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IN THE SUPREME COURT OF INDIA  
EXTRAORDINARY CIVIL WRIT JURISDICTION  
REVIEW PETITION (CIVIL) NO. 3358 OF 2018  
IN  
WRIT PETITION (CIVIL) NO. 373 OF 2006

IN THE MATTER OF:

KANTARU RAJEEVARU

...

PETITIONER

VS.

INDIAN YOUNG LAWYERS ASSOCIATION

...

RESPONDENTS

WRITTEN SUBMISSIONS — PART III

**Tushar Mehta**

**Volume I.6**

**SOLICITOR GENERAL OF INDIA**

On behalf of  
**UNION OF INDIA**

# INDEX

SR.	PARTICULARS	PG
1.	<p data-bbox="251 367 1252 472">INTERNATIONAL POSITION ON THE SUBJECT OF FREEDOM OF RELIGION – EUROPEAN CASE LAW</p> <ul data-bbox="300 493 1252 1585" style="list-style-type: none"><li data-bbox="300 493 933 535">• <i>Living together and cultural mixing</i></li><li data-bbox="300 556 1252 661">• <i>Prohibition on wearing headscarf in a State University is not violative of Article 9</i></li><li data-bbox="300 682 1252 850">• <i>Displaying crucifixes in classrooms does not violate parents' rights to a non-religious education for their children.</i></li><li data-bbox="300 871 1252 997">• <i>Protection from takeover of religious institution in Europe</i></li><li data-bbox="300 1018 1252 1123">• <i>Right of a person to propagate vis-à-vis right of another to be free from coercion</i></li><li data-bbox="300 1144 1252 1249">• <i>Registration of a rival religious leadership violative of Article 9</i></li><li data-bbox="300 1270 673 1312">• <i>Germany and Osho</i></li><li data-bbox="300 1333 1063 1375">• <i>UK ruling on limitation of defining religion</i></li><li data-bbox="300 1396 787 1438">• <i>Turkey and the Alevi faith</i></li><li data-bbox="300 1459 1209 1501">• <i>Comparative individual freedoms and public spaces</i></li><li data-bbox="300 1522 868 1564">• <i>Judging “sincerely held” beliefs</i></li></ul>	1-47
2.	<p data-bbox="251 1669 1252 1837">ERRONEOUS ATTRIBUTION OF ESSENTIAL RELIGIOUS PRACTICES TO AUSTRALIA AND COMPARISON WITH THE USA</p>	48-57

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INTERNATIONAL POSITION ON THE SUBJECT OF FREEDOM OF RELIGION

1. It is submitted that while the Indian Constitution is *sui generis* and does not require the assistance of any other constitutional jurisprudence in attempting to interpret the same, the experience of Europe with regard to religious freedoms and the jurisprudence laid down therewith is illustrative and would help the Hon'ble Bench in arriving at its own interpretations in the Indian context. It is submitted that freedom of religion is a fundamental right which is enshrined not only in the European Convention on Human Rights but also in a wide range of national, international and European texts.
2. Article 29 of the **Universal Declaration of Human Rights** states the following:
  - “1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
  2. In the exercise of his rights and freedoms, **everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.**
  3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”
3. Similarly, Article 18 of the **International Covenant on Civil and Political Rights** lays down the freedom to manifest one's religion or beliefs subject to 'morals'.
  1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom,*

*either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. **Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.***

*4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

4. The terms of Article 9 of the **European Convention on Human Rights** [hereinafter referred to as "ECHR"] are as follows:

*"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.**"*

5. Even Article 12 of the American Convention on Human Rights limits the freedom of conscience and religion by way of 'public safety, order, health or **morals**':

*1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.*

*2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.*

*3. **Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.***

*4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.*

6. The principle of freedom of religion also appears in a number of other texts, including the International ECHR on the Rights of the Child, Article 14 of which sets it out very clearly. Similarly, Article 12 of the American Convention on Human Rights states that everyone has the right to freedom of conscience and religion. This right includes the freedom to maintain or to change one's religion or beliefs, as well as the freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. No one may be subject

to restrictions that might impair their freedom to maintain or to change their religion or beliefs. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. Lastly, Article 12 of the American Convention provides that parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions. The European Union Charter of Fundamental Rights also protects freedom of thought, conscience and religion in the same way as the ECHR (Article 10 of the Charter). The following is an illustrative table on the religious freedoms and the provisions therewith in other Constitutions:

COUNTRY	PROVISION
USA	<ul style="list-style-type: none"> <li>• The First Amendment to the Constitution (1791)</li> <li>• Art. 12 of American Convention of Human Rights</li> </ul> <p><b>Article 12. Freedom of Conscience and Religion</b></p> <p>1. <i>Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.</i></p> <p>2. <i>No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.</i></p> <p>3. <i>Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.</i></p> <p>4. <i>Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.</i></p>
AUSTRALIA	<p><b>S.116 of the Australian Constitution Act, 1900</b></p> <p><i>"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth"</i></p>
CANADA	<p><b>S.2(a) of the Canadian Charter, 1982</b></p> <p><b>Fundamental freedoms</b></p> <p>2. <i>Everyone has the following fundamental freedoms:</i></p> <p><i>(a) freedom of conscience and religion;</i></p> <p><i>(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;</i></p> <p><i>(c) freedom of peaceful assembly; and</i></p>

	<p>(d) freedom of association.</p> <p><b>Equality before and under law and equal protection and benefit of law</b></p> <p>S. 15(1) <i>Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</i></p>
<b>EIRE (IRELAND)</b>	<p><b>Art. 44 (1) &amp; 44(2) of the Irish Constitution, 1937</b></p> <p><b>ARTICLE 44(1)</b></p> <p><i>1 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.</i></p> <p><b>ARTICLE 44 (2)</b></p> <p><i>Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.</i></p>
<b>USSR (FORMERLY)</b>	<p><b>Art. 28 of the Yeltsin Constitution, 1993</b></p> <p><i>“Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to profess individually or together with other any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them”.</i></p>
<b>FOURTH AND FIFTH FRENCH REPUBLICS (FORMERLY)</b>	<p><b>Clause (10) of the Declaration of Rights of 1789, which is adopted by the Preamble of the Constitutions of 1946 and 1958.</b></p> <p><b>Article X</b> – No one may be disturbed for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law.</p>
<b>WEST GERMANY (FORMERLY)</b>	<p><b>Art. 4 of the West German Constitution, 1948</b></p> <p>[Freedom of faith and conscience]</p> <p><i>1. Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.</i></p> <p><i>2. The undisturbed practice of religion shall be guaranteed.</i></p> <p><i>3. No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.</i></p>
<b>JAPAN</b>	<p><b>Art. 20 of the Japanese Constitution, 1946</b></p>

	<p><i>Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.</i></p> <p><i>No person shall be compelled to take part in any religious act, celebration, rite or practice.</i></p> <p><i>The State and its organs shall refrain from religious education or any other religious activity.</i></p>
SRI LANKA	Art. 18 of the Constitution of Sri Lanka, 1972
NEPAL	<p><b>Art.4(1) of the Constitution of Nepal, 1990</b></p> <p><b>Article 4 The Kingdom</b></p> <p><i>(1) Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom. (2) The territory of Nepal shall comprise: (a) the territory existing at the commencement of this Constitution; and (b) such other territory as may be acquired after the commencement of this Constitution.</i></p>

7. Be that as it may, it is submitted that the closeness of the text of the ECHR and the variety of cases which have fallen before it, make the jurisprudence laid down by the European Court on Human Rights the most important for chalking out a sound judicial policy in the Indian context. It is submitted that the European Court of Human Rights has developed a four-fold test to tackle the questions arising before the Court in relation to religious freedoms. It is as follows:

- At first, the Court determines whether there has been an “alleged breach” of the right under Article 9 of the ECHR *dehors* the limitations imposed on the same;
- If the right is located, the Court secondly determines if there has been a “limitation” or an “interference” by the State in the right determined above;
- If the interference is also accepted, the Court thirdly determines if the measure taken by the State is “prescribed by law”;
- Lastly, if the measure of the state is one which is prescribed by law, the Court determines if the said measure is for the furtherance of a “legitimate aim”. [“Legitimate aim is determined on the basis of the scope and the factors on the basis of which the State can provide a law for interference”]

8. It is submitted that European provides an interesting parallel to the situations. While it is not suggested that the approach of Europe is applicable squarely to India, but considering the transnational court in Europe faces varied issues from varied societal contexts and linguistic and cultural backgrounds, the approach of the Court has been allowing the State a “margin of appreciation” in such matters. It is submitted that such an approach would be well suited to India

as well wherein various Governments, at all levels, would be better equipped to deal with matters of faith in the first place. A short table is provided for studying the cases at a glance :

CASE	ISSUE	DECISION
S.A.S. v. France (GC), Application no. 43835/11	The Court was dealing with a French law prohibiting <u>concealment of the face in public</u> places. The applicant, a practising Muslim, complained that the law prevented her from wearing the niqab or burqa in public, which she said she wore by choice as an expression of her beliefs and convictions.	The Grand Chamber <u>upheld the restriction and found no violation of Articles 8 and 9</u> (and no violation of Article 14 read with them). The Court accepted that the interference was prescribed by law and that the State was entitled, within its margin of appreciation, to justify the measure by reference to legitimate aims assessed under the Convention framework.
Hamidović v. Bosnia and Herzegovina, Application no. 57792/15	The case concerned a witness who <u>refused to remove his religious skullcap in a courtroom</u> and was punished for contempt. The applicant contended that the sanction penalised the manifestation of his religious belief.	The Court <u>did not uphold the restriction and found a violation of Article 9</u> . The Court held that the punishment imposed on the applicant for wearing the skullcap in court was not shown to be necessary in a democratic society in the circumstances of the case.
Kalaç v. Turkey, Application no. 20704/92	The applicant complained in substance about measures taken against him in a military context, which he contended were connected to the manifestation of his religious convictions and practices.	The Court upheld the measure and found <u>no violation of Article 9</u> . The Court accepted the State's position that the impugned decision was connected with requirements of discipline and the applicant's conduct within the armed forces context, rather than a prohibited interference with the right to manifest religion.
Osmanoğlu and Kocabaş v. Switzerland, Application no. 29086/12	The applicants, <u>Muslim parents, sought an exemption for their daughters from compulsory mixed swimming lessons at school</u> on religious grounds. The authorities refused to grant an exemption and imposed sanctions for non-compliance.	The Court <u>upheld the restriction and found no violation of Article 9</u> . The Court accepted that there was an interference, but held that it was prescribed by law, pursued legitimate aims connected with education and social integration, and was proportionate in the circumstances.

CASE	ISSUE	DECISION
Leyla Şahin v. Turkey (GC), Application no. 44774/98	The applicant challenged a <u>university rule that prevented her from wearing the Islamic headscarf on university premises</u> . She complained that the restriction interfered with her freedom to manifest her religion and also affected her right to education.	The <u>Grand Chamber upheld the restriction and held that there was no violation of Article 9</u> , and also no violation of Article 2 of Protocol No. 1. The Court treated the matter as falling within the State's margin of appreciation having regard to the domestic constitutional context and the aims relied upon by the State.
Lautsi and Others v. Italy (GC), Application no. 30814/06	The applicants complained about the <u>mandatory display of crucifixes in classrooms</u> of State schools, alleging that it conflicted with the State's duty of neutrality in education and with parents' rights in relation to teaching consistent with their convictions.	The <u>Grand Chamber upheld the practice and found no violation</u> of Article 2 of Protocol No. 1. The Court held that, on the material before it, the display of the crucifix did not amount to indoctrination and the issue fell within the State's margin of appreciation.
Metropolitan Church of Bessarabia and Others v. Moldova, Application no. 45701/99	The case concerned <u>refusal by the domestic authorities to grant official recognition to an Orthodox church</u> , with the consequence that the church could not function effectively as a religious community with legal personality.	The Court <u>did not uphold the State's refusal and found a violation of Article 9</u> . The Court held that the refusal constituted an interference with freedom of religion and that the State's approach was inconsistent with the duty of neutrality and pluralism required by the Convention.
Rymsko-Katolytska Gromada Svyatogo Klymentiya v Misti Sevastopoli v. Ukraine (dec.), Application no. 22607/02	The applicant religious organisation <u>complained about the failure to obtain the return or transfer of a building of worship</u> that had been taken over long ago and used for other purposes.	The Court did not reach a merits finding because it declared the application inadmissible as manifestly ill-founded. The result was that the <u>complaint failed at the admissibility stage</u> , and the impugned position was not set aside by the Court.
ISKCON and Others v. the	The <u>complaint arose out of planning and enforcement</u>	The <u>Commission declared the application inadmissible</u> . The result was that the

CASE	ISSUE	DECISION
United Kingdom (Commission decision), Application no. 20490/92	<i>measures affecting the use of a religious property</i> and the associated activities of the applicants. The applicants invoked Convention rights to resist or limit the effect of planning control.	applicants obtained no relief at the Convention level and the domestic position was left undisturbed.
Hasan and Chaush v. Bulgaria, Application no. 30985/96	The case concerned State involvement in the leadership and <i>registration of the Muslim community, including State action favouring one leadership in a context of internal dispute</i> , which affected the community's ability to organise its religious life autonomously.	The Court <i>did not uphold the State action</i> and found a violation of Article 9, and also a violation of Article 13 (while finding no violation of Article 6). The Court treated State non-neutrality and intrusion into internal religious organisation as incompatible with Convention standards.
İzzettin Doğan and Others v. Turkey (GC), Application no. 62649/10	The applicants, <i>followers of the Alevi faith, complained that the State refused to provide public religious services and recognition</i> on a basis comparable to those available to the majority branch, and that this refusal produced unequal treatment in the practical exercise of religion.	The <i>Grand Chamber did not uphold the State's refusal and found a violation of Article 9</i> , and also a violation of Article 14 taken together with Article 9. The Court concluded that the differential treatment lacked an objective and reasonable justification under the Convention.
Vartic v. Romania (No. 2), Application no. 14150/08	The applicant, a detainee, <i>requested a diet compatible with his religious beliefs (a vegetarian diet)</i> . The prison authorities refused, relying on administrative and logistical reasons.	The <i>Court did not uphold the refusal and found a violation of Article 9</i> . The Court held that the authorities failed to strike a fair balance and that the refusal imposed an unjustified limitation on the applicant's religious practice.
Kokkinakis v. Greece, Application no. 14307/88	The applicant, a <i>Jehovah's Witness, was convicted under domestic law for proselytism</i> . He complained that the	The <i>Court did not uphold the conviction and found a violation of Article 9</i> . The Court held that the interference was not shown to be necessary in a democratic society on the facts as established.

