

**IS ARTICLE 9 OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS A CONTINUATION OF THE
PROTESTANT THEOLOGY?**

Submitted in fulfilment of the requirements of the Degree of Doctor of Philosophy

PhD (Laws)

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Statement of Originality

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Abstract

In this thesis it is asked whether Article 9 of the European Convention on Human Rights (ECHR) is a continuation of the Protestant theology. It is demonstrated that despite the on-going process of secularisation, Protestant religious frameworks are still embedded within Western legal systems in general and the ECHR in particular. Taking this into account, a new explanation regarding the interpretation and application of Article 9 is put forward. It is explained how religious freedom came to be one of the central claims within Christian Protestant theology in association with linked ideas such as secularism. When freedom of religion is situated within European intellectual history, the “two kingdoms” of Luther, the private realm of the conscience and the public realm of the (sinful) body, are clearly reflected in the wording of Article 9 ECHR. Since the wording, as well as the judicial interpretations and applications of Article 9 ECHR, are biased in favour of the Christian Protestant view, this is automatically discriminatory against applicants who do not have a Protestant background, and even more biased against those of non-Abrahamic traditions. It is demonstrated that applicants from a non-Protestant faith or tradition attempting to utilise Article 9 ECHR have to distort their claims to fit within the confines of Article 9. This bias is made worse by the interpretation and application of Article 9 by the European Court of Human Rights (ECtHR).

In the light of these conclusions, a fresh analysis is made of the ECtHR judgments on Article 9 illustrating the continuation of a post-Reformation struggle for iconoclasm, fought over through the secularised language of modern law. This analysis includes: applications brought by those from non-Abrahamic traditions, other Christians and other Abrahamic religions; judgments concerning Muslims,

mainly the wearing of the hijab (headscarf);¹ and the response of the ECtHR to curbs on proselytisation and idolatry in some countries of the Council of Europe.

¹ Such as *Lautsi and Others v. Italy*, Application no. 30814/06, judgment of 18 March 2011, *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014), *Lelya Sahin v Turkey* Application no. 44774/98 Grand Chamber 2005, *Dahlab v. Switzerland*, Application no. 42393/98, [2001] ECHR 899.

I dedicate this thesis to my husband Hamed, my daughter Maria and my mother Nora

for all their love,

and to the memory of my father George.

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Chapters Outline

Chapter 1

In this chapter scholarly work concerning freedom of religion is examined to illustrate that Article 9 has not been analysed the way this thesis intends to do and to show possible relationships between previous studies and this thesis. Particular attention is given to literature and case commentaries where a Protestant effect on European legal systems is discussed and where scholars argue for harmonisation between human rights and religions. Scholarly work calling for a more nuanced approach to culture and legal interpretation is also considered. Although many scholars find the ECtHR to be biased against applicants wearing religious symbols and the headscarf in particular, none have gone beyond this initial observation to question whether Article 9 itself is linked to the Protestant faith or could even be seen as a continuation of the Protestant theology.

Chapter 2

In this chapter Balagangadhara's theory² of religion and how religion has influenced the Western culture and the Western legal systems will be analysed. S.N. Balagangadhara is amongst the very few scholars to provide a novel approach to studying religion and to refute the claim of the universality of religion. He thoroughly examines how despite secularism the West remains a religious culture that is predominantly influenced by the Protestant thought. An outline of the theoretical

² S.N. Balagangadhara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005).

framework and hypothesis will be presented. This will act as a guide to examine the history and emergence of religious freedom in Europe in the following chapter.

Scholars such as Wilfred Cantwell Smith, Harold Berman and S.N. Balagangadhara have argued that the framework for studying “religion” derives from a Christian background, even in the realm of comparative religion, and that religion bears the hallmarks of a theological account. Others, such as Timothy Fitzgerald have argued that the word “religion” should not be used at all within the social sciences because of the history of its association with Christian theology.³

Balagangadhara, claims that religion should be treated as a phenomenon in the world, but that the description “religion” should be restricted to the Abrahamic traditions: Judaism, Christianity and Islam. He argues that the assertion that all cultures in the world have religion, an idea which has also been adopted and elaborated within the human sciences,⁴ is itself a claim of Christian theology, albeit since secularised.⁵ Balagangadhara’s theory offers a framework to study Article 9 of the ECHR. Using this theory, the universality of religion is questioned and what constitutes religion is examined. It is also asked what makes Christianity a religion and what qualifies for protection by the legal systems. It is demonstrated that attempting to define religion in the legal system is futile.

Chapter 3

³ Timothy Fitzgerald, *The Ideology of Religious Studies* (Oxford University Press, 2000) 3-7.

⁴ See also From Tomoko Masuzawa, ‘Secular Theories on Religion, A Selection of Recent Academic Perspectives’ in Mikael Rothstein and Tim Jensen (eds), *Theology to World Religions: Ernst Troeltsch and the Making of Religionsgeschichte* (University of Copenhagen Tusculanum Press 2000) 149-166.

⁵ Peter Harrison, *‘Religion’ and the religions in the English Enlightenment* (Cambridge, Cambridge University Press, 1990) 1.

In this chapter, freedom of religion is located within European intellectual history. How religious freedom came to be one of the central claims within Christian Protestant theology, in association with linked ideas such as that of the secular State, is discussed. The two kingdoms of Luther, the private realm of the conscience and the public realm of the (sinful) body, which may be punished by the magistrate (State), are reflected today in the split between the assertion of religious freedom in Article 9(1) ECHR and the limitations expressed in Article 9(2) ECHR. This is an appropriate framework with which to make sense of the assumptions within Article 9 ECHR and the claims made upon it. It is also argued that the concept of secularism, or neutrality, is problematic in today's world and in the ECtHR due to the Christian theological framework from which it emerged.

Chapter 4

In this chapter, how the "idea" of freedom of religion, as discussed in Chapter 3, emerged and was expressed in the law and how it made its way into international treaties and conventions will be considered. A chronological approach, encompassing key national and international instruments, is taken. It will be questioned whether religious freedom in the legal context differs much from the religious freedom expressed by Luther. The impact of Christianity on the drafting of the Universal Declaration of Human Rights (UDHR) and the ECHR will be examined and the presence of the Protestant theology in international treaties and Conventions will also be demonstrated.

Chapters 5

In this chapter, specific categories of Article 9 jurisprudence is examined to prove the hypothesis established in earlier chapters. Judgments of the ECtHR concerning non-Abrahamic traditions will be discussed in the light of the thesis to illustrate the kinds of distortions displayed when attempting to fit within the Protestant framework of Article 9 ECHR. It will be demonstrated that the current framework is discriminatory and less intelligible to applicants of non-Abrahamic cultures. Case examples are provided throughout to prove the hypothesis. Furthermore, the extent to which the ECtHR has marginalised orthopraxy over orthodoxy will be examined and linked to how Protestants regard the use of symbols. Furthermore, it is asked whether the theological roots of Article 9 are causing problems and distortions when Article 9 is relied on by non-Protestant litigants. It will be shown that the concepts of “truth” and “falsity”, which play a crucial role in Abrahamic beliefs and are insignificant in other cultures and traditions, are reflected in the language of ECtHR case law. It is questioned how the ECtHR assesses what constitutes “religion”, and whether a manifestation of an act is actually a manifestation that qualifies as a “religious” manifestation and could therefore be protected under Article 9. It is also asked what position the ECtHR takes when presented with acts that are manifested as part of a tradition rather than a religion and whether these traditions have to present themselves as religions in order to qualify for Article 9 protection.

Chapter 6

In chapter six specific categories and judgements of Article 9 concerning other Abrahamic and other Christian (non-Protestant) religions is examined in light of the thesis show the Protestant bias in the case law and the kinds of distortions displayed when attempting to fit within the Protestant framework of Article 9 ECHR. How the

ECtHR has maintained its decisions especially with regards to proselytism and conversion and the Islamic veil will be examined. A fresh analysis of the case law including religious symbols is offered to demonstrate the bias in the jurisprudence towards the Protestant faith and the continuation of the post-Reformation struggle for iconoclasm, fought over through the secularised language of modern law. It is also argued that even amongst Abrahamic religions, there is a bias in the ECtHR towards the Protestant thought. It is demonstrated that this is caused by the language of the ECHR as well as the interpretation and application of the case law by the judges of the ECtHR. It is hypothesised that other Abrahamic and other Christian religions are seen through the prism of Protestantism, and that religious symbols (like the headscarf) are seen by the ECtHR as a symbol of iconoclasm. Case examples are provided throughout to prove the hypothesis. It will therefore be demonstrated that the current framework is less intelligible to applicants who do not share a Protestant background.

When deciding Article 9 applications, the ECtHR asks questions about “faith” and “worship” that are only intelligible to people from Abrahamic religions because they are fundamentally based on the Christian anthropological framework which assumes that humans are intentional beings. When doing so, the ECtHR presupposes Protestantism to be the benchmark from which other “faiths” are understood and engages in Christian ethics and discussions of what ought or ought not be done.⁶ For example the ECtHR generally formulates questions in terms of whether the applicants are required or obliged to say, to refrain from working at certain days of

⁶ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP45(1) 58-75 see also Prakash Shah, ‘Asking about reasonable accommodation in England’ (2013) IJDL 13(2-3) 83–112, 89.

the week based on religious grounds, or whether covering of certain parts of the body is also a religious requirement. Consequently a new examination of judgments concerning Muslims, mainly concerning the wearing of the headscarf (hijab), is included.⁷ Judgments concerning proselytisation are also addressed. A theological pattern behind the ECtHR's judgments is identified and an underlying Protestant approach in how religious symbols are treated is shown. A hidden and non-vocalised theological pattern behind the ECtHR's language on Article 9 ECHR is revealed.

Chapter 7

This chapter concludes this thesis by showing that Article 9 ECHR in its present format is biased towards the Protestant theology. It is demonstrated that what is lacking in the literature and jurisprudence is a deeper understanding and critique of the ways in which the ECtHR engages with and understands different religions and traditions, particularly those of non-Abrahamic background. The two kingdoms of Luther, the private realm of the conscience and the public realm of the (sinful) body, are reflected today in the split between the assertion of religious freedom in Article 9(1) ECHR and the limitations expressed in Article 9(2) ECHR and are the benchmark from which the judicial interpretations and decisions by the ECtHR are made. It is asked whether the ECtHR should continue in this way or drop the practice of treating all cultures as having a claim to religious freedom which may limit some from obtaining the protection of Article 9 in the future. A possible alternative for looking at and interpreting Article 9 is offered.

⁷ Such as *Lautsi and Others v. Italy*, Application no. 30814/06, judgment of 18 March 2011, *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014), *Lelya Sahin v Turkey* Application no. 44774/98 Grand Chamber 2005, *Dahlab v. Switzerland*, Application no. 42393/98, [2001] ECHR 899.

Introduction

Religion and Western Culture

Religion, specifically Christianity, has played a fundamental role in the history of the West and the formation of Western culture. It has also played a role in the structuring of Western experiences of the world.⁸ Theories studying human beings and their actions in the West are said to have developed from secularised versions of Christian theology and are consistent with Christian theological presumptions about human relations and interactions with each other and with nature.⁹ S.N. Balagangadhara argues that secularised Christian theology, or their secular variants, include:

“[O]ur theories of human rights as natural rights, our theories about the State and politics, our theories about the growth and development of human psychologies, our theories about human ethics and moralities, our constitutions that erect the wall of separation between religion and politics.”¹⁰

The Western culture does not view “other” cultures as distinct entities, but as variants of its own and presupposes the universality of religion and religious experiences in all cultures.¹¹ When the West encountered “other” cultures, “it

⁸ For a detailed analysis on the role of Christianity in the formation of the Western legal tradition see Harold J. Berman, *Law and Revolution: The Formation Western legal Tradition*, (Harvard University Press 1983). On the structuring of Western experiences of the world see S.N. Balagangadhara, *The Heathen in His Blindness.... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005). The second edition (2005) will be used throughout the dissertation. See also Heinar Steiger, ‘From the International Law of Christianity to the International Law of the World Citizen- Reflections on the Formation of the Epochs of the History of International Law’ (2001) 3 J Hist Int'l L 180-193.

⁹ S.N. Balagangadhara ‘Generating a Scientific Hypothesis about Religion: A preliminary Attempt’ available at https://www.academia.edu/6791902/A_Scientific_Hypothesis_about_Religion

¹⁰ Ibid.

¹¹ Esther Bloch, Marianne Keppens and Rajaram Hegde (Eds), *Rethinking Religion in India: The Colonial Construction of Hinduism* (Routledge 2010) 4.

constructed a pattern and a structure that lent coherence to its cultural experience.”¹² As Roger Cotterrell notes, “[i]n the past when immigration was somewhat more regulated European legal analysis assumed *cultural homogeneity* even while social diversity is recognised with regard to social class, social mobility and levels of wealth. The assumption is that culture in the sense of beliefs and values, custom and traditions, is relatively uniform.”¹³ He also argues that this is not the case anymore and that nowadays different cultures cannot be ignored by the law. However, cultural diversity, although recognised by law, is recognised from within the framework of Christian theology.

Religion and Tradition

Religion is not a concept common to all “traditions” and this produces distortions from those seeking the protection of Article 9 ECHR, and offers no protection to those who might not be considered “religious”. Consequently, when non-Abrahamic traditions encounter the Protestant biased ECHR and ECtHR, problems of distortion, unintelligibility and discrimination arise. These problems develop because Protestant Christianity is still embedded in the background of the legal systems and the interpretation and language which the ECtHR uses when deciding on Article 9 cases, despite secularisation and the use of secularised language. The ECtHR therefore forces non-Abrahamic cultures to distort their traditions in order to fit into the Protestant biased ECtHR’s framework, so as to qualify for protection under Article 9 ECHR.

¹² S.N. Balagangadhara, ‘Orientalism, Post-colonialism and the ‘Construction’ of Religion’ in Esther Bloch, Marianne Keppens and Rajaram Hegde (Eds), *Rethinking Religion in India: the Colonial Construction of Hinduism* (Routledge 2010) 137.

¹³ Roger Cotterrell, ‘Law and Culture: Inside and Beyond the Nation State’, Legal Studies Research Paper No. 4/2009.

As Carl Schmitt states,

“[a]ll significant concepts of the modern theory of the state are secularised theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.”¹⁴

The Protestant theological background to Article 9 effectively distorts and excludes the cultural and traditional practices of non-Abrahamic traditions.¹⁵ Moreover, it is impossible for non-Abrahamic traditions and cultures in general and non-Protestants in particular to understand the idea of a secular State but being secular “becomes a constitutional understanding.”¹⁶ This is done when concepts such as secularism and freedom of religion, which are within the Christian theology, become “encoded into legal instruments, used for building legal theories.”¹⁷

Cases before the ECtHR are considered either with an embedded Christian theological background or in a more disguised way through the concept of “universal” ethics; the “moral ought to” and “ought not to.”¹⁸ These are concepts that have a Christian theological backdrop, and which have been incorporated in Western legal systems and human rights law after going through the process of secularisation as

¹⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab (Trs), University of Chicago Press, 2005) 36-51.

¹⁵ Prakash Shah, ‘Asking about reasonable accommodation in England’ (2013) IJDL 13(2-3) 83–112, 88.

¹⁶ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) 45(1) JLP, 58-75, 62.

¹⁷ *Ibid.*, at 60.

¹⁸ S.N. Balagangadhara, ‘Colonial Experience: Normative Ethics I’ March 2, 2011 available at <http://www.hipkapi.com/2011/03/02/colonial-experience-normative-ethics-101-s-n-balagangadhara/> see also S.N. Balagangadhara, ‘Moral Domain not Defined by Norms’ March 23, 2011 available at <http://www.hipkapi.com/2011/03/03/moral-domain-not-defined-by-norms-s-n-balagangadhara/>

secular and universal concepts or worldviews. However, these concepts make more sense if the theological background is taken into consideration.¹⁹ Christian ethics, which have been incorporated into Western legal systems, and more visibly in human rights law, are claimed to hold universally irrespective of time, place or condition. However one cannot accept this type of ethics without accepting Christian theology as true and Balagangadhara has further noted “the so-called secular ethics today continues an unbroken line with these religious ethics.”²⁰

One of the main hypotheses of this thesis is that the ECtHR uses a secularised theological language when deciding on Article 9 ECHR cases. It is also discussed how judgments of the ECtHR regarding freedom of religion promote in a “secular” guise the idea that non-Protestant practices and beliefs are idolatrous or “false” practices which after the process of secularisation, whereby the Christian ideas move more into the background and become invisible,²¹ have been labelled as “passive symbols”.²² As a result, non-Abrahamic cultures are forced to distort themselves in order to fit into the ECtHR’s framework, with its Protestant theological backdrop and language, in order to qualify for protection under Article 9 ECHR. In other words, it forces people from non-Abrahamic²³ cultures to defend their traditions as being a religion or a variant of religion.

¹⁹ Prakash Shah, ‘Legal Response to Religious Diversity, or to Cultural Diversity?’ in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge, 2015) 119-132.

²⁰ S.N. Balagangadhara, ‘Colonial Consciousness and Victorian Morality’, Hipkapi, March 23, 2011 available on <http://www.hipkapi.com/2011/03/23/colonial-consciousness-and-victorian-morality/> [Last accessed November 2017].

²¹ *Ibid.*

²² In *Lautsi and Others v. Italy*, the ECtHR accepts that the cross is a passive symbol.

²³ The terms “Abrahamic” and “Semitic” religions will be used interchangeably in this thesis.

As Balagangadhara shows in his book *The Heathen in His Blindness...*, it is in the nature of religion to distort traditions in a “secular” way and present them as “false” religions. The belief-centred approach taken by the ECtHR explains how manifestations, such as wearing particular clothes, are seen as “symbols” in the Western legal systems generally and by the ECtHR particularly, as exemplifying beliefs, leaving it open to various interpretations as to what these “symbols” represent. This makes it difficult for people outside the Protestant understanding of religion and religious practice to make sense of Article 9 ECHR without having to distort themselves to fit into the current system. This may lead to a situation where minority traditions will be recognised in the legal systems if and only if the majority, which in the West happens to be Christianity, approves of such recognition.²⁴ Consequently, Christianity and more specifically the Protestant ideology will be the benchmark through which these traditions are interpreted and dictated to be worthy of recognition.

If, on the other hand, one accepts that some cultures do not have religion, it follows that they also do not have a claim to religious freedom under the current framework of Article 9 ECHR. While this might prevent some cultures from obtaining the protection of Article 9 ECHR, it could be defended on the ground that treating them as having religion merely distorts their character, and presents a false picture of reality. Since this scenario of dropping the “universalistic” reference to religion is purely hypothetical in the contemporary legal context, the chapters to follow in this thesis will analyse the consequences for the contemporary framework of European

²⁴ The ECtHR relies on a general folk understanding of religion, which the majority can relate to. An example of this is clearly illustrated in how the ECtHR seeks the approval of the majority through the approval given by the churches e.g. in *Lautsi v Italy*.

human rights law on religious freedom in Article 9. It is argued that Article 9 ECHR in its current format is not going to work in practice to protect “traditions”. Article 9 is examined in the light of the specific cultural framework that gave rise to it and the religious and cultural diversity in contemporary Europe.

Questions Raised

This raises a number of questions: what are the consequences of the universalisation and secularisation of religion for religious freedom as protected under Article 9 ECHR? What happens when a culture is further away from the idea of religion that is presupposed in Article 9 ECHR, which is based on Protestantism? What happens when non-Christian cultures encounter the European human rights system? Is the current framework intelligible to applicants who do not share a Protestant background, or furthermore to applicants of non-Abrahamic traditions? How does Article 9 ECHR cause distortions when assessing cases presented by non-Abrahamic and specifically non-Protestant religions and different groups? How does it reconstruct them through the “agency of the dominant culture to remake them as a variety of “religions” on the model of Christianity?”²⁵ Is the Western universalistic attitude driving minorities living in the West to distort their culture and tradition, out of a reaction to a Western drive to universalise their own civilisation and “secularise” Christian beliefs,²⁶ as well as what contradicts or what is “foreign” to these beliefs?

The focus of this thesis is the link between law, religion and tradition in

²⁵ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75, 61

²⁶ Daniel Philpott, ‘Religious Freedoms and the Undoing of the Westphalia State Michigan’ (2004) Journal of International Law (25) 4,981-998, 987. On Islamic countries challenging the universality of human rights see Articles (24) (25) of the Cairo Declaration of Human Rights in Islam (CDHRI) and The Organisation of the Islamic Conference established on September 25, 1969.

Europe with a close examination of the impact of the Protestant theology and ideology on Article 9 ECHR. It will be examined how the European human rights system generally and Article 9 ECHR specifically are understood and interpreted differently against various cultural backgrounds, and the asymmetrical relations that the European Court of Human Rights generates amongst non-Protestant and non-Abrahamic cultures. It will also be examined how this distortion is taking place and whether it is possible to identify a pattern in the ECtHR's decisions when looking at these distortions. One way of showing the dysfunctions in the present system is to reveal the types of distortions that come with having a culture-specific framework of human rights such as that which protects religious freedom. Distortions can occur in all claims to religious freedom before the ECtHR, but they can be predicted to occur more strongly the further away a culture is from the idea of religion presupposed within Article 9 ECHR, which is based on Protestantism, as this thesis demonstrates. For this, a further hypothesis will be developed which states that the current framework is biased against applicants who do not have a Protestant background; and even more biased against applicants of non-Abrahamic cultures.

The European Court of Human Rights

While other international and domestic law instruments also refer to the protection of freedom of religion, European human rights law provides one of the most interesting contexts to study the right to freedom of religion given the variety of individuals, groups, and populations in a “superdiverse” Europe that make claims

upon its protection as they engage in “public reasoning”²⁷ by accessing the ECtHR.

Protestant Christianity has not only influenced the way Europeans think about law and religion, but has also shaped the development of the law, concepts of human rights, and the European Convention on Human Rights,²⁸ specifically Article 9.²⁹ The idea of the “two kingdoms” of Luther the private realm of the conscience and the public realm of the (sinful) body, is clearly reflected today in the split between the assertion of religious freedom in Article 9(1) of the ECHR and the limitations thereto as expressed in Article 9(2) and presuppose a Protestant theology. The jurisprudence clearly demonstrates that the *forum internum* is absolutely protected and that “the ECtHR has construed freedom of religion in terms of a binary opposition between belief and practice.”³⁰ Recalling the two kingdoms, it is possible to identify similar, if not identical lines of thought. The private realm of the conscience, which the State could not and should not interfere with, is held silently, and the public realm of the (sinful) body or the manifestations may be punished by the magistrate (State). Moreover, this separation in itself ascertains that there actually two parts to religion or belief: one is the thought, the ideas, and the doctrines which constitute the first part to have a “true” religion; the other is the manifestation which is very much linked to the doctrinal or theoretical part. In traditions where doctrinal justification for manifestation is not prevalent, it is difficult to separate between a belief and its manifestation or to determine the existence of

²⁷ John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge University Press 2003) 253.

²⁸ The European Convention of Human Rights, entered into force 3 September 1953. 213 U.N.T.S. 221; E.T.S. 5. The Convention has been amended through 14 protocols.

²⁹ It is important to note that despite the Protestant roots to freedom of religion, equality, tolerance and freedom of the conscience their importance are not questioned at all.

³⁰ Lourdes Peroni, ‘On Religious and Cultural Equality in European Human Rights Convention Law’, (2014) NQHR 32 231, 233.

the belief in the first place. The act could be a mere tradition practiced because it is simply a tradition. Although the ECtHR does not use the language “true” versus “false” religion, this type of thinking is evident when it determines whether a particular manifestation is “truly” religious.

The ECtHR also adopts the Protestant theology when it picks out certain phenomena, questions, and approaches when deciding applications concerning religious freedom that are specific to some cultures and are only intelligible within the Christian and more specifically Protestant religious framework. The intelligibility, for example, that “religion lends to conscientious objection among Jews, Christians, and Muslims is not accessible to members of other cultures, so the law effectively caters to preferences of some groups but not of others.”³¹ One cannot, for example, speak of a universal right of freedom of conscience without assuming that it is in the nature of human beings to have a conscience that plays a role in moral reasoning.

The ECtHR also questions whether a particular manifestation is an intrinsic requirement to one’s “belief” and asks for doctrinal confirmation. The language that the ECtHR uses (such as belief, doctrines or sacred books) and the judicial interpretations are not applicable to non-Abrahamic traditions because non-Abrahamic cultures do not need doctrines that dictate methods of worship nor is justification needed for practicing a tradition.³² When these cultures come in contact with the ECtHR, they need to prove that their traditions are a variant of what the ECtHR considers to qualify as religion. They need to show and prove that they have

³¹ Prakash Shah, ‘The Moral Basis of Anti Caste Legislation’ Public Spirit 25/09/2013 available at <http://www.publicspirit.org.uk/the-moral-basis-of-anti-caste-legislation/> [last accessed in November 2017].

³² S.N. Balagangadhara, *The Heathen in His Blindness...* 10 -22.

items such as books, doctrines, beliefs, or sacred texts that are intrinsic to their beliefs and customs. They must also prove that these practices are a result of a “belief” rather than a mere custom. Consequently, when identifying which cultural or traditional practices require protection under Article 9 ECHR or protection against discrimination on the ground of religion, the ECtHR is involved in “doing theology” but in a secular guise.

Since the wording, as well as the judicial interpretations and applications of Article 9 ECHR, are biased in favour of the Christian Protestant, this is automatically discriminatory against applicants who do not have a Protestant background, and even more biased against those of non-Abrahamic traditions. In Chapters 5 and 6, the judgments are divided into three groups to assess the influence of Protestantism on each denomination: Non-Abrahamic traditions; Abrahamic religions; and “Other” Christians.

Methodology

Despite the breadth of the literature found on freedom for religion in general and Article 9 in particular, there is considerable repetition. Many scholars have tried to set definitions on what religion is and how religion is defined under ECHR law, while others have pointed to the wide margin of appreciation granted by the ECtHR to national courts and authorities, which results in the dominant culture setting its own rules with regards to what is considered as religion. Other academic literature has focussed on the incoherence and inconsistency of the ECtHR pointing to a bias mainly towards people wearing religious symbols.

S.N. Balagangadhara is amongst the very few scholars to provide a novel approach to studying religion and his work inspired this thesis. He has revisited some of the issues taken-for-granted in religious and social science disciplines and has brought forward new insights into the whole question of religion and secularism, and their claimed universality. Furthermore, Balagangadhara in a very unique method, examines the twin dynamic of Christianity of secularisation and proselitisation. He explains in a novel way how the Secular provokes religious conflict and distortion amongst cultures where religion does not exist and how despite secularism the West remains a religious culture. Balagangadhara further elaborates on how religion requires practices to be defended and justified by reference to doctrines.

Using this concept of religion as a foundation of the research, how the ECtHR approaches the concepts of religious freedom and religious symbols, and how it views traditional and customary practices were analysed. Whether the ECtHR has developed its case law since it started considering Article 9 cases and whether non-Abrahamic applicants do have a claim to religious freedom under the current framework of Article 9 were also considered. The main challenge was to determine which case law to look at in more detail. A selection of cases concerning religious freedom, as well as commentaries on the cases, the writing and wording of Article 9, and scholarship concerning freedom of religion more generally is utilised. Close attention is paid to relevant theological literature as well as the literature that led to the formation of the hypothesis discussed and defended in this thesis.

Structure of this thesis

This thesis is divided into three parts. In the first part (Chapter 1) scholarly work on freedom of religion is examined to illustrate that Article 9 has not been analysed the way this thesis intends to do, and also to show possible relationships between previous studies and this thesis. Particular attention is given to literature and case commentaries where a Protestant effect on European legal systems is discussed. Although many scholars find the ECtHR to be biased against applicants wearing the headscarf for example, none have gone beyond this idea and questioned whether Article 9 in itself is linked to the Protestant faith or could even be seen as a continuation of the Protestant Theology. Given the claim in this thesis that the Protestant roots of human rights weighs heavily on their interpretation, counter arguments of scholars³³ who have called for a harmonistic perspective between human rights and other traditions will be examined. Moreover, considerations to scholars who have argued for a more nuanced approach to culture and legal interpretation will be put forward.³⁴ Furthermore, the bias towards the Protestant faith will be examined in light of relevant scholarship on neutrality.

In the second part (Chapters 2, 3, and 4), the theoretical framework is discussed and a guide to the history and emergence of religious freedom in Europe is provided. Based on Balagangadhara's theory and concept of what religion is, a possible hidden and non-vocalised theological pattern behind the ECtHR's language concerning Article 9 ECHR is tested. Furthermore, the role-played by religion, precisely by the Protestant Reformation, in the development of human rights law in general and Article 9 ECHR in particular is examined. It is demonstrated that the

³³ Scholars such as Abdullah Saeed and Abdullahi An-Naim.

³⁴ Scholars such as Roger Cotterrell

Protestant Reformation was a revolution that not only affected Western legal systems, but one that determined the shape of Article 9 ECHR. A historical and chronological approach is taken to demonstrate the development of religious freedom in Europe starting with the Protestant reformation and concluding with Article 9 ECHR.

It is important to go back to the sixteenth century of the Protestant Reformation and then proceed to the Enlightenment period when studying religious freedom in “modern”³⁵ Europe. This shows that the Protestant revolution is not merely an episode of the past, but a living memory with an on-going historical continuity that influences the present and future and continues to have a crucial impact on the Western legal tradition and culture.³⁶ Events prior to the sixteenth century do not have a significant effect on the hypotheses in this thesis which concerns the link between the Protestant theology, the secular State, and Article 9 ECHR. However, it is important to note that Luther’s division between the political and the religious realm was an institutional break that directly led to the separation between the State and Church,³⁷ while Calvin’s doctrines created the space for freedom of conscience.³⁸ Both Luther and Calvin adopted the theology of the two separate kingdoms, which is a crucial concept in this thesis.

Key pieces of national legislation as well as international conventions are analysed to demonstrate the origins of human rights and how the idea of religious

³⁵ The word “modern” is used to refer to post-1945 Europe.

³⁶ Harold J. Berman, *Law and Revolution II: The Impact of The Protestant Reformation on the Western Legal Tradition* (first published 2003, Harvard university Press 2006) xii.

³⁷ Randy Beck, “The City of God and the Cities of men: A Response To Jason Carter,” *Georgia Law Review* 41 (2006) 124.

³⁸ Kristine Kalanges, *Religious Liberty in Western and Islamic Law: Toward a World Legal Tradition* (Oxford University Press, 2012) 38.

freedom emerged, travelled from the sixteenth century and made its way in the international and European legal systems. The wording of various legal instruments entailing the ideas of religious freedom such as the Universal Declaration of Human Rights, the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and other instruments are examined. This historical and chronological approach demonstrates the continuation and presence of the Protestant theology in international law.

In the third part (Chapters 5 and 6) the hypothesis set out in Chapter 2 and 3 is tested in the light of the case law of Article 9 ECHR. A broad overview of judgments is assessed in addition to some inadmissibility decisions. The bias towards the Protestant theology is illustrated and the judgments that are analysed in depth are related to ideologies of the Protestant faith such as proselytism, religious symbols, and idolatry. It is shown that the ECtHR attempts to distort non-Abrahamic traditions to fit into the Protestant-biased Article 9 by using secularised religious language and by favouring orthodoxy over orthopraxy. The consequences for non-Abrahamic applicants before the ECtHR are illustrated. Close attention is paid to the interpretation and application of Article 9 rather than whether the applicant application was successful or not.

Chapter 1

Literature Review

1.1 Overview

In this chapter the scholarly work concerning freedom of religion is examined to illustrate that Article 9 has not been analysed the way this thesis intends to do and to show possible relationships between previous studies and this thesis. Particular attention is given to literature and case commentaries where a Protestant effect on European legal systems is discussed. Although many scholars find the ECtHR to be biased against applicants wearing religious symbols and the headscarf in particular, none have gone beyond this initial observation to question whether Article 9 itself is linked to the Protestant faith or could even be seen as a continuation of the Protestant theology.

Given the claim in this thesis that the Protestant roots of human rights weigh heavily upon interpretation, counter arguments of scholars such as Abdullah Saeed, who has called for a harmonistic perspective between human rights and other traditions, are also examined. It will be shown that the idea of “harmonisation” does not deviate from the concepts of belief, texts and doctrines present in the Protestant theology and that harmonisation is in conformity with the Protestant values and the claim of the universality of human rights. Authors such as Roger Cotterrell, who have argued for a more nuanced approach to culture and legal interpretation, are also considered. Furthermore, bias towards the Protestant faith is examined in the light of relevant scholarship on neutrality.

1.2 Christianity, the Protestant Theology and the Law

Modern human rights law has helped to ignite a great awakening of religion and religious demands internationally. As a result, the scope for the protection of religion has substantially expanded.³⁹ Consequently, the right to religious freedom has received significant attention in the legal context in Europe in recent years and caused some controversy, especially with regards to the place of religion in the public sphere. This includes religious dress codes, religious symbols, special religious dietary needs in prisons as well as religious accommodation in the workforce. As Lorenzo Zucca notes that “[i]t does not come as a surprise that religion is not welcome but keeps knocking at the door with increasingly more difficult demands.”⁴⁰

Europe’s relationship with religion however remains complicated despite decades of international treaties and conventions guaranteeing religious freedom to people of different faiths and beliefs. Being a culturally and religiously diverse continent, Europe is increasingly being challenged by concepts and ideas of religious freedom in general and the role of religion in society in particular. This has prompted many scholars to study religion, religious freedom and the role of religion in society.

Some have written about Christianity and law. Heinhart Steiger, for example, explains that the era of international law, from the thirteenth to the eighteenth century was an era of the “international law of Christianity”, where the law was entrenched in religious principles. Steiger notes that “Christianity formed the major intellectual foundation of legal order for the entire epoch”, which, “brought Europe

³⁹ John Witte Jr., ‘Introduction’ in John Witte Jr. and Frank S. Alexander (eds), *Christianity and Human Rights* (Cambridge University Press 2010) 8.

⁴⁰ Lorenzo Zucca, “The Crisis of the Secular State: A Reply to Professor Sajó” (2009) *I.CON* (7) 3 494.

together, under the political idea of *res publica Christiana*.”⁴¹ Sameul Moyn states that “Europe and therefore the modern world drew nearly everything from Christianity in the long term.”⁴² He explains that “mainstream secular observers are generally unaware of the Christian incarnation of human rights, which interferes with their preferred understandings of today’s highest principles”.⁴³ In his view, Christians were the ones “who did much and perhaps most to welcome and define the idea human rights in the 1940s, and some of its core notions such as the importance of human dignity.”⁴⁴

Other scholars have recognised the significant impact of Christianity on the law which is reflected in European public life and translated, for example, into public holidays and working week schedules which rely on the Christian calendar.⁴⁵ Consequently much has been written concerning the manifestation of religious practices in public. However, the scholarly work concerning Article 9 has been mostly limited to the definition of religion focussing closely on the inconsistency, incoherence, and allegedly biased decisions of the ECtHR, especially judgments concerning religious clothing and symbols with a particular focus on the veils or headscarves and its use of a wide margin of appreciation.

In recent critical writing it has also been argued that the framework for studying religion within the contemporary human sciences derives from a Christian background, even as it extends to the realm of comparative religion. The main claim

⁴¹ Heinhard Steiger, ‘From the International Law of Christianity to the International Law of the World Citizen’ (2001) *Journal of the History of International Law* (3) 180, 184.

⁴² Samuel Moyn, *Christian Human Rights*, (University of Pennsylvania Press, 2015) 6.

⁴³ *Ibid.*, at 4.

⁴⁴ *Ibid.*, at 7.

⁴⁵ *Ibid.*, at 5.

is that religion bears the hallmarks of a theological account. For example, Timothy Fitzgerald has argued that the word “religion” should not be used at all within social science because of the history of its association with Christian theology.⁴⁶ Balagangadhara claims that religion should be treated as a phenomenon in the world, and that reference to the description “religion” should be restricted to the Abrahamic religions: Judaism, Christianity and Islam.⁴⁷ In his view, the assertion that all cultures in the world have religion, an idea which has also been adopted and elaborated within the human sciences,⁴⁸ is itself a claim of Protestant theology, albeit since secularised. However, despite the considerable amount of literature on freedom of religion, there is still a lack of scholarly literature linking the idea of Protestantism to the wording and interpretation of Article 9 of the ECHR.

1.2.1 Protestantism and the Western World

There is no doubt that the Protestant reformation changed the way the West thinks about law, religion and culture. John Witte Jr. observes that the Protestant Reformation was a human rights movement.⁴⁹ Jacob De Roover argues that Protestant doctrine remains the implicit background of the modern human rights ideas and concepts in the West with regards to freedom of religion, thought and conscience. This effect was evident on many levels; the re-organisation of the dogma, reduction of the sacraments and the restoration of spiritual symbolism as opposed to

⁴⁶ Timothy Fitzgerald, *The Ideology of Religious Studies*, (Oxford University Press 2000) 4.

⁴⁷ S.N. Balagangadhara, *The heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005). The citation used in this dissertation is taken from the 2005 edition.

⁴⁸ Tomoko Masuzawa, *The Invention of World Religions or, how European Universalism was Preserved in the Language of Pluralism*, (University of Chicago Press 2005) 16-18.

⁴⁹ John Witte Jr., ‘Law, Religion, and Human Rights: A Historical Protestant Perspective’ (1998) *The Journal of Religious Ethics* 26(2), 257-262.

pilgrimages and the cult of religious objects. The reformation guided spiritual rules such as dress and diet and rejected any kind of worship of non-biblical saints. “The timeless language and phrases of Luther's German Bible and German Mass capture the imagination of a modern German as much as the magisterial language of the King James Bible and the *Book of Common Prayer* captures the imagination of a modern English-speaker.”⁵⁰

All these changes had a great influence on the law in general and human rights in particular. The unmistakable marks of the Lutheran Reformation are still present in modern Western law and politics. Today every Western legal system protects the freedom of conscience, and Luther’s original understandings of equality, liberty, human dignity, and religious freedom are at the cornerstones of the constitutional orders.

In addition to the influence of the Reformation on vital aspects in society such as marriage, education and care for the needy,⁵¹ the Reformation had significant impact on the concept of rights and human rights the “concurrent rise of the modern philanthropic citizen is, in no small measure, a modern institutional expression of Luther's ideal of the priesthood of all believers, each called to give loving service to neighbours. Sixteenth-century Lutherans and twenty-first-century Westerners seem to share the assumption that the State has a role to play not only in fighting wars, punishing crime and keeping peace but also in providing education and welfare, fostering charity and morality, and facilitating worship and piety. They also seem to

⁵⁰ John Witte Jr. ‘From gospel to law: the Lutheran Reformation and its Impact on Legal Culture’ (2017) ECC LJ 19(3) 271, 287

⁵¹ For an analysis on the effect of the Protestant Reformation on the marriage, education and welfare system, see John Witte Jr. ‘From gospel to law: the Lutheran Reformation and its Impact on Legal Culture’ (2017) ECC LJ 19(3)271.

share the assumption that law has not only a basic use of coercing citizens to accept a morality of duty but also a higher use of inducing citizens to pursue a morality of aspiration.”⁵²

1.2.2 Protestantism and Other Religions

Despite the impact of the Protestant thought on the Western human rights, some scholars such as Abdullah Saeed argue that there could be a harmonistic approach between human rights and other traditions and religions; in particular, the view that Islam can be reconciled with human rights.⁵³ It is therefore important here to note that the fact that all Abrahamic religions believe in human rights and universality is undeniable. However each religion interprets this in its own dictated and interpreted way. In just the same way as the Protestants believe that God has given man a conscience and choice to follow his word without coercion. The Islamic thought also recognises that “God grants rights to human beings, it is human authorities who realise and enforce them in communities.” Abdullah Saeed argues that “Islamic understanding of human rights is not in conflict with internationally accepted standards and norms. An understanding of these views, principles and strategies is extremely important for engaging successfully in the discourse on Islam and human rights.”⁵⁴ He further notes that Muslims as well as other traditions should have the opportunity to “reframe universal rights in such a way that reflects the contexts and

⁵² John Witte Jr. ‘From gospel to law: the Lutheran Reformation and its Impact on Legal Culture’ (2017) ECC LJ 19(3) 271, 287

⁵³ It is important to note that the interpretation of Sharia law and its link to human rights and the analysis of how Sharia law and human rights can be harmonised is beyond the scope of this thesis.

⁵⁴ Abdullah Saeed, *Human Rights and Islam; An Introduction to Key Debates between Islamic law and International Human Rights Law*, (Edward Elgar Publishing 2018) 23

values that are most relevant to them”.⁵⁵ However, as Zachary Calo correctly notes, “[t]he idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred.”⁵⁶

The “believers” of the three Abrahamic religions are bounded in almost similar theological concepts, they “are united as a community in God, where they relate to each other as equals: the chosen people of God for the Jews, the *communitas* or *ecclesia* for the Christians, and the *Umma* for the Muslims. Each is a Jew or a Christian or a Muslim only in God. As such, in each of these communities, there is formal equality of all.”⁵⁷ Consequently “secularized concepts within Christian theology such as the freedom of religion, secularism, and *laicite* are encoded into legal instruments, used for building legal theories, or taken up by academics, law reformers, and others to argue for legal change.”⁵⁸ In just the same way in which the process of secularisation modernised concepts of rights within the Protestant thought the same happens to other Abrahamic religions where the debates become as to *how* one could harmonise between human rights and these religions. The root concept remains religion and the justification relies heavily on the religious texts, while giving it a “modern” twist.

It is crucial to note that although the roots of human rights are rooted in the Protestant theology, and despite the fact that people from the Protestant faith could

⁵⁵ *Ibid.*

⁵⁶ Zachary R. Calo, ‘Religion, Human Rights, and Post-Secular Legal Theory,’ (2011) *ST. JOHN’S L. REV.* 85 495, 495

⁵⁷ Jakob De Roover, Between Ignorance and Deception Satish Deshpande’s idea of Reservations, *Dailyo.in* 8 September 2015 available at <https://www.dailyo.in/politics/satish-deshpande-patidar-reservation-system-india-dalits-obcs-hardik-patel/story/1/6119.html>

⁵⁸ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) 45(1) *JLP*, 58-75, 59.

have a more intelligible stance of the concepts found in the ECHR, there is no epistemological discontinuity between Protestantism and Islam and no disparities on idea of intelligibility. The conditions that feed one faith feeds the other, i.e. God, beliefs, doctrines, texts etc, hence “This *intelligibility condition* is crucial for the acceptance of topoi and the theories constituted by them.”⁵⁹

Muslim applicants therefore do not have to distort themselves to fit in the Protestant ambit of Article 9, though they could be discriminated against when it comes to the manifestation of certain religious symbols.⁶⁰ Beliefs for example enable individuals to generate questions on the purpose and meaning of life where these questions becomes inherent within the framework of religion, while assuming that man is an intentional being where his actions are explanatory intelligible, i.e. have a cause and a meaning, which means that his actions should be justified and meaningful, these are inherent in all Abrahamic religions.

Furthermore, one cannot speak of a universal freedom of conscience if one does not accept that it is in the nature of human beings to have a conscience or religion in the first place, that plays a role in moral reasoning. Abrahamic religions share similar religious characteristics and concepts. The concept of say, truth and falsity, good and evil, doctrines, belief etc. are present in all three Abrahamic religions and can hence be harmonised, to a certain extent, so as to fit into the Protestant model of human rights. However, this harmonisation does not make the fact that the ECHR in general and the reliance of the ECtHR on texts, beliefs, doctrinal

⁵⁹ Jakob De Roover, Sarah Claerhout and S.N. Balagangadhara, ‘Liberal Political Theory and the Cultural Migration of Ideas: The Case of Secularism in India’, (2011) *Political Theory* 39(5) 571–599.

⁶⁰ For further analysis on what is religion please refer to chapter 2 and for an analysis on Muslim applicants and Article 9 please refer to chapter 6.

justifications, less problematic. Nor does it explain whether the concept of secularism is indeed intelligible to Muslims who believe in the unity between the State and religious matters. Talal Asad for example notes that the separation between the State or politics and religion is analogous to the distinction between the spiritual and temporal, a fundamental principle of the Protestant thought, which in turn is unintelligible in Islamic law.⁶¹ On the other hand it might be argued that scholars such as Abdullahi An-Naim note the relevance and importance of Western human rights and the secular State for non-Christians. An-Naim is convinced that a relationship between Muslims and God does not require interference or delegation by another person. He notes “The fact that knowing and upholding Shari’a is the permanent and inescapable responsibility of every Muslim means that no human being or institution should control this process.”⁶² However in just as much as the concept of secularism depends on theological assumptions, so does An-Naim’s advocacy for a secular state relies on his deeply Islamic theological claims for non-interference by States in matters of religion.

Consequently, this harmonisation will inevitably be moulded through the Christian parameters within the boundaries of theological explanations as to what freedom of religion entails and there seems to be no accommodation of traditions that fall outside a doctrinal or theological scope.

⁶¹ Talal Asad, *Formation of the Secular: Christianity, Islam, Modernity*, (Stanford University Press, 2003) 209.

⁶² Abdullahi Ahmed An-Na’im, *Islam and the secular state: Negotiating the future of Shari`a*, Harvard University Press, Cambridge 2008) 14.

An-Naim's and Saeed's ideas and concepts about God, beliefs, religion, equality, morality and most importantly the concept of rights and universality,⁶³ do not much differ from that of the Protestant line of thought (or the Abrahamic religions in general), which according to Balaganaghara are what religions are.⁶⁴ Therefore attempts to harmonise various traditions with the existent framework from within the boundaries of Protestantism is possible. However, any attempt to harmonise *some* aspects of, for example, Islam, as he argues, could definitely fit it in the religious framework of human rights and Article 9. By accepting to harmonise segments of the Islamic law, Saeed pushes Islamic doctrines into conformity with the dominant Christian culture. Furthermore, the "omitted" parts could potentially be seen as a confirmation that these parts are considered as violations of human rights or false practices in just the same way as Protestants labelled certain practices as idolatry and false practices.

Consequently, despite secularisation or attempted harmonisation, theological beliefs are still embedded in the ECHR and the ECtHR. Secular concepts are thought to be universal in all cultures and therefore these legal systems are assumed to be inclusive systems taking into account diverse cultures and traditions.⁶⁵ Questions about God become questions about the meaning of life; being a good Christian becomes having good morals and ethics; God becomes the lawgiver and the voice of God becomes the conscience and idolatry becomes violators of human rights. When terms change only linguistically it is thus presumed that harmonisation is possible.

⁶³ For a further analysis see section 2.5 and 3.5.

⁶⁴ For further explanation please refer to section 3.2.2 Religion(s) as Variant Models of Christianity.

⁶⁵ Ibid.

1.3 The Protestant Framework, Symbols, Culture and Article 9

In addition to the overarching questions, scholars have also considered the interpretation and application of Article 9 by the judges of the ECtHR and suggested a Protestant bias in the approach which has been taken. The problems highlighted are most usually illustrated by the judgments concerning religious dress and religious symbols. Whilst the wearing of religious symbols may be considered as part of an individual's expression of cultural and religious identity, it may also be seen by other members of Western society as indicator, especially with Islam, of religious extremism associated with religious fundamentalism and proselytism.⁶⁶ Islamic dress in particular may be portrayed as evidence of the failed integration of Muslims in European societies, as many in the West find it difficult to understand how rational women would freely choose to veil.⁶⁷

Armin Steinbach states that in ECtHR jurisprudence, the focus of the judgments has not been on issues relating to the "internal freedom of religion (the right to believe or not believe), but rather, the freedom of religious expression."⁶⁸ Tom Lewis argues that the ECtHR's "protection of the right to manifest religious belief through clothing, has been noticeably weak."⁶⁹ He suggests that the ECtHR is unable to identify "why religious freedom is valued in the first place."⁷⁰ This undoubtedly can be traced back to the Protestant idea of the freedom of the

⁶⁶ Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2010) 17-18.

⁶⁷ *Ibid.*, at 17.

⁶⁸ Armin Steinbach, 'Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights', (2015) C.J.I.C.L. 4(1), 29-52, 30-31.

⁶⁹ Tom Lewis 'What not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) I.C.L.Q. 56(2) 395-414, 395.

⁷⁰ *Ibid.*

Christian from the monastic rules and freedom of the conscience from the temporal world, which then passed through the process of secularisation to come to its modern form as religious freedom.

This discrepancy in analysing the meaning of symbols by the ECtHR provides evidence that “courts and legislators tend to secularise the meaning of religious symbols and interpret them according to the sensitivities, prejudices, and claims of the majority”,⁷¹ which happens to be Christianity in Europe. It should be noted here that although the ECtHR does interpret at times religious symbols incoherently, the hypothesis in this thesis is that it regards symbols as “deaf and dumb” in other words a secularised version of idolatry that can easily be removed. (See Chapter 7)

Some scholars also regard the burqa ban as a coercive measure that undermines Muslim women’s dignity as autonomous individuals by stating that veiled women are unable to make individual choices or think for themselves,⁷² and that it therefore criminalises an aspect of their identity and personality.⁷³ In the public sphere, for example, they cannot be seen as “good role models” for schoolchildren because the burqa portrays the unequal treatment of women.⁷⁴

⁷¹ Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’, (2011) *Ecclesiastical Law Journal* 13 287-297 p.294 and Susanna Mancini, *The Power of Symbols and Symbols of Power: Secularism and Religion as Guarantors of Cultural Convergence*, (2008) *Cardozo Law Review* 30 at 629-631. The quotation is from Carolyn Evans and Timnah Rachel Baker, ‘Religion and Human Rights: Principles and Practice’, in Frank Cranmer, Mark Hill QC, Celia Kenny and Russell Sandberg (eds), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe*. (Cambridge University Press, 2016) at p. 196

⁷² Jill Marshall, ‘The Legal Recognition of Personality: Full Face Veils and Permissible Choices’ (2014) *IJLC* 64, 66-71.

⁷³ *Ibid.*, at 74-75.

⁷⁴ Erica Howard, ‘Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-Discrimination’ (2011) *Religion and Human Rights* 6(2) 127, 135.

