms this has often been understood to consist of financial obligations for the State which is a form of recourse often avoided by the judiciary when this may amount to policy decisions.[266] Accepting judicial reticence in this regard, the work of Holmes and Sunstein demonstrates the many positive duties associated with the interpretation of rights. It is appropriate then to extract a selection of their observations before attempting to reconcile the right to subsistence with the right to assistance.

Holmes and Sunstein advance the theory that 'all rights are positive' drawing from the fact that all rights, whether positive or negative, require positive measures to be successfully realised.[267] They state that 'an autonomous individual, in a liberal society, cannot create the conditions of his own autonomy autonomously, but only collectively.'[268] This position is consistent with the theories advanced earlier by Shue and with regard to physical security. Without the provision of protection from the State the right to physical security would be meaningless. Only through the communal sharing of resources, most particularly financial resources, can individuals realise the practicalities of certain rights such as the raising of a police force and the institution of a judiciary.

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[264] 'Subsistence', in the *Oxford English Dictionary* <http://www.oed.com/view/Entry/193020?redirectedFrom=subsistence#eid> accessed 6 February 2014.

[265] 'Subsistence', in the *Dictionary of Social Science*, Craig Calhoun (ed),<http://www.oxfordreference.com/view/10.1093/acref/9780195123715.001.0001/acref-9780195123715-e-1622?rskey=umdlpa&result=2> accessed 7 February 2014.

[266] See; *T.D. v Minister for Education* [2001] 4 IR 259 at 333 per Murray J; 'Adopting a policy or a programme and deciding to implement it is a core function of the Executive. It is not for the Courts to decide policy or to implement it. It may determine whether such policy or actions to implement such policy are compatible with the law or the Constitution or fulfil obligations. That is not deciding policy.'

[267] Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) 35.

[268] Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) 63.

While a comprehensive analysis of their research cannot be offered at this junction certain matters must be addressed. Holmes and Sunstein fail to successfully debunk the theory that rights are both positive and negative.[269] Their theoretical position attempts to blur the distinction which rightly separates 'rights' from 'duties'. Rights are measures of general application whereas duties are evolving instruments by which measures of general application are achieved. While some duties may not give rise to an actionable human right claim on the basis that they are either too unreasonable or disproportionate the fundamental right will still exist. Rights are specific; the content of their duties are evolving. While all rights may contain duties which are positive, and this may not in fact be true either, when rights are in fact truly negative this dichotomy continues to succeed. A better conception of their theory for the purposes of the present examination would be to suggest that *all rights have associated positive duties*.[270]

Accepting that the theory presented by Holmes and Sunstein contains flaws does not, however, detract from their work demonstrating the cost associated with negative rights. Negative rights realised through negative duties would lead to no cost. Negative rights constructed with positive duties leads to expenditure as the State is actively carrying out measures to ensure liberty and enforce forbearance. Holmes and Sunstein provide a comprehensive analysis of the cost associated with negative rights in their book.[271] Their statistics empirically demonstrate that negative rights can be understood to contain positive duties fundamental to their guarantee. The Irish and European Courts, in their reticence to put forward a theory regarding positive obligations, fail to succinctly reconcile the positive obligations placed upon the States in the context of the rights to due processes and fair trial with their refusal to endorse such obligations more generally. Holmes and Sunstein's research demonstrates the inconsistency of the courts in that regard and illustrates the requirement for a general theory to emerge.

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[269] Alan Gewirth, 'Are All Rights Positive?' (2001) 30(3) PPA 333.

[270] For a more comprehensive criticism of the theory advanced by Holmes and Sunstein see; Alan Gewirth, 'Are All Rights Positive?' (2001) 30(3) PPA 321.

[271] See; Stephen Holmes, Cass Sunstein, *The Cost of Rights* (W.W. Norton & Co 1999) Appendix: Some Numbers on Rights and Their Cost, 233-236.

Kuflik interprets Shue's theory regarding basic rights and the right to subsistence as suggesting that:

> '[T]here are many cases in which we can respect the allegedly positive right to subsistence merely by refraining from actions that would, in effect, deprive other people of their only available means to their own support.'[272]

His interpretation of Shue facilitates a development of the theory surrounding the right to subsistence and enables it to support an alternative theory regarding the right to assistance. Assistance should be understood as the action of providing for the deprived so that they may be in a position to realise their rights. Assistance is distinct from subsistence in that subsistence has been interpreted to amount to policy measures which may place permanent and substantial financial burdens on the actions of State. Assistance can be understood to amount to positive actions, fiscal or non-fiscal, to enable the deprived to realise their rights in an isolated action. Assistance in this form may amount to the discharge of an obligation to off-set a specific need in a specific context which is then limited to that context. It may also include the provision of legislation which enables a restricted action to efficiently operate.

As stated, members of the judiciary have expressed that it is not appropriate that the court make judgements amounting to policy decisions.[273] These decisions are most appropriately discharged by the members of the legislature and executive.[274] The presence of legislation may indicate a considered policy to restrict a form of religious expression;[275] however, the absence of legislation may indicate

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[272] Arthur Kuflik, 'Basic Rights: Subsistence, Affluence and U.S. Foreign Policy by Henry Shue' (1984) 94(2) E 319.

[273] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 151.

[274] Ron Hirschl, 'Negative rights vs Positive entitlements: A comparative study of judicial interpretations of rights in an emerging neo-liberal economic order' (2000) 22(4) HRQ 1083.

[275] In the event that legislation restricts a right the State must justify this restriction. Note the pronouncement of Costello J in *Heaney v Ireland* [1994] 3 IR 593 at 607: 'The objective of the impugned provision must be of sufficient importance to warrant overriding a Constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass the proportionality test...'

the absence of State policy. The absence of policy may enable the judiciary to provide for the deprived by vindicating their rights, the expression of which having previously been frustrated by the absence of legislation. The right of assistance would not generate socio-economic rights within the State.[276] Assistance must be understood to be a restrictive measure available to the judiciary to aid the deprived in limited circumstances. It must consider the domestic understanding of basic rights, the duties required to realise them and the absence of a social-policy. Such a policy can be demonstrated in the Irish context in the case of *Mary O'Donnell and Ors v South Dublin County Council*[277] which will be analysed in greater detail further in this chapter.[278]

Rawls, in his theory surrounding the law of peoples, suggested that a duty exists to assist the burdened State. His theory can be adapted here for a societal instead of national perspective enabling us to apply his analogy of the *burdened State* to the *deprived*. Rawls comments that 'it does not follow, however, that the only way, or the best way, to carry out this duty of assistance is by following a principle of distributive justice to regulate economic and social inequalities...'[279] His observation furthers the separation between the right to subsistence and the right to assistance as the latter does not lead to socio-economic adjustments or participate in redistributive justice. Further, Rawls recognises that these duties to assist are in furtherance of the common good but must be 'maximised consistent with the restrictions'[280] of a given jurisdiction. This is a further recognition of the inherent restrictions placed on rights and duties in given economic conditions. Assistance must not destabilise the fundamental divisions in society, such as separating the wealthy from the poor, as such interference would compromise the foundation of libertarian society. Assistance must amount to those actions which aid the deprived and enable them to achieve the basic rights within their respective jurisdiction.

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[276] The Irish Courts have divorced themselves from the continued recognition of socio-economic rights. See; Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74(4) MLR 540-542.
[277] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204.
[278] See; s 5.5.
[279] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 106.
[280] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 71.

Rights form the basis of our legal system and can be composed of positive and negative duties. In order to fully realise the guarantee of the right all such actions necessary for its realisation, whether positive or negative, must be undertaken. This can place obligations on the duty bearer. The extents to which rights and duties are recognised are governed by economic capabilities. While rights are general in their construction, duties will be specific which makes their determination fluid and evolving. The right to subsistence can be challenged on the basis of the separation of powers which exists between the various organs of State. A preferable alternative would be the right to assistance which enables the court to require those fiscal and non-fiscal acts which may aid the deprived in the realisation of their rights through context specific judgments.

The right to religious expression is a basic right, the realisation of which requires positive and negative duties to be undertaken by the State. In the Irish context this right must be seen to include the duty to provide legislation to assist the Islamic community to practice their religion in accordance with their faith. This examination has relied heavily on the work of Shue yet his theory may 'open the flood-gates' so as to complicate the policy of the State. Therefore the following, supplementation to his theory, may assist the Irish and European Court in order to provide a safeguard upon their theory towards positive obligations under the Constitution and Convention and may ground a right to assistance for the purposes of this thesis:

(i) Everyone has a right to something.
(ii) Some other things are necessary for enjoying the first thing as a right, whatever the first thing is.
(iii) Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right.[281]
(iv) Such secondary rights mush be reasonable and proportionate to the realisation of the first right.

[281] Henry Shue, *Basic Rights* (Princeton University Press 1996) 31.

5.4.2.iii Theory of Proportionality

The recognition of positive obligations is a significant yet necessary task of the judiciary in the guarantee of human rights. A theory of proportionality, which is drawn from the jurisprudence of the ECtHR, provides an adequate safeguard for the State. It protects against an 'open-ended' approach towards the recognition of positive obligations.[282] The component of proportionality was demonstrated by Pogge in his criticism of Shue when he wrote:

> 'To fulfil a destitute smoker's right to vote, his society is not morally required to do whatever it can do (say, to pay for his expensive lung operation) to ensure that he lives to future election days...no such right is entailed by his right to vote'.[283]

Pogge's example demonstrates the potential type of distorted rights claim to which Shue's analysis may give rise. This example must be further narrowed so as to avoid judicial activism which would unfairly impinge upon the legislature in its function to govern economic policies within the State. It may even be limited in the case of the smoker and his right to life. To fulfil a destitute smoker's right to life his society should not be required to provide for him a multitude of services, with the intention of elevating his capacity for life enjoyment and extending his life expectancy, when he himself participates in the endangerment of this same life. Services should be guaranteed to him on a proportionate and equitable basis in consideration of many variables.

Limiting the application of positive obligations on the basis of proportionality enables the theory regarding the right to assistance to succeed. Every negative right has the potential to contain positive duties and the State has a duty to assist the deprived by way of positive acts when it would be proportionate to do so. These positive duties can then be recognised as capable of enforcement when the exercise

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[282] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 173.

[283] Thomas Pogge, 'Shue on Rights and Duties', in Charles Beitz and Robert Goodin (eds), *Global Basic Rights* (OUP 2009) 115.

of the principal right is dependent on the provision of the duty. A negative right therefore may contain a contingent positive duty. The enforcement of this positive duty can be considered to flow from the recognition of the right to assistance in the realisation of the freeman's unhindered desires; however, it can only be recognised in the circumstance that it is proportionate to the practical and effective realisation of any such right.