CASE	ISSUE	DECISION
	conviction interfered with his freedom to manifest religion.	
Leela Förderkreis e.V. and Others v. Germany, Application no. 58911/00	The <u>applicants complained about a Government information campaign describing certain movements in negative terms</u> and argued that the State's characterisation interfered with freedom of religion.	The <u>Court upheld the State position for Article 9 purposes and found no violation of Article 9</u> in relation to the Government statements as delimited by domestic constitutional review. The Court did, however, find a separate violation of Article 6(1) on the length of proceedings.

### *Living together and cultural mixing*

9. The European Court of Human Rights, in *S.A.S. v. France*, Application no. 43835/11, was dealing with Law no. 2010-1192 of 11 October 2010 from France, which prohibited for anyone to conceal their face in public places. The Petitioner claimed that she is a devout Muslim and she wears the *burqa* and *niqab* in accordance with her religious faith, culture and personal convictions. According to her explanation, the *burqa* is a full-body covering including a mesh over the face, and the *niqab* is a full-face veil leaving an opening only for the eyes. The applicant emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner. The Court, after a detailed analysis, held as under:

*“113. The Court reiterates that the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in Article 9 § 2, is exhaustive and that their definition is restrictive (see, among other authorities, Svyato-Mykhaylivska Parafiya v. Ukraine, no. 77703/01, § 132, 14 June 2007, and Nolan and K. v. Russia, no. 2512/04, § 73, 12 February 2009). For it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision. The same approach applies in respect of Article 8 of the Convention.*

*114. The Court's practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention (see, for example, Leyla Şahin v. Turkey [GC], no. 44774/98, § 99, ECHR 2005-XI, and Ahmet Arslan and Others, cited above, § 43). However, in the present case, the substance of the objectives invoked in this connection by the Government, and strongly disputed by the applicant, call for an in-depth examination. The applicant took the view that the interference with the exercise of her freedom to manifest her religion and of her right to respect for her private life, as a result of the ban introduced by the Law of 11 October 2010, did not correspond to any of the aims listed in the second paragraphs of Articles 8 and 9. The Government argued, for their part, that the Law pursued two legitimate aims: public safety and “respect for the minimum set of values of an open and*

democratic society”. The Court observes that the second paragraphs of Articles 8 and 9 do not refer expressly to the second of those aims or to the three values mentioned by the Government in that connection.

115. As regards the first of the aims invoked by the Government, the Court first observes that “public safety” is one of the aims enumerated in the second paragraph of Article 9 of the Convention (*sécurité publique* in the French text) and also in the second paragraph of Article 8 (*sûreté publique* in the French text). It further notes the Government’s observation in this connection that the impugned ban on wearing, in public places, clothing designed to conceal the face satisfied the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. Having regard to the case file, it may admittedly be wondered whether the Law’s drafters attached much weight to such concerns. It must nevertheless be observed that the explanatory memorandum which accompanied the bill indicated – albeit secondarily – that the practice of concealing the face “could also represent a danger for public safety in certain situations” (see paragraph 25 above), and that the Constitutional Council noted that the legislature had been of the view that this practice might be dangerous for public safety (see paragraph 30 above). **Similarly, in its study report of 25 March 2010, the Conseil d’État indicated that public safety might constitute a basis for prohibiting concealment of the face, but pointed out that this could be the case only in specific circumstances** (see paragraphs 22-23 above). **Consequently, the Court accepts that, in adopting the impugned ban, the legislature sought to address questions of “public safety” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention.**

116. As regards the second of the aims invoked – to ensure “respect for the minimum set of values of an open and democratic society” – the Government referred to three values: respect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society. They submitted that this aim could be linked to the “protection of the rights and freedoms of others”, within the meaning of the second paragraphs of Articles 8 and 9 of the Convention.

117. As the Court has previously noted, these three values do not expressly correspond to any of the legitimate aims enumerated in the second paragraphs of Articles 8 and 9 of the Convention. Among those aims, the only ones that may be relevant in the present case, in relation to the values in question, are “public order” and the “protection of the rights and freedoms of others”. The former is not, however, mentioned in Article 8 § 2. Moreover, the Government did not refer to it either in their written observations or in their answer to the question put to them in that connection during the public hearing, preferring to refer solely to the “protection of the rights and freedoms of others”. The Court will thus focus its examination on the latter “legitimate aim”, as it did previously in the judgments in *Leyla Şahin* and *Ahmet Arslan and Others* (both cited above, § 111 and § 43, respectively).

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122. The Court takes into account the respondent State’s point 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. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.*

(iv) *Whether the measure is necessary in a democratic society*

(a) *General principles concerning Article 9 of the Convention*

123. *As the Court has decided to focus on Article 9 of the Convention in examining this part of the application, it finds it appropriate to reiterate the general principles concerning that provision.*

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(v) *Application of those principles to the present case*

137. *The Court would first emphasise that the argument put forward by the applicant and some of the third-party interveners, to the effect that the ban introduced by sections 1 to 3 of the Law of 11 October 2010 was based on the erroneous supposition that the women concerned wore the full-face veil under duress, is not pertinent. It can clearly be seen from the explanatory memorandum accompanying the bill (see paragraph 25 above) that it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.*

***138. That being clarified, the Court must verify whether the impugned interference is “necessary in a democratic society” for public safety (within the meaning of Articles 8 and 9 of the Convention; see paragraph 115 above) or for the “protection of the rights and freedoms of others” (see paragraph 116 above).***

139. *As regards the question of necessity in relation to public safety, within the meaning of Articles 8 and 9 (see paragraph 115 above), the Court understands that a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. ***It has thus found no violation of Article 9 of the Convention in cases concerning the obligation to remove clothing with a religious connotation in the context of security checks and the obligation to appear bareheaded on identity photos for use on official documents (see paragraph 133 above). However, in view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. The Government have not shown that the ban introduced by the Law of 11 October 2010 falls into such a context. As to the women concerned, they are thus obliged to give up completely an element of their identity that they consider important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud. It cannot therefore be found that the blanket ban imposed by the Law of 11 October 2010 is necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 of the Convention.****

140. *The Court will now examine the questions raised by the other aim that it has found legitimate: to ensure the observance of the minimum requirements of life in society as part of the “protection of the rights and freedoms of others” (see paragraphs 121-22 above).*

***141. The Court observes that this is an aim to which the authorities have given much weight. This can be seen, in particular, from the explanatory memorandum***

accompanying the bill, which indicates that “[t]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of ‘living together’ in French society” and that “[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity, ... falls short of the minimum requirement of civility that is necessary for social interaction” (see paragraph 25 above). It indeed falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity. Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places (see paragraph 122 above).

142. Consequently, the Court finds that the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of “living together”.

143. It remains to be ascertained whether the ban is proportionate to that aim.

XXX

151. Thus, while it is true that the scope of the ban is broad, since it concerns all places accessible to the public (except for places of worship), the Law of 11 October 2010 does not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which does not have the effect of concealing the face. The Court is aware of the fact that the impugned ban mainly affects Muslim women who wish to wear the full-face veil. **It nevertheless finds it to be of some significance that the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face.** This distinguishes the present case from that in *Ahmet Arslan and Others* (cited above).

152. As to the fact that criminal sanctions are attached to the ban, this no doubt increases the impact of the measure on those concerned. It is certainly understandable that the idea of being prosecuted for concealing one’s face in a public place is traumatising for women who have chosen to wear the full-face veil for reasons related to their beliefs. It should nevertheless be taken into account that the sanctions provided for by the Law’s drafters are among the lightest that could be envisaged, since they consist of a fine at the rate applying to second-class petty offences (currently EUR 150 maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.

153. Furthermore, admittedly, as the applicant pointed out, by prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of “living together”. From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (see paragraph 128 above). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.

154. **In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight** (see paragraph 129 above).

155. In other words, France had a wide margin of appreciation in the present case.

156. This is particularly true as there is little common ground among the member States of the Council of Europe (see, *mutatis mutandis*, X, Y and Z v. the United Kingdom, 22 April 1997, § 44, Reports 1997-II) as to the question of the wearing of the full-face veil in public. The Court thus observes that, contrary to the submission of one of the third-party interveners (see paragraph 105 above), there is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State of the Council of Europe has, to date, opted for such a measure. It must be observed, however, that the question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European States. In some it has been decided not to opt for a blanket ban. In others, such a ban is still being considered (see paragraph 40 above). It should be added that, in all likelihood, the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of member States, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.

**157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”.**

Criminal sanction for public veil was upheld

158. The impugned limitation can thus be regarded as “necessary in a democratic society”. This conclusion holds true with respect both to Article 8 of the Convention and to Article 9.

159. Accordingly, there has been no violation either of Article 8 or of Article 9 of the Convention”

10. Similarly, the European Court of Human Rights, in *Hamidović v. Bosnia and Herzegovina*, Application no. 57792/15, explicitly accepted that a Muslim man’s wish to wear a skullcap, which was not a strict religious duty but which nevertheless had such strong traditional roots that it was considered by many people to constitute a religious duty, was protected by Article 9. However, the Court critically held that the State had the power to regulate the same by the express sanction of law or in the said case, to regulate the proceedings before the Trial Court. Further, in the facts of the case, the court held that the punishment for contempt of court was disproportionate. The Court held as under:

*“30. The parties agreed that the punishment imposed on the applicant for wearing a skullcap in a courtroom constituted a limitation on the manifestation of his religion. This is in line with the official position of the Islamic Community in Bosnia and Herzegovina, according to which the wearing of the skullcap does not represent a strong religious duty, but it has such strong traditional roots that it is considered by many people to constitute a religious duty (see the last paragraph of the letter of 19 September 2016 cited in paragraph 24 above). This is also in line with the ruling of the Constitutional Court (see paragraph 10 above).*

*31. Such a limitation will not be compatible with Article 9 § 2 unless it is “prescribed by law”, pursues one or more of the legitimate aims set out in that paragraph and is “necessary in a democratic society” to achieve the aim or aims concerned.*

*(b) Whether the measure was “prescribed by law”*

*32. The Court reiterates that the expression “prescribed by law” in the second paragraph of Article 9 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see İzzettin Doğan and Others v. Turkey [GC], no. 62649/10, § 99, ECHR 2016).*

***33. In the present case, the parties’ opinions differed as to whether the impugned measure was “prescribed by law”. As pointed out by the applicant, no statutory provision expressly prohibited the wearing of the skullcap in the courtroom (see also the position of the HJPC in this regard in paragraph 14 above). However, the applicant was not punished pursuant to any such general ban, but on the basis of an inherent power of the trial judge to regulate the conduct of proceedings in the State Court so as to ensure that no abuse of the court occurred and that the proceedings were fair to all parties, a provision that is inevitably couched in terms which are vague (see Article 242 § 3 of the Code of Criminal Procedure in paragraph 17 above). The Constitutional Court examined this issue in depth and concluded that the interference was lawful, taking into consideration especially the fact that the president of the trial chamber had informed the applicant of the applicable rule and of the consequences of disobeying it (see paragraph 10 above). The Court has no strong reasons to depart from the finding of the Constitutional Court. It therefore considers that there was a basis in law for restricting the wearing of the skullcap in the courtroom.***

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*42. Unlike some other members of his religious group (see paragraph 6 above), the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. **There is no indication that the applicant was not willing to testify or that he had a disrespectful attitude. In these circumstances, his punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society.***

*43. **The Court concludes that in the present case the domestic authorities exceeded the wide margin of appreciation afforded to them (see paragraph 38 above). There has therefore been a violation of Article 9 of the Convention.***”

11. On the other hand, the European court has drawn a distinction between the scope of religious rights Article in the public sphere in a manner dictated or inspired by one’s religion or beliefs. In *Kalaç v. Turkey*, Application no. 20704/92, the Court dealing with a case of a Turkish citizen who was a judge advocate in the air force who was ordered to be compulsorily retired for

breaches of discipline and scandalous conduct on the ground that his conduct and attitude "revealed that he had adopted unlawful fundamentalist opinions". A parallel in this regard may be drawn with the case of *Mohd. Zubair v. Union of India*, (2017) 2 SCC 115 which concerned the growing of beard by a Muslim man in the air force. The European Court of Human Right, in *Kalac* supra, held as under:

"27. The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260-A, p. 17, para. 31). **Article 9 (art. 9) lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 (art. 9) does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.**

The sphere of private religious right and public religious right may be different.