Eva Brems has noted that while in *Eweida v United Kingdom* the ECtHR required real evidence to suggest any “encroachment on the interests of others”, this approach was not adopted in other judgments⁷⁵ including *S.A.S. v France*. Myriam Hunter-Henin argues that, “[d]enying adults choices in the name of dignity is problematic when autonomy is more and more regarded as an essential component of dignity.”⁷⁶

Gabriel Moens observes that limiting freedom of religion to religious supporters who act on their belief, does not work in a heterogeneous society with various religions but works in a society with a unified, dominant and homogenous religion.⁷⁷ In his view, such societies tend to have a harmonious agreement as to what religiously motivated acts are socially adequate which in turn become legally permissible. This approach will in most cases result in rejecting claims from the minorities whose practices and beliefs are poorly accommodated and designed.⁷⁸ Others have also argued that this approach could lead to a risky situation where minorities will be respected, if and only if, the majority approves of such respect.⁷⁹

⁷⁵ Eva Brems, ‘Ebrahimian v France: Headscarf Ban Upheld for Entire Public Sector’ Strasbourg Observers 27 November 2015 available at <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/> [last accessed in January 2015]. In *Leyla Sahin v Turkey* for example the ECtHR held that “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.” *Sahin v Turkey*, 106

⁷⁶ Myriam Hunter- Henin, *Law, Religious and Freedoms and Education in Europe* (Ashgate: Aldershot, 2011) 627.

⁷⁷ Gabriel Moens, ‘The Action-Belief Dichotomy and Freedom of Religion’ (1989) Sydney LR 12 185, 210.

⁷⁸ Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* 2nd ed. (Oxford University Press 2013) 165. See also Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001).

⁷⁹ Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’ (2011) *Ecclesiastical Law Journal* 13(03) 287 - 297.

Roger Cotterrell has argued for a more nuanced approach to the study of culture and legal interpretation. Cotterrell writes on the “jurisprudence of difference”⁸⁰ and argues that

“[C]ulture should not be seen as a unity. It consists of diverse components – relating to ultimate values and beliefs, traditions, emotional allegiances and instrumental social relations – and law relates to these components in different ways. Culture is a bounded unity only in the dangerous, pathological case of absolute cultural divisions – which state law should oppose. The concept of legal culture is equally problematic when it suggests bounded cultural unities. But when culture is conceptualised in terms of fluid networks of community it becomes possible to analyse not only issues of multiculturalism, but also the ways in which transnational regulation serves social networks that extend beyond the boundaries of nation states.”⁸¹

This approach is certainly important but it is somewhat optimistic for cultural diversity, although recognised by law, is recognised from within the framework of Christian theology. Protestantism has shaped the learning process of the Western culture which Balagangadhara also calls the *configuration of learning*. It is therefore vital here to explain the concept of the meta-learning which shows how the West seeks knowledge “about” a certain phenomenon, thereby shaping the culture’s way of *going about* in the world.

⁸⁰ Roger Cotterrell, *The Politics of Jurisprudence* (London, 2003) 209-236

⁸¹ Roger Cotterrell, *Law and Culture – Inside and Beyond the Nation State*, (January 19, 2009). Published in *Retfærd: Nordisk Juridisk Tidsskrift*, Vol. 31, No. 123, pp. 23-36, 2008; Queen Mary School of Law Legal Studies Research Paper No. 4/2009.

1.3.1 S.N. Balagangadhara and the Concept of Culture

Balaganagdhara is amongst the few scholars who have raised questions as to what makes something a cultural rather than an individual difference.⁸² He argues that it is individuals who differ in many ways and individuals who meet each other rather than cultures. He questions the extent to which one could acknowledge cultural differences as opposed to say individual or social differences. Consequently he introduces the term “culturality”, in addition to the present concepts as “sociality” and “personality”. To explain this concept one needs an example. Usually socialisation is the process in which people are taught to become established members of a society whereby the process primarily focuses on patterns of conduct, norms, rules, values etc.).⁸³ Balagangadhara argues that during this process of teaching an important meta-message is carried, informing the person how he/she should learn. The emphasis therefore shifts from the content of what is taught to how it is taught, and this meta-learning of the western culture becomes the central parameter for distinguishing cultural differences. Consequently differences between cultures are a result of differences in the configuration of learning; irrespective what one learns; one learns it in a particular way in which his or her culture has taught them. *One learns how to learn.* In the Western culture religion has generated this particular configuration of learning and meta-learning where it has become dominant and where theoretical frameworks have subordinated other learning

⁸² S.N. Balagangadhara, *Reconceptualizing India Studies*. New Delhi: Oxford University Press (2012)

⁸³ Harry van den Bouwhuisen, “Conversation of mankind or Comparative Science of Cultures? Reading Balagangadhara, *Reconceptualising India Studies Paper*” presented May 28, 2013 for the India Platform, Ghent

processes.⁸⁴ As a result the person's culturality "consists of the specific way one has learned to use the resources of the society to which one belongs. How an individual builds its culturality is a research question for the future Science of Cultures."⁸⁵

Balagangadhara observes that the European culture has a theologically grounded approach to asking questions about the nature of the universe, religion, and man and configures a theory of learning and meta-learning which shows how the West seeks knowledge "about" a certain phenomenon. This kind of learning generates a theoretical knowledge "about" the world which results in the process of "going about" the world. Consequently this culture became a culture that privileges knowledge contained in beliefs, theories, and doctrines over knowledge acquired through, traditions, practice, customs and rituals. These cultures, and equally the Western legal systems, demand that the secular realm remains free of customary, non-textual, "idolatrous" traditions. Accordingly they reconstruct traditions and customs so as to make them conform to the model of Christianity.⁸⁶ Furthermore, when the West encountered various cultures during colonialism they thought that they had a clear understanding of that culture and by merely describing what they experienced and saw, they thought they were giving a factual description and understanding of that culture— however in reality they were structuring their own experiences of those cultures.

⁸⁴ S.N. Balagangadhara, *The Heathen in His Blindness....* 398-400.

⁸⁵ Harry van den Bouwhuisen, "Conversation of mankind or Comparative Science of Cultures? Reading Balagangadhara, Reconceptualising India Studies Paper" presented May 28, 2013 for the India Platform, Ghent.

⁸⁶ S.N. Balagangadhara, *The Heathen in His Blindness...* 396-403.

Balagangadhara explains that “[t]he language the West uses to speak about other cultures is that of a secularised Christian theology. Within this linguistic practice, the practices one encounters in other cultures threaten to become radically unintelligible if they are not described as religions.”⁸⁷ Religion answers questions about the meaning of the world thus posing meaning problems as well (i.e. what is the meaning of man, the relationship between the man and the cosmos), thus people accept questions brought forth by religion even if they are not familiar with the doctrines. To put this argument in context of the legal texts, and given the theological background to the type of questions and relationships made upon them, the Christian Protestant cultural and religious background to Article 9 will inherently colour the legal texts and their interpretation in the Western culture.

1.4 Neutrality, Secularism and the ECtHR

Given its theological background, Article 9 is biased towards applicants of the Protestant faith and discriminatory against non-Protestant applicants in general and non-Abrahamic traditions in particular. It is argued that when non-Abrahamic traditions encounter the Protestant biased ECHR and ECtHR, problems of distortion, unintelligibility and discrimination arise. These problems develop because Protestant Christianity is still embedded in the background of the legal systems and the interpretation and language which the ECtHR uses when deciding on Article 9 cases, despite secularisation and the use of secularised language. The ECtHR therefore

⁸⁷ S.N. Balagangadhara, ‘Chapter-wise Questions and Answers to understand “The Heathen in His Blindness: Asia, the West and the Dynamic of Religion”’, Hipkapi, March 7, 2011. Available at <http://www.hipkapi.com/2011/03/07/chapter-wise-questions-and-answers-to-understand-the-heathen-in-his-blindness-asia-the-west-and-the-dynamic-of-religion/> See also sections 4.4. of this thesis, and also S.N. Balagangadhara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005), 233-238.

forces non-Abrahamic cultures to distort their traditions in order to fit into the Protestant biased ECtHR's framework, so as to qualify for protection under Article 9 ECHR. It picks out certain phenomena, questions, and approaches when deciding applications concerning religious freedom that are specific to some cultures and are only intelligible within the Christian and more specifically Protestant religious framework. The intelligibility, for example, that "religion lends to conscientious objection among Jews, Christians, and Muslims is not accessible to members of other cultures, so the law effectively caters to preferences of some groups but not of others."⁸⁸ Having said this one would question how can the concept of neutrality tackle this issue (if any).

In the political theory debates it is commonly agreed that it is a central principle of liberalism that the state should be neutral towards different conceptions of the good life.⁸⁹ The principle of neutrality involves, at the minimum, that States should allow their citizens to pursue and define their lives and goals as they see appropriate while the State confines itself to provide a "neutral framework within which different and potentially conflicting conceptions of the good can be

⁸⁸ Prakash Shah, 'The Moral Basis of Anti Caste Legislation' Public Spirit 25/09/2013 available at <http://www.publicspirit.org.uk/the-moral-basis-of-anti-caste-legislation/> [last accessed in November 2017].

⁸⁹ See for example, John Rawls, *Political Liberalism* (Columbia University Press 1993); Ronald Dworkin, 'Liberalism' in Stuart Hampshire (ed), *Public and Private Morality* (Cambridge University Press 1978); Charles Larmore, 'Political Liberalism' (1990) 18(3) *Political Theory* 339; Will Kymlicka, 'Liberal Individualism and Liberal Neutrality' (1989) 99 *Ethics* 883 and Peter Jones, 'The Ideal of the Neutral State' in Robert E. Goodin and Andrew Reeve (eds), *Liberal Neutrality* (Routledge 1989).

pursued.”⁹⁰ Hence States should refrain from promoting or imposing one controversial view of the good life.⁹¹

In order to prevent interference in the internal affairs of the religious, States may invoke “neutrality.”⁹² However Peter Petkoff and Malcolm Evans argue that this in itself prompts such interferences.⁹³ The ECtHR observes that the “State’s duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group.”⁹⁴ The ECtHR has stressed at various times that the Convention was meant to maintain and promote the values and ideals of a democratic society, and that political democracy is not just a fundamental feature of the European public order.⁹⁵ Consequently the notion of neutrality in religious matters is now strongly recognised in the case law of the ECtHR. However this does not mean that the concept of neutrality is unproblematic. As Julie Ringleheim notes, “as references to neutrality have multiplied, the meaning afforded to this notion has become blurred. It has come to mean different things in different rulings. And there are clear tensions

⁹⁰ Will Kymlicka, ‘Liberal Individualism and Liberal Neutrality’ (1989) 99 *Ethics* 883; see also Peter Jones, ‘The Ideal of the Neutral State’ in Robert E. Goodin and Andrew Reeve (eds), *Liberal Neutrality* (Routledge 1989) 9

⁹¹ Peter Jones, ‘The Ideal of the Neutral State’ in Robert E. Goodin and Andrew Reeve (eds), *Liberal Neutrality* (Routledge 1989) 20.

⁹² For an in-depth analysis of the connection between the protestant theology and the emergence of the secular and neutrality refer to section 4.12 and 4.13 for. See also sections 7.5 and 7.6 for a deeper analysis on whether the ECtHR could be neutral.

⁹³ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’, (2008) *Religion, State & Society* 36(3) 205-223, at 205. See also Javier Martínez-Torrón, ‘Freedom of Religion in the European Convention on Human Rights Under the Influence of Different European Traditions Universal Rights in a World of Diversity – The Case of Religious Freedom’, 329, 334.

⁹⁴ *Metropolitan Church of Bessarabia*, paras 118 and 123, and *Hasan and Chaush v Bulgaria*, para. 62.

⁹⁵ See *Refah Partisi (Welfare Party) and Others v Turkey; United Communist Party of Turkey and Others v Turkey, Moscow Branch of the Salvation Army v Russia*.

between some of these interpretations.”⁹⁶ Consequently, further specification may be needed when it comes to the implementation of neutrality in certain situations. Given this general requirement of neutrality, two requirements are clearly identified by the ECtHR; the duty of non-interference and that of impartiality and non-discrimination.⁹⁷

First, with regard to disputes that are exclusively religious, neutrality entails a duty of non-interference. Second, where the state has to take a decision affecting a religious community, in particular when determining its legal status, it must act impartially and without discrimination.

In legal doctrine, and in addition to religion, neutrality is usually only applied to beliefs that are very analogous to religion, such as humanism. However, scholars such as, Ronald Dworkin, John Rawls, Robert Nozick and Will Kymlicka apply neutrality to “conceptions of the good life” or to so-called “comprehensive doctrines” and not merely to religion.⁹⁸ Wouter De Been on the other hand puts forward a re-explanation of the concept of “inclusive” state neutrality, he argues that the request to totally remove religious symbols from the public sphere is indeed a form of secular iconoclasm.⁹⁹

⁹⁶ Julie Ringelheim ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’, OJLR (2017) 6(1), 24–47

⁹⁷ Ibid

⁹⁸ Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985); John Rawls, *A Theory of Justice* (Harvard University Press 1971) John Rawls, *Political Liberalism* (Columbia University Press 1993); Robert Nozick, *Anarchy State and Utopia* (Blackwell Publishing 1974) and Will Kymlicka, *Liberalism Community and Culture* (Oxford University Press 1989).

⁹⁹ Wouter De Been, “The Quest for Neutrality and the Stench of History,” in: Jeroen Temperman (ed.) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, Leiden and Boston: Martinus Nijhoff Publishers, 2012) 183.

Some scholars argued that neutrality bared conceptual controversies, with the concept of impartiality being the least controversial.¹⁰⁰ They divided the concepts into four stances; the first displays neutrality as being equidistant between the state and all religions without favouring one over the other. The second stance is that under neutrality the State treats all religions on a strictly equal basis. The third stance is that of the equal respect one whereby the State is permitted to differences in treatment if these differences are justified or where fundamental rights are not engaged. The fourth strand of neutrality is that of objectivity where States “treat religions equally as subjective belief systems so that, at best, the State is indifferent towards them, or at worst, they are seen as equally irrelevant or misguided.”

Other scholars have written about secularism and neutrality and some have also clearly identified the link between the Protestant theology and secularism. Despite the fact that secularism and neutrality presumed to act as effective tools to manage diversity, there still is considerable amount of bias towards the Protestant line of thought when applying secularism or neutrality. Malcolm Evans and Peter Petkoff note, “neutrality emerges as a multi-layered concept which nevertheless derives from the paradigm of the separation of religion and state.”¹⁰¹ They further argue that neutrality is often used to display a bias towards a particular worldview¹⁰²

¹⁰⁰ Ian Leigh, “The European Court of Human Rights and Religious Neutrality” in *Religion in a Liberal State*, Gavin D’Costa Malcolm Evans Tariq Modood and Julian Rivers (eds), (Cambridge University Press, 2013)

¹⁰¹ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights.’ (2008) *Religion, State & Society* 36(3) 205-223, at 205.

¹⁰² For an in-depth analysis on religion as a universal worldview see section 4.2.

or societal paradigm, rather than representing unbiased perspectives of legal reasoning.¹⁰³

Lorenzo Zucca argues that the interpretation of secularism being that of the relationship between the State and Church is an old-fashioned model and that the “new model of secularism is concerned with the way in which modern secular states deal with the presence of diversity in the society.”¹⁰⁴

Other academics question whether the secular public sphere is indeed neutral. Balagangadhara for example goes beyond the traditional ideas of recognising secularism as a relationship between the State and religion. Balagangadhara argues that secularism emanated from Protestant theological concepts, and that what is called “the secular” is religion that was secularised or in other words, religion in a different guise.¹⁰⁵ He states that distinguishing between the “secular” and “religion” is made from within and by a religion.

Jakob De Roover notes that secularisation is the transformation of recurring themes within a theological tradition of reasoning (tropes) into the common sense notions of a society or culture where they constitute the conceptual resources (topoi) for the development of new ideas and theories.

¹⁰³ Ibid.

¹⁰⁴ Lorenzo Zucca, *A secular Europe: law and religion in the European constitutional landscape* (Oxford University Press, 2012) 1.

¹⁰⁵ SN. Balagangadhara, “Is the distinction between ‘secular’ and ‘religious’ neutral?” (Hiphkapi, 2 March 2011) <http://www.hiphkapi.com/2011/03/02/is-the-distinction-between-secular-and-religious-neutral-s-n-balagangadhara/> [last accessed January 2016] see also .N. Balagangadhara, *The Heathen in His Blindness.... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005).

It while some of these ideas and theories become detached from the theological tropes (linguistic theory), others do not, but remain tied to it in specific ways (liberal secularism).

Prakash Shah argues that the *Lautsi* judgment presents an excellent illustration of this process of secularisation. The “ostensibly atheistic demand for the removal of the crucifix is really the iconoclasm at the heart of Christianity presented in secular form.”¹⁰⁶

According to Balagangadhara secularisation entails the spread of Christian ideas in a non-theological guise to become a part of the common sense of a culture. Jacob De Roover states that Christian assumptions on the aim of human life and nature become innate elements to the idea of secularism.¹⁰⁷ Furthermore, Triloki Madan argues that secularism did not emerge simply from engaging in rationalism and repudiating religion. It emerged from the dialectic of Protestantism and modern science.¹⁰⁸ Scientific ideas replaced the Christian conceptions of the world and man through a process called ‘secularization’. Hence,

“Secularization is not a process in which religion was banned from public life – and so from science – but a process by which originally Christian conceptions of man and world lost their recognizably Christian character, acquiring the status of

¹⁰⁶ Prakash Shah, ‘Does Durkheim Enhances Our Understanding of Law and Religion’ Legal Studies Research Paper No. 212/2015 at p.9. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694566 [last accessed in January 2016].

¹⁰⁷ Jakob De Roover, ‘Secularism, Colonialism and Indian Intellectuals’ April 2, 2011 available at <http://www.hipkapi.com/2011/04/02/secularism-colonialism-and-indian-intellectuals/> [accessed in December 2016].

¹⁰⁸ Triloki Nath Madan, ‘Secularism in Its Place’ (1987) *The Journal of Asian Studies* 46(4), 747-759.

‘natural’ characteristics of man and world, thereby becoming part of the ‘common sense’ of a culture.”¹⁰⁹

Alessandro Ferrari, for example, noted that Western secularism is more hostile to non-Christian religions than to Christians and used the expression “double standard secularism” to refer to this assumption. Furthermore, Ferrari states that Christians can more easily than non-Christians access the secular public sphere, since their organisational and doctrinal characteristics are more compatible with the “secular profile that distinguishes the public sphere.”¹¹⁰

Nader Hashimi states that “those involved in the discussion assume they are talking about the same idea when in reality they have rather distinct concepts in mind” and that “one way of advancing conceptual clarity with respect to secularism, especially its political variant, is to be sensitive to the different histories of secularism, of which there are many.”¹¹¹ Others simplify the concept and state that secularism is the “one that denies the existence or relevance of a transcendental or divine dimension to public affairs.”¹¹²

Carolyn Evans maintains that it difficult for the ECtHR to draw a universal or near-universal European conception of secularism to narrow the “too wide” margin

¹⁰⁹ Harry van den Bouwhuijsen, *Conversation of mankind or Comparative Science of Cultures? Reading Balagangadhara, Reconceptualising India Studies*, Paper presented May 28, 2013 for the India Platform, Ghent. See also S.N. Balagangadhara, *The Heathen in His Blindness Asia, the West and the Dynamic of Religion*. Leiden, etc.: E.J. Brill (1994).

¹¹⁰ Silvio Ferrari, “Law and Religion in a Secular World: A European Perspective.” (2012) *ELJ* (14)3 359.

¹¹¹ Nader Hashemi, ‘The Multiple Histories of Secularism: Muslim Societies in Comparison’ (2010) *Philosophy & Social Criticism* 36 325- 338, 325.

¹¹² Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* 2nd ed. (Oxford University Press 2013) 95.

of appreciation set for Article 9 cases.¹¹³ On the other hand, Brenna Bhandar argues that the “concept of multiculturalism is premised on a concept of culture that is very much related to a religious belief.”¹¹⁴ This concept of culture she states is derived from a deeply entrenched “notion of consciousness for which religious faith is essential. And this religious faith and its reconciliation with the culture of European Enlightenment thought is... Christian in its form and content.”¹¹⁵ Myriam Hunter-Henin also observes that “the differences between secularism and multiculturalism, often associated respectively with French and British traditions, should not be exaggerated.” She states that

“if multiculturalism rests on the recognition of diversity which it then seeks to accommodate, whereas secularism purports to construct a transcending common unity, both multiculturalism and secularism are deployed as techniques to govern difference that is perceived to violate dominant norms and values defined in reference to the Christian cultural heritage of the nation-state.”¹¹⁶

Both secularism and multiculturalism are seen as regulatory tools to manage diversity,¹¹⁷ but within the boundaries of the Christian culture. Unlike in France, the

¹¹³ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) see also George Letsas ‘Two concepts of the margin of appreciation 2006 O.J.L.S. 26(4), 705-732.

¹¹⁴ Brenna Bhandar, ‘The Ties that Bind Multiculturalism and Secularism Reconsidered’ (2009) JLS 36 301-326, 324.

¹¹⁵ *Ibid.*, at 323.

¹¹⁶ Myriam Hunter-Henin, ‘Why the French don’t like the Burqa: Laicite, National Identity and Religious Freedom’ (2012) x International and Comparative Law Quarterly 36 613. See also Brenna Bhandar, ‘The Ties that Bind Multiculturalism and Secularism Reconsidered’ (2009) JLS 36 301-26.

¹¹⁷ Myriam Hunter-Henin, ‘Why the French don’t like the Burqa: Laicite, National Identity and Religious Freedom’ (2012) 61 International and Comparative Law Quarterly 613.

principle of “*laïcité*” in Italy is not seen as a leeway to resist the Catholic heritage of the country but rather a way of encompassing it.¹¹⁸

Michel Rosenfeld sets out the secular model of the Enlightenment, which states that religion should be expelled from the public sphere but with religions and their adherents enjoying equal protection within the private sphere. Moreover States should neither favour nor disfavour religion, hence be neutral with respect to religion.¹¹⁹ However, Rosenfeld acknowledges that this model is challenging and cannot be attained in reality. William Twining correctly states that “[a] just International order and a healthy cosmopolitan discipline of law need to include perspectives that account of the standpoints, interests, concerns, and beliefs of non Western people and traditions.”¹²⁰ When addressing how practical conflicts between law and religion in secular democracies are managed, Lorenzo Zucca¹²¹ contends that it is rather simplistic to assume that religion can be manifested privately while the law rules the public sphere because secular States do not have adequate arguments to prevent religion from having a strong presence or role in the public sphere. Zucca also argues that this simplistic idea of separation does not necessarily mean that it is accurate. Moreover “the rise of new religious demands that are at odds with secular laws, make the distinction between private and public spheres more obsolete.”¹²² He

¹¹⁸ Alessandro Ferrari, ‘De la politique à la technique: laïcité narrative et laïcité du droit. Pour une comparaison France/Italie’, in *Le Droit ecclésiastique en Europe et à ses marges XVIIIème -XXème siècles*, eds. Brigitte Basdevant-Gaudemet and François Jankowiak (2009) 333-45. See also Lautsi v Italy.

¹¹⁹ Michel Rosenfeld, ‘Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religious Revival?’, (2009) *Cardozo Law Review* 30(6) 2333- 2368, 2333.

¹²⁰ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (Cambridge University Press 2008) 438.

¹²¹ Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, (Oxford University Press, 2012).

¹²² *Ibid.*, at 47.

argues that the real problem with secularism is the inability of the secular States to cope with diversity.¹²³

While most academics argue that the idea of religious freedom emanated from the secular philosophy of the Enlightenment,¹²⁴ some demonstrate that religious freedom and its toleration emanated from Christian theology.¹²⁵ For example, Benjamin Kaplan argues that it is only a “myth” to attribute tolerance as “a heritage of the Enlightenment”.¹²⁶ He explains that “religious tolerance became the paradigmatic, first tolerance in the Western history, the matrix out of which emerged the modern concept of tolerance as applied to all forms of difference- ethnic, cultural, and racial as well as religious.”¹²⁷ Similarly, Perez Zagorin argues that the “religious roots” of toleration, which has undergone significant secularisation, cannot be discarded. Moreover, he states that the work of the sixteenth and seventeenth century Christian thinkers has shaped the modern concepts of religious freedom.¹²⁸ When the supposedly secular law ends up verifying the religiosity of certain practices it ends up losing its secularity and the attempt to be religiously neutral becomes an inevitable failure. As Jakob De Roover convincingly puts it

“No court possesses an impartial scientific conception of religion; there are no shared secular criteria that enable one to identify and delimit the sphere of

¹²³ Ibid., at 23-24.

¹²⁴ See Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 70.

¹²⁵ Johnson Luke T., ‘Religious Rights and Christian Texts’ in Witte and van der Vyver (eds), *Religious Human Rights*, (Martinus Nijhoff Publishers 1996) See also S.N. Balagangadhara, *The Heathen in His Blindness.... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005).

¹²⁶ Benjamin Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe*, (Cambridge, 2007) 4-5.

¹²⁷ Ibid.

¹²⁸ Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton, 2003) 24–33.

religion in a manner neutral to all religions. Consequently, in such cases, judges and other secular authorities are bound to smuggle in one particular theological conception of religion. That is, a specific religious language becomes the meta-language to discuss and decide on matters of religion in courts of law and serves as the standard to reject certain practices as not “truly” religious.”¹²⁹ Neutrality thus begins to revolve around the concept of truth.¹³⁰ Consequently by deciding that “certain things, which are believed to be religious by some group, are actually not truly religious, our courts implicitly reject these practices as false religion. When this happens, they insert Protestant structures into the different forms of religion and tradition that exist in our liberal-democratic societies.”¹³¹ When the secular law ends up verifying the religiosity of certain practices, this leads to the law losing its own secularity. Consequently, despite the alleged neutrality and secularity of the law and the ECtHR Protestant Christianity “continues to shape significant aspects of both the state and state law. This is an embarrassment for liberal theories of rights and their assumption of state neutrality.”¹³²

1.5 Empirical Studies

It is important to also consider the empirical research that has been put forward to prove that Article 9 ECHR is more intelligible to the members of the Protestant faith. Silvio Ferrari has undertaken a remarkable quantitative analysis regarding the

¹²⁹ Jakob De Roover, ‘The secular law and the Realm of False Religion’ in Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (eds) *After Secular Law* (Stanford University Press, 2011) 2.

¹³⁰ For further analysis please refer to chapter 6

¹³¹ Jakob De Roover, ‘The secular law and the Realm of False Religion’ in Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (eds) *After Secular Law* (Stanford University Press, 2011) 2.

¹³² Peter Dunchin, ‘Islam in the Secular Nomos of the European Court of Human Rights’ (2011) *Michigan Journal Of International Law* 32(4) 663, 744.

violations of Article 9 on a country-by-country basis. The findings are interesting and can be analysed in various ways, but in this section, the reason(s) behind the lack of judgments in Protestant countries will be examined. It is important to note that any quantitative analysis should be approached with utmost caution and that various approaches could be taken.

Ferrari considered 100 decisions handed down by the ECtHR on Article 9 from 1959 until 2009.¹³³ The countries considered were the following: Armenia (1 decision), Austria (1 decision), Bulgaria (4 decisions), Denmark (2 decisions), France (15 decisions), Georgia (1 decision), Germany (7 decisions), Greece (11 decisions), Italy (2 decisions), Latvia (3 decisions), Luxembourg (1 decision), Macedonia (1 decision), Moldova (4 decisions), Poland (2 decisions), Russia (5 decisions), San Marino (1 decision), Spain (1 decisions), Sweden (2 decisions), Switzerland (5 decisions), Turkey (22 decisions), Ukraine (3 decisions), United Kingdom (6 decisions).¹³⁴

Ferrari then grouped these countries based on the predominant religious affiliation of population as follows: 19 Catholic countries (23 decisions), 4 Muslim countries (22 decisions), 11 Orthodox countries (29 decisions), 5 Protestant countries¹³⁵ (4 decisions) and 7 mixed countries (21 decisions). The data revealed 30 violations out of the 100 decisions given by the ECtHR.¹³⁶

¹³³ Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law*, in *The Lautsi Papers: Multidisciplinary Reflections On Religious Symbols In The Public School Classroom* 13 and n.2 (Jeroen Temperman, ed., 2012) 13.

¹³⁴ Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law*, in *The Lautsi Papers: Multidisciplinary Reflections On Religious Symbols In The Public School Classroom* 13 and n.2 (Jeroen Temperman, ed., 2012) 15.

¹³⁵ The countries being, Denmark, Germany, Latvia, Sweden and the United Kingdom.

¹³⁶ Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law*, in *The Lautsi Papers: Multidisciplinary Reflections On Religious Symbols In The Public School Classroom* 13 and n.2 (Jeroen Temperman, ed., 2012) 16.

The data also revealed the decisions that declared a violation of Article 9 were distributed as follows:

European Court of Human Rights¹³⁷	
Decisions declaring a violation of Article 9 distributed according to the religious demography of the respondent states (as a percentage of all decisions concerning religious issues for the countries):	
Catholic countries (19 countries)	2 decisions (9%)
Muslim countries (4 countries)	1 decision (5%)
Orthodox countries (11 countries)	23 decisions (79%)
Protestant countries (5 countries)	No decisions
Mixed countries (7 countries)	4 decisions (19%)

Source: Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law*.

The data indicated that Orthodox countries have the highest numbers of Article 9 violations, (79 % of the applications were declared to have been in violation of Article 9)¹³⁸, while strikingly the Protestant countries considered were never held to be in violation of Article 9. Despite the fact that these Protestant countries have a State-Church system, which could in theory cause problems when it comes to religious freedom, the numbers show that such was not the case. It was therefore revealed that countries where the people are of non-orthodox religion are less frequently found to be in violation of Article 9. This raises the question of how these numbers could be read and what could be the reasons behind these differences.

First, it is important to note that Ferrari's figures support the case law analysis in this thesis which indicates that the ECtHR has a biased approach in favour of the Protestant faith. The figures confirm that ECtHR's approach is not about

¹³⁷ *Ibid.*, at 17.

¹³⁸ *Ibid.*, at 31.

privileging *any* Christian, but rather particularly Protestant Christians. It could also be concluded from the data that the high number of violations of Article 9 by Orthodox countries, is due to the fact that the concept of religious freedom in these Orthodox countries is not the same as the one adopted by the ECtHR. For example, the notion of true proselytism that is protected by the ECtHR and is strongly resisted in Orthodox countries. Recalling the Protestant faith, proselytism is an essential element to the spreading of the faith and could not be opposed or resisted unless it amounts to “improper” proselytism or proselytism that is carried out through coercion.

On the other hand, the low number of cases shows the substantial similarity between the notion of religion in the Protestant countries and the ones adopted by the ECtHR, in other words the emphasis that the ECtHR places on the “primacy of the internal dimension” over “the detriment of the importance attached to its external manifestations”.¹³⁹ The notion of religion that is present in the ECtHR better suits the Protestant faith than the other faiths and religions and therefore there was no clash between the two. As Carolyn Evans has noted, the ECtHR protects “the cerebral, the internal and the theological over the active, the symbolic and the moral dimensions of religion and belief.”¹⁴⁰

¹³⁹ Ibid., at 32.

¹⁴⁰ Carolyn Evans, ‘Religious Freedom In European Human Rights Law: The Search For a Guiding Conception’ in M Janis and C Evans (eds), *Religion and International Law* (The Hague, 1999), 385, 396.

1.6 Conclusion

The notion of “religion” and “religious freedom” contained in the ECHR has not been adequately theorised by reference to cultural background. When this background is inserted, it gives rise to a range of problems that have not yet been tackled adequately in the jurisprudence or the academic literature. Scholarly work concerning Article 9, law and religion, and religious freedom has been mostly concerned with the inconsistency, incoherence and the biased decisions of the ECtHR, especially judgments concerning religious clothing and symbols with particular focus on veils and headscarves. It has been noted by many that the ECtHR has consistently ruled against Muslim women who have relied upon Article 9 ECHR to enforce their human rights.¹⁴¹ However, there has been a lack of scholarly work concerning the possibility that the burqa and veil judgments of the ECtHR could be a continuation of the arguments held between the Protestants and the Catholics in the sixteenth century, in fact a disguised continuation of iconoclasm. There is also limited scholarship on a possible link between religion, religious freedom, the wording of Article 9 ECHR and the Protestant theology. Although some scholars have pointed out that human rights law emanated from religious backgrounds and that modern rights law has a Christian backdrop, no literature has gone beyond this to specifically link the Protestant theology to Article 9 ECHR. Furthermore, the concepts of truth and falsity play a crucial role in Protestant faith specifically and are reflected in the language of the ECtHR even in cases where the ECtHR attempts to invoke the notion of neutrality. Therefore, for the ECtHR to consider whether an act is religious or not it

¹⁴¹ Mohammad Mazher Idriss, ‘Criminalisation of the Burqa in the UK’ J. Crim. L. 2016, 80(2), 124-137 at 133.

has to have pronouncements about “truth” and in doing so the ECtHR fails to be neutral.

Chapter 2

What is Religion?

2.1 Overview

In this chapter a new way of looking at Article 9 utilising Balagangadhara's theory and concept of religion¹⁴² is examined. In my view his theory grants new insights which have not been adequately considered by scholars in the field and fills a gap in the scholarship discussed in the preceding chapter. An outline of his theoretical framework and hypothesis is presented. As mentioned earlier, Balagangadhara in an exceptionally novel approach, examines the twin dynamic of Christianity of secularisation and proselitisation. He explains in a unique way how the secular provokes religious conflict and distortion amongst cultures where religion does not exist. Furthermore he illustrates how despite secularism the West remains a religious culture. Balagangadhara further elaborates on how religion requires practices to be defended and justified by reference to doctrines.

According to Balagangadhara, religion should be treated as a phenomenon in the world, and the description "religion" should be restricted to the Abrahamic religions: Judaism, Christianity and Islam. He argues that the assertion that all cultures in the world have religion, an idea which has also been adopted and

¹⁴² S.N. Balagangadhara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005).

elaborated within the human sciences,¹⁴³ is itself a claim of Christian theology, albeit since secularised.¹⁴⁴

Using this theory, the universality of religion is questioned and what constitutes religion is examined. It is asked what makes Christianity a religion and what qualifies for protection by legal systems. It is demonstrated that attempting to define religion in the legal systems is futile. Furthermore it is shown that there is a failure to differentiate between what constitutes a religious practice and what constitutes a traditional practice as both are approached similarly.

Key questions in this chapter would include what religion is and what makes something into religion, more precisely what makes Christianity a religion. Other themes to address are whether all cultures have religion and the difference between tradition and religion. How religion has been secularised, and what the impact of these questions on human rights law generally and on Article 9 of the ECHR specifically, will be analysed.

2.2 What is Religion?

2.2.1 The Word "Religion"

In order to enjoy freedom of religion or (freedom from religion), it is necessary to have religion in the first place. Religion is assumed to be a universal phenomenon in all cultures. However, the framework for studying religion derives from a Christian background, even in the realm of comparative religion. The main claim is that

¹⁴³ See also From Tomoko Masuzawa, 'Secular Theories on Religion, A Selection of Recent Academic Perspectives' in Mikael Rothstein and Tim Jensen (eds), *Theology to World Religions: Ernst Troeltsch and the Making of Religionsgeschichte* (University of Copenhagen Tusculanum Press 2000) 149-166.

¹⁴⁴ Peter Harrison, *'Religion' and the religions in the English Enlightenment* (Cambridge, Cambridge University Press, 1990) 1.

religion bears the hallmarks of a theological account. Scholars such as Fitzgerald have argued that the word “religion” should not be used at all within the social sciences because of the history of its association with Christian theology.¹⁴⁵ Balagangadhara proves that the word “religion” and its description are associated with Christian theology.¹⁴⁶

The secularisation of religion and the establishment of secular States changed the meaning of terms relating to religion and changed the concepts behind these terms to make them consistent with Christian theology. According to the Oxford Classical Dictionary, “[n]o word in either Greek or Latin corresponds to the English ‘religion’ or ‘religious’.”¹⁴⁷ In fact, the only tradition that satisfies the modern Western criterion of religion as a purely private pursuit is Protestant Christianity, which, like the Western view of “religion”, was also a creation of the early modern period.

The lack of a parallel in other languages is also important to note. In Arabic, the word “*din*” signifies a way of life, and the Sanskrit *dharma* covers duties, law, politics, and social institutions as well as piety.¹⁴⁸ There was no concept, idea or thought of “religious freedom” or religion in the ancient years; the entity-concept of religion was simply absent. “Modernity” has given specific names where they did not

¹⁴⁵ Timothy Fitzgerald, *The Ideology of Religious Studies* (Oxford University Press, 2000) 3-7.

¹⁴⁶ S.N. Balagangadhara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005).

¹⁴⁷ H.J. Rose, s.v. ‘Religion, Terms Relating to’, in the Oxford Classical Dictionary, M. Cary et al., eds., Oxford, 1949.

¹⁴⁸ Karen Armstrong, “the Myth of Religious Violence” *The Guardian*, Thursday 25 September 2014 available at <http://www.theguardian.com/world/2014/sep/25/-sp-karen-armstrong-religious-violence-myth-secular> [last accessed in January 2015].

previously exist.¹⁴⁹ The ancient Greeks and the ancient Egyptians for example thought about gods, God¹⁵⁰ and nature but not about religion as such. As Cantwill Smith observes:

“...religion was not a distinct entity in the lives, or in the minds of the people under consideration, yet it is so in the minds of modern people, we in order to understand them must or may use (impose?) our conceptualisation and analyses in our interpretations.”¹⁵¹

2.2.2 Religion(s) as Variant Models of Christianity

Given that the word “religion” is a concept that has evolved and modified in the West making religion into an entity it seems impossible to therefore identify what religion is. In his book, *The Heathen in His Blindness* Balagangadhara argues that Abrahamic religions are what religions are and that “Christian anthropology” is the cornerstone of knowledge about “other religions”, which are reconstructed as “diverse” religions based on the model of Christianity.¹⁵² Balagangadhara shows that our daily language refers to “at least” Christianity as a religion, and this prototypical approach allows one to study only the *entity* (or an example) of religion and not the concept, because one has already identified *at least* one aspect of religion that being Christianity. In order to argue that Christianity is not a religion one needs to make an epistemic decision which requires a theory on religion. Since there is no theory rivalling theology that would help to identify religion, Balagangadhara utilises

¹⁴⁹ For a detailed analysis of the development of the word religion see Wilfred Cantwell Smith, *The Meaning and End of Religion* (First Fortress Press Edition, 1991) 51-79.

¹⁵⁰ Wilfred Cantwell Smith, *The Meaning and End of Religion* (First Fortress Press Edition, 1991) 54.

¹⁵¹ *Ibid.*, 55.

¹⁵² S.N. Balagangadhara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005) 292-298.

language use (within European languages) which points, at least, to Christianity as religion without being certain that it is even a religion.¹⁵³

Balagangadhara demonstrates that when Christianity refers to itself as religion it provides us with “its” concept of religion and helps itself identify its religious rivals. In *The Heathen in His Blindness* it is explained that what distinguishes religious rivalry from other kinds of rivalry, is rivalry with respect to doctrinal aspects, differences in beliefs and differences in the nature and existence of God.¹⁵⁴ Balagangadhara explains that actions and practices which are embodiments of those beliefs, and doctrinal differences, crystallise this religious rivalry. Christianity based the description of its rivals on sets of beliefs and doctrines about God, through which it divided true religions from false religions. Though Christianity faced many rivals throughout history only a few were considered to be religious rivals. Although Islam and Judaism also considered themselves to be religious rivals under the same description given by Christianity, the Indian traditions and the Roman *religio* did not identify themselves as religious rivals in the description given by Christianity. This shows that to be able to judge the superiority or truth of one religion in comparison to the other one needs to do so from within the framework of religion.¹⁵⁵

This indicates that scholars can write about religion while failing to appreciate that they are adopting a Christian definition. Kevin Schilbrack, for example, argues

¹⁵³ Note that even Islam and Judaism may not have a word for religion so that is more unreliable

¹⁵⁴ *The Heathen in His Blindness*..... 295-296.

¹⁵⁵ S.N. Balagangadhara, ‘Orientalism, Postcolonialism and the ‘Construction’ of Religion’ in Esther Bloch, Marianne Keppens and Rajaram Hegde (Eds), *Rethinking Religion in India: the Colonial Construction of Hinduism* (Routledge 2010) electronic copy available at https://www.academia.edu/4228198/Orientalism_Postcolonialism_and_the_Construction_of_Religion

that although one may accept that religion is a social construction, this does not mean that religion does correspond to a reality:

“Since religion is a social construction, the only reality that religious phenomena have, they have by tradition, convention, or agreement. It follows that if people had never thought, spoken, and acted in religious ways, or if they ceased to think, speak, and act in these ways, then what are often described as religious phenomena would not exist. If everyone were to cease to recognise holy days, for instance, there would be no more holy days.... to say that something exists merely by convention (or merely rhetorically, or merely by linguistic agreement) is not at all the same as saying that the entity does not exist.”¹⁵⁶

Schilbrack does not clarify what he means by “religious ways”, cease to act in “these ways” or most importantly what he means by “religious phenomena”. He relies on conventional ideas and linguistic practices of a society or a community that teaches people to use specific words. These linguistic practices are not merely words but they contain a cultural history.¹⁵⁷ This cultural history for the West is the history of Christianity.¹⁵⁸ Schilbrack uses the words with *ad hoc* accounts groomed to fit into his presupposed definition of what religion is. He also uses the term “holy days”, and again does not theorise or explain what he means by holy and in what ways holy relates to, for example, Non- Abrahamic traditions. He uses theological language to prove that although religion is a social construction it is not an imaginary concept and it is universal in all cultures, yet it could be “*described*” in various forms. He does

¹⁵⁶ Kevin Schilbrack, ‘Religions: Are There Any?’ (2010) *Journal of the American Academy of Religion*, December 78 (4), 1112–1138.

¹⁵⁷ S.N. Balagangadhara, *The Heathen in His Blindness...* 24.

¹⁵⁸ *Ibid.*

not differentiate between practices that are performed out of belief and others that are carried out of tradition.

According to Schilbrack, the term “religion” is used as a model or a template in order to interpret a phenomenon. However, it is also not clear how he can conclude that this phenomenon, which he is referring to, is actually a religious and not a psychological phenomenon. He adds that:

“[o]ne can employ the concept of “religion” in ways that are appropriate, even if the people in question themselves do not use the term. Even when the practices so labelled do not include that idea, one can re-describe a practice as religion.”¹⁵⁹

Schilbrack is therefore caught in a terminological game of how “best” to *describe* and *define* religion in order to show that religion exists in all cultures albeit taking various shapes. Moreover, what is the purpose of describing something when its foundation is not included, and if the idea is not included how can one tell that whether what he is describing, according to the culture being described, is in fact religion? To answer these questions it is important to examine the differences between a theory and a definition and to consider the function of both.

2.3 The Difference Between a Theory and a Definition: The Problem with a Definition.

Balagangadhara shows that with a lack of theory on religion, the definitional approach cannot identify whether the characteristics of Christianity are indeed the

¹⁵⁹ Kevin Schilbrack, ‘Religions: Are There Any?’ (2010) *Journal of the American Academy of Religion*, December 78 (4), 1112–1138.

characteristics of religion, since one still lacks knowledge on what religion is. When accepting that “at least” Christianity is a religion what one actually has is an *ad hoc* theory and a presupposition of what religion is. Balagangadhara notes that if one rejects the idea that Christianity is *at least* what religion is, then one needs a theory to show what else religion is.¹⁶⁰

The problem with a definition lies in the fact that the words or language used to define religion have an *ad hoc* theological framework.¹⁶¹ Definitions use vocabulary that entail and convey theological concepts to define religion. While concepts and definitions on religion(s) are plentiful, a theory that is independent of *ad hoc* theories has always been lacking. Over time definitions shift, and what is religious or not changes from the early to medieval to “modern” times.

Talal Assad notes that there cannot be a universal definition of religion “not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes”¹⁶². These definitions, however, will “never be universally applicable when one addresses different cultural milieu or historical periods.”¹⁶³ More importantly, definitions do not explain how religion functions, they do not test claims or examine what makes something into a religion and what makes other phenomena not a religion.¹⁶⁴ It is only theories that can provide such distinctions. Whatever definition one chooses to

¹⁶⁰ S.N. Balagangadhara, *The Heathen in His Blindness.....* 169-171, 272-273.

¹⁶¹ *Ibid.*, at 289-291.

¹⁶² Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press, 1993) 29.

¹⁶³ Richard King, *Orientalism and Religion: Postcolonial Theory, India and ‘the Mystic East’* (Routledge 1999) 10.

¹⁶⁴ S.N. Balagangadhara, *The Heathen in His Blindness.... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005) 22-23, 247-265.

give to “religion” (for example, beliefs in superhuman, spiritual, responses to the Divine or transcendent, a human product) it remains the case that these definitions commit the fallacy of *petitio principii*: the truth of the proposition is presupposed where it is the truth that should be proven, in this case that religion is universal.¹⁶⁵

Christianity for example explains religion in such a “naturally” theological way that it even lends intelligibility to atheists when they attempt to discuss their scepticism about religion. Atheists can only explain atheism using theological vocabulary and concepts – their comparator is theism; hence theological ideas and language become our everyday words although disguised in secular forms. However, this language is unintelligible to people from a culture with no religion.¹⁶⁶

Balagangadhara examines the difference between a theory and a definition.¹⁶⁷ He explains that a theory, unlike a definition, clarifies debates by following strategies for testing claims through providing counter-examples. Definitions merely become a sort of a terminological game. Consequently, questions about religion and religious experiences and practices cannot be answered by giving definitions to religion such as saying it is the universal belief in the “Divine” or “super power”.¹⁶⁸ The notions of belief, spiritual, divine, and power are too vague to provide us with any real test.¹⁶⁹ In the absence of a theory, debates will be carried on without real knowledge as to why the debate is taking place. The origin of the debate fades

¹⁶⁵ Jakob De Roover, ‘Secularized Christian Theology and Evolutionary Explanations of Religion’ Hipkapi, 23 June 2012 available at <http://www.hipkapi.com/2012/06/23/secularized-christian-theology-and-evolutionary-explanations-of-religion/>

¹⁶⁶ S.N. Balagangadhara, *The Heathen in His Blindness...* 232-234, 424.

¹⁶⁷ *Ibid.*, at 247-279.

¹⁶⁸ *Ibid.*

¹⁶⁹ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005).

away and the debate becomes only linguistically intelligible. Definitions and descriptions of religion have presupposed ideas of the universality of religion incorporating a pre-theoretical intuition. These intuitions are shaped and sustained by a religious framework that has shifted into the background.¹⁷⁰ They are therefore presupposing “the truth of a proposition whose truth they should prove, namely, that religion is universal.”¹⁷¹

When Emile Durkheim for example formulated a theory on religion, which is supposedly neutral and scientific in nature, he was only able to do so by reference to theology and hence failed to draw a distinction between the sacred and profane without religious presuppositions. He defines religion as

“[a] unified system of beliefs and practices relative to sacred things, that is to say set apart and forbidden, beliefs and practices which unite into one single moral community, called a church, all those who adhere to them.”¹⁷²

This provides a characterisation of religion without using categories specific to any particular religion but ends up using categories specific to a religion. If secularism means the separation between religion and all social aspects of life, and one accepts the definition above, which says that religion is a system of social unification, then secularism would imply the annihilation of religion. This shows that

¹⁷⁰ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 7.

¹⁷¹ Jakob De Roover, ‘Secularized Christian Theology and Evolutionary Explanations of Religion’ 23 June 2012 available on <http://www.hipkapi.com/2012/06/23/secularized-christian-theology-and-evolutionary-explanations-of-religion/>

¹⁷² Emile Durkheim, *The Elementary Forms of the Religious Life*, (New York Free Press, 1965) 62.

secularism becomes inconsistent with common definitions of religion when interpreted in the terms provided in those definitions.¹⁷³

Balagangadhara explains that since it is difficult to classify the phenomena of the dispute or debate (in our case religion) and that what we actually classify is the description of the dispute, definitions become a classificatory problem,¹⁷⁴ and the theoretical background of the prevailing account remains hidden. He explains that the problem arises at “the level of the facts we want to classify because assembling these facts become dependent on the classificatory systems that are used.”¹⁷⁵ To be able to classify a certain phenomenon as religion, one needs to know what religion is and not just associate a certain phenomenon with a given term. This classification cannot provide *knowledge* about the particular phenomenon. Consequently, if we are trying to understand “what” religion is (which starts as a referential problem), by using definitions the answer becomes a classificatory one. Moreover, definitions serve as a reference to a certain phenomenon and cannot provide counter-examples and knowledge.

For example, when the ECtHR tries to determine whether something is religion, it ends up using classificatory descriptions and definitions entailing a theological Christian framework of religion and the theological language that makes the debate concrete goes into to the background and becomes invisible.

¹⁷³ Jakob De Roover, ‘The Vacuity of Secularism’ Hipkapi, April 2, 2011 available at <http://www.hipkapi.com/2011/04/02/the-vacuity-of-secularism/>

¹⁷⁴ S.N. Balagangadhara, *The Heathen in His Blindness...* 258- 276.

¹⁷⁵ S.N. Balagangadhara, *The Heathen in His Blindness...* 259.

2.4 Religion as an Explanatory Intelligible Account

Balagangadhara formulates a theory of religion that is free from ad hoc theological presuppositions. He states that for an act to be intelligible it has to include a purpose and a cause, and religion is an explanatory intelligible account of the cosmos and itself because it combines a causal and an intentional account, the cause of creating the world and the will of the Creator. One can therefore know God's intentions by studying the Cosmos and His revelation. This hypothesis could explain the necessity of worship, faith and truth. Moreover, it could explain the tendency of the Abrahamic religions to religious rivalry and the mutual misunderstanding between these religions and heathen traditions. Balagangadhara observes that Judaism, Christianity and Islam share the common structure that makes them into different instances of religion.¹⁷⁶

First, religion shows the purpose and intention of God in creating the cosmos, which becomes the perfect embodiment of His will. Second, it shows God's purpose through His revelation. Third, it confirms this truth by accepting God's purpose and his revelation. As a result the Christian doctrine claims universality and unconditional truth as the revelation of God. In order to govern the universe, there has to be *one* will and *one true doctrine* that conveys this *one* will to mankind.¹⁷⁷ Consequently, since this doctrine is said to have the "Divine truth", it cannot accept and tolerate other "religious" doctrines as being equally true, and it cannot but be intolerant

¹⁷⁶ S.N. Balagangadhara, *The Heathen in His Blindness...* 298-302.