Circumstances above demonstrate that in many contexts a negative right can be interpreted with positive effect. While these suggestions have been wholly justified in their specific contexts courts have been reluctant to recognise positive duties compared with their preference toward negative liberties.[284] This reluctance is predicated on the assumption that such recognitions may affect a national budget and potentially restrict the elected government and its ministers contrary to a correct democratic order by virtue of the separation of powers. The right of assistance proposes to limit the degree to which the courts can place duties upon the State in question, further; the theory of proportionality, echoing the established doctrine of proportionality limits the scope of judicial activism and safeguards the separation of powers. It defends the continued enumeration of rights by the judiciary and outwardly demonstrates their restraint in deference to the legislature.

5.4.2.iv The Right to Religious Expression Contains Positive Duties

It is not the intention of this work to state that the right of religious expression is a positive right.[285] In any case, it has been previously demonstrated

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[284] This was demonstrated in quantified amounts by Hirschl when examining legal judgments in Canada, India and South Africa, three jurisdictions which have specific positive rights within their respective Constitutions and judicial codes. He demonstrates (at 1083) that members of the judiciary are reluctant to uphold such claims quoting Lamer CJ in *R v Prosper* [1994] 3 S.C.R. 236 at 267 'it would be a big step for this court to interpret the Charter in a manner which imposes a positive Constitutional obligation on governments.' See; Ran Hirschl, 'Negative rights vs Positive entitlements: A comparative study of judicial interpretations of rights in an emerging neo-liberal economic order' (2000) 22(4) HRQ 1060-1098.

[285] See; s 5.4.2.

that such a determination would be unnecessary for the present application.[286] The right to religious expression is a core representation of liberalism and any such assertion would run contrary to a historical and established body of jurisprudence; however, the right to religious expression contains positive duties. Narveson characterised the interaction between a right and a duty stating: 'the connection between a right and a duty is not incidental but essential...for you to recognise that I have a right over you is for you to acknowledge that you have a duty of the relevant kind.'[287] His work led to a thought provoking review by Brown in which he identified four theoretical positions when discussing positive and negative rights and liberties,[288] only one of which is of interest to this examination. Brown stated that:

> 'since in a developed market system people are so completely dependent upon their legal procedures, not having easy access to legal services effectively renders their right too flimsy to protect their liberty. For this reason it is reasonable to argue that a proper concern for liberty must incorporate positive rights to the legal protection of negative rights, as in (c) [a general positive right to negative liberty]'.[289]

Brown speaks of liberty in a way which we can translate as freedom or non-interference. The negative right, therefore, is that which we are accustomed to; the right to forbearance. His claim is that one can make positive demands in order to provide for his freedom, or right to non-interference. Essentially this statement can be interpreted to mean that a rights holder can demand that duty bearers carry out positive actions to realise his right to non-interference. Brown's claim is a compelling point for consideration when drawing this present theoretical analysis to a close. Duties, which are necessary for the realisation of rights, are capable of enforcement only to the extent that they are reasonable and proportionate to the realisation of this principal right. This can be understood by the following:

> Party (*a*) has a right to (*x*) from party (*b*). The exercise of right (*x*) is dependent on (*y*). (*y*) is a duty stemming from (*x*) and can be considered a

[286] See; s 5.4.1.
[287] Jan Narveson, *The Libertarian Idea* (Temple University Press 1989) 45-46.
[288] Grant Brown, 'The Libertarian Idea by Jan Narveson' (1990) 20(3) CJP 431.
[289] Grant Brown, 'The Libertarian Idea by Jan Narveson' (1990) 20(3) CJP 439.

right if it is reasonable and proportionate to the realisation of (*x*) and within the capabilities of party (*b*).

or:

Party (*a*) has a right to *religious* expression (or *a fair trial*) from the *State*. The exercise of the right to *religious expression* (or *a fair trial*) is dependent on the provision of *legislation* (or *free legal aid*). The provision of legislation (or *free legal aid*) is a duty stemming from the right to *religious expression* (or a *fair trial*) and can be considered as an enforceable duty if it is reasonable and proportionate to the realisation of the right to *religious expression* (or *a fair trial*).

The judgment in *Airey v Ireland*[290] clarified that free legal aid is often considered necessity for certain legal applications which occur in a complex and highly sophisticated arena. Its provision can be considered reasonable and proportionate to the exercise of a fair trial. In this jurisdiction it can be envisaged that the State is capable of such expense due to the developments of our economic system and on the basis that there is generally no competing interest which could outweigh the right to a fair trial. This capability is not universal and it should be noted that jurisdictions of a more developing nature may not be in a position to enforce duties on the basis of the overreaching governmental financial strain; yet, even when they are unenforced they are still rights, perhaps better described as rights in-waiting.

Brown's classification of rights positively risks alienating judicial bodies which are reluctant to recognise positive rights from negative constructions. In consideration of his work and that of other commentators the following then is proposed. When an individual seeks to enforce their interest on the basis of human rights against the State it must be established whether in fact such a right exists. This right can be of either positive or negative construction though the determination is insignificant in the general sense. These rights contain positive and negative duties, and it falls to be established whether the right contains the relevant duties in order to be realised to the benefit of the individual. Should it be established that such a duty exists then it must be determined whether the judiciary are giving rise to right

[290] *Airey v Ireland* (1979) Series A no 32.

with general application, giving rise to arguments of socio-economic judicial activism or the enumeration of positive rights, or whether they are in fact providing such necessary assistance so as to aid the deprived in their attempt to realise their human right. Finally, upon this determination it must then be established, as a narrowing factor, whether placing a positive obligation upon the State in this context would be proportionate. The significance of the right in the broader rights hierarchy is relevant to this end, so also are the resource and economic capabilities of the State.

The right is a guarantee that individuals and governments forbear from interfering with the operation of religious manifestations. The full realisation of the right to religious expression requires more than forbearance. Everyone has a right to religious expression and the right to those things which are necessary to the realisation of that fundamental liberty. This examination has entirely been to justify the positive facilitation of Islamic financial regulation on the basis of the right to religious expression. The right to religious expression is a fundamental human right which is constructed of positive and negative duties. In order to enable the Islamic community to utilise a financial model in accordance with their religion the State is required to legislate for Islamic finance. It can be established that the duty to legislate for religious expression falls under this right. Recognising this specific duty does not give rise to a general application whereby the State will be required to legislate in other broad contexts but is tied directly to the unfortunate state of the Islamic community in Ireland and the ease with which the government may facilitate their religious belief. Finally, the duty to legislate in the absence of legislation is proportionate to the right as such is impossible and perhaps illegal in the absence of such. The right to religious expression must be attributed its foremost significance in the human rights hierarchy and upon this basis the Islamic community should be provided for.

The following considers the capacity for both the Irish Constitution and the ECHR to place positive obligations upon the State for the effective realisation of rights. This demonstrates the limited nature of the present theory yet reveals the capabilities of both legal spheres to extend their respective jurisprudence so as to

greater facilitate positive obligations. Upon this basis, it will be asserted that both legal spheres have the capacity to recognise positive obligations on the basis of the right to religious expression.

5.5 Positive Obligations under Bunreacht na hÉireann

Islamic finance can be considered as a form of religious expression for the purposes of this thesis.[291] The right to religious expression is afforded both legal[292] and Constitutional[293] protection in the Republic of Ireland. This large degree of protection is afforded by virtue of the importance attached to religion in both the Constitution and case law. The Constitution can be described as a document primarily consisting of 'negative liberties';[294] however, the Irish Courts, on some limited occasions, have been willing to recognise and endorse positive obligations upon the State to uphold personal rights.[295] Articles 40.6.1° and 44.2.1° are capable of giving rise to positive obligations upon the State to legislate for Islamic finance in the domestic context. The following section proposes to demonstrate the way in which constitutional rights have been positively interpreted in the Irish context with a view to distinguishing positive rights theory from socio-economic rights theory. Placing emphasis on the impact of legislation and the impact of jurisprudence from the ECtHR, the following examination attaches weight to the prospect that rights must be vindicated so as to give practical effect to their guarantee.

In recent years, in the wake of the judgments of the Supreme Court in *T.D. v Minister for Education*[296] and *Sinnott v Minister for Education*,[297] the Irish judiciary have resisted the recognition of socio-economic rights in the Irish context which

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[291] See; s 5.3.
[292] European Convention on Human Rights Act 2003.
[293] See; *Bunreacht na hÉireann* art 44.2.1°; 'Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.'
[294] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 146.
[295] Aoife Nolan, 'Holding non-State actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) 12(1) IJCL 68.
[296] *T.D. v Minister for Education* [2001] 4 IR 259.
[297] *Sinnott v Minister for Education* [2001] 2 IR 545.

might give rise to positive obligations being placed upon the State;[298] however, it is significant to note that the Supreme Court has yet to definitively rule on the matter of positive rights in the Constitution[299] which may enable a conservative authority on positive obligations to emerge distinct from the category of socio-economic rights and in consideration of the previously discussed rights theory.[300]

While socio-economic rights can give rise to financial obligations on the part of the State, the positive interpretation of Article 44.2.1°, so as to give effect to legislation to provide for religious expression, would not be the subject of governmental expenditure. As such, this section proposes to demonstrate the way in which the Constitution places positive obligations upon the State to legislate for the protection of personal rights. In view of the significant judgment in *T.D. v Minister for Education*[301] this examination endorses a more conservative construction of positive rights in which no cost obligations are placed on the State. In light of Article 44.2.1°, and in view of the obligation of the State to legislate for the realisation of the personal rights contained within the Constitution, it is suggested that the State has a positive obligation to legislate for religious expression through the medium of Islamic finance.

While Article 44 of the Constitution is primarily a negative guarantee, it is arguable that the State has a positive duty towards those who 'left to their own accord would not be able to practice their religion.'[302] In the case of *Brennan v Attorney General*[303] the Supreme Court adopted the view that the guarantee of personal rights can impose a duty upon the State to take action.[304] Subsequently in

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[298] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 151.
[299] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 162.
[300] See; s 5.4.2.
[301] *T.D. v Minister for Education* [2001] 4 IR 259.
[302] Gerard W. Hogan, Gerard F. Whyte, *J.M. Kelly; The Irish Constitution* (4th edn, Butterworths 2003) 2045-2046.
[303] *Brennan v Attorney General* [1984] ILRM 355.
[304] Gerard W. Hogan, Gerard F. Whyte, *J.M. Kelly; The Irish Constitution* (4th edn, Butterworths 2003) 1491.

the case of *A.D. v Ireland*[305] Carroll J noted that 'if the courts find there is a constitutional right which is being ignored by the State, the court will also find a remedy in the absence of the State undertaking to observe that right.'[306] Denham J, as she then was, has commented that 'the courts will protect [constitutional rights] in the absence of legislation or not.'[307] This suggests that the court may be willing to require the State to act where omission or inaction has contributed to the limitation of personal freedoms.