28. *In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, para. 57). States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.*

29. *It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.*

30. *The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude (see paragraphs 8 and 25 above). According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.*

31. *The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 (art. 9) since it was not prompted by the way the applicant manifested his religion.*

*There has therefore been no breach of Article 9 (art. 9)."*

12. The European Court of human Rights has afforded Article 9 protection to traditional practices which are objectively not part of the "core" precepts of an individual religion but which are heavily inspired by that religion and have deep cultural roots. Thus, in *Osmanoğlu et Kocabaş v. Switzerland*, Application no. 29086/12, the Court accepted a complaint lodged by a couple of Muslim parents who wanted their under-age daughters to be exempted from compulsory mixed swimming lessons in a State school. Although the Koran laid down the precept that the female body was to be covered only from puberty, the applicants stated that their faith instructed them

to prepare their daughters for the precepts that would be applied to them from puberty onwards. However, critically, the Court held that the said curtailed of the right under Article 9 was prescribed as per law and for the furtherance of a legitimate aim. The Court held as under:

**“41. In order to count as a “manifestation” within the meaning of Article 9, the act inspired, motivated or influenced by a belief must be intimately linked to the religion or that belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question (see *Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 82, ECHR 2013 (extracts)).**

42. The applicants alleged that their beliefs prohibited them from permitting their children to take part in mixed swimming lessons. They added that, although the Koran laid down the precept that the female body was to be covered only from puberty, their faith instructed them to prepare their daughters for the precepts that would be applied to them from puberty onwards. **The Court considers that the case concerns a situation in which the applicants’ right to manifest their religion is in issue. The applicants exercised parental authority and could decide, under Article 303 al. 1 of the Civil Code (see paragraph 23 above), on the religious education of their children. In consequence, they are entitled to rely on this aspect of Article 9 of the Convention. The Court considers, furthermore, that the applicants indeed suffered an interference with the exercise of their right to freedom of religion as protected by that provision.**

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53. In the present case, the Court considers that the contested measure had a sufficient legal basis. It notes that the curriculum, available on the internet, provided in point 9.2.4 that swimming formed part of the compulsory gymnastics and sports classes. Moreover, under section 91 (9) of the Education Act, a fine of up to CHF 1,000 could be imposed at the request of the school authorities in the event of repeated breaches by parents of their obligations (see paragraph 24 above). The applicants did not dispute that these provisions were indeed accessible to them.

54. On 13 August 2008 the Public Education Department of the Canton of Basle Urban warned the applicants that they were liable to a maximum fine of CHF 1,000 each if their daughters did not attend the compulsory lessons. Following the applicants’ daughters’ absence from the compulsory swimming lessons, on 28 July 2010 the education authorities imposed a fine of CHF 350 per parent and per child concerned (a total of CHF 1,400) in application of the above-mentioned provision, for repeated breach of their obligations. The Court therefore considers that the interference with the exercise of their right to freedom of religion was foreseeable by the applicants.

**55. Having regard to the foregoing, the Court concludes that the contested measure was prescribed by law as required by Article 9 § 2 of the Convention**

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64. *The Court shares the Government's view that the contested measure was aimed at the **integration of foreign children from different cultures and religions**, as well as the smooth functioning of the education system, compliance with compulsory schooling and equality between the sexes. In particular, the measure was intended to protect foreign pupils from any form of social exclusion. The Court is prepared to accept that these elements can be attached to protection of the rights and freedoms of others or the protection of public order within the meaning of Article 9 § 2 of the Convention (see, *mutatis mutandis*, *Dahlab v. Switzerland (dec.)*, no. 42393/98, ECHR 2001-V).*

Integration as  
"legitimate  
aim"

65. *It follows that the refusal to exempt the applicants' daughters from the compulsory swimming lessons pursued legitimate aims within the meaning of Article 9 § 2 of the Convention.*

***105. In view of the above considerations, the Court finds that by giving precedence to the children's obligation to follow the full school curriculum and their successful integration over the applicants' private interest in obtaining an exemption from mixed swimming lessons for their daughters on religious grounds, the domestic authorities did not exceed the considerable margin of appreciation afforded to them in the present case, which concerned compulsory education.***

106. *It follows that there has been no violation of Article 9 of the Convention."*

### ***Prohibition on wearing headscarf in a State University is not violative of Article 9***

13. In *Leyla Şahin v Turkey*, (Application no. 44774/98), the applicant, Ms Leyla Şahin, was a medical student at Istanbul University who wore the Islamic headscarf as a manifestation of her religious convictions. In 1998, the Vice-Chancellor of Istanbul University issued a circular prohibiting students from wearing Islamic headscarves or beards on University premises. When the applicant refused to comply, she was denied access to lectures, suspended, and ultimately transferred to another university outside Turkey. She challenged the circular as a violation of her Article 9 rights.

14. The issue before the Grand Chamber was whether the prohibition on wearing the Islamic headscarf at a Turkish state university constituted an unjustified restriction on the applicant's right to manifest her religion. The Grand Chamber, by 16:1, held that there had been no violation of Article 9.

15. The case is relevant to the general principle of how courts should assess state restrictions on the manifestation of religion in institutional and public spaces, without making theological determinations about the essentiality of the religious practice in question. The Grand Chamber's methodology is instructive as it examined *the nature of the state's regulatory concern* (secularism, equality, public order), *the proportionality of the measure*, and the *margin of appreciation* left to states in the sensitive area of state-religion relations — without ever asking whether the headscarf was "essential" to Islam. The Court accepted the applicant's sincerity but

assessed the validity of the restriction on entirely secular, proportionality-based grounds. It was held as under :

104. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among other authorities, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

**105. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares.** Article 9 lists the various forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance (see, mutatis mutandis, *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 73, ECHR 2000-VII).

**Article 9 does not protect every act motivated or inspired by a religion or belief** (see, among many other authorities, *Kalaç v. Turkey*, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV, p. 1209, § 27; *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission’s report of 12 October 1978, Decisions and Reports (DR) 19, p. 5; *C. v. the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142; and *Tepeli and Others v. Turkey* (dec.), no. 31876/96, 11 September 2001).

**106. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see *Kokkinakis*, cited above, p. 18, § 33). This follows both from paragraph 2 of Article 9 and the State’s positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein.**

**107. The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers 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** (see *Manoussakis and Others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, p. 1365, § 47; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 91, ECHR 2003-II), and that it requires the State to ensure mutual tolerance between opposing groups (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, Reports 1998-I, p. 27, § 57). Accordingly, 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 (see *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX).

108. Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see, *mutatis mutandis*, *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (see, *mutatis mutandis*, the *United Communist Party of Turkey and Others*, cited above, pp. 21-22, § 45, and *Refah Partisi (the Welfare Party) and Others*, cited above § 99). Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society” (see *Chassagnou and Others*, cited above, § 113).

**109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (see, mutatis mutandis, Cha’are Shalom Ve Tsedek, cited above, § 84, and Wingrove v. the United Kingdom, judgment of 25 November 1996, Reports 1996-V, pp. 1957-58, § 58). This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially (as the comparative-law materials illustrate – see paragraphs 55-65 above) in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, p. 19, § 50), and the meaning or impact of the public expression of a religious belief will differ according to time and context (see, among other authorities, *Dahlab v. Switzerland (dec.)*, no. 42393/98, ECHR 2001-V). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (see, mutatis mutandis, *Wingrove*, cited above, p. 1957, § 57). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context (see, mutatis mutandis, *Horzelek and Others*, cited above, § 67, and *Murphy v. Ireland*, no. 44179/98, § 73, ECHR 2003-IX).**

110. This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court’s task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Manoussakis and Others*, cited above, p. 1364, § 44). In delimiting the extent of the margin of appreciation in the present case, the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a

democratic society (see, mutatis mutandis, Kokkinakis, cited above, p. 17, § 31; Manoussakis and Others, cited above, p. 1364, § 44; and Casado Coca, cited above, p. 21, § 55).

**111. The Court also notes that in the decisions in Karaduman v. Turkey (no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93) and Dahlab (cited above) the Convention institutions found that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In Karaduman, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion were not considered to constitute interference for the purposes of Article 9 of the Convention. Consequently, it is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others (see, among other authorities, Refah Partisi (the Welfare Party) and Others, cited above, § 95). In Dahlab, which concerned the teacher of a class of small children, the Court stressed among other matters the “powerful external symbol” which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils.**

(ii) Application of the foregoing principles to the present case

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115. After examining the parties’ submissions, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber (see paragraphs 107-09 of the Chamber judgment) as follows:

“... The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women ... Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see, among other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, pp. 37-38, § 78; Schuler-Zraggen v. Switzerland, judgment of 24 June 1993, Series A no. 263, pp. 21-22, § 67; Burgharz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; Van Raalte v. the Netherlands, judgment of 21 February 1997, Reports 1997-I, p. 186, § 39 in fine; and Petrovic v. Austria, judgment of 27 March 1998, Reports 1998-II, p. 587, § 37) – was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution ...

... In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear

it. As has already been noted (see Karaduman, decision cited above, and Refah Partisi (the Welfare Party) and Others, cited above, § 95), the issues at stake include the protection of the ‘rights and freedoms of others’ and the ‘maintenance of public order’ in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years.

... The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (see Refah Partisi (the Welfare Party) and Others, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.”

116. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 39 above), which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

117. The Court must now determine whether in the instant case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.

118. Like the Chamber (see paragraph 111 of its judgment), the Grand Chamber notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organisation, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, the resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire are also forbidden on the university premises (see paragraph 47 above).

119. It should also be noted that, when the issue of whether students should be allowed to wear the Islamic headscarf surfaced at Istanbul University in 1994 in relation to the medical courses, the Vice-Chancellor reminded them of the reasons for the rules on dress. Arguing that calls for permission to wear the Islamic headscarf in all parts of the university premises were misconceived and pointing to the public-order constraints applicable to medical courses, he asked the students to abide by the rules, which were consistent with both the legislation and the case-law of the higher courts (see paragraphs 43-44 above).

120. Furthermore, the process whereby the regulations that led to the decision of 9 July 1998 were implemented took several years and was accompanied by a wide debate within Turkish society and the teaching profession (see paragraph 35 above). The two highest courts, the Supreme Administrative Court and the Constitutional Court, have managed to establish settled case-law on this issue (see paragraphs 37, 39 and 41 above). It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.

121. In that connection, the Court does not accept the applicant's submission that the fact that there were no disciplinary penalties for failing to comply with the dress code effectively meant that no rules existed (see paragraph 81 above). As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course (see, *mutatis mutandis*, *Valsamis v. Greece*, judgment of 18 December 1996, Reports 1996-VI, p. 2325, § 32). Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief (see *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X) and does not confer on people who do so the right to disregard rules that have proved to be justified (see *Valsamis*, cited above, opinion of the Commission, p. 2337, § 51).

**122. In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.**

**123. Consequently, there has been no breach of Article 9 of the Convention."**

16. The Grand Chamber's methodology in *Leyla Şahin (supra)* is of great importance to the present reference. The Court expressly stated that "the determination of the issue in the present case does not in any way require it to assess whether the headscarf is a religious duty under Islam's sacred texts." The Court examined and accepted the applicant's *sincerity* (she genuinely believed the headscarf was religiously required) and then proceeded directly to assess the *state's justification* for the restriction, without conducting any theological inquiry into essentiality. The result was that the state's restriction was upheld on proportionality grounds, without the Court having to decide whether the headscarf was essential to Islam.