¹⁷⁷ Jakob De Roover, What makes Christianity a religion? The structure of Christianity as a religion, March 5, 2011 available at <http://www.hipkapi.com/2011/03/05/the-structure-of-christianity-as-a-religion/>

towards all traditions and doctrines¹⁷⁸ which it views as having rivalling doctrines that express the will or plan of God. These doctrinal or religious rivals are presented by Christianity either as “the corruptions of the devil of the true doctrine or as pale and erring variants of its own doctrine (which might contain some “rays of light”, that is, traces of divine revelation.”)¹⁷⁹ Intolerance becomes a property of a religious person as he or she cannot accept other religions as “equally” true.¹⁸⁰ A religious person therefore experiences the Cosmos as an intelligible entity and as a causally explainable one. On the other hand people of non-Abrahamic traditions cannot comprehend this kind of experience, to them the cosmos is not experienced as explanatorily intelligible.

Furthermore, according to Balagangadhara the doctrines will dictate the method of the worship how to fulfil God’s purpose. It is faith that distinguishes a “true” religious Christian from another Christian in name only.¹⁸¹ Balagangadhara further explains that “belief” enables individuals to generate questions on the meaning and purpose of life and hence these questions become inherent within the framework of religion. He explains that the only way Westerners makes sense of “practices” of other cultures is by construing them as religions. *The Heathen* shows that non-Abrahamic traditions cannot see themselves in the description of religion given above, whether in terms of religious rivalry, the relationship between belief

¹⁷⁸ S.N. Balagangadhara, *The Heathen in His Blindness*.... 312.

¹⁷⁹ Jakob De Roover, What makes Christianity a religion? The structure of Christianity as a religion, March 5, 2011 available at <http://www.hipkapi.com/2011/03/05/the-structure-of-christianity-as-a-religion/>

¹⁸⁰ S.N. Balagangadhara, *The Heathen in His Blindness*.... 311

¹⁸¹ *Ibid.*, at 249-302.

and practice or in the way “belief”, “worship” and “faith” are described.¹⁸²

2.5 The Universality of Religion

Religion is not a universal in all cultures, but a cultural phenomenon and the assumption and assertion of its universality, an idea which has also been adopted and elaborated within human sciences, is itself a claim of Christian theology, albeit since secularised.¹⁸³ Christianity claims that all people once had knowledge of the true religion that was corrupted later on and that Christianity was the only rational and complete religion that promised a true knowledge and access to the divine. Although Christianity claims that others also know of “religion”, it is said to be “false” religion, but is still a “form” of religion.¹⁸⁴ In his *Institute of the Christian Religion* John Calvin said that

“... [t]here is no nation so barbarous, no race so brutish, as not to be imbued with the conviction that there is a God. Even those who, in other respects, seem to differ least from the lower animals, constantly retain some sense of religion Since, then, there never has been... any city, any household even, without religion.... a sense of Deity is inscribed on every heart. Nay, even idolatry is ample evidence of this fact. For.... when he chooses to worship wood and stone rather than be thought to have no God, it is evident how very strong this impression of a Deity must be;

¹⁸² S.N. Balagangadhara, *The Heathen in His Blindness....* 294-302. See also Sadhguru Jaggi Vasudev, ‘Idols in the Hindu Way of Life- Why are They Worshiped?’ Isha Foundation Blog, January 28, 2014- available at http://isha.sadhguru.org/blog/yoga-meditation/demystifying-yoga/hindu-idols-gods-worship/#disqus_thread who states that in ancient Indian tradition a temple was not considered a place for worship or a place of prayer or place of God, it was rather a “place of energy where everyone could go and make use of it.”

¹⁸³ S.N. Balagangadhara, *The Heathen in His Blindness....* at 200-201.

¹⁸⁴ *Ibid.*, at 54-64.

since it is more difficult to obliterate it from the mind of man, than to break down the feelings of his nature....”¹⁸⁵

Christian apologetics argued that the original religion that God had given to humanity at the time of creation was corrupted everywhere and was only restored through God’s revelation in Christ.¹⁸⁶ The Christian apologetic Justin Martyr wrote in his *Hortatory Address to the Greeks* that

“[t]he advent of our Saviour Jesus Christ; who, being the Word of God... restored to us the knowledge of the religion of our ancient forefathers, which the men who lived after them abandoned through the bewitching counsel of the envious devil, and turned to the worship of those who were no gods.”¹⁸⁷

In his *Retractationes*¹⁸⁸ St. Augustine says,

“ [for] the truth itself, which is now named the Christian religion, existed and was not missing among the ancients from the beginning of the human race, until Christ came “in the flesh” from whom the true religion, which already existed, began to be called Christian.”¹⁸⁹

¹⁸⁵ John Calvin, *The Institutes of the Christian Religion*, Henry Beveridge (trans.) (MI: Christian Classics Ethereal Library, Grand Rapids, 2002) 35. electronic copy available at <http://ntslibrary.com/PDF%20Books/Calvin%20Institutes%20of%20Christian%20Religion.pdf>

¹⁸⁶ Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) 61(1) NUMEN, 5-32 electronic copy available at https://www.academia.edu/2043491/Incurably_Religious_Consensus_Gentium_and_the_Cultural_Universality_of_Religion

¹⁸⁷ Justin Martyr, “Hortatory Address to the Greeks” In *The Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325*, vol. 1, in Rev. Alexander Roberts & Sir James Donaldson (eds) (Wm. B. Eerdmans Michigan 1989) 289 an electronic copy is available at http://if-oll.s3.amazonaws.com/titles/1969/1333.01_Bk.pdf

¹⁸⁸ St.. Augustine of Hippo, *Retractationes* I, 13.

¹⁸⁹ Meredith F. Eller and Augustine, ‘The “Retractationes” of St. Augustine Church History’, 18 (3) (Sep., 1949) 172-183.

Following from the above, one can conclude that although humankind drifted into false religion from the creation until the revelation of God in Christ, it did at all times retain the traces of the “true” original gift of God. Since the Creator had provided humanity with an awareness of his existence, it seemed to have become “theologically impossible that people without religion could exist.”¹⁹⁰ From the early Christian fathers to the Age of Enlightenment, the belief that religion is universal “rested on Christian theology and its references to an imaginary *consensus gentium*,”¹⁹¹ that presupposes the universality of religion across all human societies.”¹⁹² This assumption of the universality of religion was not empirically tested but was the presupposition of a Christian theological framework¹⁹³ that describes other cultures as having an *expression* of religion. Balagangadhara explains that the West uses a secularised Christian theological language when speaking about other cultures and “within this linguistic practice, the practices one encounters in other cultures threaten to become radically unintelligible if they are not described as religions.”¹⁹⁴

¹⁹⁰ Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) NUMEN 61(1) 5-32 electronic copy available at https://www.academia.edu/2043491/Incurably_Religious_Consensus_Gentium_and_the_Cultural_Universality_of_Religion

¹⁹¹ Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) NUMEN 61(1) 5-32.

¹⁹² Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) NUMEN 61(1) 5-32.

¹⁹³ S.N. Balagangadhara, *The Heathen in His Blindness.... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005) 144-54.

¹⁹⁴ S.N. Balagangadhara, ‘Chapter-wise Questions and Answers to understand “The Heathen in His Blindness: Asia, the West and the Dynamic of Religion”’, Hipkapi, March 7, 2011. Available at <http://www.hipkapi.com/2011/03/07/chapter-wise-questions-and-answers-to-understand-the-heathen-in-his-blindness-asia-the-west-and-the-dynamic-of-religion/> see also S.N. Balagangadhara, *The Heathen in His Blindness....* at 233-238.

Non- Western cultures have not tried to generate an alternative “factual” descriptions of the same world.¹⁹⁵ Balagandghara calls this situation a “colonial consciousness”, which he defines as “a process that hinders access to experience,” where the colonised act as though they see entities and facts in the world which in fact do not belong to their social or cultural world, so they use the thought, idiom and the language of the colonisers to describe what they think exist in their society but which in reality does not.¹⁹⁶ This applies to religion so that often people of non-Abrahamic traditions accept that what they are practising is actually a religion and not a tradition.

Christianity has not only shaped the way people think about religion but has also affected the choice of what religion(s) are in the world. It shows that because the seed of religion is thought to be planted in the souls of every human being, even the heathens who “bow down to wood and stone”¹⁹⁷ were seen as having innate knowledge of religion, God and worship, albeit a false one.¹⁹⁸ It is false because there can only be *one* true God, *one* true doctrine, and therefore *one* truth. Balagandghara shows that although theories on religion say that every culture can develop its own religion, all those theories presuppose the universality of religion as their starting point. So instead of empirically examining whether those cultures do

¹⁹⁵ For a critique on Orientalism see S.N. Balagandghara, ‘The Future of the Present: Thinking Through Orientalism’ 1998 10(2), 101-123. Available at <http://www.hipkapi.com/2011/03/05/the-future-of-the-present-thinking-through-orientalism-s-n-balagandghara/>

¹⁹⁶ S.N. Balagandghara, Documentary on Indian traditions: Beware of God, July 4, 2012 available at <http://www.hipkapi.com/2012/07/04/eshi-films-on-indian-traditions-beware-of-god/>

¹⁹⁷ S.N. Balagandghara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005) 331-336.

¹⁹⁸ *Ibid.*, at 243- 282. See also Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) 61(1) NUMEN, 5-32 electronic copy available at https://www.academia.edu/2043491/Incurably_Religious_Consensus_Gentium_and_the_Cultural_Universality_of_Religion

indeed have religion, they presuppose the existence of religion and try to find religious scriptures and doctrines of these cultures. However, what they actually examine is *what* makes religion a universal in all cultures and not whether religion is universal or not.¹⁹⁹

2.6 The “Construction” of Religions and the Discovery of “False Religions”.

Having set out Balagangadhara’s theory on religion in the previous sections, and with an illustration of his ideas in practice, how the West has constructed religions and discovered “false” religions is examined in this section. When European (Christian) missionaries, travellers, and scholars encountered and colonised other cultures, they presupposed the existence of religion in those cultures and societies and were searching for religion(s).²⁰⁰

For example, Ramchandra N. Dandekar argues that Hinduism “can hardly be called a religion at all in the popularly understood sense of the term” as it does not recognise God to be central to it nor does it claim to have any particular prophet as its founder. He adds that “Hinduism is not a system of theology – it does not make any dogmatic affirmation regarding the nature of God.... It does not...recognise any

¹⁹⁹ Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) NUMEN 61(1) 5-32 electronic copy available at https://www.academia.edu/2043491/Incurably_Religious_Consensus_Gentium_and_the_Cultural_Universality_of_Religion

²⁰⁰ As mentioned in the previous section The West (Christianity) does not accept a culture with no religion, as this would imply that religion is not a “divine” gift, and hence it is a fulfilment of a theological claim in Christianity that all cultures have religion. See Prakash Shah, see also Jakob De Roover, ‘Incurably Religious? Consensus Gentium and the Cultural Universality of Religion’ (2014) 61(1) NUMEN, 5-32 electronic copy available at https://www.academia.edu/2043491/Incurably_Religious_Consensus_Gentium_and_the_Cultural_Universality_of_Religion

particular book as its absolutely authoritative scripture.”²⁰¹ Dandekar explains that, religious practices in Hinduism are not obligatory and there is no specific moral code, moreover he states that “it does not accept any doctrine as its dogma”²⁰² and as a religion Hinduism, “does not convey any definite or unitary idea.... Hindus may not necessarily have much in common as regards faith or worship... yet, Hinduism had persisted through centuries as a distinct religious entity.”²⁰³ Hindu tradition therefore does not have any property, belief or practice that allows one to recognise it as religion. Similarly in *The Meaning and End of Religion*, Wilfred Cantwell Smith argues that Hinduism is a construction of the West and is not an entity, it is a name that is given by the West to a “prodigiously variegated series of facts”²⁰⁴ and “a notion in men’s minds that cannot but be inadequate.”²⁰⁵

Without empirical investigation the West found what they already expected to find, that all cultures had a kind of religion, although it was a false one. However what they actually found was an *imaginary experiential entity*, which they “constructed” and called religion and started describing systematically.²⁰⁶ It is imaginary because it does not have existence outside the experience of the Western culture. Accordingly, they started searching for doctrines, “beliefs” and “gods” in these societies, then study scriptures in an attempt to find “beliefs” in them. This is

²⁰¹ Ramchandra Narayan Dandekar, ‘Hinduism’ (Brill 1971) 237 quoted also in Will Sweetman, “Hinduism” And The History Of “Religion”: Protestant Presuppositions In The Critique Of The Concept Of Hinduism” Method & Theory in the Study of Religion, 2003 Journal of the North American Association for the Study of Religion 15 329-353 at 331.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Wilfred Cantwell Smith, *The Meaning and End of Religion* (First Fortress Press Edition, 1991) 144.

²⁰⁵ Wilfred Cantwell Smith, *The Meaning and End of Religion* (First Fortress Press Edition, 1991) 144.

²⁰⁶ S.N. Balagangadhara, ‘Orientalism, Postcolonialism and the ‘Construction’ of Religion’ in Esther Bloch, Marianne Keppens and Rajaram Hegde (Eds), *Rethinking Religion in India: the Colonial Construction of Hinduism* (Routledge 2010) electronic copy available at https://www.academia.edu/4228198/Orientalism_Postcolonialism_and_the_Construction_of_Religion

the process through which the West was able to identify and “construct” Hinduism²⁰⁷, Buddhism and Jainism as distinct, but “false” religions.

The reason the West admits that Indians once had a *true* religion is to maintain the Christian theology, which claims that all people were given at some point the revelation, the Vedas being the Indian version.²⁰⁸ Similar to the Protestant conflict with the Catholics, wherein the former were accused of corrupting the “true” religion and getting indulged in idolatrous practices, Brahmans were accused of corrupting the people by keeping knowledge away from the people and involving them in idolatrous practices such as worshipping the false gods of Hinduism.

It was a common belief amongst Christians that non-Christians were morally corrupt, because they lacked access to the “true” doctrines. This moral corruption of non-Christians was a theological fact, and the extent of that degeneracy was revealed by their practices.²⁰⁹ Sexual traditions for example, human dignity, and the treatment of and behaviour towards women in different cultures and traditions became an indication of this moral deficiency. These themes continue to have an effect, in a secular guise, on the ECtHR especially when the ECtHR links for example the veil phenomena with gender equality and respect for others.

The European story about Brahmanism echoes the Protestant theology of “false” religion, by identifying the Brahmans as the priests and Brahmanism as the

²⁰⁷ Richard King, ‘Orientalism and the Modern Myth of “Hinduism”’, *Numen* Vol 46 available at <http://booksandjournals.brillonline.com/content/journals/10.1163/1568527991517950?showFullText=pdf>

²⁰⁸ S.N. Balagangadhara, *The Heathen in His Blindness...* 109.

²⁰⁹ *Ibid.*, at 71-75

foundation of false religion.²¹⁰ Accordingly with the advances in the Western exploration among cultures, religions were “constructed” in India and different phenomena came to be described as religions, later becoming religious rivals with Christianity.

Consequently the West “constructed” Buddhism, which was seen an “oriental wisdom”²¹¹ as a reformative or a distinct “civilised religion” to face the corruption of Hinduism and Brahmanism.²¹² Philip Almond notes that “... there was an imaginative creation of Buddhism in the first half of the nineteenth century, and that the Western creation of Buddhism progressively enabled certain aspects of Eastern cultures to be defined, delimited, and classified.”²¹³

These “religions” says Balagangadhara, are the “imaginative creations of the Western savants and of the culture to which they belong.”²¹⁴ Almond says that “discourse about Buddhism provides..., a mirror in which was reflected an image not only of the Orient, but of the Victorian world also.”²¹⁵

The West drew a distinction between the “doctrinal cores” and common practices of the people by creating a difference between a doctrinal or philosophical Hinduism (or ethical doctrines that were akin to Western concepts) and a popular Hinduism (the cults and rituals which were condemned and seen as idolatrous,

²¹⁰ Jakob De Roover, ‘The Indian Jews’ Outlook, 20 June 2008, available at <http://www.outlookindia.com/article.aspx?237702>

²¹¹ Philip C. Almond, *The British Discovery of Buddhism* (Cambridge University Press 1998) 1-32.

²¹² S.N. Balagangadhara, *The Heathen in His Blindness...* 134-138

²¹³ Philip C. Almond, *The British Discovery of Buddhism* (Cambridge University Press 1998) 4.

²¹⁴ S.N. Balagangadhara, ‘Generating a Scientific Hypothesis about Religion: a Preliminary Attempt’, available at https://www.academia.edu/6791902/A_Scientific_Hypothesis_about_Religion

²¹⁵ Philip C. Almond, *The British Discovery of Buddhism* (Cambridge University Press 1998) 6.

corrupt and immoral), which represented the current practice.²¹⁶ Buddha was seen as another Martin Luther who fought the Brahmanic priestly caste²¹⁷ and Buddhism was often called the Protestantism of Asia.²¹⁸

Similarly, Protestants did not reject Catholics by saying they were not Catholics, but by portraying them as worshipers of the Devil. Calvin, for example, did not reject Catholicism by saying that the Roman Catholic Church was not “really” Catholic, but by calling it the “Devil’s church.” It was in the name of Christianity that Calvin rejected Catholicism. If therefore in one argument “caste” is presupposed and the argument takes place within that framework, in the other, Christianity or religion is presupposed and the argument again takes place over who is a truly religious or a Christian person.

2.7 The Difference Between a Religion and a Tradition

The West presupposed religions in all cultures but did not appreciate the difference between a religion and tradition. Books, belief in God, prophet(s) and most importantly doctrines are essential requirements to make Christianity, Islam and Judaism into religions, and without them they cannot be recognised as religions.²¹⁹ These same essential requirements are not crucial to make other traditions such as “Hinduism”, “Buddhism” and “Jainism” into a religion, yet they are still considered

²¹⁶ S.N. Balagangadhara, *The Heathen in His Blindness*....118-119.

²¹⁷ S.N. Balagangadhara, *The Heathen in His Blindness*.... 134-138.

²¹⁸ Christopher Clausen, ‘Victorian Buddhism and the Origin of Comparative Religion’ (1975) *Religion* 5(1) 1-15, 7. Clausen maintains that “[O]riginal Buddhism ... was often called the Protestantism of Asia. (The Lamaism of Tibet ... was frequently compared by English writers to Roman Catholicism and regarded as a priestly, ritualistic corruption of original Buddhism.) ... Buddha was another Luther who, sweeping away the superstitions and rituals with which the Brahman priesthood had enshrouded India, took religion back to its simple and pure origins.”

²¹⁹ S.N. Balagangadhara, *The Heathen in His Blindness* 11-25.

(by the ECtHR as well) to be “religions”.²²⁰ How can the properties that make some phenomena into religion be both unessential and essential simultaneously? Balagangadhara explains that this contradiction lies in the context of religious studies and the presupposition of the universality of religion and religious experiences when studying various cultures.²²¹

Balagangadhara identifies the difference between religion and tradition. He explains how the Roman *religio*²²² was practiced only because it was a *treditio* passed on by the ancestors; the Romans did not look for a definite or a necessary correlation between belief and practice. To the Romans, *religio* was not associated with doctrinal or theological analysis, and *belief* did not justify a practice, hence one could not have *religio* if one lacks *treditio*. According to the Romans, having a *treditio* is a requirement to having a *religio*. Since Christians were unable to establish themselves as people with a shared tradition,²²³ they were not accepted as a religion and were thus viewed by the Pagans as “atheists”²²⁴ lacking *religio*. Christians therefore had to show that Christianity was indeed a religion without a tradition.

To demonstrate the existence of their religion, Christians tried to break the connection between *treditio* and *religio*. They started looking for doctrines rather than traditional practices, and mandated that in order for something to be called a religion, it should entail doctrines which are based on God’s revelation and books, prophets, Gods, otherwise it is considered to be a “false” religion. They transformed the requirement in a way that instead of showing they were true to traditional

²²⁰ Ibid., at 11-22.

²²¹ Ibid., at 22.

²²² Ibid., at 39-53.

²²⁴ The use of the word atheism or atheist here is different from how the word is discussed later on in the dissertation where I refer to atheism as a form of secularized theism.

practice, they argued that their *doctrines* were ancient and therefore true. Christians therefore claimed that they not only had religion but that they were *the only true* religion, while asserting that others have false doctrines and religions. Consequently *Christianity was a religion precisely because it was not tradition.*²²⁵

To strengthen its theological argument, Christianity established a link between beliefs and practices, which were, according to the Romans, two separate paths. The Christians started criticizing practices in order to criticise beliefs and show that paganism was an expression of a set of false or corrupt beliefs.²²⁶ Previously there was no compulsory or essential link between practices and beliefs; practices were carried out of tradition (as previously noted). Christians however, believed that all practices emanated from beliefs, and to be able to criticise the beliefs of the pagans they had to criticise their practices first.

Christians therefore claimed that practices alone, without belief, are a seduction by the “Devil”, which will inevitably lead to these false paths. The importance of the antiquity of a custom or tradition was diminished in so far as religion was concerned. Consequently, all the pagan cults, with their multitude of practices, ceremonies and rituals, all these others, became mere exemplifications of another religion, namely a false one.

The difference between the Christians and the Romans/Greeks lies in the attempt to link between the act of practice and belief. To the Romans and Greeks belief was not a core requirement for practice and engaging in a tradition did not need reasoning or theoretical justification to practice and uphold ancestral customs.

²²⁵ .N. Balaganagadhara, *The Heathen in His Blindness...*53

²²⁶ S.N. Balaganagadhara, *The Heathen in His Blindness...*53

In Christianity, without belief, practice is deemed futile for it is not sufficient to only believe in God; this belief also needs to be translated into worship. It is through worship of God that one confirms to be part of God's plan and it is worship that sustains belief.

Since a set of beliefs became the central characteristic for any religion(s), including the belief that God should be worshiped in a particular way, human actions therefore required beliefs to justify them. Tradition, on the other hand, did not require any justification in order to be practiced. Traditions are inherited practices that are learnt by means of transmission through following instructions and imitation. Thus, unlike religious practices, they have no authority to determine whether they are required or who belongs to a certain tradition. Stories told within a tradition do not claim *the truth* like religious stories and there is no obligation to practice a tradition.²²⁷ Moreover, traditions are adaptive and flexible meaning that they are able to "change" or modify which is certainly not the case with religion.²²⁸

2.8 Religion Spreads Through Secularisation

Balagangadhara shows that the universalisation of religion has a double dynamic through which it universalises: conversion and proselytisation. Although seemingly ironic, proselytisation and secularisation move along each other to spread religion.²²⁹ This dynamic is behind the formation and development of the Western culture. Jakob De Roover says that

²²⁷ S.N. Balagangadhara, 'To Follow our Forefathers: The nature of Tradition' available at <http://www.hipkapi.com/2011/04/02/to-follow-our-forefathers-the-nature-of-tradition-s-n-balagangadhara/>

²²⁸ S.N. Balagangadhara, Is Tradition Akin to Following Moral Obligations? 23 March 2011, Hipkapi Blog available at

²²⁹ On the link between secularization and proselytisation see S.N. Balagangadhara, *The Heathen in his Blindness...*, 389-392.

“[s]ecularised religion spreads in the form of certain attitudes towards life, society and the world: one begins to look at human lives, actions and historical events as carriers of meaning, intention or purpose; one views practices as the embodiments of beliefs or doctrines; one conceives of all cultural ethics as bodies of norms; one approaches society as a system constituted by a legal framework; one experiences natural phenomena as linked to each other by an underlying order, whose regularities should be disclosed. This formulation in terms of attitudes is promising as a step towards an explanation of secularisation.”²³⁰

The process of secularisation spreads Christian theological themes in a secular guise. Balagangadhara notes that “what is called ‘the secular’ is religion secularised or is religion in a different set of clothes.”²³¹ The ECtHR applies this religiously secular language, when shifting language from religion to ethics and when assessing Article 9 applications, especially when trying to define and discuss concepts such as beliefs, truth and falsity. (For an analysis on the secularised language the ECtHR uses see Chapter 6).

Timothy Fitzgerald questions the extent to which religious practices can be distinguished from non-religious or secular practices.²³² However, Balagangadhara argues that there is no binary distinction between the “religious” and the “secular”,

²³⁰ Jakob De Roover, ‘Christian Attitudes and the Rule of Law as the Mechanism of Secularization’ Hipkapi, 1 April 2011 electronic copy available at <http://www.hipkapi.com/2011/04/01/law-secularization-and-religious-attitudes/>

²³¹ S.N. Balagangadhara, ‘Is The Distinction Between ‘Secular’ and ‘Religious’ Neutral?’ Hipkapi, March 2, 2011 available at <http://www.hipkapi.com/2011/03/02/is-the-distinction-between-secularand-religious-neutral-s-n-balagangadhara/> See also part 4.5 of this thesis Human Rights and Christianity.

²³² Timothy Fitzgerald, *Discourse on Civility and Barbarity: A Critical History of Religion and Related Categories* (Oxford University Press 2007) see also S.N. Balagangadhara, ‘On the Dark Side of the “Secular”: Is the Religious-Secular Distinction a Binary?’ available at https://www.academia.edu/6379024/On_the_Dark_Side_of_the_Secular_Is_the_Religious-Secular_Distinction_a_Binary

but a triad instead: true religion, false religion, and the secular; or, the religious, the idolatrous (or the profane), and the secular. He explains that the “realm of the secular today includes practices that were once considered as expressions of false religions but live on in the secular today as possibly religious acts.”²³³ Balagangadhara notes that what courts make, are judgments about the “religious” nature of the acts of religion. Liberal States and courts, he says, do not actually ask whether a certain manifestation is idolatrous or not, but what they do ask is whether these practices are “truly” (or actually) religious.²³⁴ Consequently, they “take an agnostic stance towards “falsity” by transforming claims about falsity into claims about beliefs regarding truth.”²³⁵ It remains up to the courts to determine whether these acts may qualify as “true” religious acts and therefore are could be protected under religious freedom.²³⁶ Furthermore, for the ECtHR to stay consistent in determining whether practices of the applicants under Article 9 cases are religious, it has to have recourse to the pronouncements about truth. Consistent with the practice of embracing Abrahamic theologies to solve religious problems, and although courts do not “define” who an authority is, they merely accept the claim that religious authorities determine the “truth” in religious matters.²³⁷

Secularists and Christians alike maintain that conversion is part of the universal freedom of conscience and is therefore a fundamental human right.²³⁸ However, the concept of conversion claims it is a religious duty to spread the “true”

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ See for example *Kovalkovs v Latvia* (35021/05) [2012] E.Ct. H.R. 280 (ECHR).

²³⁷ For a further analysis see Chapter 5 on *Kokkinakis v Greece*[1993] 260 A ECtHR.

²³⁸ See for example *Kokkinakis v Greece* at para 48; where the ECtHR speaks of “improper proselytism and true evangelism.”

religion to include more people into the “true” religion.²³⁹ Hence freedom to convert assumes that religions are rival movements competing with each other to win converts into the “true” religion. Religious conversion and proselytisation are therefore neither secular nor neutral; they are an intrinsic drive within Abrahamic religions to win converts into the “true” religion.

Non-Abrahamic cultures, on the contrary, consider every “religion” to be equally true, and there is nothing such as “false religion”. Religious conversion therefore from falsity to truth is meaningless.²⁴⁰ To non-Abrahamic cultures a religion is a tradition with specific sets of ancestral practices that characterises a human community.²⁴¹ The traditions are maintained because they make some community into a community and not because they contain some “exclusive truth” binding the believer to God. Hence any attempt to interfere with the tradition of a community will be seen as illegitimate, since all traditions are part of the human quest for truth.²⁴² Freedom to convert or proselytise does not make sense to cultures that do not view others in terms of “religious” rivals.

2.9 Conclusion

In the Western culture, it is assumed that in the heart of every human being there is a sense of divinity which God has implanted when creating humankind. This presumption is not empirically tested but is derived from a theological Christian background. Christians believe that the Bible has recorded the history of humankind

²³⁹ For Christ had ordered Christians to “go and make disciples of all nations.” The Gospel of Mathew 28:19.

²⁴⁰ S.N. Balagangadhara and Jakob De Roover, ‘The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism’ (2007) *The Journal of Political Philosophy* 15(1) 67-92.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

up until the revelation of Jesus, therefore the stories other people believe about their past are, according to Christianity, false ideas about the human past because the real truth is contained in the Bible. Christians believe in two revelations of God, one is the revelation of God in nature, everything that is there in nature reflects the will of this single God, and the second revelation is the Bible in which God not only reveals who He is but tells humans how to worship Him.

The moral theory of our modern world is the idea of the medieval theology of conscience.²⁴³ It speaks in terms of the psychology of human beings, which talks about conscience, morals, ethics and superego. However, conscience is how the Christian God speaks to humanity and how he makes humanity listen to his word.²⁴⁴ Moreover, freedom of conscience remains a fundamental element in both Christian theology and legal systems, and in Christian theology the “true” God does not accept unwilling followers who had been forced into His worship as that would be a violation to this freedom that God has given to man. In the European legal systems and specifically Article 9, religion is being reduced and collapsed into freedom of conscience assuming the comprehensiveness of it without studying it from within its cultural background,²⁴⁵ taking for granted the Christian ethical and moral backdrops to freedom of conscience.

²⁴³ S.N. Balagangadhra, “...We Shall Not Cease From Exploration...”An Invitation Disguised As a Position Paper Composed At the Behest of ARENA for the Theme “Decolonizing Social Sciences”, available at https://www.academia.edu/4214176/We_Shall_Not_Cease_from_Exploration

²⁴⁴ S.N. Balagangadhara Documentary on Indian traditions: Beware of God, July 4, 2012 available at <http://www.hipkapi.com/2012/07/04/eshi-films-on-indian-traditions-beware-of-god/>

²⁴⁵ Cecile Laborde, ‘The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age’, *The Immanent Frame: Secularism, Religion and the Public Sphere*, available at <http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/> [last accessed March 2017].

The West has studied religion through what might be called a *religious hermeneutical circle*²⁴⁶ framed by secularised Christian theological backgrounds, which remain consistent with the themes of the Bible. The religious doctrine of Christianity has become the framework within which religion is studied.²⁴⁷ Timothy Fitzgerald has argued that there is “no coherent non-theological theoretical basis for the study of religion as a separate academic discipline.”²⁴⁸

These findings have implications for the interpretation and application of Article 9 of the ECHR particularly when a culture is further away from the idea of religion that is presupposed in Article 9 which is based on Protestantism. It is likely that Article 9 introduces a skew or a distortion when assessing cases presented by non-Christian religions and different groups and reconstructs them through the “agency of the dominant culture to remake them as a variety of ‘religions’ on the model of Christianity”²⁴⁹ The Western universalistic attitude is driving minorities living in the West to distort their culture and tradition, out of a reaction to a Western drive to universalise their own civilisation and “secularise” Christian beliefs,²⁵⁰ as well as what contradicts or what is “foreign” to these beliefs.

Article 9 judgments reveal a distorted and selective approach to freedom of religion for as *The Heathen in His Blindness* shows us it is in the nature of religion to

²⁴⁶ On the study of meaning and expression in human behaviour and the ‘hermeneutical circle’ see Charles Taylor, *Interpretation and the sciences of Man* The Review of metaphysics, Vol. 25(1) Sep 1971 p. 3-51, 18.

²⁴⁷ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 12.

²⁴⁸ Timothy Fitzgerald, *The Ideology of Religious Studies* (Oxford University Press 2000) 3.

²⁴⁹ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75.

²⁵⁰ Daniel Philpott, ‘Religious Freedoms and the Undoing of the Westphalia State Michigan’ (2004) Journal of International Law 25(4) 981-998, 987. On Islamic countries challenging the universality of human rights see Articles (24) (25) of the Cairo Declaration of Human Rights in Islam (CDHRI) and The Organisation of the Islamic Conference established on September 25, 1969.

distort traditions in a “secular” way and present them as “false” religions. Consequently, Balagnadhara’s theory was utilised in this thesis as it is believed to be the perfect benchmark from which to examine the ECtHR jurisprudence. The belief-centred approach that the ECtHR takes explains how manifestations, such as wearing particular apparel, are seen as “symbols” in the Western legal systems generally and in the ECtHR particularly, exemplifying beliefs and leaving it open to various interpretations as to what these “symbols” represent. This makes it difficult for people outside the common European understanding of religion and religious practice to make sense of Article 9 without having to distort themselves to fit into the current system which has a Christian theological backdrop. This may lead to a situation where minority traditions are recognised in the legal systems if and only if the majority, where in the West happens to be Christianity approves of such recognition²⁵¹ and most importantly interprets and dictates the way through which this recognition is applied.

If on the other hand we accept that that some cultures do not have religion, it follows that they also do not have a claim to religious freedom under the current framework of Article 9. While this might prevent some cultures from obtaining the protection of Article 9, it could be defended on the ground that treating them as having religion merely distorts their character, and presents a false picture of reality. Since this scenario of dropping the “universalistic” reference to religion is purely hypothetical, in the contemporary legal context, the chapters to follow will analyse the consequences of applying the current human rights law framework on religious

²⁵¹ The ECtHR relies on a general folk understanding of religion, which the majority can relate to. An example of this is clearly illustrated in how the Court seeks the approval of the majority through the approval given by the churches e.g. in *Lautsi v Italy*.

freedom in Article 9. More specifically, the impact of having a Protestant backdrop to the development of the idea of religious freedom will be examined.

Chapter 3

The Historical Background to Religious Freedom

3.1 Overview

In this chapter the development of religious freedom in Europe is examined. It is discussed how religious freedom is situated within European intellectual history and how religious freedom came to be one of the central claims within Christian Protestant theology in association with linked ideas such as that of the secular or neutral state. It is suggested that the concept of religious freedom, secularism and neutrality have emanated from and depend on a number of deeply rooted Protestant assumptions regarding the nature and the aim of human life.²⁵² These concepts adopt ideas of the Protestant theology that claim that the world is split into a temporal carnal sphere and a spiritual religious realm, and universalises these concepts for human societies through the process of secularisation. As previously discussed, Christian assumptions on the purpose of human life and its nature are innate elements to the idea of secularism.²⁵³ “[S]ecularism suggests that plural societies will fall apart, if they fail to adopt the Protestant norm of separation of the religious and the political.”²⁵⁴ It is also argued that “modern”²⁵⁵ human rights have interlocking legal and religious dimensions, whereby human rights theories and ideas

²⁵² Jakob De Roover, ‘Secularism, Colonialism and Indian Intellectuals’ April 2, 2011 Hipkapi blog, available at <http://www.hipkapi.com/2011/04/02/secularism-colonialism-and-indian-intellectuals/> [accessed in July 2014].

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ The word modern is used to refer to post-1945 human rights law.

(such as natural rights) make no sense unless one presupposes the truth of Christian theology and religion.²⁵⁶

3.2 Religion as a Universal Worldview

Christianity defined religion and “Christian anthropology” is the cornerstone of knowledge about “other religions”. This has been successful to the extent that religion has become a worldwide concept. Accordingly, one could question whether there is a relationship between this worldwide concept and worldviews, (i.e. a view about the world or the perspective or totality of beliefs that a person has).

In *The Heathen in his Blindness* Balagangadhara demonstrates that religion is the only model that is able to pass for “worldview” or, in other words, a secularised or neutral concept of religion; other examples seem obscure when replaced by the word “worldview.” As a result, this worldview becomes a secularised version of religion, more specifically Christianity. Balagangadhara shows how if we replace the word “worldview” with religion we can barely see a difference in the meaning. Worldviews are often accepted as concepts answering “deep questions” such as for example the meaning of life. It is argued that these questions are a product of religion and not a precondition of it, as for example the question on the meaning of life can merely be presented within a religious framework. Consequently, a worldview could only answer such questions by complementing an existing religion or using secularised religious concepts to dispute existing religious concepts. Worldview is therefore the secularisation of religion.

²⁵⁶ S.N. Balagangadhara, ‘We Shall Not Cease From Exploration’ An Invitation Disguised As a Position Paper Composed At the Behest Of ARENA for the Theme “Decolonizing Social Sciences” 1985 electronic copy available at <http://www.cultuurwetenschap.be/pages/annex-01> [Last accessed September 2014].

The Enlightenment thinkers were therefore able to build their “neutral” and “rational” thoughts (as opponents of religion and organised religious institutions) by adopting ideas from Protestant Christianity. Even in our “modern” times when Western academics assume they are neutrally or scientifically studying various cultures and “belief” systems in other cultures, the framework which they are using is that of a Christian theology.²⁵⁷ Through the process of secularisation, this Christian theology that informed them moves more to the background and becomes invisible.²⁵⁸ Secularised concepts within Christian theology such as secularism, freedom of religion, and laïcité are “encoded into legal instruments, used for building legal theories, or taken up by academics, law reformers, and others to argue for legal change.”²⁵⁹ In India for example, there is no unique or radical explanation for the creation and the origin of the world or the cosmos. There are various stories and numerous Gods which people find equally true, more specifically their being true or false is irrelevant and insignificant; *people are indifferent to their falsity or truism*. These stories lack the object and the status of being knowledge claims, they impart knowledge without being knowledge claims themselves. This makes religion impossible in a culture where the question about the origin of the cosmos is a meaningless one.

²⁵⁷ Prakash Shah, ‘In Pursuit of the Pagans: Muslim Law in the Legal Context’ (2013) 45(1) JLP, 58-75
electronic copy available at
http://www.tandfonline.com/doi/abs/10.1080/07329113.2013.773197#.UwvMWvR_s00

²⁵⁸ Ibid.

²⁵⁹ Ibid.

3.3 How is Christianity De-Christianised?

After Western intellectuals divided religions on the basis of “true” and “false”, they argued that cultures having a false religion are cultures having the “wrong” set of ethics and morals. This idea of true and false religion made it a “*religious duty*” to spread, by conversion and proselytisation, the “true” religion in those cultures that are lacking it. Balagangadhara argues that religion universalises in a secular form, (that is as a worldview), but religion stays at the core of this universalisation process, the culture remains religious and the Western culture has become a culture precisely because of the universalisation of religion through its two dynamics- proselytisation and secularisation. He explains that religion secularises itself and becomes a de-Christianised “religion” while disguising itself in secular garbs, which results in the victory of religion, but in a different set of clothes; worldviews Balagangadhara says are those set of clothes. Religion therefore became universal by secularising itself and losing some of its Christian characteristics. In the process of secularisation, Christianity casts of the theological structures of its Christian features. Those specifically Christian features spread secular or neutral ideas in the world. The idea that religion is universal is one example of this process.²⁶⁰ The appreciation for conversion and proselytism is clearly evident in the stances the ECtHR takes when deciding on such cases.²⁶¹

²⁶⁰ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 16.

²⁶¹ See for example *Kokkinakis v Greece.... Insert more cases on Proselytism and conversion* For a further analysis see chapter Five.

3.4 The Secularised Language of Christianity

Balagangadhara observes that “in the name of science and ethnology, biblical themes become our regular stock-in-trade...”²⁶² The secular language used (which is a Christian one in origin) has become the sole language in which the Western culture structures experiences of various traditions and practices and consequently claims that those cultures have religion. He says:

“In the process of secularising itself, Christianity does not disappear. It continues to remain *a* religion, distinguishing itself from other religions and distinguishing itself from other entities including the secularised variant of itself.”²⁶³ The supposedly secular world of today is still a Christian world that is not free from religion, but is an extension to the Christian world that has disguised itself in a “secular garb”.

In the light of what has been said and in just the same process of how the Western culture passed through the phases of secularisation in the form of de-Christianised Christianity, the theological Christian framework of the legal systems and specifically Article 9 has moved also into the background and became invisible. The ECtHR uses secularised Christian concepts and language that has a Christian theological presupposition and utilises them as if they are universal concept. For example, debates often take place in the ECtHR as to whether a particular practice is an intrinsic part of a religion or belief (crucifix, chastity ring, veil) or is just a cultural requirement with no links to the concept of doctrinal truth and obligation. It is important to ask, what if the practice is neither intrinsic nor mandatory but is of significant importance or is an ancestral tradition, how would the ECtHR assess such

²⁶² S.N. Balagangadhara, *The Heathen in His Blindness...* 226-227

²⁶³ S.N. Balagangadhara, *The Heathen in His Blindness...* 269.

an importance? The extent to which this mandated requirement is indeed a priority in the ECtHR, and the extent to which judges are likely to undermine the persons' own understanding of their belief and tradition, is often complicated and has a deep theological background.²⁶⁴

It is important to question whether it is ever possible for non-Abrahamic traditions to access the legal systems without distorting themselves to fit into the theological language used above. In a recent keynote speech Sir James Munby, an English judge and president of the Family Division of the High Court of England and Wales, stated that “[h]appily for us, the days are past when the business of the judges was the enforcement of morals or religious belief.”²⁶⁵ However it is not known on what grounds Munby would address concepts of morality and tolerance, or more importantly “respecting and protecting the right to hold sincere beliefs on the other” which he strongly advocates for.²⁶⁶ What does he consider to be “sincere” beliefs? It seems that he is simply unaware that he is consistently upholding Christian values in disguise.

The concepts of equality, tolerance, neutrality and morality, in other words the Christian normative principles, the moral “ought to” and “ought not to”,²⁶⁷ are

²⁶⁴ For detailed analysis of Article 9 cases and the language of the ECtHR see chapters 5, 6 and 7 in this thesis.

²⁶⁵ Sir James Munby, President of the Family Division of the High Court, in a speech addressing family lawyers at the Law Society's Family Law Annual Conference. Andrew brown, Judges can sidestep religion, but they can't avoid morality available at <http://www.theguardian.com/commentisfree/belief/2013/nov/05/judges-religion-morality-speech-sir-james-munby-christian-values> See also <http://www.iclr.co.uk/law-morality-debate-goes/>

²⁶⁶ Andrew brown, 'Judges can Sidestep Religion, but They Can't Avoid Morality' The Guardian, 5 November 2013 available at <http://www.theguardian.com/commentisfree/belief/2013/nov/05/judges-religion-morality-speech-sir-james-munby-christian-values>

²⁶⁷ S.N. Balagangadhara, 'Colonial Experience: Normative Ethics I' March 2, 2011 available at <http://www.hipkapi.com/2011/03/02/colonial-experience-normative-ethics-101-s-n-balagangadhara/>

concepts that have a Christian theological backdrop, which have been incorporated in the Western legal systems, after going through the process of secularisation, as secular and universal concepts or worldviews. These concepts make sense if their theological background is taken into consideration.²⁶⁸ Equality for example presents itself clearly in the Church as, “there is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus.”²⁶⁹

Christianity transformed ethics of virtue into normative Christian ethics and those Christian ethics were incorporated into Western law in general and in human rights law more specifically. One might argue that the concept of ethics, justice and equality is an old one and that for example Aristotle has already addressed this issue extensively. However, Aristotle explains that justice consists in what is lawful and fair, with fairness involving equitable distributions and the correction of what is inequitable. Even though he talks of social equality, he talks about it in terms of proportionality rather than equality. Second, he believes aristocracy to be the best regime, which is not similar to the Christian belief of equality. Aristotle explains the concept of ethics by exemplifying it as a person who possesses excellent character, which is developed partly as a result of the person's upbringing, and partly as a result of his habit of action.²⁷⁰ This kind of virtue and ethics is not related to any divine being or a fulfilment of any divine plan. It is attributed to traditional humanly practice and upbringing. Most importantly, unlike Christian morality and ethics,

see also S.N. Balagangadhara, ‘Moral Domain not Defined by Norms’ March 23, 2011 available at <http://www.hipkapi.com/2011/03/03/moral-domain-not-defined-by-norms-s-n-balagangadhara/>

²⁶⁸ Prakash Shah, ‘Legal Response to Religious Diversity, or to Cultural Diversity?’ in Silvio Ferrari (ed), Routledge Handbook of Law and Religion (Routledge, 2015) 119-132.

²⁶⁹ Galatians 3.28.

²⁷⁰ Aristotle, *Nicomachean Ethics* (W. D. Ross tr, Batoche Books, Kitchener 1999).

Aristotle does not believe that one tries to live well for the sake of some further divine goal. Christian writers changed the meaning of terms, and changing the concepts behind them to make them consistent with Christian theology. So while many terms existed prior to Christianity they have not only been appropriated but also changed in the process. “*Religio*” is one of them, ethics is another.

Following from the above it would appear that under European legal systems “non-Christian religions and cultures would be “recognised” according to the terms already established by the secularisation of Christian theology through its Protestant lineage.”²⁷¹ Moreover, a “Christian framework would explicitly or implicitly be at play when construing what is required for the protection of other ‘religions’. This would have consequences for disputants in concrete legal contexts depending on the type of claims being made.”²⁷² Consequently, the Western legal systems, and especially human rights law, becomes the place where Christian concepts can flourish.²⁷³ The claim that the essence of religion is unstructured and is rather a feeling or an intuition is incorrect; it exhibits a very structured experience because it presupposes some concepts and requires one to experience those concepts in a particular way in order to have religious experiences.

The idea that “religious experience” is found in all cultures is a secular form of replacing the idea of how God revealed himself to Mankind.²⁷⁴ These themes

²⁷¹ Jakob De Roover and S.N. Balagangadhara, ‘Liberty, Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India’ (2009) *History of Political Thought* 30 (1) 111–139.

²⁷² *Ibid.*

²⁷³ Harold Berman, ‘The influence of Christianity upon the Development of Law’ *Oklahoma Law Review* 12 (86) available at <http://www.classicapologetics.com/b/berminfl.pdf>

²⁷⁴ Balagangadhara notes that Christianity was faced with a Christological dilemma when it had to choose between the Christ centred or the God centred approach to explain religion. Claiming that God revealed himself exclusively in Christ prevents the revelation to be seen as universal because it might

become embedded in the language when one talks about religion or when one explains certain practices. In the absence of an alternative theory, religious themes have become the basis on which one builds “scientific” theories of religion. Atheists, for example, who reject the existence of God try to find alternatives in a secular world, but how could they adapt in this “new secular” world if this world is *entirely* new? The answer is that these ideas are not entirely new. Atheists “accept the doctrines of a de-Christianised Christianity and, for these to be continually transmitted and make sense to those who accept them, this religion requires to be present in the background.”²⁷⁵ In his essay *Postmodernist Bourgeois Liberalism*, Richard Rorty says that “freeloading atheists” continue to rely on the Judeo-Christian legacy of concern with human dignity despite their rejection of the revealed truth that alone could support this concern. For Rorty, God is dead, but secularised Christian morality continues.²⁷⁶

3.5 Christianity and Human Rights

When religion is secularised and loses its Christian characteristic it gives rise to the modern forms of human rights and “secularised” ethics,²⁷⁷ which are incorporated

not be accepted among cultures of non-Christian background, i.e. it ceases to become universal, furthermore it will make God appear as a Christian God. If on the other hand the emphasis on Christ is shifted to stress on the revelation of God as such, then Christianity will face the possibility of claiming multiple revelations of the Divine such as the revelation of God in Rama, Shiva, Buddha... and will sacrifice its Christian nature. The two approaches present a dilemma to the Christian theology and the uniqueness of God’s revelation in Jesus will have to be sacrificed in order to prove the universality of Christianity. Christianity can therefore be universal if it ceased being specifically Christian. The only way out of this dilemma was to adopt the concept of the “One who reveals Himself and not to the one in whom such a revelation occurs” that is, the uniqueness of God’s revelation in Jesus will have to be sacrificed in order to present a God whose revelation is universal. By sacrificing the Christ-centred approach, theism becomes more of a ‘universal’ philosophy of religion. See S.N. Balagangadhara, *The Heathen in His Blindness...* p. 182-185

²⁷⁵ S.N. Balagangadhara, ‘Secularization and World views’ March 15 2011, available at <http://www.hipkapi.com/2011/03/15/secularization-and-world-views/>

²⁷⁶ See also Michael J. Perry, ‘The Morality of Human Rights: a Non Religious Grounds?’ (2005) Emory Research Paper No. 05-6, University School of Law Public Law & Legal Theory Research Paper Series. 97-150, 97.

²⁷⁷ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75.

into the Western legal systems as secular concepts. These “secular” concepts are thought to be universal in all cultures and therefore these legal systems are assumed to be inclusive systems taking into account diverse cultures and traditions.²⁷⁸ As a result one cannot accept the concepts of normative ethics and the theories of human rights without at the same time, accepting Christian theology as true. In creating this secularised version of the legal system, Christians are also helping in prepare the hearts and minds of humankind to “receive the *Christian* faith and grow in *Christian* hope and love. They bear witness to their own love for justice, which is one of the marks of a Christian, to their belief that law can be an instrument of justice, and to their desire, with God’s help, to convert law and justice into instruments of Christian Love.”²⁷⁹ As Charles Curran says,

“[h]uman dignity comes from God’s free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God ... Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor, young or old; male or female; healthy or sick.”²⁸⁰

Samuel Moyn notes that “Europe and therefore the modern world drew nearly everything from Christianity in the long term.”²⁸¹ Zachary Calo further explains that human rights has a clear “religious heritage and sometimes even speaks in what could be heard as religious language,” and he observes that “[t]he idea of human

²⁷⁸ Ibid.

²⁷⁹ Harold Berman, ‘The influence of Christianity upon the Development of Law’ (1959) 12 Okla. L. Rev, 86 electronic copy available at available at <http://heisenberg.library.emory.edu/berman/049.pdf>

²⁸⁰ Charles E. Curran, *Catholic Social Teaching: A Historical and Ethical Analysis 1891– PRESENT: A Historical, Theological and Ethical Analysis*, (Georgetown University Press, 2002) 132.