Hogan and White, noting that the former, now a sitting upon the bench in the Court of Appeal and writing extra-judically, resist the view that the Constitution gives rise to a general obligation upon the Executive to legislate for the pursuit of personal rights which can be enforced by the judiciary;[308] however, an obligation must lie upon the Executive to legislate in the context that, were it not to, individuals would suffer an infringement of their personal rights. The observation of Hogan and Whyte may be more appropriate in the context of unenumerated personal rights under Article 40.3 which, if capable of placing further positive obligations upon the executive, may have unforeseeable economic consequences for the executive. Whyte has separately stated 'it is important to note that legislative inaction can sometimes be as damaging to constitutional rights as legislative action.'[309]

The deficiencies within the legislation for the facilitation of Islamic finance have resulted in the Islamic community being unfairly limited in the exercise of their right to religious expression.[310] In the absence of such legislation the courts:

> '...have jurisdiction to review the failure of the Executive to act. In particular where constitutional rights are affected, the court's constitutional duty to vindicate fundamental rights entitles it to review executive inaction.'[311]

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[305] *A.D. v Ireland* [1994] 1 IR 369.
[306] *A.D. v Ireland* [1994] 1 IR 369 at 372.
[307] *North Western Health Board v H.W.* [2001] 3 IR 622 at 718.
[308] Gerard W. Hogan, Gerard F. Whyte, *J.M. Kelly; The Irish Constitution* (4th edn, Butterworths 2003) 1489.
[309] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Future Press 2002) 21.
[310] See; s 5.2.3.iii.

The limitations placed upon the judiciary by virtue of *T.D. v Minister for Education*[312] are significant; however, the application of this judgment must make reference to the particular facts of the case. By virtue of this judgment, the court is restricted from imposing mandatory orders upon the executive which may impact upon the legislative and economic function of elective representatives, save in extraordinary circumstances. In the case of *O'Shaughnessy v Attorney General*[313] O'Keeffe P emphasised that it fell upon the executive to determine the content of laws protecting personal rights; however, emphasis must be placed on the fact that Article 44.2.1° is distinct from Article 40.3.2° due to the fact that the personal right to religious freedom is enumerated.

In the context of Article 40.6.1°(i) Cox recalls that:

> 'The people endorsed a Constitution that did require that blasphemy be a crime. The courts, as guardians of the Constitution are bound to enforce the terms of that Constitution without fear or favour and in a spirit of political and social independence.'[314]

Enumerated rights must be distinguished from unenumerated rights on the basis that the former exist in plain terms placing an obligation upon the executive to legislate for and for the judiciary to enforce. It is on this basis that the then Minister for Justice, Equality and Law Reform, Deputy Dermot Ahern, felt that the executive was obliged to legislate for the crime of blasphemy on the basis that the Constitution had in fact encapsulated a criminal prohibition.[315] It is clear that the guarantee of religious liberty, contained expressly within the Constitution, must be legislated for with a view to giving it practical effect. Recognising a positive obligation upon the executive to legislate on this basis is distinct from a positive obligation to fill legislative *lacunae* in the interest of social policy interests; an action which the High

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[311] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Future Press 2002) 18.
[312] *T.D. v Minister for Education* [2001] 4 IR 259.
[313] *O'Shaughnessy v Attorney General* (unreported, High Court, O'Keeffe P, 16 February 1971).
[314] Neville Cox, 'Constitutional Law – Constitutional Interpretation – Passive Judicial Activism – Constitutional Crime of Blasphemy' (2000) 22 DULJ 207.
[315] Dermot Ahern, *Dáil Debates*, 25 March 2010, 705(3).

Court has previously considered *ultra vires* to its powers in the judgment of Keane J in *Somjee v Minister for Justice*.[316]

Asserting a positive obligation upon the State to legislate for Islamic finance, by virtue of Article 44.2.1°, is distinct from placing a positive obligation upon the State in pursuit of socio-economic rights. Indeed, the reluctance on the part of the judiciary in this regard demonstrates suitable restraint towards the role of the Executive in the separation of powers;[317] however, the failure of the State to legislate for the realisation of the enumerated constitutional rights can generate positive obligations where legislative absences cause the violation of constitutional guarantees.[318] The failure to provide legislation for the real and practical use of Islamic finance in Ireland has deprived the Islamic community from expressing their religious beliefs in accordance with Article 44.2.1° of the Constitution.

Unfortunately, the Irish judiciary have adopted a conservative attitude with regard to the imposition of mandatory orders upon the State to positively discharge certain duties.[319] While some positive departures have been noted from the severe restraints contained within *T.D. v Minister for Education*[320] in recent years[321] it continues to remain that the court is limited to the making of a declaratory order in the majority of cases before it, save in the most extreme circumstances.[322] In recent years the impact of the jurisprudence of the ECtHR has been persuasive. Binchy comments that:

> 'Other voices are beginning to be heard at both High Court and Supreme Court level which suggest an openness to protecting these rights. The

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[316] *Somjee v Minister for Justice* [1981] ILRM 324.
[317] Siobhán Mullally, 'Substantive Equality and Positive Duties in Ireland' (2007) SAJHR 292.
[318] *E.S.B. v Gormley* [1985] IR 129, see; Maeve O'Rourke, 'Ireland's Magdalene Laundries and the State's Duty to Protect' (2011) 10 HLJ 235.
[319] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Future Press 2002) 356.
[320] *T.D. v Minister for Education* [2001] 4 IR 259.
[321] See; *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105.
[322] *T.D. v Minister for Education* [2001] 4 IR 259, at 303.

> enactment of the European Convention on Human Rights Act 2003 has, I think, contributed to this process.'[323]

Separately, Charlton J has cited *ex officio* the decision of the ECtHR in the case of *Open Door Counselling Limited and Dublin Well Woman Centre Limited v Ireland*[324] with approval in which he observed that Article 40.3.3 of the domestic Constitution gives rise to positive obligations upon the State to legislate in order to give reality to a constitutional provision.[325]

> In the case of *The State (Quinn) v Ryan*[326] Ó Dálaigh J posited the following:
>
> 'It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizens that these rights should be set at nought or circumvented. The intention was that rights of subsistence were being assured to the individual and that the courts were the custodians of these rights. As a necessary corollary it follows that no-one can without impunity set these rights at nought or circumvent them, and that the court's powers in this regard are as ample as the defence of the Constitution requires.'[327]

This judgment suggests that constitutional guarantees to freedoms have positive effect as the State cannot absently guarantee them, thus setting them at nought, but are obliged to act positively upon them if positive obligations are necessary to give reality to their guarantee. The jurisprudence of the ECtHR would advocate an increased emphasis on judicial activism to give real meaning and practical effect to personal rights. In an increasing body of jurisprudence, the courts seem encouraged to look beyond the strict dichotomy of positive and negative and recognise that which will give practical effect to the guarantee in the Constitution.

The jurisprudence of the Irish Courts has demonstrated a conflicted attitude with regard to the liberal dichotomy which exists between positive and negative

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[323] William Binchy, 'Protecting Economic, Social and Cultural Rights in Ireland' (IHRC and Law Society Annual Conference 2009: Economic, Social and Cultural Rights; Making State Accountable, Dublin, 21 November 2009) 3.

[324] *Open Door Counselling Limited and Dublin Well Woman Centre Limited v Ireland* (1992) Series A no 246.

[325] Peter Charleton, 'Judicial Discretion in Abortion: The Irish Perspective' (1999) 6(3) IJLF 373.

[326] *The State (Quinn) v Ryan* [1965] IR 70.

[327] *The State (Quinn) v Ryan* [1965] IR 70 at 122.

rights and has sent out 'mixed signals' in the view of O'Connell.[328] While the Supreme Court, in the case of *Article 26 and the Health (Amendment) (No. 2) Bill 2004*,[329] advocated a traditional understanding of the constitutional guarantees, an increased number of the judiciary have begun to advocate an interpretation of the same with a view to realising their practical effect.[330] Of particular note has been the decision of the ECtHR in the case of *Sisojeva and Others v Latvia*[331] which found that:

> 'It [the court] reiterates, however, that Article 8, like any other provision of the Convention or the Protocols thereto, must be interpreted in such a way that it guarantees not rights that are theoretical or illusory but rights that are practical and effective.'[332]

In recent years, this decision has been repeatedly endorsed by members of the Irish judiciary in both the Supreme[333] and High Court.[334] This passage was cited in the judgment of Finlay Geoghegan J in *Bode (a minor) and Ors v Minister for Justice, Equality and Law Reform*[335] to particular effect in the present circumstances.

This case challenged the validity of a deportation order placed upon the father of the applicant, an Irish citizen, which would have the consequence of depriving the applicant of a father; a member of his immediate family. Finlay Geoghegan J's endorsement of the decision of the ECtHR in *Sisojeva and Others v Latvia*[336] is significant. This interest in the practical effect of rights demonstrates an increased interest in the substance of rights as opposed to the artificial dichotomy of positive and negative. It also demonstrates an increased interest in the jurisprudence emanating from Europe in the area which could have a significant

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[328] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 162.
[329] *Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] IESC 7.
[330] William Binchy, 'Protecting Economic, Social and Cultural Rights in Ireland' (IHRC and Law Society Annual Conference 2009: Economic, Social and Cultural Rights; Making State Accountable, Dublin, 21 November 2009) 3.
[331] *Sisojeva and Others v Latvia* App no 60654/00 (ECtHR, 16 June 2005).
[332] *Sisojeva and Others v Latvia* App no 60654/00 (ECtHR, 16 June 2005) [104].
[333] See; *People (DPP) v Raymond Gormley and People (DPP) v Craig White* [2014] IESC 17.
[334] See; *Paul Walsh v The Minister for Justice, Equality and Law Reform and Others* [2009] IEHC 102; *Hazel Lawlor v The Members of the Tribunal of Inquiry into Planning Matters and Payments* [2008] IEHC 282.
[335] *Bode (a minor) and Ors v Minister for Justice, Equality and Law Reform* [2006] IEHC 341.
[336] *Sisojeva and Others v Latvia* App no 60654/00 (ECtHR, 15 January 2007).

impact on the rights theory in Ireland and the facilitation of Islamic financial measures on foot of the guarantee of religious expression.