*Displaying crucifixes in classrooms does not violate parents' rights to a non-religious education for their children.*

17. In *Lautsi and Others v. Italy*, (Application no. 30814/06), the first applicant, Ms Soile Lautsi, was a Finnish-born Italian national whose children attended a state school in Abano Terme, Italy, where crucifixes were displayed on the walls of every classroom as required by Italian law. She challenged the display as a violation of her right to ensure her children's education in accordance with her own (non-religious) convictions under Article 2 of Protocol No. 1, and as a violation of Article 9 (freedom of religion). The Chamber (Second Section) found a violation in November 2009. The Grand Chamber, by 15 votes to 2, reversed the Chamber and found no violation. It was held as under :

57. In the first place, the Court observes that the only question before it concerns the compatibility, in the light of the circumstances of the case, of the presence of crucifixes in Italian State-school classrooms with the requirements of Article 2 of Protocol No. 1 and Article 9 of the Convention."

**"69. The fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions ...**

**70. The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools ... speaks in favour of that approach. This margin of appreciation, however, goes hand in hand with European supervision ... the Court's task in the present case being to determine whether the limit ... has been exceeded."**

**"72. Moreover, in the Court's view, a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities ... The Court therefore concludes that the Government's decision to keep crucifixes in the classrooms of State schools ... does not exceed the margin of appreciation of the respondent State."**

18. The Grand Chamber reaffirmed that where a sensitive question of religion and public institutional space is at stake, the State has a wide margin of appreciation, particularly where there is no trans-jurisdictional consensus.

### *Protection from takeover of religious institution in Europe*

19. Article 9 of the ECHR protects, in principle, the right to provide, open and maintain places or buildings devoted to religious worship. The European Court of human Rights has also acknowledged that if a religious community cannot have a place of worship, its right to manifest

its religion is rendered devoid of all substance. In *Metropolitan Church Of Bessarabia And Others V. Moldova*, Application no. 45701/99, the Metropolitan Church of Bessarabia, an Orthodox church aligned with the Patriarchate of Bucharest, was established in September 1992 and promptly sought official recognition under the Moldovan Religious Denominations Act. In February 1993 the Government granted recognition to another Orthodox body, the Metropolitan Church of Moldova, which is affiliated with the Patriarchate of Moscow, yet it remained silent on the Bessarabian application. Although the Court of Appeal in 1997 directed the Government to recognise the Bessarabian Church, the Supreme Court later set aside that decision, holding that the application was out of time and that such recognition would interfere in the affairs of the already-recognised Metropolitan Church of Moldova.

20. The ECtHR held as under:

*“115. The Court has also said that, in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see Kokkinakis, cited above, p. 18, § 33).*

*116. However, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial (see Hasan and Chaush, cited above, § 78). What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome (see United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, p. 27, § 57). Accordingly, 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 (see Serif v. Greece, no. 38178/97, § 53, ECHR 1999-IX).*

***117. The Court further observes that in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership (see Serif, cited above, § 52). Similarly, where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorisation, involvement in the procedure for granting authorisation of a recognised ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9 (see, mutatis mutandis, Pentidis and Others v. Greece, judgment of 9 June 1997, Reports 1997-III, p. 995, § 46).***

***118. Moreover, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes***

**the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords (see Hasan and Chaush, cited above, § 62)."**

21. Similar to the *Durgah Committee* case [supra] in India, the European Court has held that a religious community would not have a right to the return to the ownership of a building of worship taken over a long time ago by the political regime of the time. In *Rymsko-Katolytska Gromada Svyatogo Klimentiya v Misti Sevastopoli v. Ukraine (dec.)*, Application no. 22607/02 it was held as under:

*"B. Alleged violation of Article 9 of the Convention*

59. *The applicant association stated that it was unable, as the only successor religious community, to exercise its religion in the church premises built in 1911 and used until 1936 by the Catholic religious community of Sevastopol. It further stated that it had no premises available to hold its religious ceremonies that were large enough to allow all members of the Roman Catholic community to participate in the ceremonies. It was thus prevented from disseminating religious information and exchanging religious views. It maintained that the use of these premises for a public toilet, a currency exchange point and a cinema showing poor cinematic productions was offensive. The use of the premises also contradicted their views on how church premises were to be used. The applicant association concluded that there had been a breach of its rights under Article 9 of the Convention, which reads as follows:*

xxx

60. *The Government raised an objection as to admissibility of the applicant association's complaints under Article 9 of the Convention. It stated that the applicant association, as with its complaints under Article 1 of Protocol No. 1, had not exhausted domestic remedies and not complied with the six-month rule. They further stated that the refusal to transfer the religious premises at issue did not amount to an interference with the applicant association's right to exercise its religion. They further held that the applicant association could exercise its religious views elsewhere without restrictions. They concluded that no violation of Article 9 had occurred.*

**61. The Court reiterates that it is not possible to deduce from the Convention a right for a religious community to be guaranteed a place of worship by the public authorities (see Griechische Kirchengemeinde Munchen und Bayern E.V. v. Germany (dec.), no. 52336/99, 18 September 2007). In the present case, the refusal of the domestic courts to transfer church premises into ownership by the applicant association has not prevented the applicant association from functioning and did not restrict their right to obtain or construct a place of worship in the conditions provided for by law (see, mutatis mutandis, Lupeni Greek Catholic Parish and Others v. Romania, no. 76943/11, §136, 19 May 2015).**

62. *Taking into account the above, the Court considers that the refusal of the domestic courts to allow a claim for transfer of church premises into ownership by the applicant association does not have a direct bearing on the applicant association's expression of their beliefs protected under Article 9 of the Convention. Moreover, the Court finds that it*

does not follow from the applicant association's submissions that the domestic courts' decisions in the present case constituted an unjustified interference with the applicant association's right to practice religion. The Court concludes, therefore, that there is no appearance of a violation of Article 9 of the Convention.

63. Accordingly, this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.”

22. With regard to places of worship, the European Court has held that States have a wide margin of appreciation in an area as complex and difficult as that of spatial development, in implementing their town-planning policy, since planning legislation is generally accepted as necessary in modern society to prevent uncontrolled development. Further, it has been held that if the national authorities have given adequate weight to freedom of religion in balancing the various planning considerations, a religious organisation cannot use the rights secured under Article 9 to circumvent existing planning legislation.

23. In 1973, ISKCON had acquired a building for religious and residential use and entered into an agreement with the local authority in 1983. The agreement had a condition that ISKCON would not permit more than 1,000 persons to visit the building on any one day except with the council's consent. The local authority served an enforcement notice to ISKCON in 1987 claiming the latter has not fulfilled the agreement, and besides made a breach of planning control by changing the use of the land, requiring to change the use of the land. The notice was confirmed after ISKCON's appeal by the Secretary of State in 1990 and by the English Courts in 1991 and 1992. ISKCON approached the European Court which held that although the enforcement notices radically alter the use building in question, but it does not amount to a deprivation of possessions. The European Court saw the notices as merely a means to control the use of property. The European Court reiterated that a wide margin of appreciation is afforded to States in planning matters and a fair balance is to be struck between the general interest of the community and the protection of the individual's fundamental rights.

24. In *ISKCON and Others v. the United Kingdom*, Application No. 20490/92 it was held as under:

“Given that the aim of the enforcement notice served on ISKCON was to limit the use of the property to that which was permitted when ISKCON acquired it, the Commission finds that there is some doubt as to whether there has been any interference with ISKCON's right to peaceful enjoyment of its possessions. In particular, the Commission considers that, as a general principle, the protection of property rights ensured by Article 1 of Protocol No. 1 (P1-1) cannot be used as a ground for claiming planning permission to extend permitted use of property. However, assuming that there is such an interference, any limitation on use requires justification in the public interest if it amounts to deprivation of possessions, or in the general interest if it constitutes the control of property.

*Although the effect of the enforcement notices is radically to alter the use to which Bhaktivedanta Manor has been put in recent years, the Commission finds that it does not amount to a deprivation of possessions, but a control of the use of property. Accordingly, the Commission must supervise the lawfulness, purpose and proportionality of the restrictions. The Commission must determine whether, whilst recognising the wide margin of appreciation afforded to States in planning matters, a fair balance was struck between the general interest of the community and the protection of the individual's fundamental rights (cf. No. 11723/85, Dec. 7.5.87, D.R. 52 p. 250, 256 with further references).*

***The Commission finds that planning controls are necessary and desirable in modern society in order to preserve and improve town and country landscapes (cf. the above-mentioned Chater decision, D.R. 52 p. 256).***

*As to proportionality, the Commission notes that the Inspector who held the inquiry into the enforcement notices found that the Manor had caused a certain amount of disturbance to neighbouring residents, and that at times it gave rise to considerable traffic problems. If the Inspector and/or the Secretary of State had taken into account irrelevant matters, or if they had failed to take into account matters which were relevant, these matters could have been raised on the appeal against the Secretary of State's decision. The Commission finds no indication in the Inspector's report, and the subsequent decision by the Minister, that the various interests involved were not duly taken into consideration.*

***In the light of these considerations, the Commission finds that a proper balance has been struck between ISKCON's interests and the general interest."***

25. As can be seen from the above analysis, the importance of freedom of thought, conscience and religion has been emphasised on several occasions by the European Court of Human Rights. Broadly speaking, freedom of thought, conscience and religion is considered as one of the foundations of democratic society; more specifically, the European judges regards religious freedom as a vital factor in forming the identity of believers and their conception of life. In fact, the Court raised freedom of religion to the rank of a substantive right under the ECHR, at first indirectly and, later on, more directly. It should be noted that over the last fifteen years the number of cases examined by the Court under Article 9 has been constantly increasing; this trend can be explained by the increasing importance of religion and related matters in socio-political discourse.

***Right of a person to propagate vis-à-vis right of another to be free from coercion***

26. It is submitted that in *Kokkinakis v Greece*, (Application no. 14307/88) the applicant, Mr Minos Kokkinakis, was a Jehovah's Witness who had been arrested more than sixty times over his lifetime for the offence of proselytism under Greek law. Greek law defined proselytism very widely as any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement

or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety. The applicant was sentenced to imprisonment convertible into a fine.

27. The issue before the Court was whether the applicant's criminal conviction for seeking to share his religious beliefs with another person violated Article 9 of the Convention. The case is the *first religious freedom case decided by the Strasbourg Court* and the Court made a distinction between *proper witness-bearing* (protected) and *improper proselytism* (not protected) for resolving tensions between the right of one person to propagate and the right of another to be free from coercion. It was held as under :

31. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."

"31. ... While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest one's religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter."

"48. The Court notes, first of all, that in its Preamble the World Council of Churches' report of 1956, mentioned by the Commission, distinguishes between 'witness' and 'proselytism': the former corresponds to true evangelism, which the report describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others."

"49. ... The Court notes that the Greek courts established the applicant's liability by merely reproducing the wording of section 4 of Law no. 1363/1938 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding. That being so, **the measure complained of does not appear to have been justified in the circumstances by a pressing social need. The means employed were not proportionate to the legitimate aim pursued. There has therefore been a breach of Article 9 of the Convention.**"

28. Thus, the distinction between *proper witness* (sincere communication of one's beliefs) and *improper proselytism* (coercion, inducement, taking advantage of vulnerability) is drawn not by assessing the theological essentiality of the act but by examining the *method* employed.

### *Registration of a rival religious leadership violative of Article 9*

29. In *Hasan and Chaush v. Bulgaria*, (Application no. 30985/96), the applicants were Mr Fikri Sali Hasan, the Chief Mufti of the Bulgarian Muslim community from 1992, and Mr Ismail Ahmed Chaush, his secretary. In 1992 a national conference of Bulgarian Muslims had elected the first applicant as Chief Mufti and adopted new bylaws, which were duly registered by the state. In November 1994, a rival faction organised a separate conference and purported to elect a different leadership. Without any reasoned decision, the Deputy Prime Minister in February 1995 registered the bylaws and leadership of the rival faction, simultaneously deregistering the first applicant and the bylaws adopted by the 1992 conference. The authorities also transferred control of the Muslim community's offices and assets to the newly recognised leadership. The first applicant was thereby removed from his position by executive fiat, without court proceedings and without any stated reason. The issue was whether the Bulgarian Government's registration of a rival religious leadership, and the simultaneous de-registration of the legitimately elected leadership, violated Article 9 of the Convention. The Grand Chamber answered unanimously in the affirmative and held as under :

**62. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.**

**78. ... it recalls that, 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. State action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership.**

84. The Government unilaterally and arbitrarily replaced the leadership of the Muslim community ... with another leadership of its choice ... without following the procedure set out in the community's valid bylaws and without giving any reasons. **These measures were taken without any justification in terms of a pressing social need, and the**

**Government's interference in the organisation of the Muslim religious community was arbitrary and unforeseeable.**

**86. The Court finds that the national authorities' acts and the subsequent changes in the leadership and statute of the Muslim religious community were not justified by a pressing social need and were not proportionate to any legitimate aim pursued. There has therefore been a violation of Article 9 of the Convention.**

30. Thus, the State or the Court may not take sides between factions within a religious community, or favour one interpretation of a religion over another.