²⁸¹ Samuel Moyn, *Christian Human Rights*, (University of Pennsylvania Press, 2015) 6.

rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred.”²⁸²

Archbishop Rowan Williams adds that a “universal principle of legal rights requires both a certain valuation of the human as such and a conviction that the human subject is always endowed with some degree of freedom over against any and every actual system of human social life. Both of these things are historically rooted in Christian theology.”²⁸³ But Aaron Petty notes that from the Eighteenth century onward, European legal systems began to see themselves as “potentially universal, pursuing the law of reason of the Enlightenment, unmoored from their Christian origins.”²⁸⁴ The Christian foundations of the legal systems remained, of course, albeit silently. Furthermore, in the twentieth century, Christianity played the dominant role in shaping and forming international law and the subsequent legal systems.²⁸⁵ As a result, “mainstream accounts of human rights in international law are insensitive, and in some cases even blind, to the communal dimensions of goods such as religion. One place in which the silent influence of Christianity is manifested is in Article 9 of the European Convention on Human Rights.”²⁸⁶

²⁸² Zachary R. Calo, Religion, Human Rights, and Post-Secular Legal Theory, (2011) ST. JOHN’S L. REV 85 495, 495.

²⁸³ Williams Rowan, ‘Civil and Religious Law in England: A Religious Perspective’, Lecture delivered by the Archbishop of Canterbury, Dr. Rowan Williams in the Temple Festival series at the Royal Courts of Justice available on <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective#Lecture>

²⁸⁴ Aaron R. Petty, ‘Religion, Conscience, and Belief in the European Court of Human Rights’ (2016) George Washington International Law Review 48 802 Available at SSRN: <https://ssrn.com/abstract=2641644> or <http://dx.doi.org/10.2139/ssrn.2641644> p.11.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

Malcolm Evans says that “human rights and religion do not mix very easily and attempts to make them do so are fraught with difficulties and dangers.”²⁸⁷ This view is however, debatable given the strong Christian influence on the origins of human rights and human rights law. The religious origins of the “universal ethics”²⁸⁸ are greatly indebted to the Bible, under one God, the creator of all that exists; all humankind is viewed as a unity with no race existing for itself alone. The Bible contains a variety of injunctions, which are formulated in the terms of duties that correspond to secular conceptions of rights for others. For example, “thou shall not kill” implicitly refers to the right to life, just like “thou shall not steal” implies a right to property.²⁸⁹ We tend to speak of equality as if it is some kind of neutral universal “secular” notion. However, its basis lies in the Protestant notion of the priesthood of all believers so it is not necessarily a universal subscribed value.²⁹⁰

The Protestant theology abolished priesthood by turning everyone into a priest. Karl Marx says that Luther turned priests into laymen because he turned laymen into priests.”²⁹¹ It was therefore “no longer a case of the layman’s struggle against the priest outside himself but of his struggle against his own priest inside

²⁸⁷ Quoted from Tom Lewis ‘What not to wear: Religious Rights, the European Court and the margin of appreciation’ (2007) I.C.L.Q. 56(2) 395-414.

²⁸⁸ By Universal ethics I mean a code of ethics that are supposed to be universally applicable.

²⁸⁹ Michline Ishay, *The Human Rights Reader, Major Political Essays, Speeches, and Documents From the Bible to Present*. (Routledge 1997) xv.

²⁹⁰ Prakash Shah, ‘Ethnic and religious diversity in Britain, where are we going?’ in Geraldine Healy, Gill Kirton, Mike Noon (eds), *Equality, Inequalities and Diversity: Contemporary Challenges and Strategies* (Palgrave MacMillan, 2011) 77-92.

²⁹¹ Works of Karl Marx 1843, ‘A Contribution to the Critique of Hegel’s Philosophy of Right Introduction’, available at <http://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>
The full quotation reads: “Luther, we grant, overcame bondage out of devotion by replacing it by bondage out of conviction. He shattered faith in authority because he restored the authority of faith. He turned priests into laymen because he turned laymen into priests. He freed man from outer religiosity because he made religiosity the inner man. He freed the body from chains because he enchained the heart.”

himself, his priestly nature.”²⁹² It did so by transforming religious obligations into moral and legal societal ethics,²⁹³ which were later on incorporated in European legal systems as universal concepts of mankind.²⁹⁴ This “equality” can also resemble the concept of “*agape*”, the love that is personified in Christ²⁹⁵ that “as I have loved you, love you also one another.”²⁹⁶ Consequently, toleration becomes the brotherhood (*Fraternité*) that stands side by side to equality (*Egalité*) and liberty (*Liberté*) and travels beyond the boundaries of the European culture to become universal.²⁹⁷

If one is suggesting that the Christian religion rejected coercion and violence, how would one justify the importance of revolution and the violence used during colonial movements? John Locke referred to revolution as an inevitable way of achieving rights against feudal oppressions; this might be a reflection of the narrative of “the Cleansing of the Temple” the only time where Jesus had used physical force in an attempt to “cleanse” the temple from corruption.²⁹⁸ John Locke believed that rebellions were an appropriate means to achieve or restore fundamental rights against tyranny, and that revolutions happen only over a long period of serious “human rights abuses” (that were mentioned in the Bible in more theological

²⁹² Works of Karl Marx 1843, ‘A Contribution to the Critique of Hegel’s Philosophy of Right Introduction’, available at <http://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>

²⁹³ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 20.

²⁹⁴ See Article 1 of the Universal Declaration of Human Rights which says that “[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood.”

²⁹⁵ Harold Berman, ‘The influence of Christianity upon the Development of Law’ (1959) *Oklahoma Law Review* (12) (86) available at <http://www.classicapogetics.com/b/berminfl.pdf>

²⁹⁶ The Bible of John 13:24; 15:12

²⁹⁷ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 44.

²⁹⁸ Gospel of Mark 11:15–19, 11:27–33, Matthew 21:12–17, 21:23–27 and Luke 19:45–48, 20:1–8.

language) and not upon “every little mismanagement in public affairs.”²⁹⁹ This probably explains how this has emerged into our modern era wherein any abuse of human rights law, that as explained is of Christian background, has to have significant legal consequences.

Moreover, this concept of toleration and revolution against human rights abuses can only make sense in societies where different religious and cultural groups are seen as deviants of the majority’s hierarchical religious doctrines. Therefore, in light of what has been said, it is hard to talk about tolerance, in say, Asian cultures which are not structured around such comprehensive religious doctrines. Balagangadhara says:

“As western Christianity expanded, so did the Christian-religious world. The earlier civic, pagan world contracted and marginalised in this process. “Idolatry”, a theological concept, drew the boundaries. After having gone through purgatory and neutralised of its sin, once a practice was admitted into the Christian world, it could find a place in this world. It is thus that a “secular” world was to emerge later, but within the Christian world. It is a Christian-secular world that came into being, as generated within a religious world. That is why the secular world is in the grips of a religious world.”³⁰⁰

Coming to the contemporary picture, Balagangadhara writes:

“In other words, I suggest to you, the western experience of other cultures ... is no different from that of the early Christians. It is not called “idolatrous”, to be

²⁹⁹ John Locke, *Two Treatises on Government: A Translation into Modern English* (Lewis F. Abbot tr, ISR 2009) 229.

³⁰⁰ S.N. Balagangadhara, *The Heathen in His Blindness...* 444.

sure, but that is because the “secular” world of ours is also a de-Christianised religious world.³⁰¹

Nowadays, pagan traditions and practices are not referred to as idolatrous or embodiment of false religions. However, in our “modern” era the classification of certain religions and cultures as false or idolatrous is now referred to in the secular world as “violators of human rights law, gender equality and the rule of law.”³⁰²

Assuming that religion is a relic of no social role, which will gradually disappear as a social phenomenon and that it remains a mere personal belief, is a myth because religion has not yet faded away in the face of “modernity.”³⁰³ Menski notes that “states not only cannot avoid considering religion, but have an interest in doing so in an increasingly multicultural environment. Europe cannot just disregard religion in all its various manifestations in the 21st century.”³⁰⁴ One might therefore assume that religion has diminished in the West, but all what actually happened is that religion has put on a “secular garb” it, as Balagangadhara says, universalised as a worldview. Charles Taylor claims that “in our ‘secular’ societies you can engage fully in politics without ever encountering God.”³⁰⁵ Jakob De Roover argues that the secularisation of Western political thought has not produced independent rational principles, but transformed theological ideas into the “topoi” of a culture.³⁰⁶ Religion has been secularised in such a way that one does not have to only talk about or encounter God

³⁰¹ S.N. Balagangadhara, *The Heathen in His Blindness...* 445.

³⁰² Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75.

³⁰³ Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2010) 34-40

³⁰⁴ Werner Menski, ‘Fuzzy Law and the Boundaries of Secularism’, RELIGARE, Lecture, June 2010, at 1

³⁰⁵ Charles Taylor, *A Secular Age*, (Harvard University Press 2007) 1.

³⁰⁶ Jakob De Roover, Sarah Claerhout and S.N. Balagangadhara, ‘Liberal Political Theory and the Cultural Migration of Ideas: The Case of Secularism in India’, (2011) Political Theory 39(5) 571–599.

to have theologically framed ideas. This Western culture remains, therefore, religiously secular: it is a secular world within the sphere of a religious world and is created by religion.³⁰⁷ Christianity secularises itself in the form of de-Christianised Christianity.

Consequently, one could explicitly state that Law and religion are interdependent, and therefore,

“[r]eligion gives law its spirit and inspires its adherence to ritual and justice. Law gives religion its structure and encourages its devotion to order and organisation. Law and religion share such ideas as fault, obligation, and covenant and such methods as ethics, rhetoric, and textual interpretation. Law and religion also balance each other by counterpoising justice and mercy, rule and equity, discipline and love.”³⁰⁸

Even in “secular” States, law has never been free from the impact of either theology or the church³⁰⁹. Although laws on freedom of religion consisted of separating religion from the State, this separation in itself is of Protestant theology and is religious in origin and therefore fails to be intelligible outside its religious framework.

³⁰⁷ S.N. Balagangadhara, ‘Orientalism, Postcolonialism and the ‘Construction’ of Religion’ in Esther Bloch, Marianne Keppens and Rajaram Hegde (Eds), *Rethinking Religion in India: the Colonial Construction of Hinduism* (Routledge 2010) electronic copy available at https://www.academia.edu/4228198/Orientalism_Postcolonialism_and_the_Construction_of_Religion

³⁰⁸ John Witte Jr., ‘Introduction’ in John Witte Jr. and Frank S. Alexander (eds), *Christianity and Human Rights* (Cambridge University Press 2010) 14.

³⁰⁹ See the Vatican’s comments on *Lautsi v Italy* [GC], no 30814/06, 18 March 2011, ECHR 2412, (2012) 54 EHRR 3- where they Vatican said that it was shocked by the ruling, calling it “wrong and myopic” to exclude the crucifix from education. Vatican spokesman Rev. Federico Lombardi said the ECtHR had no right intervening in such a profoundly Italian matter. See BBC New ‘Italy School Crucifixes Barred’ 3 November 2009 available at <http://news.bbc.co.uk/1/hi/world/europe/8340411.stm>

3.6 The Configuration of Learning in the Western Culture and its Effect on the Legal Systems.

Christianity has shaped the learning process of the Western culture, which Balagangadhara calls the *configuration of learning*, thereby shaping the culture's way of going about in the world. He observes that the European culture has a theologically grounded approach to asking questions about the nature of the universe, religion, and man and configures a theory of learning and meta-learning which shows how the West seeks knowledge "about" a certain phenomenon. This kind of learning generates a theoretical knowledge "about" the world which results in the process of "going about" the world. Consequently this culture became a culture that privileges knowledge contained in beliefs, theories, and doctrines over knowledge acquired through, traditions, practice, customs and rituals. These cultures, and equally the Western legal systems, demand that the secular realm remains free of customary, non-textual, "idolatrous" traditions. Accordingly they reconstruct traditions and customs so as to make them confine to the model of Christianity.³¹⁰

In *Interpretation and The Sciences of Man*, Charles Taylor points out the danger in trying to interpret human behaviour and universalise human concepts across cultures. He argues that the usual methods that researchers use to interpret and analyse human sciences are deeply flawed, and that the empiricist positivist methods that are being used are distorted. He notes, "inter-subjective meanings

³¹⁰ S.N. Balagangadhara, *The Heathen in His Blindness...* 396-403.

cannot be a property of a single person because they are rooted in social practice.”³¹¹

Taylor believes that a researcher may be able to interpret other cultures by working hard on developing his “right intuition” to interpret cultural behaviour. However, if one goes with Balagangadhara’s theory of learning, then there is no way that a person’s intuition will be strengthened to develop in a way to make sense of a culture whose “going about” the world is entirely different from a culture where performative knowledge is dominant. This intuition will only remain subjective to the person describing the phenomenon (in the case of the West this intuition has religious roots). It is subjective to the experience and understanding of the person defining a particular culture or phenomenon. Consequently, this way of “going about” of the western culture has expanded to all domains of the human life. On the one hand it creates the need to have theoretical accounts about any and every aspect of life and the world in order to cope with it. As a result, knowledge is reduced to verbal and textual knowledge.

Furthermore, in *The Heathen in his Blindness* he shows that differences between cultures are a result of differences in the configuration of learning; irrespective what one learns; one learns it in a particular way in which his or her culture has taught them. *One learns how to learn*. In the Western culture religion has generated this particular configuration of learning and meta-learning where it has

³¹¹ Charles Taylor, ‘Interpretation and the Sciences of Man’, (1971) *The Review of Metaphysics* 25(1) 3- 51, 37

become dominant and where theoretical frameworks have subordinated other learning processes.³¹²

Balagangadhara identifies a discontinuity of epistemology between the West and non-Abrahamic cultures,³¹³ unlike the “cultural continuity” between the Christian West and the Post-Reformation world, which explains why despite being “defeated” by Protestantism, Catholicism survived. In the West, it is religion that lends structure to its way of going about in the world, it generates theoretical knowledge, and knowing-about is predominantly how it guides its goings-about. Religion answers questions about the “meaning” of the world and posing meaning problems as well (what is the meaning of man, does the cosmos have a meaning).³¹⁴ People accept questions brought forth by religion even if they are not familiar with the doctrines of religion. Therefore, practices and acts must have a meaning in one-way or another. In cultures that have no religion, knowledge is shifted from learning “to go about” the world to learning “how” to go in the world (experiential knowledge). This knowledge is acquired through practical and performative learning which dominate the configuration of learning rather than explanatory knowledge. By postulating necessary and intelligible connections of parts of the world together and asking about “meanings of certain phenomena”, religion provides a fertile soil for the growth and expansion of sciences. Religion transformed science into a social process by slowly universalising itself by means of proselytisation and secularisation. For example, in Indian culture, rituals and traditions lend identity to its configuration of

³¹² S.N. Balagangadhara, *The Heathen in His Blindness....* 398-400.

³¹³ Prakash Shah, review article of, “The Heathen in His Blindness...”: Asia, the West and the Dynamic of Religion and Reconceptualizing India Studies, by S.N. Balagangadhara, in *Manushi*, April 4, 20114 available at <http://www.manushi.in/articles.php?articleid=1764#.WL3HJBKLTUp>

³¹⁴ Although one can answer the question on the origin of the cosmos either religiously or scientifically, yet the root model of the question remains religious (the origin of the cosmos).

learning, this culture imparts practical knowledge, and performative knowledge dominates there. However, European legal systems “privilege the knowledge contained in doctrines, theories, beliefs, and principles over practical knowledge, performativity, rituals and customs.”³¹⁵

3.7 Freedom of Conscience and the Law

The moral and ethical theory of the modern world is the idea of the medieval theology of conscience.³¹⁶ However conscience is how the Christian God speaks to humanity and how he makes humanity listen to his word.³¹⁷ Freedom of conscience remains a fundamental element in both the Christian theology and legal systems. In the Christian theology the “true” God does not accept unwilling followers who had been forced into His worship as that would be a violation of the freedom that God has given to man. In European legal systems and specifically under Article 9, religion is being reduced and collapsed into freedom of conscience³¹⁸ and the Christian ethical and moral backdrops to freedom of conscience are taken for granted.

John Witte Jr. correctly observes that the Protestant Reformation was a human rights movement.³¹⁹ Before the Protestant Reformation there was

³¹⁵ Prakash Shah, ‘In Pursuit of the Pagans: Muslim Law in the Legal Context’ (2013) JLP 45(1) 58-75 [For a further analysis on a theory of culture on the “configuration of learning” see S.N. Balagangadhara, *The Heathen in His Blindness*401.](#)

³¹⁶ Ibid.

³¹⁷ S.N. Balagangadhara Documentary on Indian traditions: Beware of God, July 4, 2012 available at <http://www.hipkapi.com/2012/07/04/eshi-films-on-indian-traditions-beware-of-god/>

³¹⁸ Cecile Laborde, ‘The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age’, *The Immanent Frame: Secularism, Religion and the Public Sphere*, available at <http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/> [last accessed March 2017].

³¹⁹ John Witte Jr., ‘Law, Religion, and Human Rights: A Historical Protestant Perspective’ (1998) *The Journal of Religious Ethics* 26(2) 257-262, 257-258.

“[o]ne universal Catholic faith and Church, one universal system of canon law and sacramental life, one universal hierarchy of courts... [The reformists] began their movements with a call for freedom from this ecclesiastical regime- freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privileges, freedom of the local clergy from central papal rule and oppressive princely controls. "Freedom of the Christian" became the rallying cry of the early Reformation.”³²⁰

The influence of the Protestant Reformation on the Western legal systems and philosophy and the modern Western culture is unsurprising. Such a fundamental Reformation of both political institutions and religious beliefs in various European countries could not have taken place without important changes in legal thought.³²¹ At the root of the Reformers’ political and theological beliefs was a distinctive legal philosophy. The “modern” Western legal philosophy, that of natural law theory and legal positivism, can be seen as an extension of Luther’s legal philosophy³²² and his “two Kingdoms”, the earthly and the heavenly. When it comes to natural law, Luther’s legal philosophy suggests that within every person there exists a sense of justice, in other terms, a conscience. Consequently, Luther’s legal philosophy “defines law as the will of the state expressed in a body of rules and enforced by coercive sanctions. It sharply separates law and morals.”³²³ Luther and his followers believed that God embedded moral insights in the conscience of every person. Those

³²⁰ John Witte Jr., ‘Law, Religion, and Human Rights: A Historical Protestant Perspective’ (1998) *The Journal of Religious Ethics* 26(2) 257-262 258.

³²¹ Harold Berman and John Witte Jr., ‘The Transformation of Western Legal Philosophy in Lutheran Germany’ (1989) *Southern California Law Review* 62(6) 1573-1650.

³²² *Ibid.*

³²³ Harold Berman and John Witte Jr., ‘The Transformation of Western Legal Philosophy in Lutheran Germany’ (1989) *Southern California Law Review* 62 (6) 1573-1650.

moral insights correspond to the Bible, which is seen as the only source of spiritual knowledge.

As discussed in the previous chapter, the West has studied religion through religion, through what might be called a *religious hermeneutical circle*³²⁴ framed by secularised Christian theological backgrounds, which remain consistent with the themes of the Bible. The religious doctrine of Christianity has become the framework within which religion is studied.³²⁵ Timothy Fitzgerald has argued that there is “no coherent non-theological theoretical basis for the study of religion as a separate academic discipline.”³²⁶ Furthermore, religion exhibits reflexivity by including what it says about itself; hence religious language becomes both the object language and its own meta-language. Accordingly, the possibility of a “science of religion” resides in our willingness to accept theology as science. The distinction therefore between what is religion, what is thought to be religion and what is secular is drawn within the framework of religion.³²⁷

It is therefore not surprising that although international law after the Treaty of Westphalia³²⁸ emerged as a fundamentally European and “secular” concept, it remained very much influenced by Christian religious dictates.³²⁹ Heinhart Steiger said that the era of international law from the thirteenth to the eighteenth centuries

³²⁴ On the study of meaning and expression in human behaviour and the ‘hermeneutical circle’ see Charles Taylor, *Interpretation and the sciences of Man* (1971) *The Review of Metaphysics* 25(1) 3-51, 18.

³²⁵ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 12.

³²⁶ Timothy Fitzgerald, *The Ideology of Religious Studies* (Oxford University Press 2000) 3

³²⁷ S.N. Balagangadhara, *The Heathen in His Blindness...* 267-270, 444-445.

³²⁸ Peace Treaty of Westphalia of October 24, 1648, http://avalon.law.yale.edu/17th_century/westphal.asp [Accessed October 14, 2014].

³²⁹ Mashood Baderin, ‘Religion and International Law: Friends or Foes’ (2009) *E.H.R.L.R.* (5) 637-658.

was an era of “international law of Christianity” with the law ingrained with religious principles. He stated that “Christianity formed the major intellectual foundation of legal order for the entire epoch”, that “brought Europe together, not only into an intellectual-religious unit, but also under the political idea of a *res publica Christiana*”, a term he identified as still “used in treaties as late as the 18th Century.”³³⁰

3.8 The Reformation

Sixteenth Century reformers such as Martin Luther, John Calvin, Menno Simmons, Thomas Cranmer and others, started their reformation movement within a call for freedom of the individual conscience from clerical controls, canon laws and ecclesiastical rule. The call was also for freedom of the local clergy from the central Papal rule, the oppressive princely control and freedom of political officials from ecclesiastical power and privileges, freedom.³³¹ Martin Luther stated in his trial in 1521, at the Imperial Diet of Worms that

“[u]nless I am convicted by Scripture and plain reason, I do not accept the authority of popes and councils, for they have contradicted each other—my conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe. God help me. Amen.”³³²

The unleashing of the Protestant Reformation led by Martin Luther in 1517 in Germany started as an emphatic call for freedom, freedom from the “two swords”

³³⁰ Heinhard Steiger, “From the International Law of Christianity to the International Law of World Citizen” (2001) *Journal of the History of International Law* 3 180-184. See also section 4.5 in this thesis.

³³¹ John Witte Jr., ‘Law, Religion, and Human Rights: A Historical Protestant Perspective’ (1998) *The Journal of Religious Ethics* 26(2) 257-262.

³³² Words of Martin Luther at the Imperial diet of Worms on April 18, 1521, available at <http://www.luther.de/en/worms.html> [Last accessed November 2017].

regime.³³³ The Church was to be freed from the tyranny of the pope, the laity was to be freed from the domination of the clergy, and the conscience had to be freed from the strictures of the canon law.³³⁴ "Freedom of the Christian"³³⁵ was the battle cry of the early Protestant Reformation.

"The Lutheran reformation was not limited to that of Church and theology it rapidly extended into a reformation of law and the state as well. The "deconstruction of the canon law for the sake of the Gospel gave way to reconstruction of the civil law on the strength of the Gospel."³³⁶

Lutheran theologians were joined by Lutheran jurists to compose legal reforms of the State, Church and society building on the foundation of the Protestant theology. The strength of the Lutheran reformation lay in the fact that it combined both legal and theological reforms, hence was so resilient and resolute.³³⁷ Luther realised that it is a blessing in the temporal world to give an institutional form to the theological framework he had built. In its essence, the Lutheran Reformation became both a legal and a theological reformation movement. It "struck new balances between law and Gospel, rule and equity, order and faith, structure and spirit."³³⁸

3.9 The Separation of the Two Kingdoms

The Reformation divided the world into two separate kingdoms, that of the soul

³³³ John Witte Jr., 'Facts and Fictions About the History of Separation of Church and State,' (2006) *Journal of Church and State* 48 15-46

³³⁴ John Witte Jr., 'Between Sanctity and Depravity: Law and Human Nature in Martin Luther's Two Kingdoms' (2003) *Villanova LR* 48 727-762, 742.

³³⁵ Jaroslav Pelikan, et al., (eds.) and (trans) 'Freedom of a Christian' in *Luther's works* (31) 327-77 (1955-68) 5.

³³⁶ John Witte Jr., 'Between Sanctity and Depravity: Law and Human Nature in Martin Luther's Two Kingdoms' (2003) *Villanova LR* 48 727-762, 732.

³³⁷ *Ibid.*

³³⁸ *Ibid.*, at 733.

(spirit) and that of the body (flesh). It is believed that as bodies Christians lived in the temporal world (earth) and as souls they lived in the spiritual kingdom. According to the Protestant theology, the conversion from the temporal to the spiritual gave spiritual liberty to all mankind and especially to the clergy of the Roman Catholic Church. The Protestant Reformation insisted that everybody was a priest and that every human being possessed the true Christian liberty. Although the body remained subject to human authority and coercive law, for it is intrinsically sinful, the spiritual kingdom became free from human laws, works, idolatry and false worship. The Reformation's notion of Christian liberty implies that all human laws that are imposed on people in the spiritual sphere go against "true" religion and result in false worship. It is believed that in this separation Christians were liberated

"[a] Christian is at once a lord, subject to no one, and a priest who is servant to everyone. All vocations are equal, all have direct access to God. This is the origin of a Christian's dignity and liberty."³³⁹ Moreover "every Christian is by faith so exalted above all things that, by virtue of a spiritual power, he is [a] lord."³⁴⁰

The Protestant Reformation changed the relationship between the spiritual and the temporal world significantly. The Protestant theology said that all human beings live *simultaneously* in the two worlds and every soul should be left free to be saved by the Spirit of God. Consequently, every human being lives in two kingdoms, the earthly/temporal (or secular) and the spiritual (or religious). In the secular sphere, people should always obey the laws of the secular authorities while pursuing as

³³⁹ Quoted from Roger Ruston. Rev. of John Witte, Jr., 'God's Joust, God's Justice: Law and Religion in the Western Tradition' (2008) *Ecc. L.J.* 10(3) 368-370.

³⁴⁰ Luther's Works vol. 31, 354.

bodies the preservation of their earthly interests, whereas in the religious sphere, while striving for the salvation of their souls, God only has authority with no human intervention, and therefore remains a solely individual issue³⁴¹ since “God alone was the Lord of our souls.”³⁴² This generated the embedded normative belief that “*the state and its laws ought not to intrude upon religion.*”³⁴³ From this theological Protestant framework, the Enlightenment thinkers elaborated their theories of toleration and liberty of conscience.

3.10 Liberation of Conscience in the Protestant theology

The Protestant theology required all Christians to go through the process of “conversion” which is the process of subjection to God’s Will, instead of submitting oneself to the wills of other “sinful” human beings, in order to possess Christian liberty. Thus, in matters of faith, Christians were to be free from human intrusion.³⁴⁴ The Reformers explicitly refuted the idea that it is the duty of the Church *per se* to develop human law and were sceptical about the human ability to create an earthly law that would reflect eternal law.³⁴⁵ This Protestant scepticism made possible the development of a Christian legal positivism, which treats law as being in and of itself, as law, morally neutral solely as a means of exercising political power.

The primary aim of a Christian to become free was to subject oneself to the Will of God and true Christians strived to surrender their purposes to the divine law

³⁴¹ Jakob De Roover, ‘Secularism, Colonialism and Indian Intellectuals’ April 2, 2011 available at <http://www.hipkapi.com/2011/04/02/secularism-colonialism-and-indian-intellectuals/> [accessed in October 2014]

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 71.

³⁴⁵ Harold Berman, ‘The influence of Christianity upon the Development of Law’ (1959) Oklahoma Law Review (12) 86 electronic copy available at <http://www.classicapogetics.com/b/berminfl.pdf>

of their Creator. Christianity in the medieval period was a religion of the monasteries. The process of *conversio*, the subjection to God's will and turning to God to reform to his image, shaped the life of Christian monks and became the answer to what it means to lead a Christian life.³⁴⁶ In Churches of the medieval period, the two realms, that of the soul and that of the body, resembled the spiritual estate of the clergy and the temporal estate of the laity. Priests were spiritual and were given religious authority over the laymen and Christian liberty only because they turned towards God. The laymen remained confined to the earthly carnal world.³⁴⁷

Although the Protestant Reformation rejected most of the theology of medieval Christianity, it adopted the twofold scheme of the spiritual and temporal realm but gave it "a radical twist."³⁴⁸ The Protestant Reformation did not limit the process of Conversion to the clergy, it rather extended this process to all Christians equally because the Protestant reformers believed that Christian liberty should be given to all believers.

As a result of this development, the distinction between the two realms was changed in a way that would be decisive for the shape of the modern legal thought of the West and consequently the "modern" human rights law. "True" religion required freedom of the soul from earthly laws and therefore the spiritual kingdom became the sphere of freedom or liberty. The realm of the body was to remain subject to coercive laws and human authority. The temporal kingdom turned into the realm of law and coercion that could be regulated by the state, as Tertullian said:

³⁴⁶ Jakob De Roover, 'A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought' (DPhil Thesis, University of Ghent 2005) 72.

³⁴⁷ Ibid., at 358.

³⁴⁸ Ibid.

“You think that others, too, are gods, whom we know to be devils. However, it is a fundamental human right, a privilege of nature, that every man should worship according to his own convictions: one man's religion neither harms nor helps another man. It is assuredly no part of religion to compel religion— to which free-will and not force should lead us— the sacrificial victims even being required of a willing mind.”³⁴⁹

Tertullian attacks false gods whom he calls “the devils” and attacks idolatry as well. However, Tertullian’s quote is significant because it shows us that for centuries to come, freedom to choose between God and the Devil remains essential to Christianity. His words reveal the importance of freedom of conscience, for the true God is not willing to accept followers who are forced to worship Him. The concept of false worship and idolatry started to emerge, any interference with the conscience and any intermediary between man and God was regarded as false worship and therefore false religion.

When comparing the bondage of human works of the Roman Catholic Church to the Protestant liberty of Christians Luther says

“That stewardship, however, has now been developed into so great a display of power and so terrible a tyranny that no heathen empire or other earthly power can be compared with it, just as if laymen were not also Christians. Through this perversion the knowledge of Christian grace, faith, liberty, and of Christ himself has altogether perished, and its place has been taken by an unbearable bondage of

³⁴⁹ Quintus Tertullian, ‘Tertullian To Scapula’, Ch. 2 available at <http://carm.org/ter tullian-scapula> [accessed in September 2014].

human works and laws until we have become, as the Lamentations of Jeremiah say, servants of the vilest men on earth who abuse our misfortune to serve only their base and shameless will.”³⁵⁰

The Reformation’s notion of Christian liberty implied that all human laws that are imposed on the Christian in the spiritual sphere went against true religion. Hence the Reformers began to denounce the canon law and traditions of the Catholics as idolatry. Luther clearly expressed that his “conscience is captive to the Word of God.”³⁵¹ This freedom from spiritual laws became the basis of liberty of conscience in modern Europe.³⁵² Humans could therefore legitimately resist any human laws infringed upon conscience and faith (such as in Article 9(1)) but this required a boundary to be drawn between what is spiritual and what is temporal.

Calvin says that these two worlds,

“ [I]et us first consider that there is a twofold government in man.... one aspect is spiritual, whereby the conscience is instructed in piety and in reverencing God; the second is political, whereby man is educated for the duties of humanity and citizenship that must be maintained among men. These are usually called the “spiritual” and the “temporal” jurisdiction (not improper terms) by which is meant that the former sort of government pertains to the life of the soul, while the latter has to do with the concerns of the present life... For the former resides in the inner mind, while the latter regulates only outward behaviour. The one we may call the

³⁵⁰ Martin Luther 1520a: 608 also available at <http://divdl.library.yale.edu/dl/FullText.aspx?qc=AdHoc&q=3153&qp=16>

³⁵¹ Words of Martin Luther at the Imperial diet of Worms on April 18, 1521, available at <http://www.luther.de/en/worms.html> [Last accessed November 2017].

³⁵² Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 111.

spiritual kingdom, the other, the political kingdom. Now these two, as we have divided them, must always be examined separately.³⁵³

This ideology of the two kingdoms, is clearly reflected in Article 9 whereby everyone is granted absolute freedom of thought conscience and religion, no State or magistrate could interfere with this right but when it comes to manifestations and visible (temporal) appearances, the State can interfere and restrict manifestations.

3.11 The Conversion Process and the Sin of Idolatry

In the Eleventh Century the belief had become dominant that the Roman Catholic church had a mission to reform society or the temporal world and that this reformation was to take place through the priests for they have reached a superior position in this hierarchy and have gained spiritual authority over the laity.³⁵⁴ They were hence not only superior to, but responsible for the laity. Consequently “true Christians” could not but obey the church as strictly as possible. More popular movements were formed as a response to the Church reform,

“[w]ho have rejected not only the achievement but the objective of the Gregorian reform, the ideal of a hierarchically organised church which claimed the right to intervene in every area of life and thought.”³⁵⁵

The need to live in a monastery and submit oneself to the monastic rules soon after diminished. This gradual “secularisation” built the momentum it needed

³⁵³ 1559 Institutes 3.19.15; Battles edition, See also R. Scott Clark, ‘A Cross and a Twofold Kingdom’ 13 January 2014 The Hiedelblog available at <http://heidelblog.net/2014/01/a-cross-and-a-twofold-kingdom-2/>

³⁵⁴ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 70-78.

³⁵⁵ Robert I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe 950-1250* (2nd edn. Blackwell Publishing 2007) 18 (emphasis added).

to erupt in the sixteenth century Reformation. Every human being was worthy of gaining liberty if they turned to the spiritual world and rejected the temporal carnal one, accordingly the clergy's authority over the laymen could not be justified anymore. The development of "true" Christianity was hindered by the Church, and hence the clerics were viewed as "false shepherds" or "wolves", rather than "true shepherds", who averted people from turning into "true" Christians. Consequently, every Christian was to experience the process of directly surrendering to God's Will, without the interference or the intermediary of the church, this was no longer a privilege to the clergy. Moreover, Christians should realise that it is God only that they should rely on.³⁵⁶

Luther insisted that for Christians to possess the Christian liberty, they should go through the experience to the subjection to God's will. The notion of conversion was extended to all believers making everybody into a priest. Protestantism abolished priesthood only by turning everyone into a priest. Karl Marx states that Luther

"[t]urned priests into laymen because he turned laymen into priests. He freed man from outer religiosity because he made religiosity the inner man. He freed the body from chains because he enchained the heart.... it was no longer a case of the layman's struggle against the priest outside himself but of his struggle against his own priest inside himself, his priestly nature."³⁵⁷

³⁵⁶ John Calvin, *The Institutes of the Christian Religion*, Henry Beveridge (trans.) (MI: Christian Classics Ethereal Library, Grand Rapids, 2002) 35.

³⁵⁷ Works of Karl Marx, 'A Contribution to the Critique of Hegel's Philosophy of Right', Matthew Carmody (Eds) 2009 (first published in *Deutsch-Französische Jahrbücher*, 7 & 10 February 1844 in Paris available at <https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>

All Believers became subject to vocation and conversion. Luther accused the Roman Catholic Church of claiming that the “sacramental works of the priests had an active role to play in the salvation of the laymen,”³⁵⁸ and this was not tolerated by Luther because it meant the mediation of men (who are sinful and corrupt in nature) between other human beings and God. This intervention prevents human beings from becoming righteous before of God, instead all human beings were supposed to do is surrender to God and have faith in his will.

According to the Protestant Reformation, it was important to show and stress that the Church and the State are separate entities, and the Church therefore is not a legal or a political authority and shall therefore not possess any “sword”, or have any daily responsibility for law or authority. The church had to separate itself from legal affairs and limit its mission.³⁵⁹ While doing this, the clergy should resume preaching against injustice and advising the magistrate when asked to do so. However, formal legal authority between the State and the church should continue to cooperate in implementing laws set by the State.³⁶⁰ “The magistrate was God's vice-regent called to elaborate natural law and to reflect divine justice in his local domain.”³⁶¹ To allow the intervention between the Church and the State is, as Calvin says, “unwisely mingle these two [institutions] which have a completely different nature.”³⁶²

³⁵⁸ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 101.

³⁵⁹ John Witte Jr., ‘Rights and Liberties in Early Modern Protestantism’ in John Witte Jr. and Frank Alexander (eds.), *Christianity and Human Rights an Introduction*, (Cambridge University Press, 2010) 138-142.

³⁶⁰ Ibid.

³⁶¹ John Witte Jr., ‘Facts and Fictions About the History of Separation of Church and State,’ (2006) *Journal of Church and State* 48 15-46

³⁶² Ioannis Calvini *Institutio Religionis Christianae* (1559), translated as *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battles (Philadelphia: The Westminster Press, 1960), bk. 3, Ch. 19.15; bk. 4, Ch. 11.3; bk. 4, Ch. 20.1-2. See further John Witte, Jr., ‘Moderate Religious Liberty in the Theology of John Calvin’ (1996) *Calvin Theological Journal* 31 359-403 available at

Calvinists just like Lutherans and other reformists insisted on the separation between the State and Church while often referring to St. Paul's "wall of separation,"³⁶³ metaphor. Calvin required that the two kingdoms, the spiritual and the earthly be "examined separately." For there is "a great difference ... between ecclesiastical and civil power."³⁶⁴

The Reformists claimed that the Catholic clerics and laymen set up their own human selves as idols through a belief of "justification of works," through their own righteousness excluding the Word, Faith and Christ. To think that one can go through the trials of a monastic life, rather than the justification of faith, is to deny the spiritual nature of Christianity and necessity of divine grace and was considered as the biggest idolatry. No law or work should therefore act as an intermediary between God and man otherwise it could mean idolatry, he said:

"Therefore fasting, *wearing a hair shirt, holy activity* and the monastic rule and whole way of life and the Carthusians, the strictest of orders, *are all works of the flesh*; for they *imagine that they are holy* and will be saved not through Christ, whom they fear as a stern judge, but through the observance of their monastic rule. They think about God, about Christ, and about the divine not on the basis of the Word of God but on the basis of their own reason. On this basis they imagine that their monastic habit, their diet, and the whole conduct are holy and are pleasing to Christ; they hope not only to placate Him with the asceticism of their life but to obtain from

<http://www.spurgeon.org/~phil/calvin/> [Last accessed October 2014].

³⁶³ Thomas Jefferson's Letter to the Danbury Baptists, January 1, 1802 available at <https://www.loc.gov/loc/lcib/9806/danpre.html> [last accessed November 2017].

³⁶⁴ R. Scott Clark, 'A Cross and a Twofold Kingdom' 13 January 2014 The Hiedelblog available at <http://heidelblog.net/2014/01/a-cross-and-a-twofold-kingdom-2/> see also Richard C. Gamble, ed., Calvin's Thought on Economic and Social Issues and the Relationship of Church and State (New York: Garland, 1992).

hi a recompense for their good works and their righteousness. And so *the thoughts that they imagine to be most spiritual are not only the most unspiritual but even the most wicked*; for they exclude and despise the Word, faith, and Christ, and they seek to wash away their sins and to obtain grace and eternal life by trust in their own righteousness. *Therefore all forms of worship and religion apart from Christ are the worship of idols.*³⁶⁵ He adds that

“[i]n Popedom they make priests, not to preach and teach God's Word, but only to celebrate mass, and to roam about with the sacrament..... The papists in their ordinations make no mention of preaching and teaching God's Word, therefore their consecrating and ordaining is false and wrong, for all worshiping which is not ordained of God, or erected by God's Word and command, is worthless, yea, mere idolatry.”³⁶⁶

It is evident from Luther's words that there all kinds of religious celebrations and orthopraxy were regarded as mere idolatry. This is reflected in Article 9 judgments (see Chapter 5 for an analysis). Christianity, from its first beginnings, claimed to be the pure and unique revelation of God. It was when the Devil lured people to worship “false” gods, that the original revelation was corrupted by sinful idolaters. According to Christian theology, this corruption, allowed human additions

³⁶⁵ Martin Luther's Works, Lectures on Galatians 5-6 vol 27 pp. 88 (emphasis added)

³⁶⁶ Martin Luther, Table Talk, William Hazlitt (trn) (The Lutheran Publication Society, 1997) available at http://www.reformed.org/master/index.html?mainframe=/documents/Table_talk/table_talk_4.html

to the pure godly revelation in the form of myths and rites that were fabricated by prelates and priests.³⁶⁷

The Reformers noted that the clergy and the pope had created numerous rituals and canons claiming that they are necessary for salvation as they are part of God's revelation, and forced them on the believers. The most striking accusation made against the Roman Catholics is that it entailed "shameless human inventions." These charges of idolatry were extended at a later stage by the Enlightenment philosophers to all of Christianity and to all "religions" of humanity." The "atheists" among them said that all of those idolatrous practices and beliefs were human constructions including the notion of God itself. The background of the Enlightenment atheism was thus not free from theology; the atheists were therefore only able to build on the claims of Christian theology. Had the Enlightenment atheists not rely on the Christian idea that it is fundamentally wrong for religion to be a human invention, the impact of their charges would have vanished.³⁶⁸

Protestants claimed that the teachings of Christian liberty make us free from the redundant spiritual laws, and it is only God and having faith in Him that man can gain salvation. The soul or spirit is free but the body is sinful and should be subject to temporal law, as long as this law does not infringe upon ones faith. As Calvin says, "we must carefully note that Christian freedom is, in all its parts, a spiritual thing."³⁶⁹ The freedom of a Christian should be limited to the spiritual sphere and here should be a distinction between the soul and body, between civil jurisdiction and God's

³⁶⁷ Jakob De Roover, 'Dawkin's Delusion or the God Delusion?' 23 June 2012 available at <http://www.hipkapi.com/2012/06/23/dawkins-delusion-or-the-god-delusion/> [Last accessed June 2014].

³⁶⁸ Ibid.

³⁶⁹ Calvin, Institutes vol 1: 840

spiritual Kingdom.³⁷⁰

3.12 The Enlightenment as a Variant of Protestantism

Although the Enlightenment period is commonly believed to be a secular movement that strongly opposed religion, in fact it echoed the principles of Protestantism but in a secular garb. The Enlightenment thinkers were not opposing religion, but were “against revealed religion or a transcendental justification for religion.”³⁷¹ The Enlightenment thinkers were able to build their “neutral” and “rational” thoughts (as opponents of religion and organised religious institutions) by adopting ideas from Protestant Christianity.

The Enlightenment thinkers secularised the Christian belief of the Biblical claim that religion is a divine Gift from God to mankind into the anthropological “fact” that all cultures have a religion.³⁷² Nineteenth and twentieth-century scholars adopted this piece of theology although secularised,³⁷³ and Protestant values were imposed by law as values and ethics embodying universal secular reasons.³⁷⁴ The Enlightenment’s moral and political philosophy, their psychology and sociology, and their anthropology all consists of accounts that make sense only if one accepts a number of deeply held Christian assumptions, one of which is the assertion of the

³⁷⁰ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 108.

³⁷¹ Triloki Nath Madan, ‘Secularism in its Place’ (1987) *The Journal of Asian Studies* 46(4) 747-759.

³⁷² Jakob De Roover, ‘Secularized Christian Belief: Religion is a Cultural/Human Universal’ March 3 2011 available at <http://www.hipkapi.com/2011/03/03/secularized-christian-belief-religion-is-a-culturalhuman-universal/>

³⁷³ S.N. Balagangadhara, *The Heathen in His Blindness...* Chapter 3.

³⁷⁴ Jakob De Roover, ‘Christian Attitudes and the Rule of Law as the Mechanism of Secularization’ April 1, 2011, available at <http://www.hipkapi.com/2011/04/01/law-secularization-and-religious-attitudes/>

universality of religion³⁷⁵ and the concept of the separation between State and religion. The supposedly secular world of today, which resembles that of the Enlightenment period, is a Christian world that is not free from religion. The supposed atheism of the Enlightenment is “theism in disguise”.³⁷⁶ As Waldron also says

“Lockean equality if not fit to be taught as a secular doctrine it is a conception of equality that makes no sense except in the light of a particular account of the relation between man and God...Locke accorded basic equality the strongest grounding that a principle could have: it was an axiom of theology.”³⁷⁷

The call for freedom from ecclesiastical power resembles the call for separation between State authorities on freedom of conscience. According to Robert Fitch:

“[i]t was from the Enlightenment that we received the worthy ideals of freedom, equality, peace, toleration, humanitarianism. But where did the Enlightenment get these ideals? [Not from the Greek philosophers] ... The fact is, the ideals of the Enlightenment are a rational dilution of the ideals of Christianity. ... The doctrine of equality is simply the legal and political expression of the ideal of human brotherhood. ... [T]he Christian ideal of love is variously translated as humanitarianism, as equality, and as toleration.”³⁷⁸

³⁷⁵ Jakob De Roover, ‘Atheism: A Secularized Theism’ March 5 2011 available at <http://www.hipkapi.com/2011/03/05/atheism-a-secularized-theism-jakob-de-roover/>

³⁷⁶ Ibid.

³⁷⁷ J. Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, (Cambridge University Press 2004) 82.

³⁷⁸ Robert E. Fitch, ‘Can there be Morality without Religion?’ in Arthur Harding (ed.), *Religion, Morality*

When religion is secularised and loses its Christian characteristic it gives rise to the modern frameworks of human rights which are incorporated into the European legal systems and human rights law as secular concepts. When religion is secularised and takes the form of “universal” normative morals and ethics which are incorporated in human rights law it also becomes universal, and is thought to become intelligible to non-Abrahamic cultures and traditions.³⁷⁹ However, one cannot accept these ideas and theories of human rights without at the same time, accepting Christian theology as true.

In creating this secularised version of the European legal systems, Christians are also helping in preparing the hearts and minds of humankind to “receive the *Christian* faith and grow in *Christian* hope and love. They bear witness to their own love for justice, which is one of the marks of a Christian, to their belief that law can be an instrument of justice, and to their desire, with God’s help, to convert law and justice into instruments of Christian Love.”³⁸⁰ Modern forms of ethics, toleration secularism and neutrality are vital elements of Christian theology and this is the reason as to why it is able to develop and elaborate. “This Christian theology has gone secular and that is why the claim is capable of relatively autonomous development in the form of a theory.” However, this development makes sense because these claims are part of some religion. “In other words, de-Christianised Christianity can take hold and spread if and only if Christianity is present in the

and Law (Dallas: Southern Methodist University Press, 1956) 6-7.

³⁷⁹ Shah Prakash, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75.

³⁸⁰ Berman Harold, ‘The Influence of Christianity upon the Development of Law’, (1959) Oklahoma Law Review (12) 86 86-101.

culture.”³⁸¹

3.13 The Emergence of the Secular

As already noted, secularism did not emerge simply from engaging in rationalism and repudiating religion. It emerged from the dialectic of Protestantism and modern science.³⁸² Scientific ideas replaced the Christian conceptions of the world and man through a process called “secularisation”. Secularisation therefore is not,

“a process in which religion was banned from public life – and so from science – but a process by which originally Christian conceptions of man and world lost their recognizably Christian character, acquiring the status of ‘natural’ characteristics of man and world, thereby becoming part of the “common sense” of a culture.”³⁸³

Based on the twofold kingdom a distinction between the spiritual and the secular began to emerge and determine the political debates on toleration. Punishing and fighting against and for true faith with the sword constitutes interference in Christ’s world since faith is located in the consciences and hearts of man. However, the boundaries of the two kingdoms of life should be respected by secular powers, and one should distinguish “between true or false faith on the one hand and the works and deeds of true or false faiths on the other.”³⁸⁴ This in turn gives the secular authority the right to curb false worship and damaging doctrines

³⁸¹ S.N. Balagangadhara, ‘Secularization and World views’ Hipkapi, March 15 2011, available at <http://www.hipkapi.com/2011/03/15/secularization-and-world-views/>

³⁸² Triloki Nath Madan, ‘Secularism in Its Place’ (1987) *The Journal of Asian Studies* 46(4) 747-759,754

³⁸³ Harry van den Bouwhuijsen, *Conversation of mankind or Comparative Science of Cultures? Reading Balagangadhara, Reconceptualising India Studies’*, Paper presented May 28, 2013 for the India Platform, Ghent. See also S.N. Balagangadhara, *The Heathen in His Blindness...*437-440.

³⁸⁴ Johannes Brenz, ‘An Answer to the Memorandum that Deals With This Question: Whether Secular Government Has the Right to Wield the Sword in Matters of Faith’ (8 May 1530) available at <http://pages.uoregon.edu/dluebke/Religions407/BrenzAnswer.html>

among men whenever they are deemed as public crimes. Thus the external manifestation of faith becomes subject to discipline and punishment by means of the secular law. “God provides secular government throughout the whole world even among the heathen and the godless; but he gives his spiritual government only to his people.”³⁸⁵

For Luther, secular government includes much more than political authorities and governments; it includes everything that contributes to the preservation of this earthly life.³⁸⁶ Luther distinguishes all this from the spiritual reality of grace, of the word of God, and of faith and describes it as an “external matter,”³⁸⁷ that is, related to our bodies, and also as the “secular sword.”³⁸⁸

After the second half of the sixteenth century, the Reformists set out for their members what to believe and how to worship, and the period witnessed firm theological boundaries and fixed doctrinal orthodoxies as well as the formation of confessional churches.³⁸⁹ Although the Reformation was “the result of the secularisation of the monastic structure of conversion, this secularisation of conversion was also theologised into several doctrinal schemes.”³⁹⁰ The Protestant churches started to define their own sets of doctrines, in an attempt to establish the boundary between the true religion and that of its false adversary, and hence began to interpret the “correct” Word of God. As a result, various movements within the

³⁸⁵ Luther Vol 13, 193.

³⁸⁶ Luther Vol 21, 29.

³⁸⁷ Luther Vol 30, 76.

³⁸⁸ Luther vol 45, 101, and vol 46, 242, see also Paul Althaus, ‘The Ethics of Martin Luther’, (Fortress press, 1972) 47.

³⁸⁹ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 119.

³⁹⁰ *Ibid.*, at 125.

reformation became rivals of one another and of the Roman Catholic Church. This in turn made is a need for the Reformation to establish a secondary religious authority in addition to the Scripture. The spiritual authority challenges that the Church faced allowed the identification of heresy and protection of religious truth. Therefore, various churches started making claims about universal religious truth of its specific set of doctrines however staying within the boundaries of the Scripture for it is the Word of God and His Will.