The judgment of Finlay Geoghegan J was cited with approval by Laffoy J in the case of *Mary O'Donnell and Ors v South Dublin County Council*.[337] This case concerned three plaintiffs who suffered from Hurler's syndrome, sometimes referred to as gargoylism, and their contention that the defendant had breached its statutory duties to provide for them by way of sufficient accommodation and as such infringed their constitutional rights and their rights under the European Convention. Laffoy J observed that:

> 'The offer of a loan of €6350 which I have found would not be sufficient to fund the acquisition of a second suitable caravan or mobile home for Mary, even with the possibility of the €500 grant, is not sufficient to ensure that the rights of Bernard, Mary and Patrick under Article 8 are effectively and practically effected.'[338]

On the basis that South Dublin County Council had failed to allocate sufficient funding for the acquisition of proper facilities for the plaintiffs, Laffoy J found a breach of Article 8 and awarded the plaintiffs €58000 to purchase adequate facilities.[339]

This case does not herald a return of any socio-economic rights theory; indeed, Laffoy J comments that 'this is not a case which is based on an assertion that the State or any of its organs has a positive obligation to make certain provisions for every traveller family'[340] This case requires the State to give effect to the law currently in being, in this case the Housing (Traveller Accommodation) Act 1998. While it can be distinguished from the present context, this judgment is significant in view of the recent Directive of the European Parliament and Council on the access to

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[337] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204.
[338] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204 [77].
[339] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204 [94].
[340] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204 [77].

basic payment accounts.[341] This Directive, which will require the State to provide a basic payments account to citizens, must be understood to give rise to an obligation to provide same in compatibility with religious requirements. The decision of Laffoy J is significant on the basis that the State does not have a defence in a poorly constructed legislative system. Where an individual is afforded a basic payments account by virtue of statute, the court is free to determine that the system of provision operates ineffectively for religious adherents and can, on this basis, place a positive obligation upon the State.

Article 44.2.1° guarantees the right to religious expression in the domestic context in the following terms: '...the free profession and practice of religion are, subject to order and morality, guaranteed to every citizen.'[342] The court has demonstrated consistently that the protection of religion is of paramount concern in the Irish context, particularly in the judgments of *McGrath and Ruairc v Trustees of the College of Maynooth*[343] and *Quinn's Supermarket v Attorney General*.[344] The judgment of Walsh J in the latter is significant on the basis that an argument could be advanced that he is placing a positive obligation upon the State to legislate for religious expression when legislation restricts its manifestation.[345]

Academics have suggested that the realisation of Article 44.2.1° may place positive obligations upon the State.[346] The jurisprudence of the Irish Court, which currently eschews the concept of any endorsement of socio-economic rights, does not stand in opposition to the finding that the State has positive obligations, in light of Article 44.2.1°, to legislate for religious expression. The State currently has currently provided an insufficient legislative framework for this religiously-mandated

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[341] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees and related payment accounts, payment account switching and access payment accounts with basic features.
[342] *Bunreacht na hÉireann* art 44.2.1°.
[343] *McGrath and Ruairc v Trustees of the College of Maynooth* [1979] ILRM 166.
[344] *Quinn's Supermarket v Attorney General* [1972] IR 1.
[345] Oran Doyle, 'Article 44: Privileging the Right of the Religious' in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution* (Thompson Roundhall 2008) 481.
[346] See; Oran Doyle, 'Article 44: Privileging the Right of the Religious' in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution* (Thompson Roundhall 2008) 488; Gerard W. Hogan, Gerard F. Whyte, *J.M. Kelly; The Irish Constitution* (4th edn, Butterworths 2003) 2045-2046.

economic model.[347] The provision of such falls short of its obligation to provide for the practical and effective realisation of the right to religious expression under Article 44.2.1°. Accordingly, the State must be required to realise the constitutional right 'endorsed by the people'[348] through appropriate means; in this context, legislation. Failure to do so would render Article 44.2.1° meaningless from the perspective of the Islamic community and be contrary to the established authority of Ó Dálaigh J in the judgment of *The State (Quinn) v Ryan*.[349]

While such avenues are available to the judiciary, the constraints of *T.D. v The Minister for Education*[350] are a significant deterrent. As such, the jurisprudence of the ECtHR is significant and assistive when attempting to advance the concept of practical and effective rights obligations. Binchy comments that the requirement to look to the European Convention, in order to address domestic deficiencies in the practical realisation of rights, is somewhat ironic on the basis that 'the Irish Constitution, on any reasonable interpretation, is equipped to do this task far more fully and effectively.'[351] The following section considers how rights have increasingly been interpreted to contain positive obligations in the judgments of the ECtHR. These judgments represent a more liberal approach to rights theory which will be considered in the concluding passages of this section.

The jurisprudence emanating from the Irish Court does not demonstrate an advanced stream of judicial conscientiousness regarding the scope of rights theory. Previous attempts at judicial activism in the arena of socio-economic rights have been severely hampered by operation of the decision of the Supreme Court in *T.D. v The Minister for Education*.[352] At the same time, the judiciary have demonstrated their capacity to be inventive with regard to the practical guarantee of rights in a

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[347] See; s 5.2.3.iii.
[348] Neville Cox, 'Constitutional Law – Constitutional Interpretation – Passive Judicial Activism – Constitutional Crime of Blasphemy' (2000) 22 DULJ 207.
[349] *The State (Quinn) v Ryan* [1965] IR 70.
[350] *T.D. v The Minister for Education* [2001] IESC] 101.
[351] William Binchy, 'Protecting Economic, Social and Cultural Rights in Ireland' (IHRC and Law Society Annual Conference 2009: Economic, Social and Cultural Rights; Making State Accountable, Dublin, 21 November 2009) 7.
[352] *T.D. v The Minister for Education* [2001] IESC] 101.

post-T.D. jurisprudential framework. Mindful of the separation of powers, the courts have arguably retained the ability to compel the State to address legislative deficiency[353] and also the right to place further obligations upon the State to realise the content of legislation.[354] In view of such, it is appropriate to consider if a positive obligation to provide for religious expression can be derived from the European Convention on the basis that it has been found that a positive obligation can be placed upon the State to realise the extent of its legislative provisions. This requires them to give effect to the European Convention on Human Rights Act 2003.[355]

5.6 Positive Obligations under the European Convention on Human Rights

The European Convention is a document which is fundamentally concerned with the guarantee of human rights[356] primarily conceived in terms of negative liberties;[357] however, increasingly, positive obligations are being imposed upon Contracting States in order to give real and practical effect to the substance of the Convention primarily through judicial activism.[358] The following section proposes to examine the growing jurisprudence surrounding positive obligations in the ECtHR with a view to demonstrating that Contracting States have a duty to provide for religious expression by virtue of Article 9 and 10 ECHR. It proposes to emphasise the increasing judicial disassociation from any strict separation of positive and negative obligations under the Convention in order to strengthen the proposition that rights be recognised as practical and effective.[359]

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[353] *A.D. v Ireland* [1994] 1 IR 369 at 372.
[354] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204.
[355] European Human Rights Act 2003.
[356] David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61(3) NILQ 281.
[357] Janneke Gerards, 'The Scope of ECHR Rights and Institutional Concerns: the relationship between proliferation of rights and the case load of the ECtHR' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 87.
[358] David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61(3) NILQ 283.
[359] *Airey v Ireland* (1979) Series A no 32 [24].

Xenos comments that:

> '...human rights violations by the State are the exemption rather than the rule and therefore the time has come to reverse the perspective from which the human rights discourse is made, namely the classical liberal view of the State's non-interference.'[360]

Legal arguments regarding the acceptance of positive obligations under the ECHR have transitioned from arguments of *if* to those of *how*.[361] In 1999 Starmer outlined his much endorsed[362] principles by which positive obligations could be imposed upon State authorities in the following terms:

> (i) first, the principle that, under Article 1 of the Convention, States should secure Convention rights to everyone within their jurisdiction;
> (ii) second, the principle that Convention rights as secured must be practical and effective not theoretical and illusionary, and;
> (iii) third, the principle that, under Article 13, effective measures should be provided for arguable breaches of Convention rights.[363]

Article 1 of the ECHR places obligations upon the State to create a domestic legislative framework through which Convention rights can be realised.[364] Mowbray makes reference to the repeated use of Article 1 by the ECtHR in circumstances where the court recognises positive obligations on foot of the Convention.[365] In the case of *Z and Others v United Kingdom*[366] the ECtHR determined that:

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[360] Dimitris Xenos, *The Positive Obligations of the State Under the European Convention on Human Rights* (Routledge 2012) 2.
[361] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 162-163.
[362] Dimitris Xenos, *The Positive Obligations of the State Under the European Convention on Human Rights* (Routledge 2012) 223; David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61(3) NILQ 293. Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Hart Publications 2004) 5.
[363] Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (LAG Education and Service Trust Ltd 1999) 194.
[364] David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61(3) NILQ 283.
[365] Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Hart Publications 2004) 44, 65.
[366] *Z and Others v United Kingdom* App no 29392/95 (ECtHR, 10 May 2001).

> 'The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment...'[367]

It could be said that the ECtHR has utilised Article 1 in combination with a primary right under the Convention in order to recognise positive obligations on foot of the primary right. In the present circumstance, the ECtHR could recognise that religious adherents have a right to legislation, under Article 1, so as to realise the benefit of Articles 9 and 10 of the Convention.