### *Germany and Osho*

31. It is submitted that the judgment of the European Court of Human Rights in *Leela Förderkreis e.V. and Others v Germany*, Application no. 58911/00 marks an interesting read. In this case, an objection was raised by the German Government with respect to an organisation [Osho's Association] claiming rights under Article 9, stating that a collective/organisation cannot claim such rights, as the right under Article 9 of the ECHR is provided for individuals and not collective organisations. The Court held that a "complaint" [akin to a Petition in our case] lodged by a church or a religious organisation alleging a violation of the collective aspect of its adherents' freedom of religion is compatible *ratione personae* with the ECHR, and the church or organisation may claim to be the "victim" of that violation within the meaning of Article 34 of the ECHR – in effect held that organisation can claim protection under Article 9. A brief history of the case would illustrate an interesting aspect of the clash between the German State and the Osho Ashram:

- a. The religious associations or meditation associations belonging to the Osho movement, which were promoting the teachings of Osho, first surfaced in Germany in the 1960s. They were described as "sects", "youth sects", "youth religions", "psycho-sects", and "psycho-groups" or given similar labels by members of the Government. The focus of concern was the potential danger that these groups could pose to adolescents' personal development and social relations, which could lead not only to their dropping out of school and vocational training, radical changes in personality, various forms of dependence, lack of initiative and difficulties in communication, often aggravated by the group structure characteristic of certain communities, but also to material loss and psychological harm. The German Government had given several official warnings concerning so-called sects with a view to informing the public about the practice of these groups. As part of their public relations work, State agencies had characterised the associations as a "sect", "youth sect", "youth religion" and "psycho-sect". The adjectives "destructive" and "pseudo-religious" have also been used to describe them, and the accusation has been raised that their members are manipulated.

- b. On 1 October 1984, the associations instituted legal proceedings before the Cologne Administrative Court (Verwaltungsgericht) requesting that the Government desist from issuing the above-mentioned statements about the religious movement and the associations belonging to it, maintaining that such statements were incriminating. They essentially alleged that their freedom to profess a religious or philosophical creed under Article 4 §§ 1 and 2 of the Basic Law (Grundgesetz) [the German constitution] had been infringed.
- c. By a judgment of 21 January 1986, the Cologne Administrative Court prohibited the Government from calling the Rajneesh movement in official statements a “youth religion”, “youth sect” or “psycho-sect”, from using the adjectives “destructive” and “pseudo-religious” and from alleging that members of the Rajneesh movement had been manipulated. The Government appealed against that judgment.
- d. The Administrative Court of Appeal of the Land North Rhine-Westphalia (Oberverwaltungsgericht für das Land Nordrhein-Westfalen), quashed the impugned judgment and dismissed the associations’ claim as a whole, as well as the appeals of two applicant associations who had contested the findings of the first-instance court as regards the use of the term “sect”. However, the Administrative Court of Appeal found that the contested statements interfered with the associations’ basic rights guaranteed by Article 4 §§ 1 and 2 of the Basic Law. It held that the right to religious freedom was not absolute and was subject to limitations by other provisions of the Basic Law. It held that the limitations and interferences by the State had to be accepted where important reasons of public interest required the protection of basic rights which were in conflict with the right to freedom of religion. It held that under Article 65 of the Basic Law, which vested governmental functions in the Government, taken together with the positive obligations under Article 2 § 2, which guarantees the right to life and to inviolability of the person, and Article 6 of the Basic Law, which protects the rights of the family, the Government had the right to impart information. The views expressed by the Government were acceptable and respected the principle of proportionality.
- e. On 13 March 1991 the Federal Administrative Court (Bundesverwaltungsgericht) dismissed the associations’ appeal against the decision of the Administrative Court of Appeal refusing leave to appeal.

32. The European Court of Human Rights held that a Church or an ecclesiastical body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the ECHR. However, after detailed analysis, the Court held that the German Government’s actions were taken for a legitimate aim and the references, even though pejorative, were generally used for “all non-mainstream religions”. The Court held as under:

“In the present case the first and second applicant associations may therefore be considered applicants for the purposes of Article 34 of the Convention.

80. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely, worship, teaching, practice and observance. Furthermore, it includes in principle the right to try to convince one’s neighbour, for example through “teaching”, failing which, moreover, “freedom to change [one’s] religion or belief”, enshrined in Article 9, would be likely to remain a dead letter (see, amongst many authorities, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and *Buscarini and Others v. San Marino [GC]*, no. 24645/94, § 34, ECHR 1999-I). Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief (see, amongst many other authorities, *Kalaç v. Turkey*, judgment of 1 July 1997, Reports 1997-IV, p. 1209, § 27). **The freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, p. 16, § 36).** 81. **According to their statutes, the applicant associations promote the teachings of Osho. They run Osho meditation centres, organise seminars, celebrate religious events and carry out joint work projects. According to the teachings of their community, the aim of spiritual development is enlightenment. Their conception of the world is based on the idea of achieving transcendence in all essential areas of life and is continuously shared by them and their community. The Court considers that these views can be considered as the manifestation of the applicant associations’ belief. Their complaints therefore fall within the ambit of Article 9 of the Convention.**

82. The Court must consider whether the applicant associations’ right under Article 9 was interfered with and, if so, whether the interference was “prescribed by law”, pursued a legitimate aim and was “necessary in a democratic society” within the meaning of Article 9 § 2 of the Convention.

**a) Whether there was interference**

**83. The remaining applicant associations maintained that the information campaign and the expressions used to describe their movement demonstrated a failure by the Government to remain neutral in the exercise of their powers. The contested statements had had a negative impact on their reputation and the credibility of their teachings in society and reduced the number of their members.**

84. The Court notes that the measures taken by the Government did not amount to a prohibition of the applicant associations’ activities or those of their members. The applicant associations retained their freedom of religion, both as regards their freedom of conscience and the freedom to manifest their beliefs through worship and practice. **However, the terms used to describe the applicant associations’ movement may have had negative consequences for them. Without ascertaining the exact extent and nature of such consequences, the Court proceeds on the assumption that the Government’s statements in issue constituted an interference with the applicant associations’ right to manifest their religion or belief, as guaranteed by Article 9 § 1 of the Convention.**

**b) Whether the interference was prescribed by law**

85. The remaining applicant associations maintained that the Government’s information campaign had had no legal basis. They considered that the principle of proportionality did not set sufficiently clear limits to the exercise of the Government’s

discretionary power where interferences with the freedom of religion derived directly from other constitutional rights.

86. The Court reiterates its settled case-law that the expression “prescribed by law” requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct (*Gorzelik and Others v. Poland* [GC], no. 44158/98, § 64, ECHR 2004-I).

**87. Further, as regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term “law” in its “substantive” sense, not its “formal” one (*De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 45, § 93). “Law” must be understood to include both statutory law and judge-made “law” (see, among other authorities, *The Sunday Times v. the United Kingdom* (no. 1), judgment of 26 April 1979, Series A no. 30, p. 30, § 47, and *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 18, § 43). In sum, the “law” is the provision in force as the competent courts have interpreted it.**

88. The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of “foreseeability” for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Gorzelik*, cited above, § 65, and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 141, ECHR 2008-...). Furthermore it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 86, ECHR 2005-).

89. The Court notes that in its decision of 26 June 2002 the Federal Constitutional Court found that the legal basis of the interference under consideration was provided by the Basic Law. The duty of imparting information on subjects of public concern was one of the governmental tasks directly assigned by the Basic Law to the Government. The Court accepts that it can prove difficult to frame law with a high precision on matters such as providing information, where the relevant factors are in constant evolution in line with developments in society and in the means of communication, and tight regulation may not be appropriate. In these circumstances, the Court considers that the Government’s information-imparting role did not require further legislative concretisation.

90. As to the applicant associations’ argument that the legislature had failed to enact adequate legal rules to protect them against arbitrary interferences by public authorities with their right to manifest their religion or belief, the Court observes that, according to the Federal Constitutional Court, the Basic Law did not grant an unfettered discretion to the Government when imparting information. Statements affecting the very essence of the right guaranteed by Article 4 §§ 1 and 2 of the Basic Law must be appropriate in relation to

the cause for concern. **The State had to observe neutrality in religious or philosophical matters and was forbidden from depicting a religious or philosophical group in a defamatory or distorted manner.**

91. Having regard to the above, the Court accepts that the interference with the applicant associations' right to manifest their religion may be regarded as being "prescribed by law".

**c) Legitimate aim**

92. The remaining applicant associations maintained that, in the absence of any attempt on their part to infringe the rights of others and in the absence of any such objective in their statutes, the restriction on the exercise of their right to manifest their religion or belief had not pursued any legitimate aim within the meaning of Article 9 § 2 of the Convention.

93. The Court reiterates that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety (see *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 113, ECHR 2001-XII).

94. The Court observes that the purpose of the Government's warnings was to provide information capable of contributing to a debate in a democratic society on matters of major public concern at the relevant time and to draw attention to the dangers emanating from groups which were commonly referred to as sects. **Considering also the terms in which the decision of the Federal Constitutional Court was phrased, the Court considers that the interference with the applicant associations' right was in pursuit of legitimate aims under Article 9 § 2, namely the protection of public safety and public order and the protection of the rights and freedoms of others.**

98. Having regard not only to the particular circumstances of the case but also to its background, the Court notes that at the material time the increasing number of new religious and ideological movements generated conflict and tension in German society, raising questions of general importance. The contested statements and the other material before the Court show that the German Government, by providing people in good time with explanations it considered useful at that time, was aiming to settle a burning public issue and attempting to warn citizens against phenomena it viewed as disturbing, for example, the appearance of numerous new religious movements and their attraction for young people. The public authorities wished to enable people, if necessary, to take care of themselves and not to land themselves or others in difficulties solely on account of lack of knowledge.

99. The Court takes the view that such a power of preventive intervention on the State's part is also consistent with the Contracting Parties' positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate not only to any interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments, but also to interference imputable to private individuals within non-State entities (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I, and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 103, ECHR 2003-II).

*100. An examination of the Government's activity in dispute establishes further that it in no way amounted to a prohibition of the applicant associations' freedom to manifest their religion or belief. The Court further observes that the Federal Constitutional Court, in its decision given on 26 June 2002, carefully analysed the impugned statements and prohibited the use of the adjectives "destructive" and "pseudo-religious" and the allegation that members of the movement were manipulated as infringing the principle of religious neutrality. The remaining terms, notably the naming of the applicant associations' groups as "sects", "youth sects" or "psycho-sects", even if they had a pejorative note, were used at the material time quite indiscriminately for any kind of non-mainstream religion. The Court further notes that the Government undisputedly refrained from further using the term "sect" in their information campaign following the recommendation contained in the expert report on "so-called sects and psycho-cults" issued in 1998 (see paragraph 32, above). **Under these circumstances, the Court considers that the Government's statements as delimited by the Federal Constitutional Court, at least at the time they were made, did not entail overstepping the bounds of what a democratic State may regard as the public interest.***

Wide latitude of the State recognised for the purpose of pursuing a "legitimate aim"

*101. In the light of the foregoing and having regard to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.*

*There has accordingly been no violation of Article 9 of the Convention."*

### UK ruling on limitation of defining religion

33. In *Pretty v. the United Kingdom*, no. 2346/02, § 82, ECHR 2002-III Diane Pretty, suffering from motor neurone disease, was paralysed from the neck down, dependent on tube feeding, and unable to speak intelligibly. Although suicide itself is not a crime under English law, assisting someone in suicide is. As she could not end her life unassisted, Ms. Pretty sought assurance that her husband would not be prosecuted if he helped her die. The Director of Public Prosecutions refused this request, and Ms. Pretty's appeals in the domestic courts were unsuccessful.

34. She subsequently petitioned the European Court, raising arguments under several provisions of the Convention. In relation to Article 9, her counsel contended that freedom of thought encompassed her belief in assisted suicide, comparing her position to other protected convictions like veganism and pacifism. It was argued that her wish to end her life with her husband's assistance reflected a deeply held belief that deserved protection under Article 9.

35. The European Court of Human Rights, in a case concerning euthanasia, held as under:

*"82. The Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe **that not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1 of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or***

***observance as described in the second sentence of the first paragraph. As found by the Commission, the term “practice” as employed in Article 9 § 1 does not cover each act which is motivated or influenced by a religion or belief*** (see *Arrowsmith v. the United Kingdom*, no. 7050/77, Commission's report of 12 October 1978, DR 19, p. 19, § 71). To the extent that the applicant's views reflect her commitment to the principle of personal autonomy, her claim is a restatement of the complaint raised under Article 8 of the Convention.