Some thinkers like John Milton argue that the Protestant Churches that forced religion “deserve as little to be tolerated themselves.”³⁹¹ However, in England in the Seventeenth century, it was argued that liberty of conscience ought to be granted to all mankind including Muslims, Jews, pagans and Catholics.³⁹² Milton redefined liberties, civil rights and religious teachings and strongly defended freedom of speech and press, freedom of the conscience, separation between the State and Church, equality of all biblical faiths in front of the law and the disestablishment of a national religion.³⁹³ The idea of granting liberty of conscience to all human kind can be traced back to 1612 when Thomas Helwys said:

“For our Lord the King is but an earthly king, an he has no authority as a king in earthly causes... For men’s religion to God is between God and themselves. The king shall not answer for it. Neither may the King Judge between God and men. Let

³⁹¹ A Complete Collection of the Historical, Political and Miscellaneous Works of John Milton Vol. 1, 551 See also John Witte Jr., ‘Rights and Liberties in Early Modern Protestantism’ in John Witte Jr. and Frank Alexander (eds.), *Christianity and Human Rights an Introduction*, (Cambridge University Press, 2010) 148-153.

³⁹² Norah Carlin, ‘Toleration for Catholics in the Puritan Revolution’ In Grell and Scribner, (Eds.), (Cambridge University Press, 1996) p.216-230. See also John Coffey, ‘Puritanism and Liberty Revisited: The Case for Toleration in the English Revolution’ (1998) *The Historical Journal* 41(4) 961-985.

³⁹³ John Witte Jr., ‘Prophets, Priests, and Kings of Liberty: John Milton and the Reformation of Rights and Liberties in England’ (2008) *Emory Law Journal* 57 1528- 1604, 1601.

them be heretics, Jews or whatsoever, it appertains not to the earthy power to punish them in the least measure.”³⁹⁴

The concept of toleration was extended by some thinkers³⁹⁵ to false religion but many forms of worship were seen as violations of the Will of God—including religions that were to be tolerated.³⁹⁶ Catholics were still seen as heretics and Islam and Judaism were seen as defective worship whilst pagans remained idolaters. Though different sects and religions were seen as heretics and idolaters, Protestants extended the liberty of conscience to followers of all forms of worship.³⁹⁷

The threat to the divine order was the sin of idolatry, and Protestantism attempted to transform a community into a “pure Christian church” by eliminating iconoclasm for they believed that the use of symbols, relics images and items of worship were material of the temporal world.³⁹⁸ In just the same way as Christians rejected the practices of the pagans as idolatrous or at some points indifferent to religion Reformists did the same with the Roman Catholics, who were viewed as the pagans of the sixteenth and seventeenth century. The established doctrinal boundary (Ecclesiastic law) set by the Reformists allowed them to determine which practices and beliefs were idolatrous and are hence harmful to religion, other practices were acknowledged as indifferent to religion. Church laws therefore had to

³⁹⁴ Thomas Helwy, *A Short Declaration of the Mystery of Iniquity*, (ca. 1550- ca1612) Richard Groves (Ed) (Classics of Religious Liberty 1, Macon GA, Mercer University Press, 1998) 53.

³⁹⁵ Such as Roger Williams, William Walwyn, Leonard Busher.

³⁹⁶ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 247.

³⁹⁷ Ibid.

³⁹⁸ Ibid., at 135.

distinguish between idolatrous acts and truly religious ones.³⁹⁹

3.14 The link between the Protestant Reformation and Freedom of Religion

As discussed, the Protestant Reformation had a tremendous influence on the concept of freedom of conscience and freedom of religion and subsequently on the wording of Article 9 ECHR. The “two kingdoms” of Luther and Locke, those being the private realm of the conscience and the public realm of the (sinful) body, which may be punished by the magistrate (state), are reflected today in the split between the assertion of religious freedom in Article 9(1) of the ECHR and the limitations thereto as expressed in Article 9(2) and presuppose a Protestant theology.

The Protestant background is an appropriate framework to make sense of the assumptions within Article 9 and claims made upon it. Article 9(1) constitutes an intrinsic freedom of the individual’s conscience, the personal beliefs or religious creeds often called the *forum internum*,⁴⁰⁰ where in theory it is almost impossible for the State to breach or interfere with⁴⁰¹ because these beliefs are held silently, without manifestation yet. Article 9(2) is a qualified right, which entails a narrow and general limitation clause. It is the dividing line between freedom of the internal conviction, or *forum internum* and freedom to manifest religion in the public sphere (the expression of that conviction).⁴⁰² Article 9(1) is said to resemble the private realm of the conscience in Luther’s two Kingdoms (where no mankind may interfere)

³⁹⁹ Ibid., at 142.

⁴⁰⁰ *C v UK* App No 10358/83 see also *Van den Dungen v. The Netherlands*, (1995) DR80, p. 147

⁴⁰¹ Ascot Krishnaswami, Special Rapporteur of the Sub -Commission on the Prevention of Discrimination and Protection of Minorities, Study of Discrimination in the Matter of Religious Rights and Practices, E/CN.4/Sub.2/200/Rev.1 (1960) at p.16 electronic copy available at http://prf.berkeley.edu/files/2011/06/Krishnaswami_19601.pdf [last accessed in April 2014].

⁴⁰² Françoise Tulkens, ‘The European Convention on Human Rights and Church State Relations: Pluralism vs. Pluralism’ (2009) *Cardozo law Review* 30(6) 2575- 2591

and Article 9(2) is the public realm of the (sinful) body, which may be punished by the magistrate (State).

During the Protestant Reformation it was essential to determine whether certain practices or beliefs belonged to the spiritual or temporal worlds. Today the ECtHR determines whether practices belong to Article 9(1) or Article 9(2) ECHR. According to the Protestant theology, practices that belonged to the spiritual kingdom or the realm of religion were practices that concerned the soul alone, where Christ alone can rule and God alone can judge, and the followers of these beliefs or practices ought to be left totally free. On the other hand, practices that belonged to the temporal Kingdom or the State, were practices that were thought to inflict potential harm to the lives of others, then the authority or law could legitimately interfere with these practices and beliefs. Again this is reflected in the way the ECtHR assesses claims on freedom of religion where it evaluates whether certain manifestations are regarded as manifestations or beliefs that are protected under the *forum internum* in Article 9(1) or the *forum externum* in Article 9(2).

3.15 Conclusion

The distinction between the temporal and spiritual realm became crucial to the Protestant Reformation theology and was the culmination of a Christian tradition. This separation and distinction is understandable only within a Christian culture, with reference to a specific set of beliefs regarding the nature and goal of human existence.⁴⁰³ It is also reflected in the normative conceptions about the separation

⁴⁰³ Jakob De Roover, 'The Vacuity of Secularism' (2011) *Economic and Political Weekly* (37) 4047-4053 Electronic copy available at <http://www.hipkapi.com/2011/04/02/the-vacuity-of-secularism/> accessed June 2014.

between the religious and the temporal, where secular authorities should refrain from interfering in the religious sphere since it is God's territory. This is clearly reflected today in the split between the assertion of religious freedom in Article 9(1) of the ECHR and the limitations thereto as expressed in Article 9(2).

Furthermore, secularism is said to be "a gift of Christianity to mankind,"⁴⁰⁴ that is derived from the Protestant theology and should not be imposed and transferred to non-western cultures and societies.⁴⁰⁵ In the discourse of secularism, the conceptions on the separation between the State and the Church have emanated from the "theological frame that gave them significance, and transformed into universal precepts for the government of human societies."⁴⁰⁶ This belief of the separation between the State and Church has not emerged out of a reaction or as a solution to the difficulties of plural societies, but it has emanated as shown from the foundations of the Protestant theology and doctrine.

By claiming that Catholics were idolatrous and engaged in false worship, the Reformation divided various Christian sects against each other. It was Calvin's or the Protestant's suspicion of icons that made its way into the judgments of the ECtHR where these claims are still echoing.⁴⁰⁷ (This will be considered in details in Chapter 6). The main problem that Protestants identified with Catholicism was their idolatrous practices within worship, while they were indifferent to the realm of the

⁴⁰⁴ Triloki Nath Madan, 'Secularism in Its Place' (1987) *The Journal of Asian Studies* 46(4) 747-759.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ See the claim in *Lautsi and Others v. Italy*, Application no. 30814/06, judgment of 18 March 2011 when the applicant demanded the removal of the crucifix from the classroom. See also Prakash Shah, 'The Difference that Religion Makes: Transplanting Legal Ideas from the West to Japan and India' Queen Mary School of Law Legal Studies Research Paper No. 184/2014)

“secular” for it contained the set of “sanitised practices.”⁴⁰⁸ The Enlightenment continued along this path and assured freedom of conscience and religion while the State became secular, and ostensibly free from any religion.⁴⁰⁹:

“This phase of secularisation was a consequence of, and implicitly carried forward, Protestant critiques in so far as they required a secular state as a way of guaranteeing that no man-made accretions should influence true worship. Otherwise it would amount to idolatry.”⁴¹⁰

The ECtHR does not accept that some “religions” may not always require beliefs but they require mere practices and these practices require objects. The ECtHR continues to underestimate orthopraxy, symbols and the sensory (sight) requirements for religious beliefs and practices⁴¹¹ and still requires the “believer” to abolish objects, which is a clear expression of Protestant theology. The description of the cross for example as a mute and passive symbol in the *Lautsi* case is reminiscent of 16th century iconoclastic language. Orthodoxy or a dogmatic/belief-centred approach (doctrines and beliefs) remains crucial in assessing claims in the ECtHR as opposed to orthopraxy or a practice-centred approach (objects and practices based on tradition rather than doctrines).

⁴⁰⁸ Jakob De Roover, “Secular Law and the Realm of False Religion” in Winnifred Fallers Sullivan, Robert A. Yelle & Mateo Tausig-Rubbo, eds, *After Secular Law* (Stanford: Stanford University Press, 2011) 43. See also Prakash Shah, ‘The Difference that Religion Makes: Transplanting Legal Ideas from the West to Japan and India’ Queen Mary School of Law Legal Studies Research Paper No. 184/2014)

⁴⁰⁹ Prakash Shah, ‘The Difference that Religion Makes: Transplanting Legal Ideas from the West to Japan and India’ Queen Mary School of Law Legal Studies Research Paper No. 184/2014)

⁴¹⁰ *Ibid.*

⁴¹¹ See *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014), *Dahlab v. Switzerland* Application no.42393/98, (Dec) ECHR 2001-V, (inadmissible), *Lautsi v Italy* (language used to interpret the presence of the crucifix), *Leyla Sahin v. Turkey* [2005], Appl. no. 44774/98, *Austrianu v. Romania*, Application no. 16117/02 (2013) (confiscation of religious tapes- Inadmissible)

Chapter 4

The Emergence of Religious Freedom in the International and European Legal Systems

4.1 Overview

In this chapter, the relationship between law and religion is examined including the link between human rights and Christianity. A chronological approach is adopted encompassing the major national and international instruments. It is demonstrated that conceptual differences between a traditional practice and a religious practice are not reflected in international treaties, in Western legal systems, or in the ECtHR case law. The chapter concludes with an examination of whether the drafting of laws relating to freedom of religion has changed very much over time, culminating in the wording, judicial interpretation and application of Article 9 ECHR.

4.2 How did the Idea of Religious Freedom Make its way in International and European Legal Systems?

Following the Reformation, European intellectuals considered the idea of toleration as a central way to devise a *modus vivendi* amongst religious groups.⁴¹² The concept of toleration was a catalyst from which various other ideas such as freedom of thought, conscience, and religion emanated. It allowed different people from diverse faith groups a mutual space whereby interactions could be facilitated.⁴¹³ But although the concept of freedom of thought, conscience, and religion emerged early on, its recognition in national law took a long time and was a gradual process.

⁴¹² Prakash Shah, 'Toleration: Opportunities and Strains of a Historic European Ideal' Synergy Magazine of the European Law Students' Association, No. 56) available at <https://aryalegal.wordpress.com/2014/09/29/toleration-opportunities-and-strains-of-a-historic-european-ideal/>

⁴¹³ Ibid.

Tolerance was narrowly granted to a few specified beliefs or religions, but not to traditional practices as such.⁴¹⁴

Prior to the concept of freedom of conscience, thought, and religion being acknowledged in national laws, the first step was securing international treaties to protect certain rights for groups or individuals claiming a belief or religion different from that of the majority in the country.

“Such treaty stipulations date back to the time when law was felt to be personal rather than territorial, and to follow an individual even when he lived in a country other than his own.”⁴¹⁵

For example, the treaty signed by Francis I and Suleiman I of the Ottoman Empire in 1536 was one of the most important treaties granting such “capitulations”.⁴¹⁶ The treaty granted the French merchants in Turkey individual and religious freedom and became the “model for many later treaties of this sort as the capitulation system spread during the seventeenth, eighteenth and early nineteenth centuries.”⁴¹⁷

Further examples include the Peace of Nuremberg (1532) and the Treaty of Passau which made way for “religious liberty” in Europe following the Protestant Reformation. However, it was the Religious Peace of Augsburg (1555) that was the real starting point of religious liberty in Europe.⁴¹⁸ This provided that Catholic princes were to enjoy a status equal to the Lutheran rulers and princes within the empire. It

⁴¹⁴ The study of Ascot Krishwasnami.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Malcolm Evans, *Religious Liberty and International law in Europe* (Cambridge University Press, 1997) 45.

allowed the lay princes to determine which of the two religions to be adopted within their territories which was the first step towards the “abandonment of the theory of empire based upon a common religion”.⁴¹⁹

Nevertheless, this was still a long way from the protection of religious freedom as it was also provided that “all other who do not adhere to the abovementioned two religions are not included in this peace, but instead are thoroughly excluded from it.”⁴²⁰ Peace was considered to be more of a territorial and political rather than a religious settlement. The only concession to individual conscience made was that the Peace granted Lutheran or Catholic subjects the right to move to a territory where the religion of the Prince was more agreeable. Hence a “limited concession to the beliefs of the subjects of the ecclesiastical rulers”⁴²¹ existed and did not purport to extend a general freedom of religion to their subjects.

Subsequently, the Pacification of Ghent (1576) drew a distinction between the positions on the toleration of heretics. The Treaty confirmed the status of Roman Catholicism as the official religion of all other States and granted freedom of religion to the Calvinists of Zeeland and Holland.⁴²² Afterwards, the Peace of Westphalia (1648) was a pivotal point in the struggle for religious liberty within the Empire with an intent to protect members of dissenting religions. The significance of these treaties, amongst other things, was that they showed the relative acceptance of the

⁴¹⁹ Articles 15 and 16 of the Religious Peace of Augsburg. See also Malcolm Evans, *Religious Liberty and International law in Europe* (Cambridge University Press, 1997) 46-47.

⁴²⁰ Article 17 of the Religious Peace of Augsburg (1555).

⁴²¹ Malcolm Evans, *Religious Liberty and International law in Europe* (Cambridge University Press, 1997) 48.

⁴²² Jakob De Roover, *A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought* (DPhil Thesis, University of Ghent 2005) 174.

international community to humanitarian intervention.⁴²³ However, it is important to note that when addressing religion the Treaty reflected the concept of religious freedom in Protestantism. Article XXVIII reads

“[t]hat those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. As also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.”⁴²⁴

The treaty granted people who demand to exercise their religion, freedom to do so but it differentiated between the private exercise of religion and the public manifestation of religion. Freedom was unregulated and absolute when exercised in private in one’s own house. However, when exercised in public there were restrictions. The religious freedom of the State predominated over the religious freedom of the individual making its utility to true religious freedom questionable.

In the Summer of 1789, the French Revolution started and there was a violent clash between the State and the Catholic Church. Possessions of the Church were seized and priests were made to swear allegiance to the Republic.⁴²⁵ Before the term *laïcité* was used,⁴²⁶ and during the Revolution, anticlerical attitudes were developed

⁴²³ Natan Lerner, *Religion, Secular Beliefs and Human Rights* 2nd rev. ed. (Brill, 2012) 57-58.

⁴²⁴ Article XXVIII of the Treaty of Westphalia, October 24, 1648.

⁴²⁵ Henri Astier, ‘The Deep Roots of French Secularism’, BBC News Online, Wednesday 1 September 2004, available on <http://news.bbc.co.uk/1/hi/world/europe/3325285.stm> [Last accessed March 2017].

⁴²⁶ The word, *laïc*, which is as, T. Jeremy Gunn says, “generally, but imperfectly, translated as “secular,” appeared the first time in Article 2 of the French Constitution of 1958. The Article states “France is an indivisible, secular [*laïc*], democratic, and social republic. It ensures the equality before the law of all

between the French Left and the Catholic Clergy. In 1879 and amid the dominant political class, these anticlerical attitude from the revolutionary period, reemerged significantly. Many important French laws that affected relations between the State and the church were enacted between 1879 and 1905. These laws are said to be “among the founding documents of *laïcité* and the modern French State.”⁴²⁷ Gunn notes that

“with regard to matters involving religion, the prestige and importance of the 1905 Law in France compares to that of the First Amendment’s religion clauses in the [American] Bill of Rights. Although the phrase separation of Church and State does not appear in the text of the 1905 Law, the title itself is of sufficient importance legally and rhetorically to institute the term separation as a defining term in the French legal system, characterizing the relationship between religion and the state.”⁴²⁸

“[B]ecause of the controversial origins of these laws and their association with the doctrine of *laïcité*, for many French citizens the word evokes anticlericalism, anti- Catholicism, and sometimes blatantly antireligious sentiments. As early as 1880 some began to assert that the word “*laïc*” was actually a synonym for irreligious.”⁴²⁹ Religion in France was brought under the control of the State again after the

of its citizens, without distinction as to origin, race, or religion. It respects all beliefs.” See T. Jeremy Gunn, ‘Religion and Law in France: Secularism, Separation, and State Intervention’, *Drake Law Review* (57) 949-978, 953.

⁴²⁷ T. Jeremy Gunn, ‘Religion and Law in France: Secularism, Separation, and State Intervention’, (2009) *Drake Law Review* 57 949-978, 953.

⁴²⁸ *Ibid.*, at 956.

⁴²⁹ *Ibid.*, at 953. See also Dale Van Kley, *The Religious Origins of the French Revolution: From Calvin to the Civil Constitution, 1560-1791* (New Haven: Yale University Press, 1996).

Revolution. However when Napoleon signed a Concordat with the Vatican in 1801, a significant amount of the church's former status was restored.

In 1789 the French national assembly passed the Declaration of the Rights of Man and the Citizen to remind the people “of their rights and duties.” It was said to be “a crystallisation of Enlightenment ideals” and summarised the “natural and civil rights espoused by writers like John Locke, Jean-Jacques Rousseau and Jefferson, and entrenched them in French law.”⁴³⁰ Freedom of religion was set out in Article 10 of the Declaration⁴³¹ as follows:

“[n]o one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.”

Shortly after, the drafters of the American Bill of Rights of 1791 guaranteed equal religious rights as follows:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”⁴³².

John Witte Jr. explains that four groups contributed to the development and evolution of religious liberty in early American constitutionalism and that these were the Evangelical, the Puritan, the Enlightened, and the civic republican. Their contribution was organised around six distinct themes: religious pluralism; liberty of conscience; religious equality; free exercise of religion; disestablishment of religion;

⁴³⁰ Jennifer Llewellyn and Steve Thompson, THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN *Alpha History*, 2015 [last accessed November 2017], <http://alphahistory.com/frenchrevolution/declaration-rights-of-man-and-citizen/>.

⁴³¹ Declaration of the Right of Man and the Citizen, 26 August 1789, electronic copy available at: <http://www.hrcr.org/docs/frenchdec.html> [accessed 14 January 2015].

⁴³² First Amendment to the Constitution of the United States.

and the separation of church and state.⁴³³ These themes reflect many of the principal ideas of Protestant theology, and intersect in different ways and to varying degrees with the key theological and political views discussed above. The U.S. Constitution was the first national legal framework to institutionalise the separation between the State and the Church in order to protect religious liberty. However, its approach, providing for both free exercise of religion and disestablishment, was very clearly entrenched in a long political and religious history rooted historically in the theology of the Protestant Reformation.⁴³⁴

4.3 The Origins of Human Rights Law

Christian religious heritage is strongly visible in modern concepts of human rights. As Zachary Calo notes, “[t]he idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred.”⁴³⁵ According to Jürgen Habermas, the ideas of freedom, conscience and human rights emanated from Christian and Judaic ethics:

“[C]hristianity has functioned for the normative self-understanding of modernity as more than a mere precursor or a catalyst. Egalitarian universalism, from which sprang the ideas of freedom and social solidarity, of an autonomous conduct of life and emancipation, of the individual morality of conscience, human rights, and democracy, is the direct heir to the Judaic ethic of justice and the Christian ethic of love. This legacy, substantially unchanged, has been the object of continual critical appropriation and reinterpretation. To this day, there is no

⁴³³ Kristine Kalanges, *Religious Liberty in Western and Islamic Law: Toward a World Legal Tradition*, (Oxford University Press, 2012) 41.

⁴³⁴ *Ibid.*, at 54.

⁴³⁵ Zachary R. Calo, ‘Religion, Human Rights, and Post-Secular Legal Theory,’ (2011) *ST. JOHN’S L. REV.* 85 495, 495

alternative to it. And in the light of the current challenges of a post national constellation, we continue to draw on the substance of this heritage. Everything else is just idle postmodern talk.”⁴³⁶

In Chapter 4 it was explained that to love one another in the sense of *agape* resembles the love that is personified in Christ⁴³⁷ that “as I have loved you, love you also one another.”⁴³⁸ This is to see a person in a way in which one is the child of God and people are brotherhood in humanity. Consequently, it is necessary to act towards them in a particular way as *agape*,

“show[s] you the full humanity of others. To become properly aware of that full humanity is to become incapable of treating it with contempt, cruelty, or indifference. The full awareness of others’ humanity that love involves is an essentially motivating perception.”⁴³⁹

Once an underlying religious answer is given, these human rights become accepted. However, when one tries to secularise the concept without reference to God by claiming that these rights are merely ethical rights, moral duties, or duties towards humanity, the result is a secular version of a theological belief. One ends up taking a theological concept and trying to make it “secular by referring to ... an ethical theory instead of God, *as though* it is merely a question of substitution of appropriate *variables*.”⁴⁴⁰ Upon doing so, one is faced with problems that do not

⁴³⁶ Jürgen Habermas, *A Conversation About God and the World*, in *Time of Transitions* (Polity Press 2006) 149-151

⁴³⁷ Harold Berman, *The influence of Christianity upon the Development of Law* (1959) *Oklahoma Law Review* (12) 86 86-101, 89.

⁴³⁸ The Bible of John 13:24; 15:12.

⁴³⁹ Michael J. Perry, ‘The Morality of Human Rights: a Non Religious Grounds?’ (2005) Emory Research Paper No. 05-6, University School of Law Public Law & Legal Theory Research Paper Series. 97-150, 111.

⁴⁴⁰ S.N. Balagangadhra, “...We Shall Not Cease From Exploration...”An Invitation Disguised As a Position Paper Composed At the Behest of ARENA for the Theme “Decolonizing Social Sciences”, available at https://www.academia.edu/4214176/We_Shall_Not_Cease_from_Exploration

arise in a theological belief. Because “variables” have been interpreted differently, one is faced with questions which the original version was not “designed” to handle. Consequently, when one tries to defend the idea of “claim- right” without referring to God, then this person is using theological and Christian moral concepts that no social arrangement or legal system can abridge, because these rights are not coincidental or the consequence of political or social organisations.⁴⁴¹

“Modern” human rights,⁴⁴² such as religious freedom, freedom from discrimination on religious grounds, freedom of association and freedom of expression are protected by an immense body of international, regional and national laws and jurisprudence. Such human rights have helped to ignite a great awakening of religion internationally and as a result the sphere of religion has substantially expanded.⁴⁴³ Therefore, “[i]t does not come as a surprise that religion is not welcome but keeps knocking at the door with increasingly more difficult demands.”⁴⁴⁴

The ability of States to cope with religious and cultural diversity has remained a controversial issue and has hardly seen any substantial development during the twentieth and twenty first centuries. Often religious and cultural diversity is not seen as an asset of humanity, but rather as a predicament.⁴⁴⁵ The idea of religious freedom was seen as vital to the pursuit of a solution to this predicament and a

⁴⁴¹ Ibid. See also Chapter 4 part 4.5 in this thesis.

⁴⁴² By modern human rights I refer to human rights systems that came into existence just after the Second World War.

⁴⁴³ John Witte Jr., ‘Introduction’ in John Witte Jr. and Frank S. Alexander (eds), *Christianity and Human Rights* (Cambridge University Press 2010) 8.

⁴⁴⁴ Lorenzo Zucca, “The Crisis of the Secular State: A Reply to Professor Sajo” I.CON 2009 electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1343099 [last accessed January 2015].

⁴⁴⁵ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 1.

secular model of religious freedom has emerged. The model entails a set of values and norms concerning the way in which a State and a plural society should be organised. This model asserts that all citizens have the right to freedom of thought, conscience, and religion; that the State and its laws should not interfere with the realm of religion; and that the State should remain neutral or secular. The secular religious freedom model divides diverse societies into two realms: a realm where citizens should always be left free to live according to their religious and moral values; and a neutral public sphere where the citizens must obey the coercive laws of the State.⁴⁴⁶

4.4 The United Nations

The concept of religious freedom struggled to afford protection to specific national minorities. In the nineteenth century there were some cases where national minorities were given international protection. For example, the Final Act of the Congress of Vienna⁴⁴⁷ guaranteed Poles living under Russian, Prussian, or Austrian sovereignty the protection of their national representation and institutions.⁴⁴⁸ At this time, international law was concerned with minority rights in terms of national representation and national institutions, and with the duties and rights of States. However, there was a growing recognition of duties owed by States towards individuals with the introduction of various treaties that called for an individual right to freedoms and rights. A legal “international control machinery”⁴⁴⁹ which allowed

⁴⁴⁶ Jakob De Roover, “Secular Law and the Realm of False Religion” in Winnifred Fallers Sullivan, Robert A. Yelle & Mateo Tausig-Rubbo, eds, *After Secular Law* (Stanford University Press, 2011) 43-61

⁴⁴⁷ Article I, Section 2 of the final Act of the Congress of Vienna, signed on June 9, 1815

⁴⁴⁸ Stephen Kertesz, ‘Human Rights in The Peace Treaties’ 14 *Law and Contemporary Problems* (Fall, 1949) 627-646.

⁴⁴⁹ A. H. Robertson, ‘The European Convention of Human Rights: Educational Aspects’, (1970) *Am.J. Comp. L.* 18 355.

an individual to bring a human rights complaint against a state⁴⁵⁰ was developed and the protection of religious freedom as a part of human rights law became an object of international legal concern.⁴⁵¹

In the aftermath of the Second World War the focus was on a universal general protection of all human beings in all countries.⁴⁵² In his speech to the US Congress on 6 January 1941, President Roosevelt set out the “four freedoms”, that every person should be guaranteed: freedom from war; freedom from fear; freedom of speech and expression; and freedom of religion. This was defined as “freedom of every person to worship God in his own way - everywhere in the world”.⁴⁵³ It is important to note that this was worshiping God, the one God as opposed to gods or other worshiped figures. Moreover the speech emphasised the concept of worship as opposed to practice, and the inevitable idea of the God when it comes to worship.

The international framework protecting religious freedom consists of four major documents: the 1948 Universal Declaration of Human Rights (UDHR)⁴⁵⁴, the International Covenant on Civil and Political Rights (ICCPR),⁴⁵⁵ the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration),⁴⁵⁶ and the Vienna Concluding

⁴⁵⁰ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 105.

⁴⁵¹ Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 173.

⁴⁵² Bruce Dickson, ‘The United Nations and Freedom of Religion’ (1995) I.C.L.Q. 44(2) 327-357.

⁴⁵³ Franklin D. Roosevelt, Annual Message to Congress on the State of the Union January 6, 1941 available at <http://www.presidency.ucsb.edu/ws/?pid=16092> [Last accessed November 2017].

⁴⁵⁴ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (Dec. 10, 1948).

⁴⁵⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), Mar. 23, 1976, 999 U.N.T.S. 171.

⁴⁵⁶ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

Document (1989), (which extended the 1981 Declaration's religious liberty norms, especially to religious groups).⁴⁵⁷

However, arguments claiming the universality of human rights are problematic in the same way as arguments claiming the universality of religion (See chapter 3). According to David Kennedy, the idea of human rights has a specific place and time of origin, those being "post- enlightenment, rationalist, secular, Western Modern, Capitalist."⁴⁵⁸

4.5 The Universal Declaration of Human Rights

The Charter of the United Nations sets out a number of general provisions relating to human rights,⁴⁵⁹ but the Universal Declaration of Human Rights⁴⁶⁰ contains the most detailed scheme of modern human rights standards. The United Kingdom delegate referred to the Declaration as "a document of the greatest *moral force*"⁴⁶¹ while P.C. Chang the Chinese delegate, stated that

"[i]n order to throw more light on the question, he wished first of all to explain to the Committee how the Chinese approached the religious problem. Chinese philosophy was based essentially on a firm belief in a Unitarian cause, expressed on the human plane by a *pluralistic tolerance*, That philosophy considered that man's *actions* were more important than metaphysics, that *the art of living*

⁴⁵⁷ Concluding Document of the Third Follow-up Meeting, Vienna, 4 November 1986 to 19 January 1989.

⁴⁵⁸ David Kennedy, *The international Human Rights Movement: Part of the Problem?* (2002) *Harv. Hum. Rts. J.* 15 101, 114-115.

⁴⁵⁹ The general provisions set in the Charter of the United Nations are insufficient for individual protection as they are too general and vague. (For provisions relating to religion see Articles 1(3), 13(b), 55(c) and 76(c). Moreover the provisions are insufficient, as they cannot be enforced.

⁴⁶⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

⁴⁶¹ See comments of United Kingdom Delegate UN Doc. A/C.3/SR.179 (1948) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL4/805/10/PDF/NL480510.pdf?OpenElement> [Accessed in February 2015].

*should be placed above knowledge of the causes of life, and that the best way for man to testify to the greatness of the Divinity was to give proof of an exemplary attitude in this world.”*⁴⁶²

The Chinese intervention shows that in cultures like China’s, actions are more important than religion as expressed in the relevant treaties and conventions. Practice, the art of living and attitude are the essentials to a firm belief and are above concepts of national law governing human behaviour. Practice and actions therefore have greater influence than knowing about the causes of life, which is often doctrinal in nature.

As the Universal Declaration is not legally enforceable, the United Nations concluded binding multilateral treaties such as the International Covenant on Economic, Social and Cultural Rights 1966, and the ICCPR 1966.⁴⁶³ Although draft articles relating to minority rights were submitted to UN Secretariat⁴⁶⁴ and the Human Rights Division, minority rights were not included in the UDHR. There was also major opposition to the concept of minority rights by the US delegate, Mrs Roosevelt, who said, “the best solution of the problem of minorities was to encourage respect for human rights.”⁴⁶⁵ The consequence of Mrs Roosevelt’s approach was that “minority rights ceased to be the primary vehicle through which

⁴⁶² Peng Chun Chang, the Chinese delegate in the Commission on Human Rights of the United Nations (emphasis added).

⁴⁶³ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 134.

⁴⁶⁴ Part C of General Assembly [resolution 217 \(III\). International Bill of Human Rights](#)] 217 C (III). Fate of Minorities, states:

Considering that the United Nations cannot remain indifferent to the fate of minorities, *Considering* that it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises, *Considering* the universal character of the [Declaration of Human Rights](#), *Decides* not to deal in a specific provision with the question of minorities in the text of this Declaration.

⁴⁶⁵ UN Doc A/C.3/SR.161 p.726 electronic copy available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL4/804/98/PDF/NL480498.pdf?OpenElement>

religious freedoms were addressed on the international plane.”⁴⁶⁶ Moreover, challenges concerning the rights and treatments of minorities were thought to be effectively addressed through the individualist perspective.⁴⁶⁷

Article 18 of the UDHR is the main article that deals with freedom of religion. It provides:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

For the first time, the right to freedom of thought conscience and religion (the absolute rights) and the right to manifest religion or belief in worship, teaching, practice and observance (the limited rights) were clearly distinguished from each other.⁴⁶⁸ In the drafting of Article 18 there was no objection to an absolute freedom of belief which was agreed to be a fundamental right. However, participants agreed that the manifestation of the belief was to be subject to limitation by the general limitation clause Article 29(2) of the UDHR which provides:

“[i]n 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.”

⁴⁶⁶ Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 183.

⁴⁶⁷ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe*, (Ashgate, 2007) 190.

⁴⁶⁸ Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom* (Kluwer Law International, 2011) 85

Article 18 influenced the wording of the ICCPR of 1966, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981), and most importantly the ECHR.

4.6 The International Covenant on Civil and Political Rights (ICCPR)

Article 18 of the International Covenant on Civil and Political Rights is closely modelled on Article 18 of the UDHR. It provides as follows:

“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.”

Article 18 of the ICCPR differs from Article 18 of the UDHR in four aspects: Firstly Article 18 (1) of the ICCPR replaces “freedom to change his religion or belief” which was in Article 18 UDHR the “freedom to have or adopt a religion or belief of his choice”. This change came as a compromise intended for Islamic Member

States⁴⁶⁹ which objected to the right to change religion. Secondly, Article 18(2) bans “coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” This was aimed at States to prohibit the use of force or threat, penal sanctions policies, and practices that make citizens adhere to a specific religious belief. It is important to note that the article does consider proselytism to be a coercive practice but the wording of the 1981 Declaration does not explain what conditions, conduct, or forms of communication would constitute coercion. Consequently there is still uncertainty as to what exactly constitutes coercion under Article 18(2) of the ICCPR.⁴⁷⁰

Thirdly, the article places a limitation clause on freedom to manifest religion if necessary and prescribed by law under what is set out in the Article. Freedom of thought conscience and religion remain absolute. Fourthly, in 18(4) there is a right for parents or guardians “to ensure the religious and moral education of their children in conformity with their own convictions.” This is an important point for it allows schools to offer the history of religion and “ethics” if given in a “neutral” and “objective” way.⁴⁷¹

Article 27 of the ICCPR ensures respect for religious beliefs for the rights of minority communities. This Article states that

“[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community

⁴⁶⁹ Saudi Arabia, Yemen, Egypt, Afghanistan, the Saudi Arabian Delegate expressed concerns about proselytism from missionaries.

⁴⁷⁰ Daniel J. Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration of the Elimination of Religious Intolerance and Discrimination’, (1988) *Am J Int’l L* 82 487.

⁴⁷¹ For further analysis see Chapter 6.

with the other members of their group, to *enjoy their own culture, to profess and practise their own religion*, or to use their own language.”⁴⁷²

The significance of Article 27 lies in the fact that although the Article mentions the word “culture”, and that individuals have the right to enjoy their culture, the words are restricted to the *enjoyment* of the culture whereas the religion is to be professed and practiced. It is important to note that the Article distinguishes between the practicing of culture and the enjoyment of culture, for the Article does not specifically indicate the right to “practice” culture but rather to enjoy it (which could reflect the absolute freedom of the *forum internum*), however it clearly states the right to practice a religion.

4.7 What is a Manifestation of Religion under Article 18 of the ICCPR?

In its General Comment,⁴⁷³ the Human Rights Committee’s aim was to formulate a comprehensive list of basic human rights and freedoms; the formulation was rather restrictive. Worship, observance, practice and teaching, which constitute the four models of manifestation, provide an “exhaustive catalogue.”⁴⁷⁴ However, due to the interpretation placed on these four forms, expressions of activities and behaviour that flow from religious convictions are not regarded as manifestations of belief. The scope of these models is limited to acts that are directly and closely connected with the formal practice of religious customs and rites. The limitation seems to cover parent’s rights regarding religious education as well as conscientious objection both of which are treated as a form of manifestation under Article 18 only if they are

⁴⁷² Article 27 of the ICCPR. (emphasis added).

⁴⁷³ Human Rights Committee General Comment No. 22 Article 18 (Forty-eighth session, 1993) para. 4.

⁴⁷⁴ Malcolm Evans, *Religious Liberty and International law in Europe* (Cambridge University Press, 1997) 216.

considered to be a form of a manifestation of a religion or belief.⁴⁷⁵

4.8 The 1981 Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief

Article 2(1) of the 1981 Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief⁴⁷⁶ provides that “[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.” Article 6 of the Declaration gives a detailed (but still not thorough) list of the incidents of freedom of religion.⁴⁷⁷ Moreover, although the opening words refer to both religion and belief, the main concern of the Declaration was religion.⁴⁷⁸ The right to freedom of thought, conscience, religion or belief shall include:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

⁴⁷⁵ Ibid.

⁴⁷⁶ UN Doc. A/36/51 (1981). The Declaration was adopted by General Assembly Res. 36/55, 36 UN GAOR, Supp. (No. 51), 171.

⁴⁷⁷ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 107.

⁴⁷⁸ Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 227.

- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

The Declaration is also closely modelled upon Article 18 of the ICCPR. It is important to note that the Declaration does not include the right to change religion although this right was included in Article 18 of the Universal Declaration on Human Rights. Again, this omission was a result of the opposition from Islamic States.⁴⁷⁹ In some religions and cultures changing one's religion, adopting or abandoning another religion is considered a heresy or apostasy which are regarded as crimes that may be severely punished.⁴⁸⁰

4.9 The European Convention on Human rights (ECHR)

4.9.1 Introduction

The ECHR was a reaction to the Second World War where Europe had to deal with enormous economic and social problems and legacies of the Holocaust, widespread violence and racism, and also had to react to a political threat from the Soviet Union.

There was an immediate need to create the Convention as part of an overall

⁴⁷⁹ Sullivan Donna, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination (1988) AJIL 82 487-520, 495. See also Davis Derek, 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', (2002) Brigham Young University Law Review 2(2), 229.

⁴⁸⁰ Punishments do take place despite views that argue that the Quran's exact wording mandate that "there shall be no compulsion in [acceptance of] the religion."(Quran, Surat Al Baqarah (The Cow) 2:256) This Koranic injunction can be understood as a protection to freedom of religious belief and expression for all people.

“political plan for the unification of Europe”,⁴⁸¹ that was considered by many the only answer to communism which was feared to spread throughout Europe.⁴⁸² Although with regards to religion, at the time of drafting the ECHR, Europe was a fairly homogeneous culture as Christianity had been the dominant religion for centuries.

The Convention can therefore be considered a political as well as a legal instrument and its strength lies in the fact that it is an agreement between States⁴⁸³ sharing religious, cultural, political and economic similarities. By contrast to today, at the time of drafting, the issue was with religious or non-religious people rather than with people of various religion(s), traditions or cultures.⁴⁸⁴ Cultural homogeneity was assumed even while social diversity was recognised with regard to social class, social mobility and levels of wealth. The assumption was that culture in the sense of beliefs and values, allegiances and national sentiments, custom and traditions, was relatively uniform.⁴⁸⁵ Many of the delegates were explicit about the role they saw for the Christian religion in assisting with the development of human rights.⁴⁸⁶ There were no issues with people of “different” religions or even customs and national legal systems were not “strained by the resulting tensions.”⁴⁸⁷ Sir David Maxwell-Fyfe reflected his perception of the liberal/Christian homogeneity of Europe, and called on “those nations who belong to and revere the great family of Western Europe and

⁴⁸¹ Ralph Beddard, *Human Rights and Europe* (3rd ed. Cambridge University Press 1993) 19.

⁴⁸² *Ibid.*

⁴⁸³ The States were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. (All Christian States).

⁴⁸⁴ Ralph Beddard, *Human Rights and Europe* (3rd ed. Cambridge University Press 1993) 225.

⁴⁸⁵ Roger Cotterrell, ‘Law and Culture: Inside and Beyond the Nation State’, Legal Studies Research Paper No. 4/2009.

⁴⁸⁶ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 39.

⁴⁸⁷ Silvio Ferrari, ‘Individual Religious Freedom and National Security in Europe after September 11’ (2004) Brigham Young University Law Review 2 357-384.

Christian civilization,”⁴⁸⁸ that the protection and promotion of human rights is ensured.⁴⁸⁹ Europe at that time was not viewed as the Continent that “has tied itself to principles that it does not believe in.”⁴⁹⁰

4.9.2 Background to the Drafting of Article 9

The right to freedom of religion was included in the freedoms and rights protected in the Convention from the earliest drafts. Many delegates stressed the need to condemn “suppression of the most sacred right of all—that of religious belief and the works through which religious faith is manifested”⁴⁹¹ and to include “freedom of religious belief in a list of fundamental, undisputed freedoms”.⁴⁹² Others referred to religious and civil freedom as two of the fundamental rights of man and concluded that “if the Council of Europe achieves no other end than the guarantee of those two rights, it will have justified its existence.”⁴⁹³ Most delegates noted the essential nature of religious freedom in their debates and indicated the importance of religion to their countries and referred to the importance of their own religious beliefs or experiences.⁴⁹⁴

⁴⁸⁸ *Travaux préparatoires*, vol. 1, at 124, First Session of the Consultative Assembly, speech by Maxwell-Fyfe (United Kingdom).

⁴⁸⁹ Carolyn Evans, *Freedom of Religion ...* 39.

⁴⁹⁰ Gareth Davies, ‘Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*’ (2005) E.C.L.R. 1 511.

⁴⁹¹ Statement of Mr Cinglani, First Session of the Consultative Assembly from the collected Edition of *Travaux Préparatoires*, vol. 1, at 62.

⁴⁹² Statement of Mr Teitgen First Session of the Consultative Assembly from the collected Edition of *Travaux Préparatoires*, vol. 1, at 46.

⁴⁹³ Statement of Mr Everett, First Session of the Consultative Assembly from the collected Edition of *Travaux Préparatoires*, vol. 1, at 102–104.

⁴⁹⁴ The delegates being from Belgium, UK, Ireland, Italy and Greece; See Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 39-40.

4.9.3 The *Travaux Préparatoires*

Where a treaty is ambiguous, reference to the *travaux préparatoires* is generally accepted as a supplementary means of interpretation,⁴⁹⁵ and as a way of gaining insight into the views of treaty drafters. However caution is needed regarding the use of the *travaux préparatoires* of the Convention due to the selectivity and brevity of the materials recorded.⁴⁹⁶ These are not particularly revealing or complete when trying to understand the reasons for the development of the different drafts of the Convention.⁴⁹⁷ Although some debates were included in the drafts many of the critical debates were not recorded.⁴⁹⁸ As there was also a limited amount of text written about the experiences of the people involved in the drafting of the Convention there remains “an amount of guesswork”⁴⁹⁹ in trying to find the reasons behind the development of Article 9. However, the *travaux préparatoires* demonstrate that freedom of religion was an essential and fundamental priority for the States and delegates involved in the drafting of the Convention.⁵⁰⁰ The inclusion of this right in the Convention was so obvious and self-evident that not much time was spent by the drafters in considering its scope and meaning.

⁴⁹⁵ Article 32 of The Vienna Convention of the Law on Treaties, Concluded at Vienna on 23 May 1969.

⁴⁹⁶ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 38.

⁴⁹⁷ *Ibid.*, at 34.

⁴⁹⁸ *Ibid.* For a detailed analysis of drafting of the European convention see *Travaux Préparatoires*, vol. 1, at xxx–xxxii, introduction by A. H. Robertson. The draft of which was presented to the Committee of Ministers of the Council of Europe on 12 July 1949. - Robertson notes that the *Travaux Préparatoires*, “do not constitute an instrument providing an authoritative interpretation of the text of the Convention and the First Protocol, although they may be of such a nature as to facilitate the application of their provisions”.

⁴⁹⁹ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 38.

⁵⁰⁰ *Ibid.* at 50.

4.9.4 The First Steps in the Drafting of Article 9

The Consultative Assembly recommended an amendment of the proposal to include “[t]he freedom of religious practice and teaching, as laid down in Article 18 of the Declaration of the United Nations.”⁵⁰¹ The new recommended amendment was to include a right to “[f]reedom of thought, conscience and religion as laid down in Article 18 of the Declaration of the United Nations”.⁵⁰² The amendment, intended to recognise the importance of religious belief (as compared to practice) as well as the fact that non-religious beliefs, such as atheism, were to be covered in the scope of the article on religious freedom, was accepted unanimously.⁵⁰³ In its final format Article 9 ECHR states that:

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

⁵⁰¹ First Session of the Consultative Assembly. the collected Edition of *Travaux Préparatoires*, vol. 1, at 168.

⁵⁰² *Ibid.*, at 174.

⁵⁰³ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 40-41.

Article 9 was closely modelled upon Article 18 of the UDHR⁵⁰⁴ and affords much the same protection as Article 18.⁵⁰⁵ It also explicitly recognises the right to “change religion.”⁵⁰⁶ However, there were almost no amendments and few recorded debates on the Article during the drafting of the Convention.⁵⁰⁷ As already noted, the most significant aspect of the drafting of Article 9(1) was that delegates regarded freedom of religion to be of great importance and accepted that an appropriate model for its protection was provided by the UDHR. Apart from the representative from Turkey, who spoke against the inclusion of the right to proselytise,⁵⁰⁸ there was no recorded debate over issues regarding the definition of belief or religion or the right to change religion.

Whilst the protection of religious freedom was uncontroversial, the drafting of Article 9(2) caused more controversy. Different wordings of this clause were proposed. While some related only to freedom of religion others were broader to be applied to all rights. Despite still being general in nature the first approach was adopted.⁵⁰⁹ The debates on Article 9(2) are also not well documented. The United Kingdom representative was the first to suggest an amendment whereby the general

⁵⁰⁴ Universal Declaration of Human Rights UN GA Res. 217 A III adopted and proclaimed on December 10 1948

⁵⁰⁵ For more information on the UDHR and the emergence of religious freedom in the international and European legal systems see chapter 4.

⁵⁰⁶ The recognition to change religion in Article 18 UDHR came despite challenges from some Middle Eastern countries and Islamic States which pointed out that the right to change religion is contrary to the Islamic Law, and that this right may give too much scope to Christian missionaries who had often been involved in the colonisation of developing states. See comments of Saudi Arabian Delegate UN Doc. A/C.3/SR.127 (1948) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL4/804/66/PDF/NL480466.pdf?OpenElement> [Accessed in February 2015].

⁵⁰⁷ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 40-41.

⁵⁰⁸ In the drafting debates over the Declaration on Religious Intolerance and Discrimination at 22 U.N. GAOR, C.3 (1487th mtg) 120, U.N. Doc. A/C.3/SR.1487 (1967), Turkey spoke against the inclusion of a right to proselytise.

⁵⁰⁹ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 40-41.

limitation clause be replaced by a specific limitation for every right. The UK suggested that that freedom of religion be subject “only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.⁵¹⁰ However the draft used by the Committee later on, maintained the use of a general limitation clause as such:

“In the exercise of these rights, and the enjoyment of these freedoms guaranteed by the Convention, no limitations shall be imposed except those established by law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of morality, public order, security, and national unity, or of the operation of administration and justice in a democratic society.”⁵¹¹

But this was also eventually rejected. The United Kingdom proposed an amended draft Convention, which included a limitation provision for freedom of religion almost identical to that used in the final text.⁵¹² The only distinction was that the clause did not include the provision that the limitation be necessary in a democratic society. The limitation clause produced by the Conference of Senior Officials, appeared in its present form in the draft Convention:

“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

⁵¹⁰ Meeting of the Committee of Experts, 6 Feb. 1950, Doc. A798 collection of *Travaux préparatoires*, vol. 3, at 206.

⁵¹¹ *Ibid.*, at 224

⁵¹² Meeting of the Committee of Experts, 6 Mar. 1950, Doc. CM/WP1 (50) 2, A915, collection of *Travaux préparatoires*, vol. 3, 286.

interests of public safety, for the protection of public health or morals, or for the protection of the rights and freedoms of others.”⁵¹³

From *travaux préparatoires* it can be concluded that the drafters rejected the broad and general approach to the limitation clause and were in favour of a tighter and narrower approach. This suggests that the limitation clause of Article 9(2) should not be read expansively.⁵¹⁴ However, the fact that there was only one reservation from Norway to Article 9, which was later withdrawn, suggests an acceptance by Contracting States of the right to freedom of belief and religion as set out. It also indicates that the protection of freedom of religion and belief had a high priority in the Council of Europe and that the Contracting Parties had a commitment to making that protection effective.⁵¹⁵

4.10 The Presence of the Protestant Theology in International Treaties

The Protestant theology or the idea of the “two kingdoms”⁵¹⁶ is clearly present in the above mentioned laws and treaties. All preserved the separation between internal beliefs and external manifestation of such beliefs. Absolute freedom was granted only to opinions and views of an internal nature, the spiritual realm, in today’s terms the *forum internum* or *the passive right*. There remains a limitation imposed by law on the manifestation of religion, the earthly realm, the *forum externum* or *the active right*.

⁵¹³ Draft Convention appended to the draft report; Doc. CM/WP 4 (50) 16, appendix; A 1445 *collection of travaux préparatoires*, vol. 3, 218.

⁵¹⁴ Carolyn Evans, *Freedom of Religion under the European Convention of Human rights* (Oxford University press 2001) 49-50.

⁵¹⁵ *Ibid.*

⁵¹⁶ As discussed earlier, the idea that human beings lived in two worlds, the religious (spiritual) and the secular (temporal) where in the temporal realm people ought to obey the laws of the secular authorities, on the other hand secular authorities ought not intervene with the spiritual realm of the people.

The famous claim of Thomas Jefferson that there should be “a wall of separation” between Church and State reflects Protestantism. In his letter dated January, 1802 to the Danbury Baptists he wrote:

“[B]elieving with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate..... that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.”⁵¹⁷

This Protestant doctrine remains the implicit background of modern human rights ideas and concepts in the West with regard to freedom of religion, thought, and conscience. This wall of separation is incorporated in all international and regional instruments that protect religious freedom. Furthermore, the idea of secularism or toleration is dependent on a number of deeply rooted Christian assumptions concerning the nature and the aim of human life. It takes the conceptual schemes of Christian theology, more specifically, its division of the world into a spiritual religious sphere and a temporal political sphere – as though these correspond to the universal structure of human societies. Secularism suggests that plural societies will fall apart if they fail to adopt the Protestant norm of separation

⁵¹⁷ Thomas Jefferson’s Letter to the Danbury Baptist, January 1, 1802.

of the religious and the political. As a result, when this separation is applied in courts, questions regarding proof or relevance of belief (or religion) become inevitable in order to justify the manifestation of religion and therefore qualify for the protection.