Starmer's second principle is derived from the determination of the European Commission in the case of *Airey v Ireland*.[368] The applicant claimed that her right to fair procedures had been infringed by the Irish State's refusal to permit her to access legal aid. Airey sought a judicial separation from her husband on the grounds of alleged physical and mental cruelty to her and their children, a proceeding which is heard in the High Court. It was not possible to obtain legal aid in this procedure. She asserted that such a restriction frustrated her ability to fairly plead her case which resulted in the violation of her right to a fair trial.[369] The Irish State submitted that the applicant was entitled to appear before the High Court without the assistance of legal representation and that the State had not obstructed this possibility.[370]

The ECtHR noted that Article 6 of the Convention 'may sometimes compel the State to provide for the assistance of a lawyer' in civil proceedings 'when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory...or by reason of the complexity of the procedure.'[371] Having considered the complexity of the judicial separation procedure

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[367] *Z and Others v United Kingdom* App no 29392/95 (ECtHR, 10 May 2001) [73].
[368] *Airey v Ireland* (1979) Series A no 32.
[369] *Airey v Ireland* (1979) Series A no 32 [9].
[370] *Airey v Ireland* (1979) Series A no 32 [19].
[371] *Airey v Ireland* (1979) Series A no 32 [26].

the ECtHR stated that: '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[372]

The failure of the Irish State to provide for legal aid in civil matrimonial procedures was an act of forbearance; however, the realisation of Article 6(1) of the Convention required more than acts of government abstention but required such positive acts so as to give reality to the substance of the guarantee. The principle that Convention rights are to be interpreted as practical and effective has placed demands upon Contracting States to bring about measures which sufficiently protect individuals.[373] This principle, which has been adopted into the domestic jurisprudence,[374] has far reaching consequences for individual Contracting States. It requires the Contracting State not merely to refrain from interfering in the exercise of individual liberties through policies of non-interference but to adopt such positive measure 'designed to secure their respect.'[375]

Sartori places emphasis on a further principle of the European Convention which he addresses as the principle of evolutive interpretation or the living instrument.[376] The ECHR has been recognised as a living instrument since the earliest days of its jurisprudence. In the decision of *Tyrer v United Kingdom*[377] the Commission recognised that: 'the Convention is a living instrument which... must be interpreted in the light of present-day conditions.'[378] Xenos posits that the continued recognition of positive obligations on the part of the ECtHR reflects 'the court's response to social forces as expressed in individual petition'.[379]

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[372] *Airey v Ireland* (1979) Series A no 32 [24].

[373] David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61(3) NILQ 283-284.

[374] See; 5.5.

[375] Daria Sartori,'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29 TECLF 69.

[376] Daria Sartori,'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29 TECLF 50-51. See also; *Tyrer v United Kingdom* (1978) Series A no 26 [31]; *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [54].

[377] *Tyrer v United Kingdom* (1978) Series A no 26.

[378] *Tyrer v United Kingdom* (1978) Series A no 26 [31]

[379] Dimitris Xenos, *The Positive Obligations of the State Under the European Convention on Human Rights* (Routledge 2012) 18.

The *evolutive interpretation* principle of the Convention requires the ECtHR to approach the interpretation of human rights with reference to subjective values. Burbergs observes that such an interpretation will have to take into consideration not only the values of the Contracting State under scrutiny but the presence of pervasive values across the Contracting States.[380] Any such attempt would largely risk the facilitation of a more conservative and traditional interpretation of human rights which would endorse the classical negative liberties approach to the Convention.[381] Contracting States would be wary of facilitating positive obligations which incur cost liabilities for the State. The statement of Singh that 'protection has a price'[382] may be counter-productive to the recognition of positive obligations under the Convention on the basis of any contemporaneous interpretation.

The right for religious adherents to express their religion through Islamic finance is frustrated by the absence of an adequate legislative framework in the domestic context. The recognition that any Contracting State holds a positive obligation to legislate on foot of any Article of the Convention interferes in the least possible way with the freedom of individual Contracting States to manage their individual economies. Such concern is of particular relevance to the present study. In addition to the principles discussed above, Starmer has stated that the ECtHR has further recognised duties which may be imposed upon Contracting States:

(1) a duty to put in place a legal framework which provides effective protection for Convention rights;
(2) a duty to prevent breaches of Convention rights;
(3) a duty to provide information and advice relevant to the breach of Convention rights;
(4) a duty to respond to breaches of Convention rights, and;

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[380] Maris Burbergs, 'How the Right to Respect for Private Family Life, Home and Correspondence Became the Nursery in Which New Rights are Born: Article 8 ECHR' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 319.

[381] Janneke Gerards, 'The Scope of ECHR Rights and Institutional Concerns: the relationship between proliferation of rights and the case load of the ECtHR' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 87

[382] Rabinder Singh, *The Future of Human Rights in the United Kingdom* (Hart Publications 1997) 54.

(5) a duty to provide resources to individuals to prevent breaches of Convention rights.[383]

The right to religious expression under Articles 9 and 10 of the Convention must be realised in a way which is practical and effective; therefore, ensuring that the Islamic community are facilitated in their attempt to regulate their financial affairs places a positive obligation upon the Contracting State to legislate.

The duty to put in place a legislative framework in order to realise the objectives of the European Convention could be considered to amount to the minimum obligation which can be placed upon Contracting States.[384] Xenos advances this proposition by suggesting that this legislative framework must be interpreted in order to facilitate practical measures.[385] The decision of the European Commission in *Rees v United Kingdom*[386] is significant. The applicant in this case, a transsexual, alleged that the refusal of the United Kingdom to bring about legislation which enabled him to change his birth certificate, from female to male, infringed his rights under *inter alia* Article 8 of the Convention. The ECtHR recognised that such a finding would require 'detailed legislation'[387] and on the basis of the margin of appreciation afforded to the Contracting State it determined that 'the positive obligations arising from Article 8...cannot be held to extend that far.'[388] Significantly, the ECtHR observed in its closing passages that:

> '...it must *for the time being* be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances.'[389]

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[383] Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (LAG Education and Service Trust Ltd 1999) 196.
[384] Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (LAG Education and Service Trust Ltd 1999) 196.
[385] Dimitris Xenos, *The Positive Obligations of the State Under the European Convention on Human Rights* (Routledge 2012) 209.
[386] *Rees v United Kingdom* (1986) Series A no 106.
[387] *Rees v United Kingdom* (1986) Series A no 106 [44].
[388] *Rees v United Kingdom* (1986) Series A no 106 [44].
[389] *Rees v United Kingdom* (1986) Series A no 106 [47] (emphasis added).

While the way in which the ECtHR determined that no positive obligation existed in this context could be described as less than adequate[390] the decision demonstrates how the court will be mindful of the domestic circumstances only where it is reasonable to do so and does not bind itself to any time specific determination.

In the case of *X and Y v the Netherlands*[391] the applicant father alleged that the rights of his daughter under Articles 3 and 8 were infringed by virtue of the fact that the domestic legislation precluded her from initiating criminal proceedings against an alleged rapist by virtue of her mental handicap.[392] The government responded by stating that, although the criminal complaint system enabled no one to bring a complaint in the circumstances, the applicant was at liberty to institute civil proceedings.[393] Xenos refers to this as the classic positive obligations case whereby the State is rendered 'indirectly responsible for its failure to actively protect an individual.'[394] The ECtHR determined that 'the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient'.[395]

This determination pre-dates that of *Airey v Ireland*[396] and indeed the 'principle of effective interpretation'[397] under the Convention; however, it demonstrates that the refusal to put in place effective legislation where it encounters 'a procedural obstacle' can amount to a breach of its obligations under the Convention.[398] The ECtHR recognised in the circumstances of the case of *X and Y*

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[390] See; Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013). Layrysen argued that the ECtHR should be careful to apply a two-stage-test in positive obligation cases in line with the way in which negative liberties are determined. He suggests that the court should adopt a mechanism whereby it first addresses whether there is in fact any positive obligation before secondly addressing whether the Contracting State may be afforded the margin of appreciation in the specific circumstances. Further analysis of this theory is unnecessary at this juncture.

[391] *X and Y v the Netherlands* (1985) Series A no 91.

[392] *X and Y v the Netherlands* (1985) Series A no 91 [18].

[393] *X and Y v the Netherlands* (1985) Series A no 91 [24].

[394] Dimitris Xenos, *The Positive Obligations of the State Under the European Convention on Human Rights* (Routledge 2012) 24.

[395] *X and Y v the Netherlands* (1985) Series A no 91 [27].

[396] *Airey v Ireland* (1979) Series A no 32.

[397] Daria Sartori,'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29 TECLF 50.

[398] *X and Y v the Netherlands* (1985) Series A no 91 [27].

v the Netherlands[399] that the legislature had not foreseen the obstacle posed by the applicant yet this did not excuse the Contracting State from living up to its obligations under the Convention. In the case of *Mouvement Raëlien Suisse v Switzerland*[400] Judge Pinto de Albuquerque observed that, in a dispute regarding positive and negative obligations, 'the court should ask itself if the absence of any action by the national authorities would have resulted in a violation of the Convention.'[401] In a contemporary context the ECtHR has suggested that any such examination should consider whether the Contracting State had or ought to have had knowledge before imposing any positive obligation.[402]

As previously stated in this section, placing a duty upon a Contracting State to legislate for the guarantee of rights under the Convention can be considered as the minimum decree of positive obligation. Further to this, the ECtHR has been disposed towards placing positive obligations upon Contracting States even in circumstances where they could not foresee the obstacle in any legislative omission.[403] By virtue of the determinations of the ECtHR in the cases of *Osman v United Kingdom*[404] and *Budayeva and Others v Russia*[405] the ECtHR requires that the Contracting State had or ought to have had prior knowledge of the omission.[406] The recognition of positive obligations on foot of such knowledge should not be 'interpreted in such a way as to impose an impossible or disproportionate burden' on the Contracting State.[407] The Irish State has knowledge of the fact that the current legislative framework does not adequately address the requirements of the Islamic community with regard to

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[399] *X and Y v the Netherlands* (1985) Series A no 91.
[400] *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012).
[401] *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) dissenting opinion of Judge Pinto de Albuquerque.
[402] *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) [152].
[403] *X and Y v the Netherlands* (1985) Series A no 91
[404] *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998).
[405] *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).
[406] See; *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) [116]; *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) [152].
[407] *Ilaşcu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) [332].

Islamic finance which has resulted in some legislative amendments;[408] these legislative amendments are insufficient.[409] It can be argued on this basis that the Islamic community has a *prima facie* claim under Article 9 and 10 of the Convention attempting to place a positive obligation upon the Irish State to legislate for Islamic finance in order to give practical effect to the guarantees of the Convention.

At the same time certain obstacles lie in the path of the imposition of positive obligations upon Contracting States under the Convention, foremost amongst them is the resistance of the ECtHR to 'develop a general theory of positive obligations which may flow from the Convention.'[410] This has prompted Russell to observe that the stance of the court towards the imposition of positive obligations has been 'less than optimal.'[411] While the ECtHR has expressed its refusal to determine a general theory Lavrysen posits that this has been rebutted in case law.[412] As has been witnessed above, a steady theory emanates with regard to the necessary practicality of Convention rights which has encouraged the willingness of the ECtHR to impose positive obligations to legislate where the forbearance of a Contracting Party has resulted in the deprivation of individual liberties. It is, however, fair to reiterate the observations of Russell and to state that the current refusal of the ECtHR to explicitly determine the issue of positive obligations under the Convention is less than adequate. A general theory is in fact required.