83. The Court concludes that there has been no violation of Article 9 of the Convention.”

Not everything connected with religion or claimed to be religious can be declared religious

36. The word “religion” is defined neither by the text of Article 9 nor in the Court’s case-law. This omission is quite logical, because such a definition would have to be both flexible enough to embrace the whole range of religions worldwide (major and minor, old and new, theistic and nontheistic) and specific enough to be applicable to individual cases – an extremely difficult, indeed impossible undertaking. On the one hand, the scope of Article 9 is very wide, as it protects both religious and non-religious opinions and convictions. On the other hand, not all opinions or convictions necessarily fall within the scope of the provision, and the term “practice” as employed in Article 9 § 1 does not cover each act which is motivated or influenced by a religion or belief.

### *Turkey and the Alevi faith*

37. In that connection, the Court points out that the ECHR is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective. The right enshrined in Article 9 would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of a religion of legal protection. Such limitative definitions have a direct impact on the exercise of the right to freedom of religion and are liable to curtail the exercise of that right by denying the religious nature of a faith. At all events, these definitions may not be interpreted to the detriment of non-traditional forms of religion. Critically, the court has consistently held that it is not the Court’s task to enter into any controversy in that sphere or to determine what principles and beliefs are to be considered central to any given religion or to enter into any other sort of interpretation of religious questions. In *İzzettin Doğan and Others v. Turkey*, Application no. 62649/10, In this case, a group of Turkish nationals belonging to the Alevi faith challenged the refusal of the Turkish Prime Minister to afford them the same rights and recognition that were granted to the Sunni branch of Islam. The petitioners, followers of the Alevi faith, had sought recognition of their religious services as public services, classification of their places of worship—*cemevis*—as official places of worship, recruitment of their religious leaders

as civil servants, and financial support similar to that granted to Sunni religious institutions. At the heart of their grievance was the assertion that the Turkish authorities, through the Religious Affairs Department (RAD), failed to acknowledge the Alevi faith as an autonomous religious belief.

38. The European court of Human rights, held as under:

**“68. The Court reiterates that, as guaranteed by Article 9 of the Convention, the right to freedom of thought, conscience and religion denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance. However, provided this condition is satisfied, 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 (see S.A.S. v. France [GC], no. 43835/11, § 55, ECHR 2014, and Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 81, ECHR 2013, with further references).**

The State is duty bound to legislate neutrally

*In the present case the Court notes at the outset that neither of the parties disputed the existence in Turkey of a sizeable Alevi community (see paragraph 36 above), to which the applicants belong, and which is the country’s second-largest faith in terms of the number of followers. Furthermore, as acknowledged by the Administrative Court and the Government, the free exercise by Alevis of their right to freedom of religion is protected by Article 9 of the Convention. The Court observes in particular that in its judgment in Hasan and Eylem Zengin v. Turkey (no. 1448/04, § 66, 9 October 2007), it held as follows:*

*“As to the Alevi faith, it is not disputed between the parties that it is a religious conviction which has deep roots in Turkish society and history and that it has features which are particular to it ... It is thus distinct from the Sunni understanding of Islam which is taught in schools. It is certainly neither a sect nor a ‘belief’ which does not attain a certain level of cogency, seriousness, cohesion and importance ... In consequence, the expression ‘religious convictions’, within the meaning of the second sentence of Article 2 of Protocol No. 1, is undoubtedly applicable to this faith.”*

*This approach has been repeatedly reaffirmed in the Court’s case-law (see Sinan Işık v. Turkey, no. 21924/05, § 46, ECHR 2010; Mansur Yalçın and Others v. Turkey, no. 21163/11, §§ 71 and 74, 16 September 2014; and Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey, no. 32093/10, § 44, 2 December 2014). Article 9 is therefore applicable to the present case (see Bayatyan v. Armenia [GC], no. 23459/03, § 110, ECHR 2011; see also, mutatis mutandis, Campbell and Cosans v. the United Kingdom, 25 February 1982, § 36, Series A no. 48, and, conversely, Pretty v. the United Kingdom, no. 2346/02, § 82, ECHR 2002-III).*

**69. The Court also observes that the case concerns a sensitive debate which is a source of controversy in the sphere of Muslim theology and on which it is not for the Court to express an opinion (see Mansur Yalçın and Others, cited above, § 70). Hence, in referring, for the purposes of its reasoning, to the Alevi faith and the community founded on that faith, the Court does not attach any particular significance to those terms beyond the finding that Article 9 is applicable to them.**

*70. In that connection the Court notes that the parties submitted numerous documents concerning the Alevi faith and the place occupied by the Sufi movements in the Muslim religion. Mindful of the subsidiary nature of its role, it will base its assessment of the facts of the case on the judgments of the domestic courts (see paragraphs 14 and 16 above), but will also attach particular weight to the Final report of the Alevi workshops*

(see paragraphs 41 and 53 above) which was submitted by the Government and the content of which is not disputed by the parties. It stresses in particular that, as stated by the Government, this report was drawn up following seven Alevi workshops held between June 2009 and January 2010 which were attended by over 300 participants including Alevi spiritual leaders, theologians, persons sympathetic to the problems of Alevis, and State representatives (see paragraph 39 above).

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103. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among other authorities, Kokkinakis v. Greece, 25 May 1993, § 31, Series A no. 260-A; Buscarini and Others v. San Marino [GC], no. 24645/94, § 34, ECHR 1999-I; and S.A.S. v. France, cited above, § 124).

104. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which the manifestation of one’s religion or beliefs may take, namely worship, teaching, practice and observance (see Metropolitan Church of Bessarabia and Others, cited above, § 114, and S.A.S. v. France, cited above, § 125).

Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one’s religion or beliefs (see, for example, Arrowsmith v. the United Kingdom, no. 7050/75, Commission’s report of 12 October 1978, Decisions and Reports 19; Kalaç v. Turkey, 1 July 1997, § 27, Reports of Judgments and Decisions 1997-IV; Leyla Şahin v. Turkey [GC], no. 44774/98, §§ 105 and 121, ECHR 2005-XI; and S.A.S. v. France, cited above, § 125).

**105. Under the terms of Article 9 § 2 of the Convention, any interference with the right to freedom of religion must be “necessary in a democratic society”. An instance of interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and in particular if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see, among many other authorities, Bayatyan, cited above, § 123, and Fernández Martínez, cited above, § 124).**

A measure to tackle pressing social need is a legitimate aim

106. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on the freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see Kokkinakis, cited above, § 33). This follows both from paragraph 2 of Article 9 and from the State’s positive obligations under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein (see Leyla Şahin, cited above, § 106, and S.A.S. v. France, cited above, § 126).

107. The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society (see *S.A.S. v. France*, cited above, § 127). **As indicated above (paragraph 68), where the views in question attain a certain level of cogency, seriousness, cohesion and importance (see, mutatis mutandis, Bayatyan, cited above, § 110), the State’s duty of neutrality and impartiality excludes any discretion on its part to determine whether religious beliefs or the means used to express such beliefs are legitimate** (see *Manoussakis and Others v. Greece*, 26 September 1996, § 47, Reports 1996-IV; *Hasan and Chaush*, cited above, § 78; and *Fernández Martínez*, cited above, § 129). Religious and philosophical beliefs concern individuals’ attitudes towards religion (see *Sinan Işık*, cited above, § 49), an area in which even subjective perceptions may be important in view of the fact that religions form a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature (see *Mansur Yalçın and Others*, cited above, § 70).

Intra religious diversity is to be promoted

108. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership. In that connection, State action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion. The role of the authorities in such a case is not to adopt measures favouring one interpretation of religion over another (see *Sinan Işık*, cited above, § 45) or to remove the cause of the tensions by eliminating pluralism, but to ensure that the competing groups tolerate each other (see *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX; *Hasan and Chaush*, cited above, § 78; and *Metropolitan Church of Bessarabia and Others*, cited above, § 117).

109. Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position (see, mutatis mutandis, *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A no. 44; *Valsamis v. Greece*, 18 December 1996, § 27, Reports 1996-VI; *Folgerø and Others v. Norway [GC]*, no. 15472/02, § 84 (f), ECHR 2007-III; and *S.A.S. v. France*, cited above, § 128). Pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion (see *Gorzelik and Others v. Poland [GC]*, no. 44158/98, § 92, ECHR 2004-I, and *The Moscow Branch of the Salvation Army*, cited above, § 61). Respect for religious diversity undoubtedly represents one of the most important challenges to be faced today; for that reason, the authorities must perceive religious diversity not as a threat but as a source of enrichment (see, mutatis mutandis, *Nachova and Others v. Bulgaria [GC]*, nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII).

110. As indicated above (paragraph 93), the right of a religious community to an autonomous existence is at the very heart of the guarantees in Article 9 of the Convention and, were the organisational life of the community not protected by Article 9, all other aspects of the individual’s freedom of religion would become weakened (see *Hasan and Chaush*, cited above, § 62; *Sindicatul “Păstorul cel Bun”*, cited above, § 136;

and Fernández Martínez, cited above, § 127). In that connection, determining the religious affiliation of a religious community is a task for its highest spiritual authorities alone and not for the State (see *Miroļubovs and Others v. Latvia*, no. 798/05, § 90, 15 September 2009). Only the most serious and compelling reasons can possibly justify State intervention (*ibid.*, § 86).

**111. In their activities, religious communities abide by rules which are often seen by followers as being of divine origin. Religious ceremonies 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. The personality of the religious ministers and the status of their places of worship are undoubtedly of importance to every member of the community. Participation in the life of the community is thus a particular manifestation of their religion which is in itself protected by Article 9 of the Convention (see, mutatis mutandis, Hasan and Chaush, cited above, § 62; Perry v. Latvia, no. 30273/03, § 55, 8 November 2007; and Miroļubovs and Others, cited above, § 80 (g)).**

112. It is also important to emphasise the subsidiary role of the Convention mechanism. As the Court has held on many occasions, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. **In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. This is true in particular where questions concerning the relationship between State and religions are at stake (see, among other authorities, S.A.S. v. France, cited above, § 129). This will be the case in particular where practice in European States is characterised by a wide variety of constitutional models governing relations between the State and religious groups (see *Sindicatul “Păstorul cel Bun”*, cited above, § 138, and *Fernández Martínez*, cited above, § 130). In sum, the Contracting States must be left a margin of appreciation in choosing the forms of cooperation with the various religious communities (see *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and 8 others, § 108, ECHR 2014).**

113. **This margin of appreciation, however, goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court’s task is to determine whether the measures taken at national level are justified in principle and proportionate (see, among other authorities, *Manoussakis and Others*, cited above, § 44; *Leyla Şahin*, cited above, § 110; and *S.A.S. v. France*, cited above, § 131). Furthermore, in exercising its supervision, the Court must consider the interference complained of in the light of the case as a whole (see *Metropolitan Church of Bessarabia and Others*, cited above, § 119).**

A measure taken as a legitimate aim is to be justified in principle and proportion.

114. Lastly, the Court reiterates that the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, among other authorities, *Folgerø and Others*, cited above, § 100; see also *Kimlya and Others*, cited above, § 86). The right enshrined in Article 9 would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of a religion of legal protection. Such limitative definitions have a direct impact on the exercise of the right to freedom of religion and are liable to curtail the exercise of that right by denying the religious nature of a faith (see, in particular and *mutatis mutandis*, *Kimlya and Others*, cited above, § 86). It should be pointed out in this connection that, according to the United Nations Human Rights Committee (see paragraph 58 above), these definitions may not be

*interpreted to the detriment of non-traditional forms of religion (see, mutatis mutandis, Magyar Keresztény Mennonita Egyház and Others, cited above, § 88)."*

### *Comparative individual freedoms and public spaces*

39. Nadia Eweida, a devout Christian and an employee of British Airways, found herself at the heart of a legal controversy when she refused to comply with her employer's uniform policy that required all religious jewellery to be worn discreetly, beneath clothing. Eweida insisted on wearing her cross visibly over her attire as a manifestation of her faith. British Airways, while allowing employees from other faiths—such as Sikhs and Muslims—to wear visible religious symbols like turbans and hijabs, justified the distinction by arguing that such garments were religiously mandated, whereas wearing a cross was not an essential requirement of Christianity.

40. The British domestic courts sided with the airline, dismissing Eweida's claim under the Human Rights Act, 1998, which incorporated the European Convention on Human Rights into UK law. However, Eweida remained undeterred and brought her grievance to the European Court of Human Rights, asserting that the United Kingdom had failed in its positive obligation to protect her freedom of religion under Article 9.