The intelligibility that religion lends to “conscientious objection among Jews, Christians, and Muslims is not accessible to members of other cultures, so the law effectively caters to preferences of some groups but not of others.”⁵¹⁸ The Christian freedom of conscience, which equally applies to Muslims and Jews, could easily become the grounds from which to challenge the ecclesiastic as well as civil authorities. When human laws infringe upon faith and conscience, they can be resisted legitimately.⁵¹⁹ Hence the failure to be religiously neutral seems inevitable when courts decide that some practices do not fall under the scope of religious freedom because they are not religious, or do not qualify for tax exemptions and state funding:

“No court possesses an impartial scientific conception of religion; there are no shared secular criteria that enable one to identify and delimit the sphere of religion in a manner neutral to all religions. Consequently, in such cases, judges and other secular authorities are bound to smuggle in one particular theological conception of religion.”⁵²⁰

⁵¹⁸ Prakash Shah, ‘The Moral Basis of Anti Caste Legislation’ Public Spirit 25/09/2013 electronic copy available at <http://www.publicspirit.org.uk/the-moral-basis-of-anti-caste-legislation/> [last accessed in July 2014].

⁵¹⁹ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 109.

⁵²⁰ Jakob De Roover “Secular Law and the Realm of False Religion” in Winnifred Fallers Sullivan, Robert A. Yelle & Mateo Tausig-Rubbo, eds, *After Secular Law* (Stanford: Stanford University Press, 2011) 43.

4.11 Conclusion

The international laws discussed above recognise at least in words that everyone has the right to freedom of thought, conscience and religion and that this right includes freedom to change religion or belief, and freedom, either alone or in community with others and in public or private, to manifest religion or belief in teaching, practice, worship and observance. However, this recognition does not solve the conceptual problem that is inherent to the principles of religious freedom and liberty or the lack of intelligibility (among non-Protestants applicants) of the separation between the spiritual and the worldly kingdom and the secularisation of the Protestant theological scheme.

All of the international laws that include provisions on freedom of religion do not actually divert from the idea that manifestation of the freedom in public should be restricted by the State whilst the private right to the freedom remains absolute. There is also no deviation from the Protestant theological concepts of belief, worship and God even when trying to protect the rights of atheists; atheism is only in the form of “atheistic religiosity.”⁵²¹ Atheism cannot be explained without using theological vocabulary and concepts (the comparator is theism and the grounds of the ideas emanate from the non-existence of God, hence God is the comparator and not a non-religious entity).⁵²²

The Preambles of the UDHR, the ICCPR, and the ICESCR all refer to human beings as having an inherent dignity.⁵²³ They state that “the inherent dignity . . . of all

⁵²¹ S.N. Balagangadhara, *The Heathen in His Blindness....*, 318-320.

⁵²² See section 3.3 in this thesis.

⁵²³ Article 1 of the UDHR, *supra* note 27, reads “[a]ll human beings are born free and equal in dignity [A]nd should act towards one another in a spirit of brotherhood.”.

members of the human family”⁵²⁴ and “the inherent dignity of the human person” — from which, both covenants declare, “the equal and inalienable rights of all members of the human family . . . derive.”⁵²⁵ Moreover, they stress that human beings “should act towards one another in a spirit of brotherhood,”⁵²⁶ all of which are Christian theological concepts as explained.⁵²⁷ As Leo Tolstoy explains, “attempts to found a morality outside religion are similar to what children do when, wishing to replant something they like, they tear it out without the roots and plant it, rootless, in the soil...”⁵²⁸

These theological concepts and ideas (including concepts of truth and falsity are conscientious objection) become a “*topos*”, where one can “only lend intelligibility to the resulting theory because of the presence of other *topoi* and theological ideas surrounding it.”⁵²⁹ Therefore one is unable, for example, to speak of a universal right to freedom of conscience or freedom of religion, without likewise assuming that it is in the nature of human beings to have a conscience or religion that plays a particular role in moral reasoning.⁵³⁰

Consequently, the questions the ECtHR asks regarding religiosity and religious belonging can only be asked if they are assumed to have universal relevance and intelligibility. As a result answers from Abrahamic religions come to assume greater

⁵²⁴ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171, 172; International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3,4, UDHR, supra note 27, pmb., Art. 1.

⁵²⁵ UDHR, supra note 27, pmb., Art. 1.

⁵²⁶ Ibid.

⁵²⁷ For a detailed analysis on the assumption that human beings have innate dignity and morals see section 3.5 in this thesis.

⁵²⁸ Leo Tolstoy, *A Confession and Other Religious Writings* (Translated by Jane Kentish) (London: Penguin, 1989) 150.

⁵²⁹ Jakob De Roover and S.N. Balagangadhara, ‘Liberal Political Theory and the Cultural Migration of Ideas: The Case of Secularism in India’, (2011) *Political Theory* 39(5) 571–599.

⁵³⁰ Ibid.

relevance in comparison with non-Abrahamic traditions where the applicants cannot respond to “religious” questions without distorting themselves because they lack the theological framework to make sense of these questions.⁵³¹

⁵³¹ Prakash Shah, *‘Asking about reasonable accommodation in England’* (2013) IJDL 13(2-3) 83–112, 88.

Chapter 5

Article 9 the ECtHR and Non-Abrahamic Traditions

5.1 Overview

This chapter will specifically examine how the ECtHR treats non-Abrahamic traditions in its application of Article 9. The status of other Christians (non-protestants) and other Abrahamic religions are examined in the following chapter. It is essential to divide the types of situations and cases into three groups: Non-Abrahamic traditions; other Christians; and other Abrahamic religions, due to the fundamental differences in the concept of religion or tradition in each denomination.⁵³² It is argued in this thesis that distortions are predicted to occur most strongly the further away a culture is from the idea of religion presupposed within Article 9 which is based on Protestantism. The most impact is therefore on Non-Abrahamic traditions due to the lack of religion in these cultures.

Practices of Non-Abrahamic traditions do not require any justification for their manifestations. They do not require any reference to any religious doctrines or texts, they are merely inherited traditions and customs and unlike religious practices traditions, have no authority to determine who belongs to them or whether a certain culture requires them or not. In traditions where doctrinal justification for manifestation is not prevalent, it is difficult to separate between a belief and its manifestation or to determine the existence of the belief in the first place. The act could be a mere tradition practiced because it is simply a tradition. This makes Article 9 in its current format unintelligible to Non-Abrahamic traditions unless they distort

⁵³² On the difference between religion and tradition see section 2.7 in this thesis.

themselves to fit into the confines of the Protestant format of Article 9. The ECtHR treats all cultures as having religion and accepts their claims as potentially involving the question of religious freedom. In doing so, it is taking the claim of Protestant theology but in a secularised version. Whilst this mostly affects applicants from non-Abrahamic traditions, the wording and interpretation of Article 9 ECHR is also detrimental to other Abrahamic religions (non- protestant). Although Abrahamic religions can more easily than non- Abrahamic traditions rely on textual and doctrinal proofs to justify their manifestations, religious symbols and rituals are interpreted by the ECtHR utilising Protestant thought. Religious symbols are often seen as having power and presence rather than being deaf, dumb or mute.

It is also argued in this chapter that the ECtHR falls into the trap of attempting to define religion under Article 9 but the attempted definitions are kept within the boundaries of theological claims. As a result, applicants who are considered not “religious” such as those who adhere to traditional or customary rituals and acts, are either distorted to fit Article 9 or fail to receive protection altogether. Case examples will be provided throughout the chapter.

Many of the judgments of the ECtHR show that the Protestant thought or belief, and Abrahamic or well established religions, especially individuals within these religions who could rely on doctrinal proofs for their beliefs, are more difficult to restrict and easier to interpret than other thoughts or traditions who base their manifestations on traditionally inherited customs or mere practices rather than doctrines and beliefs. Such examples range from confiscating religious audio tapes and a cassette tape player, which the ECtHR considered as being not essential to

manifesting a religion,⁵³³ to removing incense sticks and massaging oils from an applicant's prison cell where again the ECtHR again deemed these as not essential for the manifestation of belief.⁵³⁴ Other applicants have had to prove that a certain tradition is a religion in order to qualify for the protection of Article 9.⁵³⁵ In the light of the jurisprudence of the ECtHR, crucial questions remain. Is there a place for non-Abrahamic tradition(s) or non-Protestant beliefs under Article 9? What "proper object of the right to religious freedom"⁵³⁶ does Article 9 protect? To what extent does the ECtHR allow limitations? These questions and more will be addressed in this chapter.

As discussed in chapters 2 and 3, questions relating to religion and religious belonging make sense only within the boundaries of an Abrahamic religious framework.⁵³⁷ This framework depends on an explanatorily intelligible account (causal and intentional)⁵³⁸ to "frame experience and generate the kind of ethics required to formulate questions about whether, for example, one is obliged by one's religion to cover a certain part of one's body or not to work at a certain times of the week."⁵³⁹ As a result, when religion-related questions are asked, distortions inevitably occur "with differently situated participants relaying the message that they understand religion as quite different sets of phenomena." This reflects the prevailing understanding that all cultures have religion (even non-Abrahamic ones)

⁵³³ *Austrianu v. Romania*, Application no. 16117/02 (2013).

⁵³⁴ *Kovalkovs v Latvia* Application no. 35021/05 [2012] ECtHR 280 (ECHR).

⁵³⁵ *X. v. United Kingdom*, Application No. 7291/75 (1977).

⁵³⁶ Peter Dunchin, 'Islam in the Secular Nomos of the European Court of Human Rights' *Michigan Journal Of International Law* 32(4) 663-747.

⁵³⁷ Prakash Shah, 'Asking for Reasonable Accommodation in England', (2013) *IJDL* 13 (2-3) 83-112, 88-89. See also chapters 3 and 4 in this thesis.

⁵³⁸ S.N. Balagangadhara, *The Heathen in his Blindness...* at 82-85.

⁵³⁹ Prakash Shah, 'Asking for Reasonable Accommodation in England', (2013) *IJDL* 13 (2-3) 83-112, 89.

but that “they are not adequately recognised within the existing frameworks of religion. This view can be held as if it is consistent with the feeling that Christianity is the benchmark from which other faiths are understood.”⁵⁴⁰

5.2 How Does the ECtHR Define Religion?

Defining religion has been a controversial issue which has often proved futile, therefore the definition is usually kept very wide. International human rights instruments such as the ECHR define the “legal protection (rights) in terms of freedom of religion or prohibition of discrimination on the basis of religion thereby focusing legal inquiry on what is meant by the terms “freedom” or “discrimination.”⁵⁴¹ Consequently, any attempt to define the content and scope of the right to religious liberty will “necessarily involve assumptions about the underlying nature of religion itself.”⁵⁴² These assumptions are normally unarticulated and secularised concepts concerning the psychological, cultural and metaphysical aspects of religion. The risk then lies, as T. Jeremy Gunn says, in that the legal definition “may contain serious deficiencies when they (perhaps unintentionally) incorporate particular social and cultural attitudes towards (preferred) religions, or when they fail to account for social and cultural attitudes against (disfavoured) religions.”⁵⁴³

⁵⁴⁰ Ibid.

⁵⁴¹ Peter Dunchin, ‘Islam in the Secular Nomos of the European Court of Human Rights’ (2011) Michigan Journal Of International Law 32(4) 663-747.

⁵⁴² Ibid.

⁵⁴³ T. Jeremy Gunn, The Complexity of Religion and the Definition of “Religion” in International Law, (2003) 16 Harv. Hum. RTs. J. 189, 195.

Veit Bader explains that “[r]eligion is a complex, historically and socio-culturally embedded, essentially contested concept.”⁵⁴⁴ He observes that there are “two widely known characteristics of religions that make it nearly impossible to find a common and objective core of a meaningful term: first, the huge variety of types of religions, and second, the increasing acknowledgment that definitions or observations of religions are inevitably rooted in competing religious and cultural traditions themselves. This seems to exclude any possibility of independent, neutral, transcultural or Universalist definitions or second-order observations of religions.”⁵⁴⁵

According to Silvio Ferrari the ECtHR “has developed its own notion of religion which fits better with some religions than with others.”⁵⁴⁶ This has also been suggested by Julie Ringelheim who stated that “underlying the Court's case law is the idea that religion is primarily an inward feeling”⁵⁴⁷ and as determined by the ECtHR in the case of *97 members of the Gldani Congregation of Jehovah Witnesses v Georgia*;⁵⁴⁸ a “matter of individual conscience”.⁵⁴⁹ Carolyn Evans has also noted that the ECtHR is inclined to protect more strongly “the cerebral, the internal and the theological ... dimensions of religion and belief”, while it tends to ignore the “active, the symbolic and the moral dimensions.”⁵⁵⁰ Malcolm Evans observes that “there is considerable advantage in being able to place one's belief within the

⁵⁴⁴ Veit Bader, ‘Religion and the Myths of Secularization and Separation’, RELIGARE Working Paper No.8/March 2011, 1.

⁵⁴⁵ Ibid.

⁵⁴⁶ Silvio Ferrari, ‘Law and Religion in a Secular World: a European Perspective’, (2012) *Ecc. L.J.* 14(3) 355-370, 367.

⁵⁴⁷ Julie Ringelheim, ‘Rights, Religion, and The Public Sphere: the European Court of Human Rights in Search of a Theory?’, in L Zucca and C Ungureanu (eds), *Law, State and Religion in the New Europe: debates and dilemmas* (Cambridge, 2012) 293.

⁵⁴⁸ *97 members of the Gldani Congregation of Jehovah Witnesses v Georgia*, Application no 71156/01 (ECtHR, 3 May 2007).

⁵⁴⁹ Ibid., at 130.

⁵⁵⁰ Carolyn Evans, ‘Religious Freedom in European Human Rights Law: The Search For a Guiding Conception’ in M Janis and C Evans (eds), *Religion and International Law* (The Hague, 1999), 396.

bounds of an accepted form of religious belief since this ensures that it will cross the threshold of “seriousness”.⁵⁵¹

Other scholars have considered the wording of Article 9 itself. Carolyn Evans explains that despite the fact that Article 9 ECHR calls for the protection of religious freedom, it is challenging to establish what exactly this freedom covers.⁵⁵² It has also been pointed out that the underlying philosophical justification for the right to religious freedom and religious manifestation remains vague⁵⁵³ and that the wording of Article 9 is limited, ambiguous and non-comprehensive.⁵⁵⁴ Malcolm Evans states that a lack of a clear and narrow definition to religion in the legal context is one of the main causes of the incoherence and inconsistency of the case law and leads to a wide variety of conceptions.⁵⁵⁵ Consequently, defining religion or belief has been a constant challenging task for the ECtHR and for scholars of religious studies. However, identifying what practices and manifestations fall within the legal definition of religion or belief is fundamental so that the ECtHR can determine whether a claim is admissible or not and avoid “acting in vacuum and without principles to guide them... with minority religions particularly left unprotected.”⁵⁵⁶

⁵⁵¹ Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 2008) at p. 290-291.

⁵⁵² Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 18.

⁵⁵³ Tom Lewis ‘What not to Wear: Religious Rights, the European Court and the Margin of Appreciation’ (2007) I.C.L.Q. 56(2) 395-414

⁵⁵⁴ See Malcolm Evans, *Religious liberty and international law in Europe*, (Cambridge University Press, 1997). see also Carolyn Evans *Freedom of religion under the European convention of Human rights* (Oxford University press 2001). See also Lucy Vickers *Religious Freedom, Religious Discrimination and the Workplace*, (Hart Publishing 2008).

⁵⁵⁵ *Ibid.* This idea however will be contested in the following chapters to show that what is lacking is a theory on religion rather than a definition.

⁵⁵⁶ Lucy Vickers *Religious Freedom, Religious Discrimination and the Workplace*, (Hart Publishing 2008) 15.

Identifying and interpreting what is belief or what is religion in the jurisprudence of the ECtHR is far from straightforward. Peter Edge and Lucy Vickers argue that although there is no clear definition as to what constitutes religion or belief, there is a certain level of consistency between scholars and various courts in the way religion is described and interpreted.⁵⁵⁷ Vickers also states that there is an on-going scholarly debate regarding a “proper definition of religion”⁵⁵⁸ and that these debates usually revolve around three approaches. The first identifies the contents of belief that makes them religious in nature; i.e. a content-based definition. The second approach is the attempt to produce a list of “key indicators” of religion, to be used as a testing method for religions that are “less well known”.⁵⁵⁹ This approach is called “reason by analogy”⁵⁶⁰ with religions that are regarded as “universal” whereby key indicators of religion are identified and tested against less well-known religions. The third approach is the attempt to find a “purposive definition”,⁵⁶¹ whereby the attempt is to look at the purpose to protect religions. Having set out these three approaches Vickers then shows how each is at risk of being biased towards the majority or well-established religions, towards orthodox understanding of religion, and the risk of them being over- or under-inclusive.

Gunn observes that legal definitions of religion adopt a similar approach to non-legal definitions, by “making assumptions about the nature of religion then

⁵⁵⁷ Peter Edge and Lucy Vickers, “Review of Equality and Human Rights Law relating to religion or belief” Equality and Human Rights Commission, Research Report 97 (2015) 13.

⁵⁵⁸ Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 15.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

presented in either essentialist or polytheistic form.”⁵⁶² Gunn argues that legal definitions establish rules for regulating social and legal relations among people and fail to merely describe the phenomenon of religion. This does not accommodate diverse views and attitudes as to what manifestation of religion is eligible for protection and more importantly what religion is in the first place. Gunn concludes that as a result legal definitions “may contain serious deficiencies when they (perhaps unintentionally) incorporate particular social and cultural attitudes towards (preferred) religions, or when they fail to account for social and cultural attitudes against (disfavored) religions.”⁵⁶³ According to Gunn in legal systems it is assumed that known religions are “real” religions while other faiths and beliefs are only “pseudo-religions.” Gunn further notes that legal systems “may explicitly or implicitly evaluate (or rank) religions. Depending on the attitudes of the evaluator, religions may be described in ways such as “good religion” versus “bad religion,” or, “religion” versus “non-religion.” Thus some might think of monotheistic religions in terms such as “traditional,” while polytheistic or non-theistic religions may be perceived as “primitive” or “superstitious.”⁵⁶⁴

Lourdes Peroni notes that in its judgment in *Eweida and Others v UK* the ECtHR has done “a great job in unpacking what counts as “manifestation” of religious belief,”⁵⁶⁵ when it held that there is to be “no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in

⁵⁶² T. Jeremy Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’ (2003) *Harvard Human Rights Journal* 16 189-215, 194.

⁵⁶³ *Ibid* at 195.

⁵⁶⁴ *Ibid.*, at 196.

⁵⁶⁵ Lourdes Peroni, ‘Eweida and Others v. the United Kingdom (Part I): Taking Freedom of Religion More Seriously’, *Strasbourg Observers*, 17 January 2013 available at <https://strasbourgobservers.com/2013/01/17/eweida-and-others-v-the-united-kingdom-part-i-taking-freedom-of-religion-more-seriously/> [last accessed June 2017].

question.”⁵⁶⁶ Peroni explains that one of the advantages of this approach is that “it leaves more room for recognising minorities within religions, whose practices might not be generally recognised or considered as required by the religion in question.”⁵⁶⁷

Gwynth Pitt contends that protecting too broad a set of religions or beliefs “leads to a real danger of trivialising the equality principle”⁵⁶⁸, or watering down the concept of religion or belief so as to bring it into disrepute.⁵⁶⁹ According to Malcolm Evans and Peter Petkoff while a definition of religion was never offered by the ECtHR, the ECtHR strays in this direction “while determining ancillary issues, such as what are and what are not religious symbols and appropriate forms of religious manifestation.”⁵⁷⁰ Furthermore, in relation to the ECHR, Karl Partsch notes that the terms conscience, thought and religion that are utilised in Article 9 ECHR, are “diplomatic wording” intentionally used in the legal systems and mean different things for different people.⁵⁷¹ There is a wide discretion as to what and how conscience, religion and thought are interpreted and the limits set regarding lawful

⁵⁶⁶ *Eweida and Others v, United Kingdom*, para 82.

⁵⁶⁷ Lourdes Peroni, *Eweida and Others v. the United Kingdom (Part I): Taking Freedom of Religion More Seriously*, Strasbourg Observers, 17 January 2013 available at <https://strasbourgothers.com/2013/01/17/eweida-and-others-v-the-united-kingdom-part-i-taking-freedom-of-religion-more-seriously/> [last accessed June 2017].

⁵⁶⁸ Gwynth Pitt, ‘Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination’, (2011) *Industrial Law Journal* 40(4) 384-404.

⁵⁶⁹ Alice Donald, (with K. Bennett, and P. Leach), *Religion or Belief, Equality and Human Rights in England and Wales*, (2012) EHRC Research Report no. 84 Equality and Human Rights Commission, at 54.

⁵⁷⁰ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights.’ (2008) 36(3) *Religion, State & Society*. 205-223, 206.

⁵⁷¹ Karl Joseph Partsch, *Freedom of Conscience and Expression and Political Freedoms*, in L Henkin (ed), *THE INTERNATIONAL BILL OF RIGHTS- THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, 209, 211.

manifestation of such religion or belief. However, in practice, the jurisprudence of the ECtHR indicates a narrower approach.⁵⁷²

Aaron Petty correctly observes that “religion” as a legal term of art is generally understood by judges to refer primarily to propositional belief, that is, “belief in” something, and this understanding privileges Christianity (specifically Protestant Christianity, and to a lesser extent other confessional religions such as Islam) at the expense of others, such as Judaism and Hinduism, that place greater emphasis on community, practice, ethics, or ritual.”⁵⁷³

Moreover, such a conception of religion, as belief or conscience is, as Talal Asad says in his commentary on Geertz’s *Interpretation of Cultures*⁵⁷⁴ a,

“[m]odern, privatised Christian one because and to the extent that it emphasises the priority of belief as a state of mind rather than as constituting activity in the world..... In modern society, where knowledge is rooted either in an a-Christian everyday life or in an a-religious science, the Christian apologist tends not to regard belief as the conclusion to a knowledge process but as its precondition.”⁵⁷⁵ Asad adds that it was predominantly the Christian church that has occupied itself with “identifying, cultivating, and testing belief as a verbalizable inner condition of true religion.”⁵⁷⁶

⁵⁷² Jim Murdoch, ‘Freedom of Thought Conscience and Religion; A Guide to the Implementation of Article 9 of The European Convention on Human Rights’ Human Rights Handbooks, No. 9, 11.

⁵⁷³ Aaron R. Petty, ‘Religion, Conscience, and Belief in the European Court Of Human Rights’, (2016) *The Geo. Wash. Int’l. L. Rev.* 48 807-851, 809-810.

⁵⁷⁴ Geertz states that “The basic axiom underlying what we may perhaps call ‘the religious perspective’ is everywhere the same: he who would know must first believe”, Clifford Geertz, *The Interpretation of Cultures* (Basic Books, New York, 1973) 110.

⁵⁷⁵ Talal Asad, *The Construction of Religion as an Anthropological Category in Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press, 1993) 47-48.

⁵⁷⁶ *Ibid.*

In Chapter 3 it was established that there cannot be a universal definition of religion in regional or international human rights instruments, not only because its constituent elements and relationships are historically specific, but because that definition is itself the “historical product of discursive processes.”⁵⁷⁷ Furthermore, religion in itself is not universal in all cultures. This raises the question of how the ECtHR can assess whether a manifestation of some act is actually a manifestation of religion and therefore qualifies to be protected by Article 9 given that there is no universal definition or universal concepts of religion and freedom of religion.

There is a wide discretion as to what and how conscience, religion and thought are interpreted and the limits set regarding lawful manifestation of such religion or belief. But despite this, in practice, the ECtHR jurisprudence indicates a narrow approach. Often non-Abrahamic traditions find it more difficult to prove that their tradition fulfils the requirements to be considered a “religion” protected under Article 9. Even though the ECtHR has not yet explicitly provided a definition of religion, it does in practice actually do so when determining secondary issues such as what constitutes a religious symbol and what does not qualify as an “eligible” religious symbol, as well as “proper” forms of religious manifestation.⁵⁷⁸ As Malcolm Evans and Peter Petkoff correctly observe, “one specific problem area which emerges from the jurisprudence of the ECHR is the way in which the Court combines neutrality with certain sociological and empirical patterns when considering what is or is not

⁵⁷⁷ Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press, 1993) ch. 7. See also Charles Taylor, “Western Secularity,” in *Rethinking Secularism*, ed. Craig Calhoun et al., (Oxford University Press, 2011) 38.

⁵⁷⁸ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’ (2008) *Religion State and Society* 36(3) 205-223

religious.”⁵⁷⁹ This approach enables the ECtHR to recognise particular empirical occurrences as evidence of a manifestation of “religious” belief in accordance with Article 9(2).⁵⁸⁰ This may not only lead to an inaccurate assessment of facts as to what is a religious manifestation and what is not, but also risks the ECtHR viewing other traditional practices in light of the framework established of what is religious and what is not. It is irrational to assume that everything that emerges in the public realm and appears like an exercise of “religious freedom” in the *forum externum* is actually a manifestation of religion.⁵⁸¹

Although there are detailed analyses and explanations on what the wording of Article 9 means, these explanations are not satisfactory⁵⁸² as these are *ad hoc* explanations of what religion, belief and conscience are. The “notion” of religion itself is not examined and there is a tendency to accept its universality without empirical evidence. Scholarly work on religion also tends to only problematise the lack of definition and it is caught in the same kind of a terminological game of how best to define religion.

Although the ECtHR has taken a “liberal” approach to the definition of religion by considering claims concerning scientology⁵⁸³, druidism⁵⁸⁴, pacifism⁵⁸⁵, communism⁵⁸⁶, atheism⁵⁸⁷, pro-life⁵⁸⁸, Divine Light Zentrum⁵⁸⁹ and the Moon Sect⁵⁹⁰,

⁵⁷⁹ *Ibid.*, at 206.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’ (2008) *Religion State and Society* 36(3) 205-223, 206.

⁵⁸² For a detailed interpretation on the wording of Article 9 see Carolyn Evans, *Freedom of Religion under the European Convention on human Rights* (Oxford University Press 2001).

⁵⁸³ *X and Church of Scientology v. Sweden* (1978) 16 DR 68.

⁵⁸⁴ *Chappell v. United Kingdom* (1987) 53 DR 241.

⁵⁸⁵ *Arrowsmith v. United Kingdom* (1978) 19 DR 5.

⁵⁸⁶ *Hazar, Hazar and Acik v. Turkey* (1991) 72 DR 200.

⁵⁸⁷ *Angelini v. Sweden* (1986) 51 DR 41.

these definitions remain within the *theological framework* in terms of the language used and background explanation even when secularised language is employed. This leads to the implication that although the ECtHR recognises these movements as forms of religion, it still does so through the prism of Protestant Christianity and is therefore suggesting that there is one true religion which is the benchmark from which other religions, movements or traditions are assessed.

In addition, the term “belief” as used by the ECtHR is “considered to require a worldview rather than a mere opinion”⁵⁹¹ and is defined as “views that attain a certain level of cogency, seriousness, cohesion and importance.”⁵⁹² The assumption appears to be that by giving diverse definitions to the word “belief” and by secularising the concept as a “worldview” this would help the ECtHR to assess Article 9 claims in a clearer, more inclusive and more consistent way. However, all that the ECtHR is doing is getting caught in a terminological game and trying to universalise religion while failing to see religion as a phenomenon in the world. It is only by looking at religion as a phenomenon in the world that one can see the distinction between various religions and traditions, and Article 9 can be seen in its wider context.

It is also important to note that not only has the ECtHR avoided defining religion to some extent it has also “avoided addressing Article 9 entirely. The ECtHR has developed its jurisprudence of the permissible limitations on rights in the context of Articles 8, 10, and 11, because Article 9 claims, until 1993, were nearly all deemed

⁵⁸⁸ *Plattform ‘Ärzte für das Leben’ v. Austria* (1985) 44 DR 65.

⁵⁸⁹ *Omkananda and the Divine Light Zentrum v. Switzerland* (1981) 25 DR 105.

⁵⁹⁰ *X v. Austria* (1981) 26 DR 89.

⁵⁹¹ Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom*, (Kluwer Law International, Netherlands, 2011) 49.

⁵⁹² *Campbell and Cosans v. United Kingdom* EHRR 4(1982) 293.

inadmissible by the Commission.... and has found [it] easier to dispose of many cases arising in a religious context on these other grounds because of the extant case law on addressing those provisions.”⁵⁹³ This includes applications concerning family life, privacy, assembly, association, and freedom of expression.

5.3 Are Non-Abrahamic Traditions Protected under Article 9?

In Chapter 3 it was established that by contrast to religions, the manifestation of traditions does not require doctrinal justification. Therefore, it is difficult to separate between a belief and its manifestation or to determine the existence of the belief in the first place. The act could be a mere tradition practiced from tradition. Consequently, belief is not a core requirement for practice and engaging in a tradition does not need reasoning or theoretical justification to practice and uphold ancestral customs.⁵⁹⁴

A hypothetical example could be a person from an Indian tradition who wants to make an application to the ECtHR as he/she has been prohibited from attending the temple, not because this person wants to worship God or pray in the temple but because he/she believes that it is a place of energy to recharge with positive vibrations.⁵⁹⁵ How would this person present himself to the court in order to fit within or qualify for protection under Article 9? How would he/she emphasise the importance of practice without reference to belief? Does this person qualify to make a claim under Article 9? The importance of belief and faith as opposed to practice,

⁵⁹³ Aaron R. Petty, ‘Religion, Conscience, and Belief in the European Court of Human Rights’, (2016) *The Geo. Wash. Int’l. L. Rev.* 48 807-851, 844. See also Javier Martinez-Torron, ‘Limitations On Religious Freedom In The Case Law Of The European Court Of Human Rights’, (2005) *Emory Int’l L. Rev.* 19 587-636, 595.

⁵⁹⁴ (For a further analysis on the difference between a religion and a tradition, and a belief and practice see Chapter 3).

⁵⁹⁵ Sadhguru Jaggi Vasudev ‘Idols in the Hindu way of life’, Isha foundation Blog, 28 January, 2014 <http://blog.ishafoundation.org/yoga-meditation/demystifying-yoga/hindu-idols-gods-worship/>

which has become a secondary element to faith, play a crucial role in Protestant Christianity, which is reflected in Article 9 and in the way the legal system assesses religious claims.

The ECtHR has attempted to preserve the traditions of non-Abrahamic denominations through the lens of Protestantism. The importance the ECtHR gives to the *forum internum* is evident in these cases. The ECtHR found that wearing a religious symbol was always seen as a manifestation rather than something related to the *forum internum*.⁵⁹⁶ The reluctance therefore of the ECtHR to find manifestations to be part of the *forum internum* was explicit in its judgment in *X v UK*. In this case, a Sikh was convicted when he refused to replace his turban with a helmet while driving a motorcycle. Compelling the applicant who, based on his strong beliefs, wore a turban, to wear a helmet was considered a safety measure.

Although the ECtHR found that there was an interference with the applicant's right under Article 9, the interference was justified on grounds of the protection of health.⁵⁹⁷ Similarly in *Phull v France*,⁵⁹⁸ a Sikh applicant was asked to remove his turban by the French security at the airport. The applicant argued that his rights under Article 9 were infringed as he had accepted to be manually scanned by a hand detector and also walk through the scanner. In this case also, and similar to the *X v UK* case, the French airport security staff asked the applicant to remove his turban in the interests of public safety. The ECtHR held that health and safety concerns proved "a compelling and proportionate reason" to interfere with the applicant's freedom of

⁵⁹⁶ For a further discussion of the absolute protection of the conscience or *forum internum* please see section 7.2 in this thesis

⁵⁹⁷ *X v United Kingdom* Application No 7992/77 14 ECHR 1978 Dec and Rep 234.

⁵⁹⁸ *Phull v France*, Application no. 35753/03, 11 January 2005

religion, the case was therefore declared inadmissible. In *Salonen v Finland*⁵⁹⁹, the application of a man who wanted to name his daughter “the one and only Marjaana” was found inadmissible. While the Commission did accept that “taking into consideration the comprehensiveness of the concept of thought, this wish can be deemed as a thought in the sense of Article 9,”⁶⁰⁰ it did not find that it was “a manifestation of any belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby.”⁶⁰¹

A similar approach was taken in *X v Germany*,⁶⁰² where a man wanted his ashes to be scattered over his land as opposed to being buried in a cemetery with graves bearing Christian symbols and writings. The Commission concluded that the desired action had “strong personal motivation,” but decided that it was not protected by Article 9(1). Hence a personal motivation, no matter how strongly held, does not fall within the scope of Article 9 because it does not constitute the expression of “a coherent view on fundamental problems”.⁶⁰³

The ECtHR has developed categories such as “non-belief” and “non-religious” but these are also examined within the boundaries of religion just as belief and religion are. When assessing applications that relate to these concepts, the ECtHR raises questions that emanate from religious boundaries. The comparator is always religion or God. As discussed in Chapter 3, atheism becomes theism in disguise and the sociology, psychology, anthropology, morality and political philosophy of atheists consist of accounts that can make sense only if one accepts a number of deeply held

⁵⁹⁹ *Salonen v Finland* Application no. 27868/95 (1997) 90 DR 60.

⁶⁰⁰ *Ibid.*, at 5.

⁶⁰¹ *Ibid.*, at 6.

⁶⁰² *X v Germany* Application no 8741/79 (1981) 24 DR 137.

⁶⁰³ Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 118.

Christian assumptions. Consequently, by postulating necessary and intelligible connections of parts of the world together, and asking about “meanings” of certain phenomena, religion provides a fertile soil for the growth and expansion of science.

In *Bernard v Luxembourg*⁶⁰⁴ for example, the applicants argued that the refusal of the National Council for Moral and Social Education to exempt their children from attending compulsory moral and social educational lessons, violated their rights under Article 9 of the Convention and Article 2 of Protocol No. 1. The Commission held that classes on society and morality were not a form of indoctrination and did not give rise to an interference with Article 9 and the case was therefore held to be inadmissible. The Commission noted that by requiring the children to attend the social and moral education classes, the legislators were not seen to have “failed to respect the applicant’s philosophical convictions,”⁶⁰⁵ without attempting to describe the nature of these convictions. Here it is important to question the extent to which morality is distinct from religion and if so, how the ECtHR draws this distinction. (See Chapter 3 for a detailed analysis on the concepts of morality and links to Christianity).

In *C. v. United Kingdom*, the ECtHR held that Article 9 primarily protects “[t]he sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of practice of a religion or belief in a generally recognised form.”⁶⁰⁶ The different protection that is given by the ECtHR to practice and belief (in other words the *forum externum* and

⁶⁰⁴ *Bernard and Others v Luxembourg*, App No. 17187/90, 75 Eur. Comm’n. H.R. Dec & Rep. 57 (1993).

⁶⁰⁵ *Ibid.*, p.75.

⁶⁰⁶ *C. v the United Kingdom* (Application No. 10358/83) 1983.

the *forum internum*⁶⁰⁷) suggests that the kind of religion that is legally protected by the ECtHR interpreting and applying the ECHR is the religion that is “private, voluntary, textual and believed”.⁶⁰⁸ However non-Abrahamic traditions that are classified as religions by the ECtHR are often grounded in bodily practices, physical objects and traditions and do not require any forms of doctrinal, textual or simple “belief” but are customary practices that are inherited from ancestors.

The term “belief” in ECtHR case law is “considered to require a worldview rather than a mere opinion”⁶⁰⁹ and was defined as “views that attain a certain level of cogency, seriousness, cohesion and importance.”⁶¹⁰ Here it is obvious that forms of “mainstream religious beliefs have a considerable advantage in being able to place one’s belief within the bounds of an accepted form of religious belief since this ensures that it will cross the threshold of seriousness.”⁶¹¹ This will also apply if the applicant relies upon a belief of a non-religious nature from a well-established school of thought. Cantwell Smith argues that outside the scope of non-Abrahamic religions, the idea of coherent beliefs or the primacy of belief is unintelligible or alien. Therefore the idea that religion is composed of a coherent set of beliefs, as the ECtHR case law suggests, cannot reflect how certain traditions perceive the issue. Moreover, “belief” is given a very abstract wide scope.⁶¹² This raises concerns as to

⁶⁰⁷ Lourdes Peroni, ‘Deconstructing “legal” religion in Strasbourg’, (2014) *Oxford Journal of Law and Religion* 3 235-257 at 236; see also Meadhbh Mclvor, ‘Carnal exhibitions: material religion and the European Court of Human Rights’ (2015) *Ecc. L.J.* 17(1), 3-14.

⁶⁰⁸ Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ, 2005), p 5. Sullivan writes of the American context, but her analysis equally applies to the ECHR.

⁶⁰⁹ Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom*, (Kluwer Law International, Netherlands, 2011) 49.

⁶¹⁰ *Campbell and Cosans v. United Kingdom* EHRR 4(1982), para 36.

⁶¹¹ Malcolm Evans, *Religious Liberty and International law in Europe* (Cambridge University Press, 1997) 291.

⁶¹² Carolyn Evans, *Freedom of Religion Under the European Convention of Human Rights* (Oxford University press, 2001) 66.

whether the belief could cover or include political membership or broad ethical positions. Carolyn Evans notes that if belief were considered not through a simple definition but through a range of factors (using a conceptual approach) this “could help to ensure that the term does not become unduly restrictive or exclusionary of new religious groups, but does not become so open-ended that it is rendered essentially meaningless.”⁶¹³ She further suggests that belief should be attributed a more protective and restrictive meaning, because for many individuals it plays the same essential role in their lives as religion.⁶¹⁴

However, when belief is set beyond the conventional doctrinal context and is associated with orthopraxy rather than orthodoxy, it often fails to qualify as a belief protected under Article 9. The belief must relate to a “weighty and substantial aspect of human life and behaviour” and also be such as to be deemed worthy of protection in European democratic society.⁶¹⁵

Personal beliefs and convictions must amount to more than “mere opinions or deeply held feelings,”⁶¹⁶ therefore belief is not synonymous with the words “opinions” or “ideas”. Furthermore, these personal beliefs should have an identifiable formal content;⁶¹⁷ hence Article 9 protects ideas relating to personal integrity.⁶¹⁸ However cultural or language preferences are not protected,⁶¹⁹ and the

⁶¹³ Ibid.

⁶¹⁴ Gay Moon and Carolyn Evans, ‘Freedom of Religion under the European Convention on Human Rights’ (2002) E.H.R.L.R. 1 126-127

⁶¹⁵ *Campbell and Cosans v. United Kingdom*, judgment of 25 February [1982], Series A no. 48, at para. 36

⁶¹⁶ *McFeely v the United Kingdom* (1981), 3 EHRR 161.

⁶¹⁷ *McFeeley v. the United Kingdom* [1980], 20 DR 44; In *Campbell and Cosnas v. United Kingdom* [1982], Series A no 48, 4 EHRR 293, 40 the ECtHR held that personal beliefs must “attain a certain level of cogency, seriousness, cohesion and importance.

⁶¹⁸ *Arrowsmith v. the United Kingdom*.

⁶¹⁹ Belgian ‘language’ case, Series A, No. 6; V. Berger, *Jurisprudence de la Cour européenne des Droits de l’Homme*, Sirey, 9th ed., 2004, p. 503 and bibliography.

aim of seeking to protect a group's cultural identity,⁶²⁰ does not give rise to an issue under Article 9.

5.4 True Religion versus False Religion/Idolatry

From the early religious division between Protestants and Catholics emerged the idea of competing truth claims. The religious debates, including Judaism and Islam, were defined based on the concept of "truth and falsity" and religions were classified as true and false. Whether the accusation amongst these religions is merely the deficiency in worshiping God (the God of the Bible) or being false religions is not very significant; the important feature is that each of these religions claim that their beliefs are true.⁶²¹ The Roman "*religions*" were called false religions by Judaism and Christianity, and the Hindu traditions were called the same by Christianity and Islam many years later. When these concepts of truth and falsity are analysed in law and by the ECtHR it is possible that the legal systems of liberal States and the ECtHR could stay neutral with regard to the "competing truth claims of each of these religions."⁶²²

In other words, the ECtHR could stay at an equal distance from all religions with respect to competing "truth claims". However, this position would not prevent the ECtHR from viewing religion as a matter of truth or something that revolves around doctrinal truth. As Jakob De Roover says,

"[t]he claim that religion is a matter of truth is not an epistemological thesis about the beliefs present in different religions. Instead, it is a theological meta-claim advanced by each of the Semitic religions about itself..... The liberal state in the West has accepted a Semitic theological meta-claim as its factual assumption. It

⁶²⁰ *Sidiropoulos and others v. Greece*, para 41.

⁶²¹ S.N. Balagangadhara and Jakob De Roover, 'The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism' (2007) 15(1) *The Journal of Political Philosophy*, 67-92.

⁶²² *Ibid.*

is able to play the agnostic with respect to the truth-value of religious claims because it shares the Semitic beliefs about religions.”⁶²³

In *The Impossibility of Religious Freedom*⁶²⁴ Winnifred Sullivan provides an interesting example. A Florida court was to decide if the municipal cemetery regulations, only permitting simple horizontal grave markers, constituted a significant burden on the applicant’s freedom to exercise religion. The court had to decide whether the applicant’s marking of the graves with statues and “vertical” symbols was actually religious or not. It found that the practices undertaken were not a religious requirement and that the decorations were individual and voluntary acts, and that the cemetery regulations did not amount to a significant obstacle on the free exercise of religion.⁶²⁵

From this it can be concluded that some people are told that parts of their practices are not actually religious, although they consider them to be religious. This implies that courts view these practices as secular practices that are just “wrongly” regarded as religious, and can be regulated by placing a limit on their manifestation.

It is challenging to assess what or who is truly religious outside the framework of a particular religion. If one takes the example of the breaking of bread, “the question ‘Is this a religious practice?’ hardly makes sense when it concerns crumbling bread to feed ducks in a pond. It is only against the background of liturgical practices and theological disputes about transubstantiation, sacraments and the Eucharist that it becomes a sensible and answerable question.”⁶²⁶ To provide an explanation, one

⁶²³ S.N. Balagangadhara and Jakob De Roover, ‘The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism’ (2007) *The Journal of Political Philosophy* 15(1) 67-92.

⁶²⁴ Winnifred Sullivan, *The Impossibility of religious Freedom* (Princeton university Press, 2005).

⁶²⁵ *Warner v City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999).

⁶²⁶ Jakob De Roover “Secular Law and the Realm of False Religion” in Winnifred Fallers Sullivan, Robert

needs to interpret the Scripture in a certain way and get involved in theological disputes. The same applies to other situations and examples. Such cases tend to transform courts into “arbiters of religious truth who cannot but invoke theological criteria to come to a decision.”⁶²⁷ This is also reflected in the jurisprudence of the ECtHR.

5.5 A Protestant-Biased Approach: Favouring Orthodoxy over Orthopraxy

The bias of the ECtHR in favour of the Christian Protestant faith is shown by its favouring orthodoxy over orthopraxy. However it is important to note that despite the fact that all Abrahamic religions engage in orthopraxy these practices are the embodiment or expressions of beliefs, unlike the practices that are carried out by non-Abrahamic denominations, which are practiced out of tradition and have no specific religious obligation or moral codes. Christians claimed that practices alone, without belief, are a seduction by the “Devil”, which will inevitably lead to these false paths. The importance of the antiquity of a custom or tradition was diminished in so far as religion was concerned. Consequently, all the pagan cults, with their multitude of practices, ceremonies and rituals, all these others, became mere exemplifications of another religion, namely a false one.

Carolyn Evans correctly argues that while “some religions . . . give great emphasis to the beliefs or orthodoxy as the constituting factor of the religion. Others do not do so or place equal emphasis on acting and belief.”⁶²⁸ She further argues that

A. Yelle & Mateo Tausig-Rubbo, eds, *After Secular Law* (Stanford: Stanford University Press, 2011) 43.

⁶²⁷ Ibid at p. 45.

⁶²⁸ Carolyn Evans, ‘Religious freedom in European human rights law: the search for a guiding conception’ in M Janis and C Evans (eds), *Religion and International Law* (The Hague, 1999), 385, 396.

the ECtHR favours “the cerebral, the internal and the theological over the active, the symbolic and the moral dimensions of religion and belief.”⁶²⁹

In a number of cases, in order to for practices to count as “manifestations” of religion, the ECtHR has demanded that the applicants explicitly (and implicitly) conform with textually religious prescriptions and mandates.⁶³⁰ This approach bears Protestant hallmarks. Lori Beaman suggests that

“[t]here is a tendency when dealing with religious groups with which we are not familiar to essentialize them, often in orthodox ways. Thus, not all Muslims require prayer space, not all Sikhs wear kirpan, and so on. Religious groups and individuals themselves complain that such essentialization is pushing them toward an orthodoxy of practice that is inappropriate.”⁶³¹

In *Kuznetsov v. Russia*, for example where the applicants claimed that they were unable to conduct religious meetings without being disrupted by the government, the ECtHR held that

“Article 9 of the Convention protects acts of worship and devotion which are aspects of the practice of a religion or belief in a generally recognised form... It is *undeniable* that the collective study and discussion of *religious texts* by the members of the religious group of Jehovah’s Witnesses *was a recognised form of manifestation of their religion* in worship and teaching”.⁶³²

⁶²⁹ Ibid.

⁶³⁰ Lourdes Peroni, ‘The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review’, (2014) *Chicago-Kent Law Review* 2(89) 663, 672.

⁶³¹ Lori G. Beaman, ‘The Missing Link: Tolerance, Accommodation and...Equality’ (2012) *Canadian Diversity* 9 16-19, 19.

⁶³² *Kuznetsov v. Russia*, Application no. 184/02 (ECtHR 11 January, 2007) at para 57 (emphasis added). See section 1.13.2 in this thesis.

The ECtHR concluded that the applicant's right to freedom of religion was violated and stressed the importance of religious texts as being a "recognised form" of a religion or belief thus favouring and illustrating the importance of doctrinal requirements over symbols. This shows that that non-textual and non-doctrinal practices are not considered worthy of forming a religious subject when compared to textual practices.

For example, in *Kovalkovs v Latvia*,⁶³³ Mr. Kovalkovs, a Latvian detainee was an adherent to Vaishnavism, also called the International Krishna Consciousness Society. He claimed that the Latvian authority had violated his right to freedom of religion (as enshrined in Article 9) by restricting his freedom to practice his religion and by removing incense sticks from his cell. His tradition comprised massaging with oils, meditation, seeking to light incense and chanting in shared cells in prison.

First, the government did not accept that he was a follower of Vaishnavism stating that since the applicant had "participated in a distance-learning Bible study course,"⁶³⁴ he was simply not a follower of Vaishnavism. However, the ECtHR recognised Mr. Kovalkov's religious practice as a manifestation of belief and stated that it "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".⁶³⁵ It saw "no reason to question the genuineness of the applicant's faith."⁶³⁶ Furthermore, it considered that the "applicant's *wish* to pray, to meditate, to read religious literature

⁶³³ *Kovalkovs v Latvia* (35021/05) (2012) E.Ct. H.R. 280 (ECHR).

⁶³⁴ *Gatis Kovalkovs v Latvia* at para. 57.

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*

and to worship by burning incense sticks can be regarded as motivated or inspired by a religion and not unreasonable.”⁶³⁷

But despite this finding, the ECtHR was reluctant to protect practices that had a material impact on its surrounding rather than an internal belief. It concluded that “restricting the list of items permitted for storage in prison cells by excluding items (such as incense sticks) *which are not essential for manifesting a prisoner’s religion* is a proportionate response to the necessity to protect the rights and freedoms of others”.⁶³⁸ It is clearly evident from the ECtHR’s decision that materialistic requirements to practice a religion are seen as secondary to the manifestation of the religion. It did not consider that smell and music to be a central part of Mr. Kovaļkovs’ religion, and his “religion” could be manifested without these requirements. Even though the ECtHR considered that the *wish* to pray and meditate, coming within Article 9(1) was not unreasonable, it did consider other materialistic requirements unessential to the manifestation of the applicant’s religion. It is not clear on what basis or benchmark the ECtHR is able to assess the reasonableness of the claim. If it were claiming that the *wish* to pray, to meditate, to read, etc. was not unreasonable, why would it find that it was unessential or unnecessary? The ECtHR could have simply noted that “the burning of incense sticks typically creates a powerful odour which is not pleasant to everyone and which might be disturbing to other prisoners.”⁶³⁹

⁶³⁷ Ibid., at 60 (emphasis added).

⁶³⁸ *Gatis Kovaļkovs v Latvia* at 68 (Emphasis added).

⁶³⁹ Ibid., at 68.

By contrast, in *Kuznetsov v. Russia*, where the applicants claimed that they were unable to conduct religious meetings without being disrupted by the government, the ECtHR held that

“Article 9 of the Convention protects acts of worship and devotion which are aspects of the practice of a religion or belief in a generally recognised form... It is *undeniable* that the collective study and discussion of *religious texts* by the members of the religious group of Jehovah’s Witnesses *was a recognised form of manifestation of their religion* in worship and teaching”.⁶⁴⁰

The ECtHR concluded that the applicant’s right to freedom of religion was violated and stressed the importance of religious texts as being a “recognised form” of a religion or belief thus favouring and illustrating the importance of doctrinal requirements over symbols. This shows that that non-textual and non-doctrinal practices are not considered worthy of forming a religious subject when compared to textual practices.

This is also illustrated in the judgment in *Jones v UK* where the applicant requested that a photograph be engraved on a memorial stone and placed on the grave of his daughter.⁶⁴¹ The ECtHR found that the restricting the applicant from placing an engraved stone on his daughter’s grave did not constitute an interference with his rights under the Convention. It held that the application was inadmissible holding that the decision to refuse granting permission to place a photograph on the memorial, “*cannot be regarded as preventing any manifestation of the applicant’s religious beliefs* in the sense protected by this provision.... *it cannot be argued that*

⁶⁴⁰ *Kuznetsov v. Russia*, Application no. 184/02 (ECtHR 11 January, 2007) at para 57 (emphasis added). See section 1.13.2 in this thesis.

⁶⁴¹ *Victor Jones v. the United Kingdom*, Application no. [42639/04](#), 13 September 2005 (Inadmissible).

the applicant's beliefs required a photograph on the memorial or that he could not properly pursue his religion and worship without permission for such a photograph being given.”⁶⁴²

In *X. v. the United Kingdom*, the applicant, a Buddhist prisoner, was refused permission to send out articles to be published in a Buddhist magazine. He claimed that his rights under Article 9 were infringed. The Commission noted that the applicant, “has produced statements to the effect that communication with other Buddhists is an important part of his religious practice. But he has *failed to prove that it was a necessary part of this practice* that he should publish articles in a religious magazine.”⁶⁴³ The applicant’s complaint was therefore found to be manifestly ill founded.