While the ECtHR has continued to employ the rhetoric dividing positive and negative liberties case law has in fact contributed to a blurring of the boundaries which separate them.[413] The jurisprudence of the Court, based on the desire to

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[408] Finance Act 2012, see; Edana Richardson, 'Islamic Finance for Consumers in Ireland: A Comparative Study of the Position of Retail-Level Finance in Ireland' (2011) 31(4) JMMA 534.
[409] Edana Richardson, 'Islamic Finance for Consumers in Ireland: A Comparative Study of the Position of Retail-Level Finance in Ireland' (2011) 31(4) JMMA 539.
[410] *Plattform "Ärzte für das Leben" v Austria* (1988) Series A no 139 [31].
[411] David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61(3) NILQ 284.
[412] Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 163.
[413] Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (LAG Education and Service Trust Ltd 1999) 206.

realise the practical effect of rights, has placed positive obligations upon Contracting States on the basis of what appear at times to be negatively constructed Articles.[414] The European Court has recognised positive obligations drawing from negatively constructed rights such as; Article 2, the right to life[415]; Article 3, the prohibition of torture[416]; Article 5, the right to liberty[417]; Article 6, the right to a fair trial[418]; Article 8, the right to respect for family and private life[419]; Article 9, the right to freedom of religion[420]; Article 10, the right to freedom of expression[421]; Article 11, the right to free assembly[422], and; Article 13, the right to an effective remedy[423]. These demonstrate only a small portion of the cases in which the European Court

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[414] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002) 53: 'most of the rights under the Convention are negative rights, or rights to freedom from interference. However a few rights impose obligations on the State to take positive action to protect people.'

[415] In *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) the applicant asserted that the respondent Member State had failed to safeguard the life of Mr Osman, as obligated by art 2 (right to life), by failing to take positive action in response to a real and then present threat to their security. The court recognised that [115] '...art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'

[416] In *A v United Kingdom* App no 25599/94 (ECtHR, 23 September 1998) the applicant had been the subject of beatings with a garden cane by his step-father which bruised him. The European Court asserted that [22] '...art 3 (prohibition of torture) requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhumane or degrading treatment of punishment...'

[417] In *Storck v Germany* App no 61603/00 (ECtHR, 16 June 2005), the European Court asserted that the negative construction of art 5 (right to liberty) should be interpreted with positive effect, [102] 'Having regard to this, the court considers that art 5(1)...of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens.'

[418] See above; *Airey v Ireland* (1979) Series A no 32 [9].

[419] See above; *Rees v United Kingdom* (1986) Series A no 106 [44].

[420] In *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013), this case has been discussed at length during the course of this thesis, see; s 3.2.1. At [84] the ECtHR noted that the Contracting State has an obligation to 'consider the issues in terms of the positive obligations on the State...under art 9' when examining the proportionality of any limitation of a religious expression.

[421] In *Manole and Others v Moldova* App no 13936/02 (ECtHR, 17 September 2009), the court recognized that 'genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice' [99].

[422] In *Plattform "Ärzte für das Leben" v Austria* (1988) Series A no 139, the court recognised that art 11 (freedom of assembly) at times required positive action on the part of the State to guarantee the safety of those exercising their right. It noted 'genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of art 11. Like art 8, art 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals...'

[423] In *Silver and others v United Kingdom* (1983) Series A no 61, six prisoners and a person at liberty alleged that the interference with their mail by prison officials was contrary to art 8 while at the same time the lack of procedures to remedy this led to a breach of art 13 (right to an effective remedy). The court found that the State had a duty to put in place such procedures [119] 'art 13 has been violated'.

continues to recognise the existence of positive duties and obligations stemming from negative rights.[424] Indeed there are now hardly any provisions under the Convention where positive obligations have not been recognised.[425] This jurisprudence demonstrates that the European jurisprudence is leading the Convention rights theory to oppose the strict negative and positive understanding of rights in preference to those actions which best facilitate the substantive realisation of rights.

While the ECtHR has recognised that the State does have positive obligations under Article 9 of the Convention[426] there is a relative paucity of case law in this area in order to demonstrate any cohesive theory; however, it is clear from the decision in *Eweida and Others v United Kingdom*[427] that, in the examination of any limitation of religious expression on behalf of an applicant, the court must 'consider the issues in terms of the positive obligations on the State authorities to secure the rights under Article 9 to those within their jurisdiction.'[428] The ECtHR has been more proactive in the recognition of positive obligations under Article 10 of the Convention, even in the context where the parameters of any recognition may not be clear.[429]

In the case of *Steel and Morris v United Kingdom*[430] the ECtHR recognised that freedom of expression can be fundamental for the stimulation of public debate. The ECtHR concluded that the applicant's right to expression was infringed by virtue of the failure of the Contracting State to afford them legal aid on the basis of the

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[424] For a deeper analysis of the court's jurisprudence in this area see; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014), see also; Alastair Mowbray, *Cases, Material and Commentary on the European Convention on Human Rights* (OUP 2012).

[425] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 102.

[426] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [84].

[427] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

[428] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [84].

[429] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 462.

[430] *Steel and Morris v United Kingdom* App no 68416/01 (ECtHR, 15 February 2005.

length and complexity of the case.[431] Considering the arguments put forward in the third chapter of this thesis pertaining to the fundamentality of religious expression within the rights hierarchy of the Convention, the right to express religion must be considered as a fundamental concern for each Contracting State.[432] At the same time, on the basis of the decision in *Plattform "Ärzte für das Leben" v Austria*,[433] the court is operating in the absence of any theoretical basis.[434] Difficulties exist regarding the extent to which Contracting States can be held responsible for violations of the Convention where individuals require positive measures on foot of negative rights.[435] Consistent with the observations in *Steel and Morris*[436] religious expression is instrumental in the stimulation of public debate particularly in the realms of morality. On this basis, and upon the basis of its central fundamentality discussed throughout this thesis, it can be asserted that there exist positive obligations for the State in the successful guarantee of religious expression under Article 9 and 10 of the Convention; however, it remains to be seen if the Irish Court or the ECtHR will adopt the theoretical considerations put forward earlier during the course of this chapter to realise the full potential and capabilities of the right to religious expression.

5.7 Conclusion

Rainey, Wicks and Ovey characterise positive obligations as 'circumstances in which a Contracting Party is required to *take action* in order to secure to those within its jurisdiction the rights protected by the Convention.'[437] It is accepted that all Convention rights contain positive obligations to give effect to rights so as to make their guarantee meaningful; this contains the duty to *take action*. This chapter

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[431] *Steel and Morris v United Kingdom* App no 68416/01 (ECtHR, 15 February 2005 [75].
[432] See; s 3.4.2.
[433] *Plattform "Ärzte für das Leben" v Austria* (1988) Series A no 139 [31].
[434] Dimitris Xenos, *The Positive Obligations of the State Under the European Convention on Human Rights* (Routledge 2012) 6.
[435] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 102.
[436] *Steel and Morris v United Kingdom* App no 68416/01 (ECtHR, 15 February 2005.
[437] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) 102 (emphasis added).

has argued for the recognition of positive obligations upon the State in order to realise the real and practical guarantee of the right to religious expression. It has used Islamic finance as a medium to explicate the theory.

Islamic Finance is a form of religious expression centred around four prohibitions contained within *Sharī'a* law.[438] Certain structures are available to the Islamic adherents to avail of financial transactions which are religiously compliant.[439] Some of these operate on a similar tax basis with conventional financial transactions by virtue of various tax amendments and the supplementation of the Finance Acts.[440] This is to facilitate the wider availability of Islamic finance in the State with a purpose to foster trade and investment with Islamic States outside of the European Union with perhaps an incidental benefit towards the religious expression of the Islamic community.

Due to the State's reluctance to modify the land registration procedure, transactions concerning or involving real property are fundamentally more expensive in Islamic finance.[441] This is further complicated by the usual requirement that Islamic transactions be constructed about an identifiable asset which consequently frustrates the practical operation of Islamic transactions in the Irish State;[442] therefore, Islamic investors require the State to amend the Finance Acts and modify the system of land registration so as to enable them to conduct their finances in compliance with their religion.[443]

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[438] See; Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 903-906.
[439] Andrew Henderson, 'Islamic Financial Services' in George Walker, Robert Purves and Michael Blair (eds), *Financial Services Law* (3rd edn, OUP 2014) 907.
[440] Irish Revenue Commissioners, 'Islamic Finance' (2009) 78 Tax Briefing available at http://www.revenue.ie/en/practitioner/tax-briefing/archive/78/ accessed 22 January 2015.
[441] *Stamp Duties Consolidation Act, 1999* s 70.
[442] Drawing a parallel with the State obligation to provide those in its direct care, through prisons or hospitals, with religious services the observation of Kelly might suggest that the State has an obligation to provide for Islamic Finance on the basis that these individuals cannot act themselves. See; G.W. Hogan, G.F. Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, Butterworths Press 2003) 2045-2046 – '...it is arguable, particularly given the terms of art 44.1, that in cases involving persons who, left to their own accord, would not be able to practise their religion and in respect of whom the State has a special responsibility, a more active policy of providing religious services may be required.'
[443] For a more comprehensive analysis, see; s 5.2.3.