41. In line with the same, it has been held that if a personal or collective conviction is to benefit from the right to "freedom of thought, conscience and religion" it must attain a certain level of cogency, seriousness, cohesion and importance. It is submitted that provided this condition is satisfied, 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. In *Eweida and Others v. the United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, it was held by the European Court of Human Rights as under:

*"1. General principles under Article 9 of the Convention*

*79. The Court recalls that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. In its religious dimension it 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. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see Kokkinakis v. Greece, 25 May 1993, § 31, Series A no. 260-A).*

*80. Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of*

religious convictions (see *Kokkinakis*, cited above, § 31 and also *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 105, ECHR 2005-XI). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

**81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011; *Leela Förderkreis e.V. and Others v. Germany*, no. 58911/00, § 80, 6 November 2008; *Jakóbski v. Poland*, no. 18429/06, § 44, 7 December 2010). Provided this is satisfied, 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 (see *Manoussakis and Others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, p. 1365, § 47; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 1, ECHR 2003-II).**

**82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 (see *Skugar and Others v. Russia* (dec.), no. 40010/04, 3 December 2009 and, for example, *Arrowsmith v. the United Kingdom*, Commission's report of 12 October 1978, Decisions and Reports 19, p. 5; *C. v. the United Kingdom*, Commission decision of 15 December 1983, DR 37, p. 142; *Zaoui v. Switzerland* (dec.), no. 41615/98, 18 January 2001). In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question (see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, §§ 73-74, ECHR 2000-VII; *Leyla Şahin*, cited above, §§ 78 and 105; *Bayatyan*, cited above, § 111; *Skugar*, cited above; *Pichon and Sajous v. France* (dec.), no. 49853/99, Reports of Judgments and Decisions 2001-X).**

83. It is true, as the Government point out and as Lord Bingham observed in *R (Begum) v. Governors of Denbigh High School* case (see paragraph 46 above), that there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2. For example, in the above-cited *Cha'are Shalom Ve Tsedek* case, the Court held that "there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable". However, this conclusion can be explained by the Court's finding that the religious practice and observance at issue in that case was the consumption of meat only from animals that had been ritually

slaughtered and certified to comply with religious dietary laws, rather than any personal involvement in the ritual slaughter and certification process itself (see §§ 80 and 82). More relevantly, in cases involving restrictions placed by employers on an employee's ability to observe religious practice, the Commission held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee's religious freedom (see, for example, *Konttinen v. Finland*, Commission's decision of 3 December 1996, *Decisions and Reports* 87-A, p. 68; *Stedman v. the United Kingdom*, Commission's decision of 9 April 1997; compare *Kosteski v. "the former Yugoslav Republic of Macedonia"*, no. 55170/00, § 39, 13 April 2006). However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under Article 8; the right to freedom of expression under Article 10; or the negative right, not to join a trade union, under Article 11 (see, for example, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI; *Vogt v. Germany*, 26 September 1995, § 44, Series A no. 323; *Young, James and Webster v. the United Kingdom*, 13 August 1981, §§ 54-55, Series A no. 44). Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

84. According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Leyla Şahin*, cited above, § 110; *Bayatyan*, cited above, §§ 121-122; *Manoussakis*, cited above, § 44). Where, as for the first and fourth applicants, the acts complained of were carried out by private companies and were not therefore directly attributable to the respondent State, the Court must consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction (see, *mutatis mutandis*, *Palomo Sánchez and Others v. Spain [GC]*, nos. 28955/06, 28957/06, 28959/06 and 28964/06, §§ 58-61, ECHR 2011; see also *Otto-Preminger-Institut v. Austria* judgment of 25 November 1994, Series A no. 295, § 47). **Whilst the boundary between the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable principles are, nonetheless, similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State** (see *Palomo Sánchez and Others*, cited above, § 62)."

42. The above said case is also critical in examining the meaning of "manifestation" of a religious belief – akin to the Indian Constitution's triumvirate of 'profess', 'practice' and 'propagate'. As per European law, where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in any way inspired, motivated or influenced by that belief constitutes a "manifestation" of it. Thus, for example, acts or omissions

which do not directly express the belief concerned or which are only distantly connected to a precept of faith fall outside the protection of Article 9 § 1. **In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief.** One example might be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, applicants claiming that an act falls within their freedom to manifest their religion or beliefs are not required to establish that they acted in fulfilment of a duty mandated by the religion in question.

### *Judging “sincerely held” beliefs*

43. Further, the European Court of Human rights has held that the domestic authorities are not justified in casting doubt on the sincerity of the beliefs which an individual claims to hold without supporting their position with solid, cogent evidence. In *Kovalkovs v. Latvia, App. No(s). 35021/05*, Mr. Kovalkovs alleged that he was prevented from adequately performing the religious rituals of Vaishnavism (the Hare Krishna movement). In stark contrast to the Indian Supreme Court, the European Court of Human Rights held that domestic authorities are not justified in casting doubt on the sincerity of beliefs claimed by an individual unless supported by solid, cogent evidence.

In this case, Mr. Kovalkovs complained that he was unable to read religious writings in his prison cell due to his cellmates’ persistent use of offensive language while discussing immoral lifestyles. Additionally, he was prohibited from burning incense sticks, which had been confiscated. The Latvian Government argued that Mr. Kovalkovs was not a genuine follower of Vaishnavism, citing his participation in a distance-learning Bible study course and the fact that he was not formally affiliated with the local branch of the International Krishna Consciousness Society.

44. The ECtHR held as under

*“56. The applicant complained of repeated violations of his freedom of religion. He relied on Article 9 of the Convention, which reads as follows:*

*“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."

57. *As a preliminary issue the Court takes note of the Government's argument that the applicant could not be considered a victim of the alleged infringement of his freedom of religion, since he was not a follower of Vaishnavism. The Government based their argument on the fact that in 2004 the applicant had participated in a distance-learning Bible study course. The Court takes this opportunity to underline the fact that in no way can a person's choice to educate himself – be it on religious or other topics – be objectively held to affect that person's belief system. The Government further referred to a letter of 8 November 2007 signed by the State Secretary of the Ministry of Justice which included a statement that the applicant "currently does not belong to the International Krishna Consciousness Society, does not support it and does not propagate its beliefs". Since that statement is not supported by any evidence, the Court does not consider it a reliable indicator of the applicant's religious leanings. Lastly, it has to be noted that none of the domestic authorities to which the applicant addressed his complaints concerning the alleged interference with his freedom of religion appear to have questioned the genuineness of his faith. In principle, the State's duty of neutrality and impartiality, as defined in the Court's case-law (see, for example, *Miroļubovs and Others v. Latvia*, no. 798/05, § 80, 15 September 2009), is incompatible with any power on the State's part to assess the legitimacy of religious beliefs (*ibid.*, and *Leyla Şahin v. Turkey*[GC], no. 44774/98, § 107, ECHR 2005-XI) **The Court sees no reason to question the genuineness of the applicant's faith either. Therefore the Government's argument concerning the applicant's victim status is dismissed.***

58. In his application to the Court the applicant formulated his complaint under Article 9 in rather general terms. He stated that he had been "denied the freedom of faith [and] forbidden to devote [himself] to [his] religious convictions by following religious customs".

59. *The Court will focus its analysis on the supposed restrictions of the applicant's ability to follow the fundamental requirements of Vaishnavism.*

**60. Clearly, 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 (see the case-law references above, paragraph 57). However, certain core principles emerge from the applicant's complaints to various domestic authorities and to the Court as well as from the response given to the Prison Administration by the president of the Rīga Chapter of the International Society of Krishna Consciousness (see above, paragraph 17) and the information received from members of the Rīga congregation and summarised by the Directorate of Religious Affairs (see above, paragraph 18). In the light of that information, the Court will concentrate on the applicant's purported inability to read religious literature, to meditate and to pray because of being placed in a cell together with other prisoners and on the fact that incense sticks were taken away from his cell. The Court considers that the applicant's wish to pray, to meditate, to read religious literature and to worship by burning incense sticks can be regarded as motivated or inspired by a religion and not unreasonable (see *Jakóbski v. Poland*, no. 18429/06, § 45, ECHR 2010-...).**

45. Similarly, in *Vartic v. Romania* (no. 2), Application no. 14150/08, the Romanian Government put forward the very similar allegation to the effect that an applicant had probably

claimed to be a Buddhist in order to obtain better food in prison. The European court of Human Rights, repelling the contention, held as under:

*“45. In this respect, the Court reiterates that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 9, or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar (see Siebenhaar v. Germany, no. 18136/02, § 38, 3 February 2011). In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see Eweida and Others, cited above, § 84).*

*46. In the instant case, the Court notes that the Government questioned the genuineness of the applicant’s faith and referred to a survey in Rahova which had suggested that detainees were abusing freedom of religion in order to receive better food (see paragraph 43). However, the suggestion that the applicant had himself abused this right is not supported by any evidence. The applicant himself provided a coherent account of the manner in which he observed his Buddhist faith, and argued that he asked the prison authorities to provide the diet required by his faith only when, due to a change in legislation, he could no longer rely exclusively on the food provided by his family. It also appears that during the domestic proceedings the courts did not in any way question the genuineness of his faith (see Kovalkovs v. Latvia (dec.), no. 35021/05, § 57, 31 January 2012).*

*47. The Court further notes that the domestic courts dismissed the applicant’s complaint on the grounds that the prison authorities had contacted a Buddhist organisation to seek more information on their dietary rules (see paragraphs 14 and 19 above). Whether or not the authorities were at that material time willing to offer the applicant a diet that respected the applicant’s religious beliefs, the Government did not provide any additional information on the outcome of their initial initiative. On the contrary, they asserted to the Court that the applicant had been provided with a diet that included meat because it was appropriate for his medical condition. However, the Court notes that the general practitioner at Rahova Prison described a vegetarian diet as appropriate for the applicant’s medical condition (see paragraph 9 above).*

*48. The applicant requested a meat-free diet, as prescribed by his religion (see Jakóbski, cited above, § 45). Whilst the Court is prepared to accept that a decision to make special arrangements for one prisoner within the system can have financial implications for the custodial institution and thus indirectly on the quality of treatment of other inmates, it must consider whether the State can be said to have struck a fair balance between the interests of the institution, those of other prisoners and the particular interests of the applicant (see Jakóbski, cited above, § 50).*

***49. The Court notes that the applicant’s meals did not have to be prepared, cooked and served in any special way, nor did he require any special foods (see Jakóbski, cited above, § 52). The Court is not persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or any decline in the standards of meals served to other prisoners, all the more so as a similar diet free of animal products was already provided for detainees observing the Christian Orthodox fasting requirements (see paragraph 10 above).***

***54. Having regard to all the foregoing factors, and despite the margin of appreciation left to the respondent State, the Court finds that the authorities failed to strike a fair***

***balance between the interests of the prison authorities and those of the applicant, namely the right to manifest his religion through observance of the rules of the Buddhist religion.***

55. The Court concludes that there has been a violation of Article 9 of the Convention.”

ERRONEOUS ATTRIBUTION OF ESSENTIAL RELIGIOUS PRACTICES TO  
AUSTRALIA AND COMPARISON WITH THE USA

46. It is submitted that no principled answer any question is possible without confronting the fundamental institutional problem at the heart of the Essential Religious Practices doctrine. The doctrine requires constitutional courts to function as theological arbiters. The historical reference of ERP connects to an Australian judgment in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, (1943) 67 CLR 116 [Vol. V.6 @ Pgs. 120 – 172], while formulating the definition of religion in *Shirur Mutt supra*. It is now submitted that this connection is a source of confusion rather than legitimacy.

47. It is submitted that *Adelaide supra* does not propound the ERP test and does not authorise courts to determine whether a practice is “essential” to a religion as a condition of constitutional protection. The judgment of *Adelaide supra* provided was a broad definitional premise that religion encompasses outward acts and not merely beliefs. A precise understanding of what *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, [1943] HCA 12 : (1943) 67 CLR 116, actually held and what it did not hold, is essential to any assessment of the foundations of ERP. The following aspects of the case may be noted :

- a. During World War II, regulations under the National Security Act 1939 declared Jehovah's Witnesses a “prejudicial association” and dissolved their organisation in Australia.
- b. The Adelaide Company of Jehovah's Witnesses Inc had its property seized and challenged the regulations as contravening S 116 of the Australian Constitution, which provides that the Commonwealth shall not make any law “for prohibiting the free exercise of any religion.”
- c. The High Court [the apex court in Australia] held 5:2 that the regulations did not violate S 116 in the circumstances of wartime, though different justices reached this conclusion by different routes. The discussion of the meaning and scope of “religion” in the judgments arose in this context.