Similarly, in *Austrianu v. Romania*, the applicant claimed that the confiscation of his religious audiotapes and cassette player by the prison authorities infringed his right to freedom of religion under Article 9. The government argued that “the confiscation by the prison authorities of the cassette player the applicant received from the national civil assistance centre for prisons could not be considered as an infringement of his freedom of religion as he could have continued his religious instruction by correspondence and by attending the activities organised by the prison.”⁶⁴⁴

The ECtHR noted that his freedom of religion guaranteed by Article 9 was not infringed since “the confiscation of the cassette was not such as to completely

⁶⁴² *Ibid.*, at 3 (Emphasis added).

⁶⁴³ *X. v. United Kingdom*, App. No. 5442/72, (1974) 1 Eur. Comm’n H.R. Dec. & Rep. 41, 42 (emphasis added).

⁶⁴⁴ *Austrianu v. Romania*, Application no. 16117/02 (2013) para 101.

prevent him from manifesting his religion.”⁶⁴⁵ Moreover, it found that restricting the list of items prisoners could have in their cells by excluding items (such as cassette players) *“which are not essential for manifesting religion”* was a proportionate response to the necessity to protect the rights and freedoms of others and to maintain security in prison.⁶⁴⁶

The ECtHR also stipulated that, “although the applicant contested the existence of a cultural-educational facility in prison it appears that he did not raise any complaint in this respect with the prison’s authorities. Moreover, *he had been allowed to attend religious seminars, and the fact that he could read religious books in his cell was never contested.*”⁶⁴⁷

Since the applicant was not prevented from reading religious books, attending religious seminars and maintaining his religious instruction by correspondence, according to the ECtHR, his right to manifest his belief was not prevented and consequently not infringed even though the cassette player was confiscated. His “options” to write and read were found to meet his religious needs. This is a clear illustration of the doctrinal approach to religion that the ECtHR applies which is similar to the Protestant ideology on icons and rituals which is “suspicious of the kinds of sensual worship that the Protestant reformers might have dismissed as indulgently ritualistic, and is wary of the ‘chanting and loud clamour’ that they might have thought to be lacking in ‘true devotion’.”⁶⁴⁸ The engagement with textual doctrines is considered more significant than the use of non- textual practices, which

⁶⁴⁵ Ibid., at 104.

⁶⁴⁶ Ibid., at 106 (emphasis added).

⁶⁴⁷ Ibid., at 105 (emphasis added).

⁶⁴⁸ Méadhbh Mclvor, ‘Carnal exhibitions: material religion and the European Court of Human Rights’ (2015) *Ecc. L.J.* 17(1), 3-14, 6.

as in the judgment in *Austrianu*, were not considered to have religious significance since the ECtHR allowed the confiscation of the cassette player but not the books.⁶⁴⁹

For example in *Förderkreis E.V. and Others v. Germany*⁶⁵⁰ the applicants associations were “religious”, or meditation associations that belonged to the Osho Movement. The applicants complained that the government infringed their right to manifest their “religion” under Article 9, thereby identifying the movement as religion to be able to fit into Article 9. The applicants were described as “sects”, “youth sects”, “youth religions”, “psycho-sects”, and “psycho-groups” or given similar labels and a campaign was launched by the German Government to draw attention to the possible dangers of such groups and protect the “human dignity”⁶⁵¹ of its citizens. The applicants requested that the Government stop describing them using these terms. The main concern “was the potential danger that these groups could pose to adolescents’ personal development and social relations...”⁶⁵² The applicants complained that the Government’s negative expressions breached their right to freedom of religion, mainly manifestation. The applicants further objected that the government’s campaign had an undoubtedly “negative connotation and had been made in a climate of interference and oppression by the State and the mainstream churches, and had effectively prevented them from exercising their right to freedom of religion.”⁶⁵³

The ECtHR held that

⁶⁴⁹ Ibid., at 6.

⁶⁵⁰ *Leela Förderkreis E.V. and others v. Germany*, Application No. 58911/00 (2009) at para 7.

⁶⁵¹ Ibid., at 76.

⁶⁵² Ibid., at 7.

⁶⁵³ Ibid., at 71.

“[t]he 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.*”⁶⁵⁴

Although the ECtHR acknowledged that the “terms used to describe the applicant associations’ movement may have had negative consequences for them,”⁶⁵⁵ it held that “the Government’s warnings were 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.”⁶⁵⁶ The ECtHR noted that the Government failed to remain neutral when it started the information campaign and used the negative expressions, which has resulted in an interference with the applicant associations’ rights under Article 9(1). However, the ECtHR found the interference to be “prescribed by law” and pursued a “legitimate aim” namely the protection of public safety and public order and the protection of the rights and freedoms of others. Moreover, the ECtHR stipulated that the protection of others and public safety was a legitimate aim although no proof was submitted as to how these “sects” could be a threat or danger to society. It further observed that “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.”⁶⁵⁷

⁶⁵⁴ *Leila Förderkreis E.V. and others v. Germany*, Application No. 58911/00 (2009) at para 100 (emphasis added).

⁶⁵⁵ *Ibid.*, 84.

⁶⁵⁶ *Ibid.*, 94.

⁶⁵⁷ *Ibid.*, at 99.

The ECtHR stated that the terms, “sects”, “youth sects” or “psycho-sects”, were used at the material time quite indiscriminately for any kind of non-mainstream religion.⁶⁵⁸ In her partly dissenting opinion, Judge Kalaydjieva held that although the majority in this case indicated that “the 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”⁶⁵⁹ she drew attention to the fact that the ECtHR in its judgment in of *Manoussakis v. Greece* held that the right to freedom of religion “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”⁶⁶⁰

It is clear that in its judgment in *Förderkreis E.V. and Others v. Germany*, the ECtHR looked at non-Abrahamic traditions as some kind of a “form” of religion but a false one with idolatrous practices and it therefore found lawful the portrayal of negative stereotypes about them. It could easily be concluded from this judgment that the ECtHR regarded sects to be a “bad thing”.⁶⁶¹ It is not clear on what grounds the ECtHR determined that these sects were not true religion. Evidently there was a comparator and this comparator was the mainstream religions.

Here the concept of truth and falsity has played a role allowing the ECtHR to indirectly consider these traditions or cultures as “false” religions leading to the conclusion that taking preventive measures by the Government to protect its citizens from such sects is acceptable. Again the ECtHR is privileging and granting more

⁶⁵⁸ Ibid., at 100.

⁶⁵⁹ Ibid, Partly dissenting opinion of Judge Kalaydjieva at p. 30.

⁶⁶⁰ *Manoussakis v. Greece*, at para. 47.

⁶⁶¹ Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th ed. (Oxford University press, 2017) 474.

protection to Abrahamic religions over cultures or traditions. The ECtHR concluded that pejorative words are appropriate to be used in relation to any non-Abrahamic “religions” because these traditions are false as there can only be one true God one true doctrine and therefore one truth. The ECtHR is reproducing the Protestant theology of “false” religion, and claiming that these traditions could potentially be a danger to public order as they are “false” and therefore a “preventive intervention”⁶⁶² is needed. In today’s secularised language the ECtHR calls this prevention to secure public order and public safety, in the past this was called prevention of idolatry and false religion.

It is important to recall that Calvin did not reject Catholicism by saying that the Roman Catholic Church was not “really” Catholic, but by calling it the “Devil’s church.” It was in the name of Christianity that Calvin rejected Catholicism.

When “secular” law ends up verifying the religiosity of certain practices, this leads to the law losing its own secularity. When tracing the history of such assessments (whether an act is truly religious or not) one goes back to the typical characterisation of the Protestant notions on idolatry, where idolatry was seen as imposing some sort of choice and human inventions that are not necessarily required by religion or not necessarily religious. As Gunn correctly notes, the concept and definition of religion under the legal systems “may not simply be neutral, but may contain an inappropriate societal value judgment regarding particular beliefs or actions with “good” beliefs being characterised as “religions” and “bad” beliefs being characterised as “cults” or “heresies.”⁶⁶³

⁶⁶² Ibid., at 99.

⁶⁶³ T. Jeremy Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’ (2003) *Harvard Human Rights Journal* 16 189-215 at 197.

While the terminology of idolatry or false religion is not used in courts today, the results are similar when secular courts have to decide on what constitutes a religion. It is often held that legally speaking, these certain beliefs or practices that are considered religious by certain individuals are personal preferences or human inventions thus they are not truly religious.⁶⁶⁴ Moreover, even though nowadays pagan traditions and practices are not referred to as idolatrous or embodiments of false religions, in our “modern” era, the classification of certain religions and cultures as false or idolatrous is now referred to as not only practices that do not account to be religious but also “violators of human rights law, gender equality and the rule of law.”⁶⁶⁵

For example, the principle of equality in Islamic law and tradition is regarded as discriminatory against women. Sultanhussein Tabandeh argues that Islam cannot accept some aspects of the UDHR particularly Articles 2 and 18 since “it cannot deny the difference between a Muslim and a non-Muslim.”⁶⁶⁶ This approach towards Islam is also evident from the ECtHR’s decision in *Sahin v Turkey* when the ECtHR concluded that the headscarf is “imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.”⁶⁶⁷ The same was noted in *Dahlab v Switzerland*. It is thus questionable whether the ECtHR regards the veil ban to promote gender equality, and whether this approach amounts to negative stereotyping of non-Christian faiths.

⁶⁶⁴ Jakob De Roover “Secular Law and the Realm of False Religion” in Winnifred Fallers Sullivan, Robert A. Yelle & Mateo Tausig-Rubbo, eds, *After Secular Law* (Stanford: Stanford University Press, 2011) 43.

⁶⁶⁵ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75

⁶⁶⁶ Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration on Human Rights*, (F. J. Goulding 1970) 20.

⁶⁶⁷ *Leyla Sahin v. Turkey* [2005], No. 44774/98 at para [111] See also *Dahlab v Switzerland* [2001] No. 42393/98.

On the other hand, it might be argued that the ECtHR has made a step forward in its judgment in *S.A.S. v France* and dismissed “gender equality” as a reason noting that a State “cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”⁶⁶⁸ However, the ECtHR did accept that the veil is a barrier to the notion of living together.

How these ideas have come to be seen as a human rights violation and discrimination is clear. The Bible states that “there is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus.”⁶⁶⁹ As Zachary Calo convincingly notes, “[t]he idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred.”⁶⁷⁰ And that it is “doubtful that the universal claims of human rights could have emerged without religious traditions and concepts.”⁶⁷¹

5.6 Distortions under the ECtHR

Early ideas of Christian freedom and freedom of the Church have, over time, transformed political theology into political and legal theory. As Rudolph Sohm states, “Luther's Reformation was a renewal not only of faith but also of the world: both the

⁶⁶⁸ *SAS. V France* at para 119.

⁶⁶⁹ The Bible, Galatians 3:28.

⁶⁷⁰ Zachary R. Calo, ‘Religion, Human Rights, and Post-Secular Legal Theory,’ (2011) ST. JOHN’S L. REV. 85 495, 495. For further explanation on the origins of human rights see section 4.2 in this thesis.

⁶⁷¹ *Ibid.*, at 496. For a detailed analysis on the link between Christianity and human rights see sections 4.3 and 4.5 in this thesis.

world of spiritual life and the world of law.”⁶⁷² The conceptual structure of this political thought divided the world into two separate realms, that being the spiritual and the temporal. As a result of this division, a complex political theory was generated, which “viewed the relations between governors and subjects in terms of the rapport between the spiritual and temporal kingdoms. The result was the political theology of the two kingdoms.”⁶⁷³ As a result of freeing the Christian from spiritual laws, the notion of the liberty of conscience surfaced, which soon became the foundation for the concept of toleration in early modern Europe.⁶⁷⁴ The political theology of the two kingdoms turned the Protestant idea of the freedom of the human soul from the spiritual laws, into a strong foundation for the toleration of religious oppositions.⁶⁷⁵ As a result, Christian freedom of conscience became the ground from which to challenge the authorities and thus when the temporal laws infringed on the conscience and faith they will be resisted legitimately.⁶⁷⁶

This is reflected in national⁶⁷⁷ as well as European legal and human rights instruments. But judgments of the ECtHR concerning Article 9 reveal a confused and narrow approach to this freedom particularly in relation to manifestation. This makes it difficult for people outside the traditional European understanding of religious practice to make an application relying on Article 9⁶⁷⁸ without distortion and the ability to maintain that their practices are non-doctrinal but rather customary and

⁶⁷² Rudolph Sohm, *Weltliches and Geistliches Recht*, (Munich and Leipzig 1914), 69. Quoted in Harold J. Berman, ‘The Influence of Christianity upon the Development of Law’, (1959) *Oklahoma Law Review* 12(86) 86-101, 94.

⁶⁷³ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 107.

⁶⁷⁴ *Ibid.*, at 108.

⁶⁷⁵ *Ibid.*, at 155.

⁶⁷⁶ *Ibid.*, at 109.

⁶⁷⁷ US first Amendment.

⁶⁷⁸ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 167.

based on tradition. Hence restrictions on the manifestation of religion of adherents of non-Abrahamic traditions, that do not require any doctrinal justification for the manifestation of the practice, are more easily imposed.

For example, in *Jakóbski v Poland*⁶⁷⁹ the ECtHR held that the refusal to offer a Buddhist a meat-free diet in prison infringed his rights under Article 9 of the Convention. The ECtHR held that

“Buddhism is *one of the world's major religions* officially recognised in numerous countries. In addition, it has already held that observing *dietary rules can be considered a direct expression of beliefs* in practice in the sense of Article 9..... In the present case the applicant requested to be provided with a meat-free diet because as a practising Buddhist he wished to avoid eating meat. Without deciding whether such decisions are taken in every case to fulfil a religious duty, as there may be situations where they are taken for reasons other than religious ones, in the present case the Court considers that the *applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable*. Consequently, the refusal of the prison authorities to provide him with a vegetarian diet falls within the scope of Article 9 of the Convention.”⁶⁸⁰

The Polish government argued that “Buddhism generally did not prohibit eating meat and vegetarianism was not required nor did it constitute an element of the Buddhist religion.... They further submitted....that even the strict Mahayana school to which the applicant declared his adherence only encouraged vegetarianism

⁶⁷⁹ See *Jakóbski v Poland* [2010] ECHR 1974, (2012) 55 EHRR 8. (App no 18429/06, 7 December 2010.) at para [45].

⁶⁸⁰ *Jakóbski v Poland* Application no. 18429/06 (2011) at para 45 See also *Vartic v. Romania* Application no. 14150/08 (2014) (emphasis added).

and did not prescribe it. For these reasons only some Mahayana Buddhists were vegetarians.”⁶⁸¹ By contrast the applicant argued that,

“Buddhism was a path of life in which the individual was supposed to recognise himself and develop self-awareness. A Buddhist was supposed to improve his spiritual life,”⁶⁸²

The ECtHR maintained its *ad hoc* understanding of what a religion is and held:

“Buddhism is *one of the world's major religions* officially recognised in numerous countries. In addition, it has already held that observing dietary rules can be considered a direct expression of beliefs in practice in the sense of Article 9.”⁶⁸³

Although the outcome of the *Jakóbski* case is to be welcomed, as despite the Polish government’s claims, that offering special food for detainees would invoke a lot of financial and technical difficulties, a violation of Article 9 was found, the problem lies in how the ECtHR justified the protection and the language it used. The ECtHR ruled that

“[t]he applicant’s decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion *and was not unreasonable*. Consequently, the refusal of the prison authorities to provide him with a vegetarian diet falls within the scope of Article 9 of the Convention.”⁶⁸⁴

In the views of *Saïla Ouald-Chaib and Lourdes Peroni*, the ECtHR “adopts a more accommodating approach towards religious minorities’ specific needs. This

⁶⁸¹ *Jakóbski v Poland*, App. No. 18429/06, (2010) Eur. Ct. H.R., at para 38.

⁶⁸² *Ibid* at para. 35.

⁶⁸³ *Ibid*. (emphasis added).

⁶⁸⁴ *Jakóbski v Poland*, App. No. 18429/06, (2010) Eur. Ct. H.R., at 9, 10.[Emphasis added].

stands in contrast to the usual hands-off stance adopted in most of its prior case law, when confronted with the accommodation of religious minorities' concerns."⁶⁸⁵

In *Jakóbski* for example, the ECtHR did not grant the applicant the right to his meat-free diet because it was simply the applicant's decision not to eat meat, but specifically because his diet preferences were inspired and motivated by religion, and therefore supposed to follow a religion. He won his application because the Polish authorities failed to strike a fair balance between his interests and that of the prison administration, "namely the right to manifest his religion through observance of the rules of the Buddhist religion."⁶⁸⁶

The ECtHR often directly or indirectly compels individuals to find "meaningful" and doctrinal proofs for their actions and "practical" decisions in terms of "scientific" or doctrinal reasons. Therefore its judgments are founded on "scientific" or doctrinal "truth" (that is, the hypotheses which are dominant at that particular point of time). Thus, the search for the meaning or doctrinal evidence of the practice becomes the ultimate adjudicator in decisions regarding traditions. Accordingly, when an interference with a certain tradition or custom is challenged before the ECtHR, the applicant has to give good doctrinal and meaningful reasons in order to defend the importance and relevance of the practice using religious concepts and terminology. As Balagangadhara notes "by thematizing [tradition] as [a] belief-guided and theoretically founded set of practices, the very terms of description [are

⁶⁸⁵ *Saïla Ouald-Chaib and Lourdes Peroni*, 'Jakóbski v. Poland: Is the Court Opening the Door to Reasonable Accommodation?' Strasbourg Observers blog, 8, December, 2010, available at <https://strasbourgothers.com/2010/12/08/jak%CF%8Cbski-v-poland-is-the-court-opening-the-door-to-reasonable-accommodation/> [last accessed April 2018].

⁶⁸⁶ *Ibid* at para. 54.

transformed]. Practical certainties are provided with something they never had or never needed: a theoretical foundation.”⁶⁸⁷

In addition to the consideration of *Jakobski* above, further examples are provided in this section to show how applicants describe and distort their traditions so as to be recognised in the legal system. As mentioned earlier, the ECtHR has taken a wide approach as to what constitutes a religion or belief.⁶⁸⁸ However, in practice, followers of non-Abrahamic beliefs and “religions” have to prove that religion or belief actually exists when presenting their case to the ECtHR.⁶⁸⁹ In *X v the United Kingdom*⁶⁹⁰ for example, the applicant was a prisoner who requested the prison Governor to be registered as a follower of the “Wicca” religion. His request was refused and the applicant had to prove that Wicca was a religion but failed to do so. According to the Commission, the applicant failed to mention “any facts making it possible to establish the *existence* of the Wicca religion.”⁶⁹¹ The Commission further noted that facilities that come with registering a prisoner to a religion could only be granted “if the religion to which the prisoner allegedly adheres is identifiable.”⁶⁹² As Jeremy Gunn notes, the European Commission has always denied applications from religions that could be called “new”, “minority” and “non-traditional.”⁶⁹³ It is therefore not clear what type of evidence or facts the Commission was seeking in

⁶⁸⁷ S.N. Balagangadhara, *The Heathen in His Blindness... Asia, the West, and the Dynamic of Religion* (first published 1994, 2nd edn, New Delhi: Manohar 2005) 330

⁶⁸⁸ See section 6.2 in this thesis.

⁶⁸⁹ Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 118-119

⁶⁹⁰ *X. v. United Kingdom*, Application No. 7291/75 (1977) 11 DR 241.

⁶⁹¹ *Ibid.*, at 56 (emphasis added).

⁶⁹² *Ibid.*

⁶⁹³ T. Jeremy Gunn, ‘Adjudicating Rights on Conscience Under the European Convention on Human Rights,’ in Johan Van der Vyver and John Witte, Jr., *Religious Human Rights in global Perspective: Legal Perspectives*, Volume 2, (Kluwer Law International, 1996) 311.

order for the Wicca “religion” to satisfy the existence of religion. The applicant’s belief was clearly deemed as not sincere enough to qualify deserve legal protection. It is clear that no adherent to the Abrahamic religions would be required to prove the existence of their faith.

While non-Abrahamic traditions and minorities have been held to “deserve” the protection of religious freedom under the Convention, “that protection has only extended to manifestations that are highly analogous to Christian beliefs.”⁶⁹⁴ Abrahamic religions fall easily within the scope of Article 9 without bearing the burden of proving them to be “religions” or whether they are coherent. No adherent to the Abrahamic religions would be required to prove that Christianity, Islam, or Judaism were actually religions.⁶⁹⁵ This leaves little space for non-Abrahamic traditions to fall within the scope of Article 9 unless they prove that they have “religious” elements and doctrinal evidence, while using terminology and elements that are used within Abrahamic religions.

The search for the meaning or doctrinal evidence of the practice becomes the ultimate adjudicator where an application is made under Article 9 concerning a tradition. Consequently, when a certain tradition or custom is raised in court, the applicant has to give ‘good doctrinal and meaningful reasons’ in order to defend the importance and relevance of the practice using religious concepts and terminology. As Gunn correctly observes,

“[r]eligion” may be seen not simply as a neutral description of such things as theological beliefs or ritual practices, but as judgment on whether the particular

⁶⁹⁴ Carloyn Evans, *Freedom of Religion Under the European Convention of Human Rights*, (Oxford University Press, 2001) 132.

⁶⁹⁵ *Ibid.*, at 57-58.

beliefs or actions are acceptable to the society or the legal system. Thus, a definition of “religion” may not simply be neutral, but may contain an inappropriate societal value judgment regarding particular beliefs or actions with “good” beliefs being characterised as “religions” and “bad” beliefs being characterised as “cults” or “heresies”.⁶⁹⁶

The ECtHR does not actually ask whether a certain manifestation is idolatrous or not, but it does ask whether these practices are “truly” (or actually) religious.⁶⁹⁷ Consequently, it takes “an agnostic stance towards “falsity” by transforming claims about falsity into claims about beliefs regarding truth.”⁶⁹⁸ It then remains up to the ECtHR to determine whether these acts may qualify as “true” religious acts and can therefore be protected. In *Pretty v. UK*⁶⁹⁹ for example the ECtHR did not dispute the “firmness of the applicant's views concerning assisted suicide”⁷⁰⁰ therefore did not ask whether assisted suicide was an idolatrous practice or not but what they did assess is whether these practices were “truly” religious.

5.7 The ECtHR and the Concept of Choice

It is evident that the ECtHR, when adopting the concept of choice in Article 9, whether giving the applicant the choice to wear the headscarf or to retain certain religious beliefs, is applying a Protestant theological framework, because freedom of choice is crucial and one of the important foundations to the Protestant belief. God

⁶⁹⁶ T. Jeremy Gunn, The Complexity of Religion and the Definition of "Religion" in International Law, (2003) Harv. Hum. RTs. J. 16 191-193

⁶⁹⁷ S.N. Balagangadhara, 'On the Dark Side of the "Secular": Is the Religious-Secular Distinction a Binary?' available at https://www.academia.edu/6379024/On_the_Dark_Side_of_the_Secular_Is_the_Religious-Secular_Distinction_a_Binary See also Winnifred F. Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2007)

⁶⁹⁸ Ibid.

⁶⁹⁹ *Pretty v the United Kingdom* Application no. 2346/02, Reports 2002-III.

⁷⁰⁰ Ibid., at 80.

has given man the freedom to choose. Christian beliefs are not based on coercion but on the theological ideas that every individual has the right to choose between God and the “Devil” and in secularised terms “good and evil.”⁷⁰¹ In ethical theories for example, a moral action is an action of choice, made freely without coercion and in the absence of freedom or choice morality is impossible. However, it only does so when the requirements to consider the concept of choice are compliant with Christian concepts.⁷⁰² When the ECtHR refers to the applicant’s freedom of choice when manifesting religious beliefs, it is imposing the Protestant notion of choice and considering that the applicants have freely taken a particular decision, in other words, freely agreed to choose evil. Freedom of conscience remains a fundamental element in both the Christian theology and in the ECtHR, for in the Protestant belief the “true” God does not accept unwilling followers who had been forced into His worship as that would be a violation to this freedom that God has given to man.

Truth and falsity play a crucial role in Christian beliefs in general and Protestant faith specifically and is reflected in the language of the ECtHR, while the question of truth is insignificant in other cultures and traditions. The ECtHR frequently states:

“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

⁷⁰¹ S.N. Balagangadhara, ‘Negative Portrayals of non-Western Cultures like Indian: Secularization of Christianity’ February 28, 2011, available at <http://www.hipkapi.com/2011/02/28/negative-portrayals-of-non-western-cultures-like-indian-secularization-of-christianity-s-n-balagangadhara/>

⁷⁰² In *X v. Germany* the Commission did not accept that the scatter of one’s ashes is a “coherent view on fundamental problems”.

atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it... 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 conviction...⁷⁰³

As seen above the ECtHR uses a secularised Christian theological language and Christian ethics that do not make sense within non-Abrahamic cultures and traditions. "Bearing false Witness" is a religious prohibition in Abrahamic religions and is considered a heinous religious transgression. The notion of truth and falsity are not theoretical terms in the sense that they do not carry a technical meaning as defined in some specific branch of law or in the sense that they are specifically jurisprudential terms. Legal language works with normal meanings of these words as they are connoted by these natural language terms. In order to understand their semantic scope one needs to look at their meanings in natural languages and their common history.⁷⁰⁴ The ECtHR is neither neutral nor agnostic because to be a neutral entity with respect to religious matters, the ECtHR must not take any position regarding the truth or falsity of religions and must treat religion as a

⁷⁰³ *Kokkinakis v. Greece* (1993) 17 EHHR 397 (App no 14307/88, 25 May 1993.) para 31

⁷⁰⁴ S.N. Balagangadhara, 'Rethinking Religion in India IV: Religion, Secularism and Law' The Platform Paper electronic copy available at http://www.rethinkingreligion.org/files/downloads/RRI_IV_platform_paper.pdf

phenomenon in the world rather than something universal. The ECtHR must remain agnostic with respect to God and His revelation. It is not enough for the ECtHR to say that it is agnostic but it must be seen to be agnostic as well. Applicants must recognise agnosticism as a “possibility they can countenance in their strife.”⁷⁰⁵ This means that, “for both believers and atheists, agnosticism must appear as a reasonable option within their discourse. That is, in more general terms, agnosticism is a choice both within a theistic discourse and an atheistic discourse and, as such, is a part of such discourses. And, as such, is not an independent third choice that is above and beyond theism and atheism.”⁷⁰⁶

Further, when assessing Article 9 claims, even when broadened to include Catholicism and Judaism, the ECtHR has been following a “dogmatic (favouring derivative theological articulation over religious activity), a theistic (God, supreme being), belief-centred (discriminating against ritual-centred religions) and content-centred (favouring so-called “high” or “civilised religions” over “low” or “barbarian” ones)”⁷⁰⁷ approach.

5.8 Conclusion

In this chapter the attempts of the ECtHR to define religion have been examined. The theological roots of Article 9 have been found to cause problems and distortions when Article 9 is being relied on by non-Abrahamic litigants. It is also argued the traditions and customs of non-Abrahamic applicants are distorted so as to fit the Christian Protestant backdrop of Article 9 ECHR. The case law has revealed that some

⁷⁰⁵ S.N. Balagangadhara, ‘The Religion of Secular State: De-Christianized Christianity March 3, 2011 available at <http://www.hipkapi.com/2011/03/03/the-religion-of-secular-state-dechristianized-christianity-s-n-balagangadhara/>

⁷⁰⁶ Ibid

⁷⁰⁷ Veit Bader, ‘Religion and the Myths of Secularization and Separation’ RELIGARE Working Paper No. 8/March 2011, p. 3.

applicants' practices are not actually religious, although the applicants' themselves consider them to be religious. This implies that ECtHR views these practices as secular practices that are just "wrongly" regarded as religious, and can be regulated by placing a limit on their manifestation. The ECtHR does not actually ask whether a certain manifestation is idolatrous or not, but it does ask whether these practices are "truly" (or actually) religious. It was also shown that the ECtHR privileges Abrahamic religions over non-Abrahamic traditions as not only does it favour orthodoxy over orthopraxy but also views religion as a matter of truth or something that revolves around doctrinal truth.

The ECtHR asks questions of faith and worship that are only intelligible to people from Abrahamic religions because they are fundamentally based on Christian anthropological framework, which assumes that humans are intentional beings.⁷⁰⁸ When doing so, they presuppose Christianity to be the benchmark from which other "faiths" are understood and engage in Christian ethics and discussions of what ought or ought not be done.⁷⁰⁹ Therefore in order for non-Abrahamic traditions to claim religious freedom under Article 9, they have to distort themselves in such a way to fit into the framework and wording of Article 9 which has a theological backdrop and defend their traditions as religion. Moreover, with any judgment of the ECtHR, the significant part lies in the articulation by the majority of the emergent principles in accreted Strasbourg case law when interpreting and applying the relevant articles of

⁷⁰⁸ *Eweida and Others v. the United Kingdom*, no. 48420/10, ECHR 2013.

⁷⁰⁹ Prakash Shah, 'In pursuit of the Pagans: Muslim law in the Legal Context' (2013) JLP 45(1) 58-75 available at http://www.tandfonline.com/doi/abs/10.1080/07329113.2013.773197#.UwvMWvR_s00 see also Prakash Shah, 'Asking about reasonable accommodation in England' (2013) IJDL 13(2-3) 83-112, 88.

the European Convention on Human Rights.⁷¹⁰ What one finds is the adoption of a language that, when sufficiently repeated over time, develops into a secularised Christian theological mantra. The specific religious language becomes the meta-language to discuss and decide on matters of religion in courts of law and serves as the standard to accept or reject certain practices as not “truly” religious.⁷¹¹

⁷¹⁰ Mark Hill, ‘Religious Symbolism and Conscientious Objection in the Workplace: an Evaluation of Strasbourg’s Judgment in *Eweida and others v United Kingdom*’ (2013) *Ecc. L.J.* 15(2) 191-203.

⁷¹¹ Jakob De Roover, ‘Secular Law and the Realm of False Religion’ in Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (eds) *After Secular Law* (Stanford University Press 2011).

Chapter 6

Article 9, the ECtHR, Other Abrahamic Religions and “Other” Christians”

6.1 Overview

In this chapter, it is argued that even amongst other Christians and Abrahamic religions, there is a bias in the ECtHR towards the Protestant thought. It is demonstrated that this is a result of the wording of the ECHR as well as the interpretation and application of the case law by the judges of the ECtHR. Similar to the argument in the previous chapter, other religions are seen through the prism of Protestantism and religious symbols (like the headscarf) are seen by the ECtHR as a symbol of iconoclasm. Case examples are provided throughout to prove the hypothesis.

The “two kingdoms” of Luther, the private realm of the conscience and the public realm of the (sinful) body, are clearly reflected in the interpretation and application of Article 9. The concept of neutrality and the approach of the ECtHR with regards to proselytism and conversion are analysed with links made to the Protestant thought. Furthermore, it is shown that the ECtHR favours orthodoxy over orthopraxy and a new analysis concerning the importance of the face in cases relating to the full-face veil is set out. Moreover, the discrepancy in analysing the meaning of symbols by the ECtHR provides evidence that “courts and legislators tend to secularise the meaning of religious symbols and interpret them according to the

sensitivities, prejudices, and claims of the majority”,⁷¹² which happens to be Christianity in Europe. It should be noted here that although the ECtHR does interpret at times religious symbols incoherently, the hypothesis in this thesis is that it regards symbols as “deaf and dumb” in other words a secularised version of idolatry that can easily be removed.

6.2 The Absolute Protection of the Freedom of Conscience or the *Forum Internum*

Free choice and choice without interference or imposition is crucial to the Protestant theology, because God has given man the “freedom” to choose between the Devil and God and therefore choosing one’s religion cannot be derived from humankind. The ECtHR has consistently held that “[t]he internal dimension of religious freedom is absolute, while the external dimension is by its very nature relative. Indeed, Article 9(2) clearly states that the limitations specified therein may be applied only to the freedom to manifest one’s religion or beliefs.”⁷¹³ Furthermore, Article 9 grants protection to individuals to choose a particular religion, maintain adherence to a religion, or to change their religion altogether as well as having the right to be free from restrictions or coercive forces that impair that choice. Personal choice is unrestricted. The United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Arcot Krishnaswami, has noted that “[f]reedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from

⁷¹² Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’, (2011) *Ecclesiastical Law Journal* 13 287-297 p.294 and Susanna Mancini, *The Power of Symbols and Symbols of Power: Secularism and Religion as Guarantors of Cultural Convergence*, (2008) *Cardozo Law Review* 30 at 629-631. The quotation is from Carolyn Evans and Timnah Rachel Baker, ‘Religion and Human Rights: Principles and Practice’, in Frank Cranmer, Mark Hill QC, Celia Kenny and Russell Sandberg (eds), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe*. (Cambridge University Press, 2016) at p. 196

⁷¹³ Javier Martínez-Torron, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, (2005) *Emory International Law Review* 19 587, 590

this angle, one would assume that any intervention from outside is not only illegitimate but impossible.”⁷¹⁴

Malcolm Evans suggests that the ECtHR is more concerned with the role of the State in religious affairs than with the rights of individuals, and that when the ECtHR addresses individual rights and the protection of their beliefs and religion, it “has taken such a cautious approach to protecting the manifestation of religion or belief that the law has come to protect only a very restrictive and conservative form of private religious life”.⁷¹⁵ For example, in *Kosteski v. the former Yugoslav Republic of Macedonia* the applicant absented himself from work while celebrating a Muslim religious holiday and was subsequently fined. The ECtHR held that

“while it may be that this absence from work was motivated by the applicant’s intention of celebrating a Muslim festival *it is not persuaded that this was a manifestation of his beliefs in the sense protected by Article 9* of the Convention or that the penalty imposed on him for breach of contract in absenting himself without permission was an interference with those rights”⁷¹⁶

Moreover, the ECtHR recalled that

“the courts’ decisions on the applicant’s appeal against the disciplinary punishment imposed on him made findings effectively that the applicant had not substantiated the *genuineness of his claim to be a Muslim* and that his conduct on the contrary cast doubt on that claim in that there were no outward signs of his

⁷¹⁴ Arcot Krishnaswami, Special Rapporteur of the Sub -Commission on the Prevention of Discrimination and Protection of Minorities, Study of Discrimination in the Matter of Religious Rights and Practices, E/CN.4/Sub.2/200/Rev.1 (1960) at 16.

⁷¹⁵ Alice Donald, ‘Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?’, (2013) OJLR 2 50, 51.

⁷¹⁶ *Kosteski v. the former Yugoslav Republic of Macedonia* Application no. 55170/00 (judgment of 13 April 2006) at para. 38 (emphasis added).

practising the Muslim faith or joining collective. Muslim worship.... *the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent* and may smack unhappily of past infamous persecutions...."⁷¹⁷

A striking link can be seen between the ECtHR's language which stresses that it is abhorrent for the State to judge a "citizen's inner personal beliefs" and the Protestant theology which emphasises the importance of the private realm of the conscience where no man can interfere and is therefore inviolable. The ECtHR required evidence to substantiate the applicant's claims that he was an adherent to the Muslim faith,⁷¹⁸ thus testing whether the applicant's beliefs were sincere and genuine enough to be protected. This could also imply that the ECtHR was accusing the applicant of having a fraudulent belief since his actions were not deemed sincere enough to be granted protection under Article 9. Here the interference was justified as being prescribed by law and necessary in a democratic society for the protection of the rights of others.

Malcolm Evans also notes that since the ECtHR repeatedly stipulates that the protection of the *forum internum* is the main purpose of Article 9, it ought to identify what it considers to fall under the *forum internum*, but it fails to do so.⁷¹⁹ The ECtHR may well protect the *forum internum*, but has difficulties giving this a wide scope and sees things as non-absolute manifestations. For example, in *Francesco Sessa v. Italy*,⁷²⁰ the applicant was unable to attend court hearings as his religious responsibilities prevented this given the hearing date fell on the same day as a

⁷¹⁷ Ibid at 39 (emphasis added).

⁷¹⁸ Ibid at 39.

⁷¹⁹ Malcolm Evans, *Manual on Wearing of Religious Symbols in Public Areas*, (Martinus Nijhoff Publishers, 2009) 8.

⁷²⁰ *Francesco Sessa v. Italy*, Application no. 28790/08 (2012).

Jewish religious holiday. The applicant argued that the refusal of the judicial authority to adjourn the hearing infringed his rights under Article 9 of the Convention. The ECtHR held that it was

“not convinced that setting the case down for hearing on a date which coincided with a Jewish holiday and refusing to adjourn it to a later date amounted to a restriction on the applicant’s right to practise his religion freely. It is not disputed between the parties that the applicant was able to perform his religious duties.”⁷²¹

The ECtHR found that the applicant’s freedom of conscience and belief was not restricted, which again illustrates the importance of absolute freedom of conscience thought and belief enshrined in Article 9(1), while Article 9(2) justifiably limits the manifestation of this belief. Moreover, it reveals the ECtHR’s reluctance to find “manifestations” to be part of the *forum internum*.

By contrast, in *Darby v Sweden*,⁷²² the Commission held that being forced to pay taxes to a Church, to which one does not belong, for secular functions, was a serious interference on the *forum internum* since the applicant was being forced to participate in a religion in which he did not believe. Consequently, not adhering to that particular religion would force the person unwillingly to reveal his own beliefs, violating his right under Article 9(1). The Commission attempted to set a definition for the protection of the *forum internum* by stating that “Article 9(1) protects everyone from being compelled to be involved in religious activity against his will.”⁷²³ On the private and “silent” level, freedom of conscience is protected and coercion is not allowed. This is reminiscent of the words of Luther in his 1521 Imperial Diet of

⁷²¹ *Ibid.*, at 37.

⁷²² *Darby v Sweden* [1990] 187 Eur Ct. H.R. (Ser A)

⁷²³ *Ibid.*, Annex at 51.

Worms when he said “my conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe.”⁷²⁴

The Commission did not provide clear guidance on how direct the participation has to be, and how the person can be said to be involved “against his will”⁷²⁵ and at what level the participation was considered to be moved from the silent level to the level of manifestation. However, it is clear that what is absolutely protected is going against one’s will, for all human laws imposed on the Christian in the spiritual realm go against true religion.⁷²⁶

The judgment of the ECtHR in *Buscarini v San Marino* also concerned the *forum internum*. Members of the parliament of San Marino were required to take an oath on the Gospel, “without referring to any religious text”⁷²⁷, or not assume their parliamentary seats. The oath, as the Government explains, has lost its religious significance and is replaced by “the need to preserve public order, in the form of social cohesion and the citizens’ trust in their traditional institutions.”⁷²⁸ Despite the wide margin of appreciation and the Christian tradition on which San Marino was founded, the judges unanimously ruled that there had been a violation of Article 9. The ECtHR also held that requiring “members to swear allegiance to a particular religion” was contrary to Article 9(1), unless swearing allegiance to a particular

⁷²⁴ Words of Martin Luther at the Imperial diet of Worms on April 18, 1521, available at <http://www.luther.de/en/worms.html> (Last accessed November 2017).

⁷²⁵ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 73.

⁷²⁶ John Calvin, *Institutes*, McNeill, Ed., vol. 2: 1180

⁷²⁷ *Buscarini v San Marino* at para. 8.

⁷²⁸ *Ibid.*, at 36.

religion is prescribed by law and is necessary in a democratic society under Article 9(2).⁷²⁹

The ECtHR concluded that it was dealing with a case of manifestation of religion or belief rather than with the basic freedom of religion itself, which was already protected.⁷³⁰ It further accepted the applicants' claim that the requirement to take an oath on the Gospel was a "premeditated act of coercion".⁷³¹ Similar to the Protestant line of thought, the ECtHR was not tolerant of any act that it viewed as a coercion of religion holding that "it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs."⁷³² However, the oath in itself was seen as a secondary act, in terms of Protestant thought, not essential to the religion, but rather a manifestation of religion. Paul Taylor has correctly noted that treating the obligation to swear on the Gospel contrary to one's belief "cannot sensibly be characterised as a restriction on the manifestation of one's own beliefs."⁷³³

In *El Morsli v France*,⁷³⁴ the applicant, a Muslim woman who wore the veil, was denied entry to the French consulate in Marrakech after refusing to remove her veil for a security check. The woman was therefore refused a visa to join her husband in France and the husband lodged an appeal on behalf of his wife. The ECtHR held

⁷²⁹ Ibid., 34.

⁷³⁰ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 74.

⁷³¹ *Buscarini and others v San Marino* at para 37.

⁷³² Ibid., at 39.

⁷³³ Paul. M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 130.

⁷³⁴ *El Morsli v France*, Application no. [15585/06](#), 4 March 2008.

that the limitation “concerned at least one of the legitimate aims provided for in Article 9 § 2, namely public safety and the protection of public order.”⁷³⁵ Furthermore, in *Serif v. Greece*⁷³⁶, although the ECtHR accepted that convicting the applicant for usurping the functions of a minister of a “known religion” (Mufti) and publicly wearing the dress of such a minister amounted to a violation of his rights under Article 9, it recognised the interference to have a legitimate aim namely “to protect public order”.⁷³⁷ The ECtHR maintained its reasoning from *Phull v France* concerning security checks stating that the interference was necessary in a democratic society finding that the “obligation to remove her veil for the purposes of a security check was necessarily very limited in terms of time.”⁷³⁸ In *Işik v. Turkey*⁷³⁹, the right not to have to manifest a religion or belief was considered. The ECtHR held that requiring a citizen to specify his religion on an application for an identity card amounted to an interference with Article 9 but it did not consider the applicant’s request to change his religion from Islam to Alevi, a tradition influenced by Sufism and certain pre-Islamic beliefs. Instead, the ECtHR preferred to assess the case on the basis of the right not to manifest a religion. By doing this, the ECtHR had considered the Alevi tradition a religion and granted the applicant the negative right that is protected under Article 9. However, the applicant was placed within the boundaries of religion and the Alevi tradition was not seen outside the realm of conventional religion. In *Refah Partisi v Turkey*⁷⁴⁰, although the case was determined

⁷³⁵ Ibid.

⁷³⁶ *Serif v Greece* Application no. 38178/97 (2000).

⁷³⁷ Ibid., at 45.

⁷³⁸ Ibid.

⁷³⁹ *Sinan Işik v Turkey* Application no. 21924/05 (02 May, 2010).

⁷⁴⁰ *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC] Application nos. 41340/98, 41342/98, 41343/98 and [41344/98](#) (2003).

under Article 11 and the ECtHR maintained that it was not necessary to examine it under other ECHR provisions⁷⁴¹ separately, the judgment reveals the distortion the ECtHR inflicts when assessing non-Christian beliefs. The case concerned members of a political party (Refah Partisi), where the applicants argued that the dissolution of *the Party*, by the Turkish Constitutional Court and the suspension of certain political rights of the other applicants violated their rights under articles 9, 10, 11, 14, 17 and 18.⁷⁴² The Constitutional court in Turkey argued that the “Refah had become a centre of activities contrary to the principle of secularism”⁷⁴³ as whenever they spoke they “advocated the wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities.”⁷⁴⁴ Furthermore they claimed that the applicant has stated that he “would fight to the end for the introduction of Islamic law (sharia).”⁷⁴⁵ The applicant maintained that “his speeches which they had distorted and taken out of context”.⁷⁴⁶ The ECtHR held that

“the plan to introduce a plurality of legal systems, which had never been abandoned by Refah, was clearly incompatible with the principle of non-discrimination, which was enshrined in the Convention and was one of the fundamental principles of democracy.”⁷⁴⁷ The ECtHR ruled that the dissolution of the party was within the margin of appreciation of Turkey and the interference was prescribed by law and necessary in a democratic society. Furthermore the ECtHR

⁷⁴¹ Articles being 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.

⁷⁴² *Refah Partisi (The Welfare Party) and Others v. Turkey* at para. 2.

⁷⁴³ *Ibid.*, at 26.

⁷⁴⁴ *Ibid.*, at 12.

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*, at 17.

⁷⁴⁷ *Ibid.*, at 80.

noted that “the dissolution of a political party on account of a risk of democratic principles being undermined met a pressing social need”.⁷⁴⁸

The party’s attempt to introduce a system whereby it set its own religious beliefs to abide by, clashed with the principle of secularism. In the name of secularism, non-Christian principles (in this case Islamic), were carefully being reformed by the ECtHR. There was an attempt “to transfer the language of Muslims from language of law and religion to a language that is more related to ethics and virtue so that they could fit into a secular national public sphere.”⁷⁴⁹ This secularised language forces non-Christians somehow to condemn and criticise practices that are “considered offensive in a Western culture as practices being “non-Islamic” in an attempt to reform them.”⁷⁵⁰

It is evident that in the absence of doctrinal justification of the manifestation, it is difficult to establish the existence of the belief that is being manifested. Whilst it could be argued in relation to all of these judgments that “victories for common sense”⁷⁵¹ prevailed, it can also be concluded that the Commission and the ECtHR regard symbols as deaf and dumb (a secularised version of idolatry) that can easily be removed. This is also evident in the way the ECtHR views the veil as an object, with

⁷⁴⁸ Ibid., at 104.

⁷⁴⁹ Prakash Shah, Shaira in the West: Colonial Consciousness in a Context of Normative Competition, in Elisa Giunchi (ed), *Muslim Family Law in Western Courts* (Routledge 2014) 19. Within Christianity for example, the concept of consent in marriages was a fundamental Christian obligation, which was further developed by theologians in a later stages. This idea of consent was endorsed in many Western legal systems despite the fact that its Christian roots have faded. See also Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) p. 75, 168

⁷⁵⁰ Ibid., at 25.

⁷⁵¹ Andrew Copson, BHA: 'Persecution of Christians' and 'aggressive secularism' claims exposed as false by European court judgment' 15 January 2013 electronic copy available at <http://www.politics.co.uk/opinion-formers/bha-british-humanist-association/article/persecution-of-christians-and-aggressive-secularism-claims-e> (last accessed in September 2015).

no further meaning, that can easily be removed for a short period of time or whenever necessary. The language used (whether consciously or unconsciously) implies that the veil is also an “icon” that can be put aside for a specific period of time. Furthermore, these religious symbols are seen as manifestations and it is not countenanced by the ECtHR that any could come within 9(1).

This jurisprudence clearly demonstrates that the *forum internum* is absolutely protected and that “the ECtHR has construed freedom of religion in terms of a binary opposition between belief and practice.”⁷⁵² Recalling the two kingdoms of Luther and then Locke, it is possible to identify similar, if not identical lines of thought. The private realm of the conscience, which the State could not and should not interfere with, is held silently, and the public realm of the (sinful) body or the manifestations may be punished by the magistrate (State).

These are reflected today in the split between the assertion of religious freedom in Article 9(1) of the ECHR and the limitations thereto as expressed in Article 9(2) and presuppose a Protestant theology. Moreover, this separation in itself ascertains that there actually are two parts to religion or belief: one is the thought, the ideas, and the doctrines which constitute the first part to have a “true” religion; the other is the manifestation which is very much linked to the doctrinal or theoretical part.

The ECtHR tries to utilise a wide approach to the protection granted under Article 9, yet these definitions and interpretations remain within a Protestant theological framework in terms of the language used and the background of the

⁷⁵² Lourdes Peroni, ‘On Religious and Cultural Equality in European Human Rights Convention Law’, (2014) NQHR 32 231, 233.

explanation of the ECtHR albeit with a secularised language. The ECtHR also tends to focus on the definition of belief, religion, and conscience. However, all that it is doing is getting caught in a terminological game of how best to describe these terms instead of looking at religion as a phenomenon in the world rather than something universal in all cultures. The ECtHR's assertion that all cultures in the world have religion, an idea which has also been adopted and elaborated within the human sciences,⁷⁵³ is itself a claim of Protestant theology, albeit since secularised.

It was reported in *Le Monde* on 11 May 2010⁷⁵⁴ that in an attempt to politicise “alien” religions and emphasise the importance of complying with the beliefs of the majority, the French minister of immigration, Eric Besson, announced that Imams who intend to work in France should undergo courses in two provincial universities to learn how to “articulate their Islamic beliefs in a way compatible with the French political values and republican culture.”⁷⁵⁵ This is a clear example of how State authorities distort non-Christian cultures and moulding them in order to fit into the secularised Protestant framework. They are seeking to influence how “beliefs” ought to be held and manifested in a way that is compatible with Christian beliefs.

6.3 The Protestant Thought and Compulsory Religious Education

The ECtHR has attempted, when deciding on Article 9 cases, to distinguish between a “practice” that is merely motivated or inspired by belief or religion as opposed to a practice which is a manifestation of belief or religion. However, people often shape

⁷⁵³ Tomoko Masuzawa, *The Invention of World Religions or, how European Universalism was Preserved in the Language of Pluralism*, (University of Chicago Press 2005).

⁷⁵⁴ Eric Besson Annonce de Futures Formations D'imam à L'université, *Le Monde* 11-05-2010 available at http://www.lemonde.fr/societe/article/2010/05/11/eric-besson-annonce-de-futures-formations-d-imam-a-l-universite_1349990_3224.html

⁷⁵⁵ Cited in Raymond Plant, 'Religion, Identity and freedom of expression' (2011) *Res Publica* 17(1) 7-20.

their religious beliefs by following a thought or their conscience, and therefore in reality, it is hard to differentiate between the two.⁷⁵⁶ Nicholas Gibson observes that to assess if there is a violation when manifesting a “belief”, one should first question if “the matter relates to a protected ‘belief’ under Article 9.”⁷⁵⁷ This question may seem simple, but it is actually challenging to address because in assessing whether an act is a protected belief, one is assuming that the concept of belief is indeed universal in all cultures and has similar meaning amongst all cultures. As a result of this approach, the ECtHR fails to address the needs of non-Abrahamic applicants in general and non-Protestant applicants in particular. The ECtHR sets a very high threshold for applicants to prove that a certain practice is a manifestation of religion. This threshold is easily met by applicants from religious groups whose practices emanate from belief and which are in turn mandated by religious doctrines. On the contrary, applicants, from a non-Protestant background, find it more difficult to prove that their tradition and practices fulfil the requirements to be considered a manifestation under Article 9. This is illustrated by the example of how the ECtHR deals with claims against compulsory religious education.