This chapter reappraised the traditional understanding of rights from a broader contemporary philosophical perspective. It addressed the dichotomy between positive and negative rights and concluded that any right can contain internal positive and negative duties which are necessary for the effective guarantee of the right. These duties are capable of enforcement when they are essential for the realisation of the right and proportionate against countervailing interests of the Contracting State in accordance with the usual limitation test of Convention rights.[444] It is concluded that, on the basis of the right to religious expression, the State has a duty to provide for those things necessary to give life and vitality to that right. Islamic finance is a form of religious expression through which individuals adhere and live out their religious belief. It is necessary and essential to enact supplementary legislation to provide for this religious expression. It could not be argued that the exercise of this right disproportionately infringes the rights of others; therefore, on this basis and upon those grounds discussed during the course of this chapter, the State is positively required to enact specific legislation to provide for Islamic finance on the basis of the right to religious expression

Jurisprudence emanating from the ECtHR has authorised and imposed positive obligations on Contracting States by virtue of negatively constructed Articles of the convention. This approach places a greater degree of emphasis on the spirit of an intended provision and supports the theory which eschews the traditional positive and negative dichotomy. This approach purports to assert that States have positive obligations inherent in the vindication of rights even where these rights are perceived as negative. This approach would assist the argument that the State has an obligation to provide for Islamic finance to give real and practical effect to the freedom of religious expression, found under Articles 9 and 10 of the European Convention on Human Rights and Articles 40.6.1° and 44 of *Bunreacht na hÉireann*. The current approach of the Irish Courts displays a reluctance to consistently recognise rights with positive effect. It appears that any argument built in this manner may find difficulty within the Irish Courts and could be frustrated by virtue

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[444] See; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey; The European Convention on Human Rights* (6th edn, OUP 2014) ch 14.

of the reluctance of the same court to place mandatory orders upon members of the Executive;[445] however, this examination places emphasis on the disposition of the Judiciary towards the practical and effective nature of rights and particularly emphasises the potential of the jurisprudence emanating from the judgment of Judge Laffoy in *Mary O'Donnell and Ors v South Dublin County Council*.[446]

The refusal of the Oireachtas to legislate for Islamic finance impedes the operation of this financial system on an equal basis with conventional finance and acts as an obstruction to the religious expression of the Islamic community in Ireland. The State recognises the right of religious expression and guarantees this freedom to every person. Failure to give positive effect to this right would fail to enable the Islamic community to utilise the freedom. Guaranteeing a right gives way to obligations. As has been demonstrated throughout the course of this work, the right to religious expression is capable of positive effect. While is remains to be determined how the judiciary will approach this in a domestic context the jurisprudence emanating from the ECtHR is supportive of such an interpretation. Rights theory in the Irish Courts should continue to move away from the oppositional approach of understanding positive and negative rights but aim to consider the meaning of the respective right in order to give it real and practical effect.

Recognising a positive obligation to provide for religious expression may be challenging to accept in a contemporary and increasingly secular legal sphere; however, scholarship in this post-secular context should continue to recognise the fundamentality of religious conscience and belief in the lives of religious adherents advocated in the third chapter of this thesis and affords this appropriate legal recognition.[447] This recognition is by no means a claim for an unyielding or absolute right to religious expression but a petition for real judicial consideration of the meaning of religion in the life of believers from a truly unbiased perspective. A true

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[445] This stems primarily from the opinion of the Supreme Court in *TD v Minister for Education* [2001] 4 IR 259.
[446] *Mary O'Donnell and Ors v South Dublin County Council* [2007] IEHC 204.
[447] See; s 3.4.2.

commitment to 'live together' in accordance with the decision of the ECtHR in *S.A.S. v France*[448] requires this mutual respect and the provision for the right to religious expression.

[448] *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

Conclusion

> 'When they came to the place that God had shown him, Abraham built an altar there and laid the wood in order. He bound his son Isaac and laid him on the altar on top of the wood...'[1]

Religious belief is not straight forward. This thesis has sought to consider in detail the relationship which exists between law and religion in a contemporary and 'increasingly secular society'.[2] The story of Abraham and his son Isaac demonstrates the complexities in this study where obedience to the rules of the temporal sphere can have perhaps everlasting consequences in the ethereal sphere. The study of law and religion is tasked with balancing competing interests between the requirements of living in social fraternity and adhering to the strict demands of conscience. Echoing the sentiments of Fallers Sullivan, perhaps it is impossible for law to truly understand religion.[3] This thesis has attempted to emphasise the meaning of religious beliefs for individuals and communities in order to demonstrate that their rights need adequate protection where law re-characterises its relationship with religion. This has been completed in two parts.

The first part of this thesis examined the definition of religion and of religious manifestation in order to characterise the right to religious expression as a superior right capable of enhanced protection under Article 10 of the European Convention in the addition to Article 9. The first chapter acknowledged that scholarship has queried the necessity of attempting to define religion;[4] however, it demonstrated that, due to the practical consequences of definition under Article 44 of the Irish Constitution and Article 9 of the European Convention, legal commentary is required to arrive at an operable definition for

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[1] *The Holy Bible* (OUP 1995) Genesis 2:9.
[2] Kerry O'Halloran, *Religion, Charity and Human Rights* (OUP 2014) 481.
[3] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 138.
[4] Victoria Harrison, *Religion and Modern Thought* (Canterbury Press 2007) 26.

the use of judges and legal practitioners so as to give effect to the guarantees of the Constitution and the Convention.[5]

In the absence of any definition under the Irish Constitution or the Convention, the first chapter emphasised the role of philosophical and broader academic commentary and concluded that a subjective and polythetic definition of religion was most appropriate for legal application. It suggested, considerate of the jurisprudence of the EComHR and the view of commentators,[6] that religious beliefs must be characterised by aspects of fundamental concern to which the applicant ascribes some degree of severity. Mindful of the legislation of the Irish State, particularly s 36(4) of the Defamation Act 2009[7] and s 3 of the Charities Act 2009,[8] this research added a further characteristic; that religion is also characterised by a public benefit. It should be expressly stared that this benefit is determined subjectively; however, it functions to exclude those movements which pose a danger to society and who would improperly seek to benefit from any categorisation as religious.

The second chapter of this thesis demonstrated that it was not always possible to determine, with any consistency, the theoretical position which the EComHR and ECtHR adopted with regard to the definition of the manifestation of religious belief.[9] Through a detailed consideration of case law, this chapter illustrated the way in which the European Courts struggled to develop a theory which has been consistent with the protection ascribed to the *forum internum*.[10] It has demonstrated that the 'necessity test'[11] derived from the decision of the Commission in *Arrowsmith v United Kingdom*[12] is no longer applicable and

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[5] Thomas Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 HHRJ 190-191.

[6] *X v Germany* (1981) 24 DR 137; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 54.

[7] Defamation Act 2009 s 36(4).

[8] Charities Act 2009 s 3.

[9] Isabelle Rorive, 'Religious Symbols in the Public Sphere: In Search of a European Answer' (2009) 30(6) CLR 2674.

[10] Erica Howard, *Law and the Wearing of Religious Symbols; European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 17; Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2013) 3(2) OJLR 241.

[11] Samantha Knights, *Freedom of Religion, Minorities, and the Law* (OUP 2007) 44.

[12] *Arrowsmith v United Kingdom* (1978) 19 DR 5.

that emerging case law advocates a subjective perception towards the characterisation of religious manifestation.[13] This theoretical modification came to the fore in the judgment of *Şahin v Turkey*[14] and has been subsequently advanced in the recent decisions of *Austrianu v Romania*[15] and *Eweida and Others v United Kingdom*.[16] However, it is argued that the ECtHR has demonstrated undependable theoretical flexibility with regard to the manifestation of religious belief which has contributed to the conclusion that judicial 'neutrality' in religious contexts has resulted in a Christian benchmark for religious manifestations in the European sphere.

The third chapter of this thesis illustrated that religious belief can make demands of conscience which fundamentally characterise the way in which a religious adherent will orientate themselves towards life and society.[17] It argued that the significance which the law ascribes to conscience augments the significance of expressions made upon this basis and creates a right to religious expression. This chapter characterised religious belief as an immutable characteristic; however, it also countered this argument with an acknowledgement that any characterisation of immutability based on biological or fundamental characteristics without reference to the subjective value these characteristics possess in the lives of adherents is futile. It suggested that, regardless of any theoretical categorisation of religious immutability, religious belief must be ascribed heightened protection on the basis of the role which it occupies in the lives of religious adherents. Further, this chapter challenged the classification of religious belief as an irrational enterprise and unworthy of heightened protection on the basis that rationality is inherently subjective and largely incapable of objective appraisal for the purposes of law and religion. This chapter queried the dichotomy between manifestation and expression from the perspective of judicial analysis and concluded that, on the basis of its fundamentality in the

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[13] Julie Ringelheim, 'Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP 2012) 283-284.

[14] *Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

[15] *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013).

[16] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

[17] Nader Hashemi, *Islam, Secularism and Liberal Democracy; Towards a Democratic Theory for Muslim Societies* (OUP 2009) 120.

life of the religious adherent, the right to religious expression must be afforded the highest level of protection under Article 10 alongside freedom of expression.[18] This brought to a close the first part of this thesis.

The second part of this thesis examined the limitation of and the provision for the right to religious expression. Due to the challenges which the Islamic religion has brought to the contemporary legal regulation of religion this thesis applied its theoretical considerations to the Islamic veil and Islamic finance respectively.[19] The fourth chapter considered the limitation of religious expression with a focus on the Islamic veil. While recognising the plurality of grounds for the legal limitation of religious belief this chapter addressed three such grounds; namely, secularism, gender equality and the obligation to 'live together'. It concluded that the former two grounds of limitation, secularism and gender equality, are inappropriate in any application of a general nature. It suggested that limitations argued upon these respective grounds objectively characterise religious expression leading to the interpretation that it contrasts with these respective societal values. It has been demonstrated that secularism is not a fundamental value of the Convention alongside religious expression;[20] however, it further argued that religious expression is not *prima facie* incompatible with secularism if this political system is to be understood as an equalising concept respectful of religious belief. With regards to the final ground, 'living-together', this chapter was of the view that this, while now an accepted ground for the general limitation of religious expression, marked the nadir in Article 9 jurisprudence. It was said that the ECtHR afforded disproportionate weight to the ability of the Contracting State to pursue social policy interests to the detriment of the right to religious expression. It concluded that this decision strengthens the objective of this thesis to better guarantee the right to religious expression under Articles 9 and 10 of the Convention.

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[18] Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 690.
[19] Hilal Elver, *The Headscarf Controversy; Secularism and Freedom of Religion* (OUP 2012) 1.
[20] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [2.1] and [2.2].

The fourth chapter also concluded that the limitation of religious belief based on gender equality fundamentally mischaracterised the consequences of expressing religion with particular application to the Islamic veil. It concluded that the Islamic veil can be understood as a symbol of empowerment which enables women to enter into the public sphere on specific terms.[21] It is accepted of course that context specific limitations of religious expression are permissible in specific and isolated circumstances, analysed herein with reference to coercion; however, this must be done mindful of the extreme consequence which this may have on religious belief and upon the religious adherent. By virtue of the conclusions of the first part of this thesis and articulated in the third chapter, limitations in this regard require the highest scrutiny alongside the restriction of political expression.