Latham CJ delivered the most detailed and historically significant judgment on the meaning of religion and made the foundational observation that has been universally cited:

*“It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. Whatever subtle differences of opinion there may be about the nature of religion and the character of a belief in and a relation to a supernatural being, most thoughtful men would agree in saying that religion involves some relation between man and God or gods, and that it commonly involves the acceptance of certain doctrines and beliefs and the practice of certain rites and ceremonies.”*

Latham CJ then addressed the central question of whether s 116 protects only religious opinions or also acts done in pursuance of religious belief:

*“In my opinion, however, the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. To say that a man may believe what he likes but that he may not do what his religion requires him to do is to make the free exercise of religion a mockery. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion.”*

Latham CJ addressed the scope of judicial inquiry into religious claims:

*“It is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character. Section 116 extends to protect the religion of minorities, and in particular, of unpopular minorities.”*

Latham CJ posed the limiting question and stated the criterion for permissible state restraint:

*“This raises the question whether any person can, by honestly calling his beliefs and practices religious, exempt himself from obedience to the law. **Can an unreasonable claim to religious freedom be restrained? The answer must, I think, be Yes. Freedom of religion does not mean freedom from all law. It means freedom from law specifically directed at religion qua religion or at religion as such, so as to prohibit the free exercise of it.**”*

Latham CJ then framed the concept of ordered religious freedom:

*“[T]he freedom guaranteed by s 116 is freedom within a society organised under the Constitution. It is not a freedom which extends to acts which are **inconsistent with the maintenance of civil government or which are destructive of the foundations of civil society.**”*

McTiernan J held that “the word religion extends to faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion.”

Starke J held the freedom “not absolute” but “subject to limitations ... reasonably necessary for the protection of the community and in the interests of social order.”

Williams J agreed that the freedom is freedom within a society organised under the Constitution.

Rich J traced the historical development of the law toward “complete religious liberty and religious equality.”

48. It is now submitted that propositions, which form the very foundation of ERP from the judgment of *Durgah Committee supra*, are not to be found anywhere in *Adelaide supra*. The Courts in Australia do not hold that a court must determine which practices are “essential” to a religion as a condition of constitutional protection. It does not authorise courts to distinguish

between “essential and integral” practices and “superstitious beliefs” or “extraneous and unessential accretions.” Third, and most importantly, the permissibility of state restraint was legislative purpose and consistency with civil government and not theological centrality.

49. It is submitted that the reference to *Adelaide supra* in *Shirur Mutt supra* merely for the definitional purpose that religion encompasses conduct as well as belief. The further step requiring courts to determine which elements of that conduct are theologically essential was an entirely Indian judicial innovation. Thus, the Australian judgments do not support the Indian doctrine, and Australia itself subsequently confirmed this by developing in a precisely opposite direction.

50. The *Attorney-General (Vic); Ex rel Black v Commonwealth*, [1981] HCA 2 : (1981) 146 CLR 559, confirms the direction of Australian courts. A coalition of government school advocates challenged the constitutional validity of Commonwealth legislation providing financial aid to non-government schools largely operated by religious bodies. The plaintiffs argued this contravened the establishment clause in s 116 by making laws “for establishing any religion.” The High Court rejected this challenge 6:1. The critical point is that constitutional question was entirely about the object of the law, not about the content of religious doctrine. Barwick CJ stated the test for “establishment” at 146 CLR 579 and 582–583:

*“In the interpretation and application of s 116, the establishment of religion must be found to be the object of the making of the law ... it involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion.”*

51. Gibbs J held that establishment means conferring on a religion “the position of a state (or national) religion or church.” Stephen J made a structural observation of wide application:

*“The very form of s 116, consisting of four distinct and express restrictions upon legislative power, is also significant. It cannot readily be viewed as the repository of some broad statement of principle concerning the separation of Church and State, from which may be distilled the detailed consequences of such separation.”*

52. Wilson J stated that establishment requires “deliberate selection of one to be preferred from among others.” At no point did the High Court inquire into the internal doctrines of Catholicism or any other faith to determine whether subsidised religious education was “essential” to its practice.

53. The most instructive Australian authority is *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*, [1983] HCA 40 : (1983) 154 CLR 120. The Church of Scientology claimed exemption from Victorian payroll tax as a “religious institution”. The Commissioner and

Victorian courts held Scientology was not a religion. The High Court unanimously allowed the appeal, holding Scientology was entitled to the exemption. Mason ACJ and Brennan J delivered a joint judgment that has become the foundational Australian statement on the relationship between courts and religion and observed as under :

**“Under our law, *the State has no prophetic role in relation to religious belief; the State can neither declare supernatural truth nor determine the paths through which the human mind must search in a quest for supernatural truth.*”**

**“No valid statement can be made as to a tenet of a religion unless its validity as a tenet is recognized by the adherents of that religion. A court would be ill-advised to go searching for tenets which are said to inhere in obscure writings without the guidance of those who can explain the meaning which the adherents of the religion accept.”**

*“The chief function of a definition of religion for legal purposes is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. The freedom of religion being a fundamental theme of our society, a restrictive definition would be particularly unfortunate. The guarantees would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit minority religions out of the main streams of religious thought.”*

54. This is a direct statement of the principle of deference to the religion’s self-understanding that *Shirur Mutt supra* originally embodied and that *Durgah Committee supra* misinterpreted.

55. In the same judgment, Wilson and Deane JJ, in a separate joint judgment, formulated five indicia of religion as under :

**“It is important that care be taken, in the exercise of that judgment, to ensure that the question is approached and determined as one of arid characterization not involving any element of assessment of the utility, the intellectual quality, or the essential “Truth” or “worth” of tenets of the claimed religion.”**

56. This formulation the “arid characterisation” without any assessment of the essential ‘Truth’ or ‘worth’ of tenets”, is the direct antithesis of what ERP requires courts to do and especially contrary to the approach of the judgments by J. Ramaswamy. The purpose-based approach to s 116 was consolidated in *Kruger v Commonwealth*, [1997] HCA 27 : (1997) 190 CLR 1. Aboriginal Australians removed from their families under the Aboriginals Ordinance 1918 (NT) challenged the Ordinance on multiple constitutional grounds including s 116. The High Court upheld the Ordinance. On the s 116 question, the justices converged on a **legislative purpose test** as the sole criterion for invalidity. Brennan CJ stated the governing test as under :

*“To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids. None of the impugned laws has such a purpose.”*

Gaudron J addressed the scope of the free exercise clause as under :

*“[S]ection 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it ... The use of the word ‘for’ indicates that purpose is the criterion and the sole criterion selected by s 116 for invalidity.”*

57. Under Australian doctrine, *the constitutional inquiry is directed outward at the law and at legislative purpose and not inward at theological content*. A law that pursues a legitimate state object and burdens religion only incidentally is valid in Australia, without the court needing to determine whether the burdened practice is theologically central. This approach respects both state authority and religious self-determination.

58. It is submitted that the United States First Amendment provides the most direct and unambiguous comparative authority against the ERP doctrine. American constitutional law has, across decades and across a wide range of contexts, held that civil courts *cannot* adjudicate questions of theological doctrine, ecclesiastical rule, or the centrality of religious practices. This position is not merely a judicial policy preference but a *constitutional mandate*.

59. The foundational principle was stated in *Watson v Jones*, 80 U.S. (13 Wall.) 679 (1872) [Vol. V.7 @ Pgs. 2053 – 2114], where the US Supreme Court held that where questions of discipline, or of faith, or ecclesiastical rule have been decided by the highest church judicatories, legal tribunals must accept such decisions as final. The Court declared that *“the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”* This statement, which the Court subsequently described as having “a clear constitutional ring,” has remained the foundation of American religion-clause jurisprudence ever since.

60. It is submitted that the First Amendment dimension of this principle was established decisively in *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). In the said case, two local Presbyterian churches in Georgia voted to withdraw from the national church over doctrinal disputes, including the national church’s allegedly liberal stance on Scripture and social issues. Under Georgia’s implied trust doctrine, the jury was instructed to determine whether the general church had “substantially departed” from its original doctrines, because if it had, the property would vest in the local congregations. The Supreme Court (per Brennan J, unanimously) reversed, holding that the “substantial departure” doctrine contravened the First Amendment and held as under :

*“[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. **First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever***

**present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. The Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.”**

The Court then identified at 393 U.S. 450 precisely why the “substantial departure” test was constitutionally impermissible:

*“The departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.”*

61. It is submitted that this directly addresses the ERP doctrine. The said principle was extended and deepened in *Serbian Eastern Orthodox Diocese v Milivojevich*, 426 U.S. 696 (1976). In the said case, the Serbian Orthodox Church defrocked Bishop Milivojevich and reorganised the American-Canadian Diocese. The Bishop challenged these decisions in Illinois courts, which reviewed the Church’s internal proceedings and held them “arbitrary,” then reinstated him. The US Supreme Court reversed 7:2 (per Brennan J), holding that not even a review for “arbitrariness” of internal ecclesiastical proceedings was constitutionally permissible. It was held as under :

*“[W]hether or not there is room for ‘marginal civil court review’ under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes, no ‘arbitrariness’ exception — in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations — is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”*

The Court explained why even arbitrariness review is impermissible:

*“For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits.”*

The Court addressed the deeper reason why secular courts cannot conduct this review:

**“[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.”**

*“[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that*

*civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them.”*

*“[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. **When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.**”*

62. The principle of non-interference in doctrinal matters was further articulated in *Jones v Wolf*, 443 U.S. 595 (1979). In the said case, a local church in Georgia voted to separate from the national Presbyterian denomination. A property dispute arose over which faction was entitled to church assets. The Court (5:4, per Blackmun J) allowed states to employ “neutral principles of law” to resolve such disputes, but with a critical limitation. It was held as under :

*“[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.”*

63. The Court, quoting Brennan J’s earlier concurrence in *Maryland & Virginia Churches v. Sharpsburg*, 396 U.S. 367 (1970), held that a State may adopt any approach for church property disputes *“so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.”* The Court reiterated: *“[I]f the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.”*

64. The essentiality approach was completely denied in *Thomas v Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). In the said case, Eddie Thomas, a Jehovah’s Witness, quit his job when transferred to a department manufacturing tank turrets, claiming his religion forbade participation in weapons production. His co-worker, also a Jehovah’s Witness, held a different theological view and did not object to the same work. Indiana denied Thomas unemployment benefits on the basis that his decision was not required by his religion — effectively adjudicating between the two co-religionists’ competing interpretations of their faith. The Supreme Court (8:1, per Burger CJ) reversed and held as under :

*“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”*

*“Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly*

*perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation. ... Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”*

*“Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.”*

65. It was held that the sincerity standard as the correct and only proper inquiry - “The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.” Thus, under United States law, the court asks whether the claimant sincerely believed the practice was required by his religion. Under ERP, the court asks whether the practice is objectively essential to the religion as a whole.

66. In *Employment Division, Department of Human Resources of Oregon v Smith*, 494 U.S. 872 (1990), [Vol. V.7 @ Pgs. 2145 – 2190] two members of the Native American Church were dismissed from their jobs for sacramental use of peyote and denied unemployment benefits. The Court (6:3, per Scalia J) held that the Free Exercise Clause does not require religious exemptions from neutral, generally applicable laws. The case is controversial as a matter of free exercise theory. But on the specific question of judicial competence to assess the centrality of religious practices, Justice Scalia’s opinion is unequivocal and has never been questioned on that point. The Court held as under :

**“[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”**

*“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”*

**“[I]t is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’”**

67. It is submitted that Justice Scalia identified with precision the logical impossibility at the heart of centrality-based tests that - what principle of law or logic can contradict a believer's assertion that a particular act is 'central' to his personal faith? The answer is no one can do it. The Courts have no principle by which to adjudicate such questions, and therefore no business attempting to do so. It is, in the Court's own formulation, akin to the unacceptable business of evaluating the relative merits of differing religious claims, a business that secular constitutional courts in any jurisdiction should decline to transact.

68. In *Our Lady of Guadalupe School v Morrissey-Berru*, 591 U.S. 732 (2020), the Court (7:2, per Alito J) extended the ministerial exception to elementary school teachers performing religious teaching functions, even without formal ordination. It was held as under :

*"The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"*

*"Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate."*

*"State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion."*

*"[B]oth their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important."*

69. Having surveyed the European, Australian and American authorities, the comparative propositions that ERP is a global constitutional anomaly, is clear. It is without parallel in comparable jurisdictions, and that its anomalous character reflects structural defects that are independently visible in the doctrine's internal logic and in its practical application to Indian religious life.

70. ERP creates an asymmetric and arbitrary constitutional order, where a religion has canonical texts and a centralised ecclesiastical authority, it is relatively straightforward to identify what is "essential." Where a religion is pluralistic, decentralised, and organic, as Hinduism characteristically is, the ERP inquiry is both more intrusive and more likely to produce results the community does not recognise as accurate. The comparative exercise confirms that the proper

constitutional sequence is to ask whether the State has crossed a constitutional boundary and not whether the religion has met a judicial threshold of essentiality.