Further to the specified grounds for limitation this chapter considered those indirect theoretical considerations regarding any potential limitation of religious expression in the European context. It suggested that certain factors can affect this, particularly, the relationship which exists between religion and the State. It suggested that this relationship can inform the judicial interpretation of neutrality which subsequently influences the constitutional model in place in any given jurisdiction. Three such models were discussed in this chapter; secularism, multiculturalism and ethno-cultural nationalism. It was demonstrated that the Irish legal system has not specified into which model it purports to be placed. In view of the limited jurisprudence and official interaction which the State has with regard to the limitation of religious expression it was stated that the State has demonstrated characteristics of ethno-cultural nationalism as evidenced in Germany.[22] Such a constitutional model impacts significantly on the limitation of religious expression in the jurisdiction; however, it must be mindful of the recent decision of BVerfG 471/10 and BVerfG 1181/10[23] where it was found that any such constitutional model cannot operate with discriminatory effect. This chapter concluded, however, that recent social and political developments have demonstrated an increased pluralism which frustrates the

[21] Cécile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10(2) IJCL 401.
[22] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' 2009 30(6) CLR 2642.
[23] BVerfG 471/10 and BVerfG 1181/10;ECLI:DE:BVerfG:2015:rs20150127.1bvr047110, 13 March 2015.

characterisation of the State as having adopted a latent ethno-cultural constitutional model. The chapter emphasised that, while the Christian religion continued to be the prototypical example of religion on the State, this was largely due to the historical realities of the jurisdiction. It concluded with a consideration of the issues which may arise in contexts of employment and distinguished the public sector from the private and further the teacher from the student.

The final chapter of this thesis considered the right to be positively provided for on the basis of the right to religious expression. In applying this theory to Islamic finance this chapter provided a comprehensive description of this religiously informed economic model so as to equip the reader with a sufficient knowledge to appraise the application. Subsequently, this chapter considered a theory of rights. In doing so this chapter stated that it was unnecessary to distinguish between positive rights and negative rights on the basis that it should be accepted that all rights have associated positive duties. This chapter argued that these duties must be performed by the duty bearer, the State in this circumstance, where they are necessary for the realisation of the first right and proportionate to other interests. This research is particularly applicable on the basis of the recent Directive of the European Parliament and Council on the universal success to a basic payments account.[24] This chapter endorses the perception that the participation in financial and economic affairs is an essential aspect of contemporary society. It argues, upon this basis, that individuals should not disproportionately be excluded from this practice by virtue of their religious belief. It suggests that the Irish State has a positive obligation to legislate on the basis of the right to religious expression.

This thesis has fundamentally endeavoured to challenge the relationship which religion has with law. The dynamic between religion and society and also religion and law is

[24] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees and related payment accounts, payment account switching and access payment accounts with basic features.

changing.[25] As scholarship arguably moves towards a post-secular period legal commentary should reappraise its provision for religion in view of the founding principles of the European legal system.[26] Edge and Lewis recall that the right to religious freedom was primarily concerned with the right to be different.[27] Being different is challenging, both for society and the individuals concerned; however, being different enables individuals to develop and a complex commonwealth, as opposed to a homogenous construction, to emerge. It generates discourse, champions debate and advances society. The right to religious expression enables religious adherents to have a seat at the table. It provides individuals with the freedom and assistance they require to adhere to the prescriptions of their conscience which they often feel they have no choice but to observe[28] but it also edifies the society as it exercises forbearance on a people who hold subjectively understood rational beliefs. This is a compassionate society and a democratic one.

It is clear that, at times, religious expression can be harmful and justifiably limited; however, recalling Abraham, a common prophet of Judaism, Christianity and Islam, demonstrates that religious belief can be so fundamentally significant for religious adherents that some would give almost anything to express it. This thesis has advocated for a renewed theoretical approach to the legal regulation of religion in Europe and Ireland and has strongly advocated a subjective appraisal of religious belief for legal application. It has stated that, upon the fundamentality of religious conscience, the right to religious expression can be afforded the highest level of protection under Article 10 alongside political expression. Consequently, any proposed limitation of the right to religious expression requires the most careful scrutiny. Further, in order to give practical effect to the right certain things must be provided for. The right to religious expression has positive obligations. This thesis advocates a new theoretical approach to the protection of religious interest and grounds this upon the right to religious expression in Europe and Ireland.

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[25] Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom* (Kluwer Law International 2011) 463.
[26] Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 5.
[27] Peter Cumper, Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) ELJ 139.
[28] Slavica Jakelić, *Collectivistic Religions; Religion, Choice and Identity in Late Modernity* (Ashgate Publishing Limited 2010) 203.

Appendix to the Bibliography

AJCL	American Journal of Comparative Law
AJJ	American Journal of Jurisprudence
ALQ	Arab Law Quarterly
AMJ	Academy of Management Journal
AMR	Academy of Management Review
AMSR	American Political Science Review
ARBFL	Annual Review of Banking and Financial Law
ASR	American Sociological Review
AUILR	American University International Law Review
AUJILP	American University Journal of International Law and Policy
BJES	British Journal of Educational Studies
BJLP	Baltic Journal of Law and Politics
BJS	British Journal of Sociology
BYULR	Brigham Young University Law Review
CA	Cultural Anthropology
CD	Canadian Diversity
CHRLR	Columbia Human Rights Law Review
CILR	Columbia International Law Review
CJEL	Columbia Journal of European Law

CJLG	Cardozo Journal of Law and Gender
CJLJ	Canadian Journal of Law and Jurisprudence
CJP	Canadian Journal of Philosophy
CJTL	Columbia Journal of Transitional Law
CKLR	Chicago-Kent Law Review
CLJ	Cambridge Law Journal
CLR	Cardozo Law Review
Con	Constellations
Conn.LR	Connecticut Law Review
CRLSJ	Contemporary Readings in Law & Social Justice
CRISPP	Critical Review of International Social and Political Philosophy
DLJ	Denning Law Journal
DULJ	Dublin University Law Journal
E	Ethics
ECLR	European Constitutional Law Review
EHRLR	European Human Rights Law Review
EHRR	Essex Human Rights Review
EILR	Emory International Law Review
EJCCC	European journal of crime, criminal law and criminal justice
EJIL	European Journal of International Law
EJP	European Journal of Philosophy
EJPT	European Journal of Political Theory

EL	Education and the Law
ELJ	Ecclesiastical Law Journal
ELMUEJL	eLaw: Murdoch University Electronic Journal of Law
ELR	European Law Review
EPW	Economic and Political Weekly
FJ	Family Journal
FLR	Fordham Law Review
FMII	Financial Markets Institutions and Instruments
FP	Foreign Policy
GJICL	Georgia Journal of International and Comparative Law
HHRJ	Harvard Human Rights Journal
HJLG	Harvard Journal of Law and Gender
HJLPP	Harvard Journal of Law and Public Policy
HLJ	Hibernian Law Journal
HLR	Harvard Law Review
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
I	Indonesia
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
IES	Islamic Economic Studies
IHS	Irish Historical Studies

IICLR	Indiana International & Comparative Law Review
IJ	Irish Jurist
IJCL	International Journal of Constitutional Law
IJIA	Italian Journal of International Affairs
IJLF	International Journal of Law and the Family
IJLC	International Journal of Law in Context
IJMES	International Journal of Middle East Studies
IJSE	International Journal of Social Economics
ILJ	Industrial Law Journal
ILT	Irish Law Times
IMR	International Migration Review
IPS	Irish Political Studies
IR	Implicit Religion
J	Jurisprudence/Jurisprudencija
JAAR	Journal of the American Academy of Religion
JCL	Journal of Constitutional Law
JCLI	Journal of Contemporary Legal Issues
JCS	Journal of Church and State
JCR	Journal of Contemporary Religion
JConR	Journal of Conflict Resolution
JD	Journal of Democracy
JFC	Journal of Financial Crime

JH	Journal of Homosexuality
JHI	Journal of the History of Ideas
JHS	Journal of Historical Sociology
JKAUIE	Journal of King Abdulaziz University: Islamic Economics
JL&O	Journal of Laryngology & Otology
JLE	Journal of Law and Education
JLERI	Journal of Legal, Ethical and Regulatory Issues
JLP	Journal of Law and Policy
JLR	Journal of Law and Religion
JMF	Journal of Marriage and Family
JMMA	Journal of Muslim Minority Affairs
JOCS	Journal of Classic Sociology
JPP	Journal of Political Philosophy
JR	Journal of Religion
JSIJ	Judicial Studies Institute Journal
JSSR	Journal for the Scientific Study of Religion
JTSB	Journal for the Theory of Social Behaviour
LCP	Law and Contemporary Problems
LD	Le Débat
LGG	Legitimacy and Global Governance
LP	La Philosophoire
M	Man

MBR	Monash Bioethics Review
MEQ	Middle East Quarterly
MHCP	Medical, Health Care and Philosophy
MILR	Michigan Law Review
MJECL	Maastricht Journal of European and Comparative Law
MJIL	Melbourne Journal of International Law
MLR	Modern Law Review
MQLR	Marquette Law Review
MTSR	Method and Theory in the Study of Religion
NELR	New England Law Review
NILQ	Northern Ireland Legal Quarterly
NJIL	Nordic Journal of International Law
NWSLJ	National Women's Studies Association Journal
NYULR	New York University Law Review
OJLR	Oxford Journal of Law and Religion
PC	Public Culture
PI	Psychological Inquiry
PLR	Pennsylvania Law Review
PS	Political Studies
PubS	Public Space
PP	Progressive Politics
PPA	Philosophy and Public Affairs

PRI	Politics, Religion and Ideology
PR	Politics & Religion
PT	Political Theory
R	Religion
RF	Review of Finance
RHR	Religion & Human Rights
RP	Res Publica
RSRR	Relegere: Studies in Religion and Reception
RSR	Religious Studies Review
RSS	Religion, State and Society
SAJHR	South African Journal on Human Rights
SC	Social Compass
SCLR	South Carolina Law Review
SF	Sociological Forum
SI	Social Inquiry
SIQR	Studies: An Irish Quarterly Review
SLULJ	Saint Louis University Law Journal
SP	Social Politics
SR	Social Research
STP	Social Theory & Practice
STP	Social Theory and Practice
T	Think

TECLF	Tulane European and Civil Law Forum
TILJ	Texas International Law Journal
TILR	Thunderbird International Business Review
TS	Theory and Society
TM	The Monist
TWQ	Third World Quarterly
UALRLJ	University of Arkansas at Little Rock Law Journal
UCDLR	UCD Law Review
UCLALR	UCLA Law Review
UILR	University of Illinois Law Review
ULR	Utah Law Review
UNSWLJ	UNSW Law Journal
UPLR	University of Pittsburgh Law Review
WJCLI	Web Journal of Current Legal Issues
WMBRJ	William and Mary Bill of Rights Journal
WMLR	William & Mary Law Review
YHRDLJ	Yale Human Rights and Development Law Journal
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal

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