In *Karnell and Hardt v. Sweden*⁷⁵⁸ for example, the applicants challenged a Swedish law that required compulsory religious education to be taught in public schools. The applicants, all of whom were adherents to the Evangelical Lutheran faith, argued on the basis of Article 2 of the First Protocol that "the State shall respect the right of parents to ensure such education and teaching in conformity

⁷⁵⁶ Carolyn Evans, *Freedom of religion under the European convention of Human rights* (Oxford University press 2001) 111.

⁷⁵⁷ Nicholas Gibson, ‘Faith in the courts: Religious Dress and Human Rights’ (2007) C.L.J. 66(3) 657-697.

⁷⁵⁸ *Karnell and Hardt v. Sweden*, Application No. 4733/71 [1971] Y.B. EUR. Comm. On Human Rights

with their own religious and philosophical convictions.”⁷⁵⁹ The Swedish law states that the exemption should be granted only to pupils where the parents “adhere to a faith and concept of life which essentially *belongs to a different civilisation than our own*.”⁷⁶⁰ Eventually, both parties came to a compromise and agreed that pupils belonging to the Evangelical Lutheran sect could be exempted from the compulsory religious studies.

Contrary to this decision, in *Angeleni v Sweden* the Commission found the application to be manifestly ill-founded. The case concerned a mother and a daughter, both of whom were atheists and did not belong to any religious congregation. The mother requested that her daughter be exempt from the religious knowledge course and complained that her daughter’s “freedom of thought is violated when the child is obliged to be brought into the Christian way of thinking.”⁷⁶¹ Moreover, the applicant argued that the religious teaching undertaken by the school was not neutral and it was only concerned with Christianity.⁷⁶² The Commission found “the fact that the instruction in religious knowledge focuses on Christianity at junior level at school does not mean that the second applicant has been under religious indoctrination in breach of Article 9 of the Convention.”⁷⁶³ It also accepted the school’s arrangement to exempt the second applicant from “morning gatherings of a religious character with singing of hymns”.⁷⁶⁴ The National School Board rejected the mother’s request. The Commission held that the obligation for the applicant to follow a course in religious knowledge, did not subject

⁷⁵⁹ The Convention, First Protocol, art. 2

⁷⁶⁰ *Karnell and Hardt v. Sweden*, at 670.

⁷⁶¹ *Angeleni v Sweden* at p. 46.

⁷⁶² *Ibid.*, at 49.

⁷⁶³ *Ibid.*, at 43.

⁷⁶⁴ *Ibid.*

her to any religious indoctrination, and as a result did not infringe her right to freedom of religion.

This case fits the Protestant line of thought whereby chanting and singing of religious hymns is considered a ritualistic, unessential character of a religion, and therefore could easily be removed from one's religious or customary practices. It should also be noted that the Commission did not find the Christian religious education to cause any kind of indoctrination on the applicant, while other religious symbols such as the headscarf are considered by the ECtHR to be powerful symbols of indoctrination. This preferential status for the Protestant line of thinking portrayed in the Commission's reasoning is indeed problematic since it could, as Carolyn Evans suggests, lead to marginalisation of people who think or act differently.⁷⁶⁵

By contrast, in *Folergo v Norway*, the applicants, a group adhering to the humanist thought, requested an exemption from religious knowledge classes. The ECtHR ruled in favour of the applicants and held that failing to grant the applicant's full exemption from religious classes infringed their rights under Protocol 1 Article 2 of the Convention. Although the outcome of the case was indeed more favourable to the applicants than that in *Angeleni and Others v Sweden*, the ECtHR's approach of interpretation did not differ much. The ECtHR did not question the privilege of Christianity in the education syllabus and clearly accepted that the "presence of an established religion does not in itself violate the right to belief and religion of non-

⁷⁶⁵ Carolyn Evans, *Freedom of Religion Under the European Convention on Human rights*, (Oxford University Press, 2001) 94.

members.”⁷⁶⁶ Moreover, the ECtHR found that it was within the State’s margin of appreciation whether to adopt a syllabus that gave greater weight to Christianity than to other religions.⁷⁶⁷ The ECtHR stated that

“[t]he fact that Christianity was given priority is true only as far as the quantity of the different religions and other elements of the KRL subject is concerned. Furthermore, it is important to note that Christianity is not only the state religion of Norway, but also forms an important part of Norwegian history. In our opinion, the KRL subject clearly fell within the limits of the competence of the Contracting States under Article 2 of Protocol No. 1.”⁷⁶⁸

The implication of this judgment is that equality with regard to religions and philosophies is not deemed essential by the ECtHR. It can also be concluded that the ECtHR does indeed accept that Norway can favour Evangelism, but not force anyone into coercive ways to be taught it. This is reminiscent of the Protestant line of thought that prevents subjecting individuals to coercive ways to accept Christianity, which in turn, and according to the Protestants, infringes one’s freedom of conscience.

6.4 The Concept of Neutrality

It is questionable whether the ECtHR is able to be neutral when dealing with Article 9 cases.⁷⁶⁹ It is often argued that in order to prevent the State from interfering in the

⁷⁶⁶ Ian Leigh, Objective Critical and pluralistic: Religious Education and Human Rights in the European Public Sphere, in *Law, State and Religion in the New Europe: Debates and Dilemmas*, 192, 209, Lorenzo Zucca & Camil Ungureanu eds (Cambridge University Press, 2012).

⁷⁶⁷ *Folgero and others v Norway* at para 89

⁷⁶⁸ *Folgero and others v Norway*.

⁷⁶⁹ Case law examples will be given later in section 7.3 to illustrate the present hypothesis in this section.

internal affairs of religious communities, neutrality may be invoked. However, neutrality can result in such interferences. “Neutrality may be the product of a desire to create an environment in which all are able to make ultimate choices in an unfettered fashion, but it may also prevent the making of choices and reduce that freedom of choice to mere relativism.”⁷⁷⁰ As defined in the ECtHR’s case law, the State’s duty of impartiality and neutrality “is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the way those beliefs are expressed.”⁷⁷¹

In order for the ECtHR to be neutral when assessing Article 9 cases, it must have the same attitude towards religious conversions and proselytism and not favour one type of conversion over the other. That is, it must treat conversions between Abrahamic religions and other traditions in a similar manner⁷⁷² as conversions between different “religions”. It should also refrain from qualifying what constitutes proper means of proselytism and conversion, which it draws from within Abrahamic theological ideas. A “neutral” ECtHR should also assume that Abrahamic religions and other traditions are the same kind of phenomena. The problem lies in the fact that this assumption cannot be made because what makes Semitic religions into a religion is not the same as what makes other traditions into traditions.⁷⁷³

⁷⁷⁰ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights.’ (2008) *Religion, State & Society* 36(3) 205-223, 206.

⁷⁷¹ *Metropolitan Church of Bessarabia and Others v. Moldova* at para 118 and 123; *Hasan and Chaush v Bulgaria*, para. 62.

⁷⁷² S.N. Balagangadhara and Jakob De Roover, ‘The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism’ (2007) *The e Journal of Political Philosophy* 15(1), 67-92.

⁷⁷³ See section 3.7 of this thesis. Books, beliefs, God, Prophet and most importantly doctrines are essential requirements to make Christianity, Islam and Judaism into religions, and without them they cannot be recognized as religions. These same essential requirements are not crucial to make other traditions such as ‘Hinduism’, ‘Buddhism’ and ‘Jainism’ into a religion, yet they are still considered to be a kind of ‘religion.’

Ramchandra N. Dandekar, for example, argues that Hinduism “can hardly be called a religion at all in the popularly understood sense of the term.”⁷⁷⁴ The problem is not confined only to Hinduism, but applies to all non-Abrahamic traditions and cultures. Decisions of the ECtHR reveal that Semitic religions and non-Semitic traditions are being treated as instances of the same kind rather than different phenomena.

If the ECtHR keeps its current approach of treating both as similar phenomena, it will continue to favour Semitic values over traditional ones and refer to, for example, proselytism and conversion in terms of proper and improper.⁷⁷⁵ By referring to proper means of proselytism and conversion, it is essentially prohibiting all forms of improper means including coercion in conversion. It is suggesting that proper means of conversion can take place by means of persuasion alone. But if “one takes conversion from one religion to another to be a matter of persuasion, one must presuppose that religion involves the question of doctrinal truth. One can be persuaded to convert only in so far as one accepts the truth of one religion as opposed to the falsity of another.”⁷⁷⁶ Conversion and proselytising are intrinsic drives within Abrahamic religions and freedom to convert assumes rival movements competing with each other to win converts into the “true” religion.

⁷⁷⁴ Ramchandra Narayan Dandekar, *‘Hinduism’* (Brill 1971) 237. Quoted also in Will Sweetman, “Hinduism” And The History Of “Religion”: Protestant Presuppositions In The Critique Of The Concept Of Hinduism” Method & Theory in the Study of Religion, (2003) Journal of the North American Association for the Study of Religion 15 329-353 at 331. See also section 3.6 of this thesis.

⁷⁷⁵ *Kokkinakis v. Greece* (1993) 17 EHHR 397 (App no 14307/88, 25 May 1993.) para 48.

⁷⁷⁶ S.N. Balagangadhara and Jakob De Roover, ‘The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism’ (2007) The e Journal of Political Philosophy 15(1), 67-92.

The ECtHR's restriction on religious conversion shows that it is indirectly questioning whether or not religion is a matter of truth.⁷⁷⁷ It is reforming traditions and their manifestations according to Christian theological concepts and normative morals.⁷⁷⁸ Although the ECtHR may not merely accept the "truth" claims of a particular religion, it does, however, seem to accept and assume that religion does revolve around truth claims.⁷⁷⁹ Failing to be neutral towards the issue of conversion is, as Balagangadhara says, a "general malfunction of the neutrality of the model of liberal secularism. Even when its theorists take a critical attitude towards proselytisation, they reproduce the theological assumption that religion revolves around truth and therefore support a principle of religious freedom that entails the freedom to convert."⁷⁸⁰ The ECtHR could only be neutral with respect to the competing truth claims of Semitic religions. Moreover, despite the alleged neutrality and secularity of the law and the ECtHR protestant Christianity "continues to shape significant aspects of both the state and state law. This is an embarrassment for liberal theories of rights and their assumption of state neutrality."⁷⁸¹

6.5 Proselytism and Conversion

The reasons why the ECtHR, in its current approach, is incapable of acting neutrally vis-à-vis all religions and traditions and ends up favouring adherents to the Protestant faith in particular, has been analysed earlier in this thesis.⁷⁸² In this

⁷⁷⁷ The analysis of the case law regarding proselytism and conversion is looked at later in section 7.3 in this thesis.

⁷⁷⁸ Jakob De Roover, 'Christian Attitudes and the Rule of Law as the Mechanism of Secularization' April 1 2011, available at <http://www.hipkapi.com/2011/04/01/law-secularization-and-religious-attitudes/>

⁷⁷⁹ S.N. Balagangadhara and Jakob De Roover, 'The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism' (2007) *The e Journal of Political Philosophy* 15(1), 67-92.

⁷⁸⁰ *Ibid.*

⁷⁸¹ Peter Dunchin, 'Islam in the Secular Nomos of the European Court of Human Rights' (2011) *Michigan Journal Of International Law* 32(4) 663, 744.

⁷⁸² See sections, 2.9, 4.4, 5.3 and 7.4 in this thesis.

section, it will be demonstrated that the approach of the ECtHR on proselytism and conversion is not neutral and bears significant Protestant hallmarks.

Ostensibly, Article 9 protects acts intimately linked to the *forum internum* of personal belief.⁷⁸³ It has held that “bearing witness in words and deeds is bound up with the existence of religious convictions”.⁷⁸⁴ However, in *Kokkinakis v Greece*⁷⁸⁵ the ECtHR opened up a distinction between proper as opposed to “improper proselytism”⁷⁸⁶ and religious conversion. The ECtHR held:

“[F]irst of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to *true evangelism*, which in a report drawn up in 1956 under the auspices of the World Council of Churches is described as an essential mission and *a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it.*”⁷⁸⁷

It suggested that “improper proselytism” as opposed to “bearing Christian witness” might

“[t]ake 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 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.*”⁷⁸⁸

In its view, improper proselytism was coercive and incompatible with respect for freedom of religion, thus being a corruption or deformation of true proselytism.

⁷⁸³ *CJ, JJ and EJ v. Poland*, Appl. no. 23380/94, (1996) DR84, p. 46.

⁷⁸⁴ *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, at para. 31.

⁷⁸⁵ *Kokkinakis v. Greece (1993)* 17 EHHR 397 (App no 14307/88, 25 May 1993).

⁷⁸⁶ *Ibid.*, at 48.

⁷⁸⁷ *Ibid.*, (emphasis added).

⁷⁸⁸ *Ibid.*, (emphasis added).

It is not clear how the ECtHR assesses proper or “true” as opposed to “improper” proselytism. In Chapter 3, spreading religion through conversion and proselytism was analysed.⁷⁸⁹ Christians maintain that conversion is part of the universal freedom of conscience and is therefore a fundamental human right.⁷⁹⁰ However, the concept of conversion claims that the religious have a religious duty to spread the “true” religion, the universal truth that God has given to mankind, and to include more people into the “true” religion, for Christ ordered Christians to “go and make disciples of all nations.”⁷⁹¹ Freedom to convert assumes that religions are rival movements competing with each other to win converts into the “true” religion. As also explained in Chapter 3, non-Abrahamic cultures consider every “religion” to be equally true, so there is no existence of “false religion”. Therefore, religious conversion from falsity to truth is deemed meaningless.⁷⁹² It is clear that the ECtHR has also set a benchmark from which it decides upon true or proper and improper proselytism in just the same language as Christianity divides between spreading the “true” religion.

In its judgment in *Kokkinakis*, the ECtHR promoted the “comprehensive doctrine or the conception of the good”⁷⁹³ of Christianity at the expense of other traditions. The ECtHR held that the Greek courts did not “sufficiently specify in what way the accused had attempted to convince his neighbour by improper means”,⁷⁹⁴ thereby suggesting a different outcome had there been proof to “improper”

⁷⁸⁹ See sections 3.8 and 3.9 in this thesis.

⁷⁹⁰ See for example *Kokkinakis v Greece* at para 48; where the ECtHR speaks of “improper proselytism and true evangelism.”

⁷⁹¹ The Gospel of Mathew 28:19.

⁷⁹² S.N. Balagangadhara and Jakob De Roover, ‘The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism’ (2007) *The Journal of Political Philosophy* 15(1) 67-92.

⁷⁹³ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 354-356.

⁷⁹⁴ *Kokkinakis v. Greece* at para. 49.

proselytism or in other words “untrue” evangelism. In his dissenting opinion, Judge Valticos differentiated between a “militant” Jehovah’s Witness faith and a “true” Christian faith:

“[O]n the one hand, we have a militant Jehovah's Witness, a hardbitten adept of proselytism..... on the other hand, the ideal victim, a naive woman, the wife of a cantor in the Orthodox Church”.⁷⁹⁵ He further notes that “it is regrettable that the above judgment should allow proselytising activities on condition only that they should not be “improper”.”⁷⁹⁶

Similarly, in the *Larissis and Others v Greece*⁷⁹⁷ case, the applicants were officers in the Greek air force and followers of the Pentecostal church. They were convicted of improper proselytisation on Orthodox Christian airmen of lower ranking, as well as civilians. The applicants claimed that their rights under Article 9 were breached when they were prosecuted and punished because they were proselytising others. The ECtHR did not dispute that there was an interference with the applicants’ rights to “freedom ... to manifest [their] religion or belief”.⁷⁹⁸ However, the ECtHR notes that the measures taken were prescribed by law⁷⁹⁹ and pursued a legitimate aim.⁸⁰⁰ On the question of whether or not the measures were necessary in a democratic society, the ECtHR held that

“the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it

⁷⁹⁵ *Kokkinakis v. Greece*, (Valticos, J., dissenting opinion).

⁷⁹⁶ *Ibid.*

⁷⁹⁷ *Larissis and others v Greece*, 65 ECtHR 363 (1998).

⁷⁹⁸ *Ibid.*, at 38.

⁷⁹⁹ *Ibid.*, at 42.

⁸⁰⁰ *Ibid.*, at 44.

difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It must be emphasised that not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. Nonetheless, where the circumstances so require, States may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces.”⁸⁰¹

The ECtHR accepted that the Greek courts’ decisions were justified in protecting airmen from improper proselytisation and any forms of coercion. The ECtHR held that

“... the Court considers that the Greek authorities were in principle justified in taking some measures to protect the lower ranking airmen from improper pressure applied to them by the applicants in their desire to promulgate their religious beliefs. It notes that the measures taken were not particularly severe and were more preventative than punitive in nature, since the penalties imposed were not enforceable if the applicants did not reoffend within the following three years. ... In all the circumstances of the case, it does not find that these measures were disproportionate.”⁸⁰²

The ECtHR, however, rejected the respondent government’s arguments as regards proselytising the civilians and held that “the Court finds it of decisive

⁸⁰¹ *Larissis and Others v. Greece*, Application Nos. 40/1996/759/958–960 (1998) at paras. 50-51.

⁸⁰² *Ibid.*, at 54.

significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen.”⁸⁰³

What the above cases reveal is that the ECtHR does not only show appreciation for “true” proselytism over what it identifies as improper proselytism, but also emphasises the importance and necessity of proselytism to the Christian faith. The ECtHR thus accepts the right to proselytise as a manifestation of the teaching of one’s belief or religion. However, true conversion – or as the ECtHR calls it: proper proselytisation – which the ECtHR accepts, derives (as Chapter 3 illustrates) from the Christian belief that every individual should be free to turn towards the true God at all times and that this can be done only by converting from false to true religion. This conversion should be done without coercion, as the Protestant faith recommends. This is reflected in how the ECtHR accepted the air force officers proselytising of the civilians, where it considered that there would not be any coercion, but found compatible with Article 9 the measures taken against the applicants when proselytising airmen as these were “justified by the need to protect the prestige and effective operation of the armed forces and to protect individual soldiers from ideological coercion.”⁸⁰⁴

Though the ECtHR does not use the language “true” versus “false” religion, it does interpret it in this line of thought, this is an indication of the underlying bias that is present in the ECHR system. According to Balagangadhara,⁸⁰⁵ non-Abrahamic cultures do not have “religion” to compete in this religious rivalry. They are traditions

⁸⁰³ Ibid., at 59.

⁸⁰⁴ Ibid., at 47.

⁸⁰⁵ S.N. Balagangadhara, *‘To Follow our Forefathers: The nature of Tradition’* available at <http://www.hipkapi.com/2011/04/02/to-follow-our-forefathers-the-nature-of-tradition-s-n-balagangadhara/>

with specific sets of ancestral practices that characterise a human community. Traditions are inherited practices and, unlike religious practices traditions, have no authority to determine who belongs to them or whether a certain culture requires them or not. Stories that are told within a tradition do not claim *the truth* like religious stories and there is no obligation to practice a tradition⁸⁰⁶ or proselytise and convert people into a tradition. The traditions are maintained because they make some community into a community and not because they contain some “exclusive truth” binding the believer to God. The attempt to interfere with the tradition of a community from the outside will be seen as illegitimate, since all traditions are part of the human quest for truth.⁸⁰⁷ Freedom to convert or proselytise does not make sense to cultures that do not view others in terms of “religious” rivals. Proselytism and conversion are an intrinsic drive within Abrahamic religions, hence when the ECtHR accepts that conversion and proselytism have proper and improper aspects, it is confirming that there are true and false ways to proselytise and convert. This competing attitude of truth and falsity (or of conversion) is entrenched in Abrahamic religions. When there were divisions between the Catholics and the Protestants (i.e. when Western Christianity was divided during the Age of Reformation), both sects spoke of competing truth claims. The discussions were initiated as debates on false versus true religions. Interestingly, Judaism and Islam did the same. Each suggested that their beliefs were the true beliefs regardless of whether they accused each other of being deficient in worshipping God or whether they were false religions.

⁸⁰⁶ Ibid.

⁸⁰⁷ S.N. Balagangadhara, Jakob De Roover, *The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism* (2007) *The Journal of Political Philosophy* 15(1) 67–92.

Consequently, and by adopting a similar theological approach, the ECtHR cannot play the role of the agnostic, because it presumes that religious truth is cognitive in nature, and for example, coercion is not the way for a religion to persuade people of its truth.⁸⁰⁸ It therefore cannot remain neutral with respect to the competing truth claims of each and every religion. That is, “the notion of state neutrality can be made sense of by saying that where there are competing ‘truth claims’, one does not assume a pro-stance with respect to any one of them.”⁸⁰⁹ However, as the case law shows, the ECtHR does not debate whether religion itself is a question of truth and therefore accepts it to be a matter of truth. This also leads the ECtHR to endorse the religious toleration, which is in itself a Protestant concept that is not in turn agnostic.⁸¹⁰

6.6 Secularism and Indoctrination in the European Court of Human Rights: Is the Veil a Symbol of Iconoclasm?

Limitations on the manifestation of religion, especially religious symbols and clothing, are often justified by the principle of secularism. For example, in *Sahin v Turkey*, the ECtHR notes that “it is the principle of secularism....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

⁸⁰⁸ S.N. Balagangadhara and Jakob De Roover, ‘The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism’ (2007) *The Journal of Political Philosophy* 15(1) 67–92, 85–86.

⁸⁰⁹ *Ibid.*, at 86.

⁸¹⁰ For more details on the concept of truth and falsity see section 3.6 in this thesis.

to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.”⁸¹¹ Furthermore, the ECtHR noted in *Dogru v France* that “having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.”⁸¹² However, it is questionable if the ECtHR can then be neutral in its decisions and whether it could play the role of an agnostic. It is also questionable whether a “neutral” State, as opposed to a “secular” State, can better accommodate the cultural traditions of say adherents of non-Abrahamic traditions.

In *Lautsi v Italy* for example, the applicants complained that the presence of a cross on the school walls infringed the principle of secularism and requested that the crucifix be removed. The applicants argued that the crucifix is a religious symbol with no cultural attribute.⁸¹³ However, even though Italy is a “secular” State, the ECtHR accepted the cross to be a religious symbol, but allowed schools to display it on the walls under the name of secularism or neutrality. The ECtHR did not deny the religious nature of the cross, but did not see it as a sufficient element to constitute indoctrination, thereby confirming the Protestant line of thought that symbols, although they are religious in nature, are indeed “deaf” and “dumb”.

The Grand Chamber of the ECtHR overruled the lower Chamber’s decision and held that the question of religious symbols in classrooms was, in principle, a

⁸¹¹ *Sahin v Turkey* at 116.

⁸¹² *Dogru v France*, Application No. 27058/05 at para 72.

⁸¹³ *Lautsi v Italy* (2011) at para 42.

matter falling within the margin of appreciation of the State, particularly as there was no European consensus as regards the presence of religious symbols. The ECtHR reverted to the principle of the margin of appreciation to recommend that the Italian public opinion or local consensus should be taken into consideration. This shows that “judges come to judgments relying upon a local consensus about religion.”⁸¹⁴

In the judgment of the ECtHR, the fact that crucifixes in State-school classrooms in Italy conferred on the country’s majority religion predominant visibility in the school environment was not in itself sufficient to denote a process of indoctrination. Moreover, in its view, “the presence of crucifixes was not associated with compulsory teaching about Christianity”,⁸¹⁵ and there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. It accepted that the cross was a religious symbol, yet it allowed schools to display it on the walls of the school.

The ECtHR considered the crucifix to be “essentially a passive symbol . . . particularly having regard to the principle of neutrality.” It was not “deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”⁸¹⁶ The Grand Chamber rejected the Chamber’s view that the cross was a “powerful external symbol,”⁸¹⁷ since the display of the crucifix was not accompanied by obligatory Christian teachings and proselytising.⁸¹⁸ It held that there was no evidence to show that the display of the cross on the wall may have any

⁸¹⁴ Jakob De Roover, *Europe, India, and the Limits of Secularism*, (Oxford University Press, 2016) 32.

⁸¹⁵ *Lautsi v Italy* (2011) at para 74.

⁸¹⁶ *Ibid.*, at 72.

⁸¹⁷ *Ibid.*, at 73.

⁸¹⁸ *Ibid.*, at 74.

influence on the students. There was no consideration of the possibility that a crucifix on the wall would lead students to question the significance and meaning of it or that this in itself could be a kind of proselytism and influence.

By contrast, in a different judgment regarding religious symbols, i.e. in *Sahin v Turkey*,⁸¹⁹ the ECtHR concluded that the headscarf represented a “powerful external symbol”, which “appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.”⁸²⁰

As Lorenzo Zucca points out, it is curious that the Grand Chamber did not believe that the crucifix, as a symbol, does have a sizeable impact on pupils.⁸²¹ Furthermore, it held that whether the crucifix has “any other meanings beyond its religious symbolism is not decisive at this stage.”⁸²² However, why would a symbol need any interpretation? A symbol as defined by Oxford English dictionary is “a thing that represents or stands for something else, especially a material object representing something abstract.”⁸²³ The cross is a clear visual reflection and visual influence of what it stands for.⁸²⁴ If the cross has no visual influence or if it is a passive symbol as the ECtHR claims, could it then be seen as a symbol that is neither false nor true with “no “moral rule” attached to it (the way, say, the fables of Aesop)”⁸²⁵ and with no reflective influence? Could the concept it resembles also be seen as neither true nor false? The ECtHR required the applicant to bring evidence

⁸¹⁹ *Leyla Sahin v. Turkey* (2005), Application no. 44774/98.

⁸²⁰ *Ibid.*, at 111. See also *Dahlab v Switzerland* (2001) No. 42393/98.

⁸²¹ Lorenzo Zucca, ‘Lautsi: a Commentary of the Grand Chamber Decision’ April 14, 2011 IJCL, electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809577

⁸²² *Lautsi v. Italy* at 66.

⁸²³ Definition of the word symbol in Oxford dictionary electronic copy available at <http://www.oxforddictionaries.com/definition/english/symbol>

⁸²⁴ Lorenzo Zucca, ‘Lautsi, ‘A Commentary of the Grand Chamber decision’ April 14, 2011 IJCL, electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809577

⁸²⁵ S.N. Balagangadhara, ‘Are Stories Symbols?’ March 23, 2011 available at <http://www.hipkapi.com/2011/03/23/are-stories-symbols/>

that the crucifix had a negative influence on her children, stating that “[t]here is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.”⁸²⁶

When comparing the *Lautsi* case with the *Dahlab* case, Jeroen Temperman observes that the ECtHR considers that:

“in the absence of proof to the contrary in cases involving state display of symbols (notably, crucifixes) in public schools, it may be assumed that the symbol has no adverse effects on the rights of others; whereas in the absence of proof to the contrary in cases involving the individual display of symbols (notably, Islamic headscarves) it may be assumed that the symbol does have adverse effects on pupils”.⁸²⁷

Jeroen Temperman observes that when the ECtHR refers to symbols as “passive”⁸²⁸ or “powerful”, it does so without any authoritative citation or evidence but by merely relying on “common sense”.⁸²⁹ Moreover Nicholas Gibson reveals the inconsistent approach taken by the ECtHR in the *Sahin* and *Dahlab* case on the one hand and the *Kokkinakis* case on the other hand. He states that the “mere wearing of religious attire is scarcely “improper””. He explains that, even if worn with the intent of proselytising, the wearing of the headscarf remains a passive act when compared to the “active coercion inherent in the examples of impropriety listed in *Kokkinakis*.”

⁸²⁶ *Lautsi v Italy* (2011) at para 66.

⁸²⁷ Jeroen Temperman (ed.), *Religious Symbols in the Public School Classroom, The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (BRILL/ Nijhoff, 2012).

⁸²⁸ *Lautsi and Others v. Italy*, para. 72.

⁸²⁹ *Ibid.*

Nicholas Gibson argues that even if a teacher wears the headscarf in the classroom this on its own is insufficient to cause "impropriety, as that would require "more active attempts by her to coerce or corrupt."⁸³⁰

When assessing the influence of the crucifix on children in the *Lautsi* case, one should not only question the potential influence of the symbol itself (as a passive symbol), but rather the message the State is sending by prescribing its display (as an active symbol). The ECtHR indirectly accepted the analysis of the Italian Administrative court which had decided as follows:

"The symbol of the crucifix, thus understood, now possesses, through its references to the values of tolerance, a particular scope in consideration of the fact that at present Italian State schools are attended by numerous pupils from outside the European Union, to whom it is relatively important to transmit the principles of openness to diversity and the refusal of any form of fundamentalism – whether religious or secular – which permeate our system."⁸³¹

The judgment is also an example of the ECtHR's understanding of what "proper proselytism" is as opposed to improper proselytism.⁸³²

By accepting that there was no violation of Article 9, the ECtHR also accepted that "[t]he cross, as the symbol of Christianity, can therefore not exclude anyone without denying itself; it even constitutes in a sense the universal sign of the

⁸³⁰ Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) C.L.J. 66(3) 657-697, 693.

⁸³¹ *Lautsi v Italy* (2011) at para 12.6.

⁸³² *Kokkinakis v Greece* (1993) 260 A ECtHR (ser. A) at para 48.

acceptance of and respect for every human being as such, irrespective of any belief, religious or other, which he or she may hold.”⁸³³

Recalling Balagangadhara’s framework, religion spreads either through proselytisation or by secularising itself. Consequently in order for religion to universalise and spread, it requires secularism that makes it lose its specific reference to a religion and eventually lose its specific character, which in this argument is Protestant Christianity. Accordingly, “secularisation would not mean the absence of religion, but occlusion of the specific religion that Christianity is, as part of its universalizing dynamic, and its spread in a non-religious guise.”⁸³⁴ The *Lautsi* case, therefore exemplifies an excellent model of such a process for “the ostensibly atheistic demand for the removal of the crucifix is really the iconoclasm at the heart of Christianity presented in secular form.”⁸³⁵

The ECtHR’s decision that the cross did not infringe the principle of neutrality, secularism and freedom of thought and conscience is an acceptance that the cross “constitutes in a sense the universal sign of the acceptance of and respect for every human being as such, irrespective of any belief, religious or other, which he or she may hold.”⁸³⁶ Moreover, it is an indirect acceptance that its presence is a sign of tolerance, equality and respect for all human beings irrespective of their beliefs, since the ECtHR clearly accepts that the presence of crucifixes in classrooms “made a legitimate contribution to enabling children to understand the national community in

⁸³³ *Lautsi v Italy* (2011) at para 13.3.

⁸³⁴ Prakash Shah, “Does Durkheim Enhance Our Understanding of Law and Religion’ Legal Studies Research Paper No. 212/2015 at p.4. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694566 (last accessed in March 2018).

⁸³⁵ *Ibid.*

⁸³⁶ *Ibid.*, at 13.4

which they were expected to integrate”⁸³⁷ as there was no sign to suggest that “the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.”⁸³⁸

The ECtHR also clearly accepted the analogy that the cross does not reject other faiths, since doing so would be a contradiction to the Protestant faith. However, nothing similar is said about other faiths, which also means that the ECtHR considers this similarity inapplicable to other religions. The ECtHR has clearly accepted the Italian court’s analysis that the presence of the cross in the classroom “when correctly understood, is not concerned with the freely held convictions of anyone, excludes no one and of course does not impose or prescribe anything.”⁸³⁹

Moreover, this acceptance can be read as a message from the ECtHR that Christianity is universal, since no one can exclude herself or himself, and all human beings are included in the message that the cross displays. The ECtHR also agrees that symbols relating to Christianity are universal symbols of respect and tolerance that do not convey any coercive or proselytising messages, even on children who are still developing their own non-religious or non-Christian views.⁸⁴⁰

By contrast, in *Dahlab v Switzerland* a Muslim schoolteacher was prohibited from wearing the headscarf whilst teaching. The ECtHR held that wearing a headscarf was contrary to the principle of tolerance which was employed as an additional argument for accepting the ban. This approach is highly problematic because by

⁸³⁷ *Lautsi v Italy* (2011) at para 39.

⁸³⁸ *Lautsi v Italy* (2011) at para 74.

⁸³⁹ *Lautsi v Italy* (2011) at para 14.1.

⁸⁴⁰ Stijin Smet, ‘Lautsi v Italy: The Argument from Neutrality’ March 22, 2011 available at <https://strasbourgobservers.com/2011/03/22/lautsi-v-italy-the-argument-from-neutrality/> (Last accessed in April 2018).

accepting that the headscarf is a sign of intolerance, the ECtHR is not only in danger of stigmatising the applicant herself as intolerant, but also numerous other women wearing the scarf.⁸⁴¹ Furthermore, as Judge Tulkens noted in *Sahin v Turkey*, “by accepting the applicant’s exclusion from university in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of those values can take shape and develop.”⁸⁴²

Tolerance is not some secular or philosophical doctrine, but a concept that is embedded in the Protestant theology. The discussions about tolerance emanated from the religious conflicts in Europe between the Protestants and the Catholics. According to the Protestant theology, there should be no human mediation between God and man. The Catholics, by contrast, claimed that the Church mediated between man and God because the Church was the body and bride of Christ. The Catholics held that the Church decided what proper faith is, whilst the Protestants held that the Holy Spirit inspired Christians in interpreting the message of God (that being the Bible, without the mediation of the Church).⁸⁴³ Religious symbols were viewed as idolatrous or the Devil’s worship. Accordingly, when the ECtHR refers to the headscarf as a sign of intolerance, it is getting involved in the same debate as that between the Protestants and the Catholics, and is viewing the headscarf as some kind of idolatry or iconoclasm.

⁸⁴¹ Ingvill Thorson Plesner ‘The European Court on Human Rights between fundamentalist and liberal secularism’ (Strasbourg Conference), available at <http://www.strasbourgconsortium.org/document.php?DocumentID=3849> [Accessed May 2014]

⁸⁴² *Leyla Sahin v. Turkey* [2005], Appl. no. 44774/98 at para 19.

⁸⁴³ S.N. Balagangadhara, ‘The Theology of Tolerance’ March 25, 2014 available at <http://www.hipkapi.com/2014/03/25/theology-of-tolerance/>

Idolatry identifies the practices that are forbidden from the practices that worship constitutes as obligatory, thus opening up the realm of the religiously permissible. “By filtering out such neutral or indifferent practices, the mechanism of idolatry creates a secular world that is now defined by Christian religion.”⁸⁴⁴ The ECtHR does not use terms such as “false religion” or “idolatrous practices”, but the conclusion is similar in cases where the ECtHR has to decide what counts as religion.⁸⁴⁵ It argues that certain practices or beliefs considered religious by some people are not truly religious, but actually concern personal preferences or secular issues that is, human inventions. Regarding the headscarf, what the ECtHR is actually saying is that the headscarf is not “truly” religious even though it looks that it is so. It is false faith. The suggestion also is that these practices are secular and wrongly viewed as religious so can therefore be regulated by State.

The problem therefore lies in the fact that disputes about whom or what is truly religious are viable only within the framework of a specific religion.⁸⁴⁶ When the ECtHR describes the headscarf as a powerful symbol that “appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality,”⁸⁴⁷ it is again trying to identify what qualifies as “true” practices of religion and what are thought to be “false” spiritual rules and coercive methods, which according to the Protestants infringe one’s freedom of conscience.

The notion of Christian liberty and freedom from spiritual laws is at the core of how the ECtHR interprets what constitutes the freedom of conscience. Humans

⁸⁴⁴ Jakob De Roover, ‘Secular Law and the Realm of False Religion’ in Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (eds) *After Secular Law* (Stanford University Press 2011).

⁸⁴⁵ Ibid.

⁸⁴⁶ Ibid.

⁸⁴⁷ *Leyla Sahin v. Turkey* [2005], No. 44774/98 See also *Dahlab v Switzerland* [2001] No. 42393/98.

could therefore legitimately resist any human laws which infringed upon their conscience and faith (in this case the false religious law or belief in wearing the headscarf). The spiritual kingdom should only be the place where God only rules. When human laws infringed upon faith and conscience, they could be resisted legitimately.⁸⁴⁸

While using “secular” language in its judgment in *Dahlab v Switzerland*, the ECtHR prohibited the headscarf and “legally” replicated the Protestant ideas that symbols (in this case the Hijab) are interfering between man and God and cannot be tolerated in a “secular” society. When the ECtHR identifies the cross in *Lautsi* as a “truly” religious symbol, although a passive one, it is introducing an implicit model of false religion that restructures traditions in society. The ECtHR in *Lautsi* explicitly rejected the fact that the crucifix is a powerful religious symbol while accepting in *Dahlab* that the headscarf is an immediate visible religious symbol that has a direct influence on pupils. It held that

“it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children . . . In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing, that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality

⁸⁴⁸ Jakob De Roover , PhD thesis at p. 111.

and non-discrimination that all teachers in a democratic society must convey to their pupils.”⁸⁴⁹

The ECtHR did not give a clear explanation as to why students in *Dahlab* may be more influenced and indoctrinated by religious symbols than students in *Lautsi*. The ECtHR could be seen, when also comparing *Dahlab* and *Sahin* to *Lautsi* and *Eweida*, as favouring particular symbols over others. With a slight ironic implication, the principle of neutrality has been applied to prohibit non-Christian symbols, but does not apply to ban majority symbols, or it may even be concluded that some symbols are more “neutral” than others.⁸⁵⁰ The ECtHR considers the cross and Christian religious symbols to be passive and therefore “deaf and mute”, much like the Protestant ideology on symbols. However, when it comes to symbols of other faiths, the ECtHR is more critical and views them as symbols that can easily indoctrinate and spread “false” images.⁸⁵¹ This is a similar interpretation of the Protestant ideology on iconoclasm.

Lourdes Peroni makes a very incisive observation on the *Dahlab* judgment noting that the ECtHR “backgrounds the applicant through nominalisation.”⁸⁵² She notices that the ECtHR suppresses the applicant by using the noun “the wearing of” the headscarf, instead of using the active verb clause “to wear”. This, Peroni says, objectifies the applicant’s action (wearing of the veil) and backgrounds her (the applicant). It therefore transforms the applicant (the agent) into a static entity. She

⁸⁴⁹ *Dahlab v Switzerland* Application No. 42393/98, 15 February 2001 at p.13.

⁸⁵⁰ Lorenzo Zucca, ‘Lautsi, ‘A Commentary of the Grand Chamber decision’ April 14, 2011 IJCL, electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809577

⁸⁵¹ See for example *Dahlab v Switzerzland* and *Leyla Sahin v Turkey*.

⁸⁵² Lourdes Peroni, ‘Religion and Culture in the Discourse of the European Court of Human Rights: the Risks of Stereotyping and Naturalising’, (2014) *International Journal of Law in Context* 10(2) 195-221, 202.

further notes that this language is not used when talking about the applicant's "victims", as they are not excluded from the text like the applicant.⁸⁵³ Peroni continues to explain that "by turning verbs into nouns, the Court linguistically creates a 'thing'. It suggests that 'the headscarf' has a real or tangible existence, external to that of the applicants. It gives 'the headscarf' a life of its own, while "denying the lives of the applicants."⁸⁵⁴ Thus the veil becomes a symbol and an entity, and it is evident that this entity (the veil) is not seen as similar to the cross (which was seen as a passive symbol in *Lautsi*) but has some active element in it that could improperly proselytise.

The ECtHR's decisions on the veil and other religious garments and symbols reflect Calvin's words that it was when the world began to delight in vests, garments and other material things, rather than seeking Christ in his Word, sacraments and spiritual graces asserts, that the first stage of the corruption into idolatry happened.⁸⁵⁵ Consequently, to put this in the context of the Protestant theology, it could be seen as illustrating the continuation of a post-Reformation struggle for iconoclasm, but one that is fought over through the secularised language of modern law, such as equality, gender inequality, discrimination, and respect for others. Similarly, in *Sahin v. Turkey*, it could also be said that the ECtHR viewed the veil as a powerful symbol capable of exerting pressure on students and 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

⁸⁵³ Ibid.

⁸⁵⁴ Ibid., at 203.

⁸⁵⁵ Jakob De Roover, 'A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought' (DPhil Thesis, University of Ghent 2005) 138.

a democratic society should convey to their pupils.”⁸⁵⁶ Maleiha Malik suggests that when the ECtHR invokes the gender equality, living together and other arguments, it is implicitly portraying religions other than Christianity, for example Islam, as “backward” and “barbaric” when compared with the Western culture.⁸⁵⁷

In *D. v France*,⁸⁵⁸ the applicant, a devout Jewish man, had refused to hand over the *Guett* (a divorce document) to his ex-wife in order to preserve his right to remarry his wife. The Commission noted that “that the applicant does not allege that in handing over the letter of repudiation he would be obliged to act against his conscience.”⁸⁵⁹ Furthermore, it argued that the “applicant would seem to be at variance on this point with the religious leaders under whose authority he claims to be acting.”⁸⁶⁰ Then the Commission found that “under Hebrew law, it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that *no man with genuine religious convictions* would contemplate delaying the remittance of this letter to his ex-wife.”⁸⁶¹ Accordingly, the Commission concluded that this refusal did not constitute the manifestation of religious observance or practice and declared the complaint manifestly ill-founded.

The ECtHR in this judgment required the applicant to be in compliance with religious leaders in order to be entitled to the protection granted by Article 9. This approach clearly places at a disadvantage those who do not adhere to all doctrinal

⁸⁵⁶ *Sahin v Turkey* at para 111.

⁸⁵⁷ Maleiha Malik, The “Other” Citizens: Religion in a Multicultural Europe, in *Law, State and Religion In the New Europe: Debates And Dilemmas* 93, 112 (Lorenzo Zucca & Camil Ungureanu eds. 2012).

⁸⁵⁸ *D. v France*, App. No. 10180/82, 35 (1983) Eur. Comm’n H.R. Dec. & Rep. 199.

⁸⁵⁹ *Ibid.*, at p. 202.

⁸⁶⁰ *Ibid.*

⁸⁶¹ *Ibid.* (emphasis added).

prescriptions of a particular religion.⁸⁶² The ECtHR also questions the authenticity of the applicant's religious convictions as it considers that a man with genuine convictions would not "behave" in the way the applicant did. Furthermore, it shows that the ECtHR's narrow construction of the "manifestation" of religion fits with an understanding of religion as "a set of theological propositions" as opposed to "a particular way of living."⁸⁶³

Furthermore in *Cha'are Shalom Ve Tsedek v. France*⁸⁶⁴, the applicants' organisation wanted to follow its own ritual in slaughtering while using the strictest method. The ECtHR claimed that authorisation for ritual slaughter was already granted to an organisation which was supposed to be broadly representative of the Jewish community in France. Applicants could still eat Kosher meat and the meat did not differ much from that of "*glatt*" meat (which could be obtained from Belgium) and the applicants could not establish that they were unable to obtain this kind of meat from Belgium or elsewhere.

The ECtHR held that the right to freedom of religion guaranteed by Article 9 of the Convention could not "extend to the right to take part in person in the *performance of ritual slaughter* and the subsequent certification process."⁸⁶⁵ It considered this ultra-orthodox category of Jews through the lens of the dominant Jewish religion. Furthermore it stated that the practice of only consuming Kosher meat was required by Judaism as enshrined in the Doctrines and the Torah.

⁸⁶² See also Carolyn Evans, *Freedom of Religion Under the European Convention of Human Rights* (Oxford University press, 2001) 122

⁸⁶³ Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search For a Guiding Conception' in M Janis and C Evans (eds), *Religion and International Law* (The Hague, 1999), 385, 395

⁸⁶⁴ *Cha'are Shalom Ve Tsedek v. France* ECtHR, Application no. 27417/95 (2000).

⁸⁶⁵ *Ibid* at 82 (emphasis added).

The ECtHR did not contest that that ritual slaughter “constitutes a rite ... whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion.”⁸⁶⁶ It held that there would have been an infringement of the applicant’s freedom of 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,”⁸⁶⁷ which was decided not to be the case. The interference was seen as prescribed by law and perused a legitimate aim namely the “protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance.”⁸⁶⁸ Accordingly, the ECtHR ruled that there was no violation of Article 9.

The ECtHR has considered the applicant’s method of slaughter a “ritual performance”, where the “only difference lies in the thoroughness of the examination of the slaughtered animal's lungs after death”;⁸⁶⁹ a difference which evidently the ECtHR regards as not of any importance or is of minimal significance. It is thus clear that the ECtHR favoured a highly textualised and doctrinal approach to rituals performed by the applicants.

Silvio Ferrari suggests that the ECtHR “has some problems in understanding the conceptions of religion which stress the elements of identity and practice over

⁸⁶⁶ Ibid., 73.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ibid., 84.

⁸⁶⁹ Ibid., 79.

those of freely chosen belief.”⁸⁷⁰ Furthermore, Nomi Maya Stolzenberg notes that “[t]here is good reason to be concerned that the model of religion as conscience, which relies on the basic distinction between practice and belief, privileging the latter over the former, threatens to give short shrift to religious practices and institutions.”⁸⁷¹ The ECtHR refers to the “non-essential” element of a certain practice when considering the “manifestation of religion” and is in favour of the conventional or Protestant logic that material requirements to manifest a religion can be restricted without causing any interference with the applicant’s real beliefs. By focusing on the *forum internum* at the expense of material manifestation of a tradition the ECtHR fails to take into account that a particular religion or more specifically a tradition can be something grounded in experience and matter and not merely something immaterial. It seems that to qualify for the protection accorded under Article 9, the applicant ought to have demonstrated immaterial concepts to accessing the divine.⁸⁷²

6.6.1 The Protestant Understanding of Symbols

The above examples show that the ECtHR remains within the boundaries of theological explanations as to what freedom of religion entails and there seems to be no accommodation of traditions that fall outside a doctrinal or theological scope. It appears that manifestations of belief that are doctrinally mandated attract protection under Article 9 of the ECHR as opposed to religious manifestations that

⁸⁷⁰ Silvio Ferrari, The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law, in THE LAUTSI PAPERS: Multidisciplinary Reflections On Religious Symbols In The Public School Classroom 13 and n.2 (Jeroen Temperman, ed., 2012) 33.

⁸⁷¹ Nomi Maya Stolzenberg, ‘Theses on Secularism’ (2010) SDLV 47 1041, 1065.

⁸⁷² Saïla Ouald Chaib, Gatis Kovalkovs v. Latvia: The Strasbourg Court keeps the door to reasonable accommodation open March 15 2012 avaliable at <http://strasbourgobservers.com/2012/03/15/gatis-kovalkovs-v-latvia-the-strasbroug-court-keeps-the-door-to-reasonable-accommodation-open/>)

are not based on doctrinal mandates.⁸⁷³ Protestantism attempted to transform a community into a “pure Christian church” by eliminating iconoclasm. For it believed that the use of symbols, relics images, and items of worship were material of the temporal world.⁸⁷⁴ In just the same way as Christians rejected the practices of the pagans as idolatrous, Reformists did the same with the Roman Catholics and labelled their practices as idolatrous. They viewed them as the pagans of the sixteenth and seventeenth centuries. The established doctrinal boundary (through ecclesiastic law) set by the Reformists allowed them to determine which practices and beliefs were idolatrous and harmful to religion; other practices were acknowledged as indifferent to religion. Church laws therefore had to distinguish between truly religious acts and idolatrous ones.

Going back to the arguments in *Lautsi* above for example, these reveal a similar approach to that of the Protestants and Catholics in the sixteenth century and disclose the on-going clash of iconoclasm. Although the ECtHR does not use the term idolatry, in its view there was “no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils,”⁸⁷⁵ and that “a crucifix on a wall is an essentially passive symbol”.⁸⁷⁶ According to the Protestant theology, symbols are not considered to interfere with the conscience of the believers. Symbols are mere passive objects that have no actual influence on “true” Christians. The ECtHR’s opinion of the cross as a mute symbol bears a striking similarity to the description by the iconoclast and German Protestant Reformer

⁸⁷³ Mark Hill, *Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v United Kingdom*, (2013) ELJ 15(2).

⁸⁷⁴ Jakob De Roover PhD Thesis p.135

⁸⁷⁵ *Lautsi and Others v Italy* at para. 66.

⁸⁷⁶ *Ibid.*, at 72.

Andreas Karlstadt of religious art as “deaf and dumb”. Karlstadt argued in 1522 that, “since images are deaf and dumb, can neither see nor hear, neither learn nor teach and point to nothing other than the pure and simple flesh which is of no use, it follows conclusively that they are of no use.”⁸⁷⁷

Although one may suspect that the Catholic faith did indeed benefit from the decision of keeping the cross on the wall in the classroom, this could be debated otherwise. According to Catholics, religious symbols and statues are not dead and mute (passive); on the contrary, they are “power and presence”.⁸⁷⁸ Symbols and statues could, heal, bleed, and even cry. Consequently the view of the cross could potentially break “just as many sensory boundaries as the sound of Mr. Austrianu’s audio tapes or the aroma of Mr Kovalkovs’ incense.”⁸⁷⁹

Although the ECtHR protected the Catholic symbol in the Italian school, it only did so by interpreting the concept of the cross in such a way as to declare it passive and mute therefore unable to have an influence on the students, thus applying the Protestant theology which does not object to the use of symbols as such, but rather objects to the ideology and faith associated with it.

In *Eweida v UK* a broader understanding of “manifestation” was adopted by the ECtHR. The applicant, a Coptic Christian and a British Airways employee, complained that her rights under Article 9 were infringed as she was prohibited by her employers to wear a necklace displaying a visible cross. The UK government

⁸⁷⁷ Andreas Karlstadt, ‘On the removal of images’ in Bryan Mangrum and Giuseppe Scavizzi (eds), *A Reformation Debate: Karlstadt, Emser and Eck on sacred images*, trans B Mangrum and G Scavizzi (Toronto, 1991; first published 1522), pp 19-39 at p 25. Electronic copy available at <http://warburg.sas.ac.uk/mnemosyne/fq/karlstadt.pdf> (Last accessed September 2015)

⁸⁷⁸ Jon Mitchell, ‘Performing Statues: the Presence and Power of Catholic Saints’ in D Morgan (ed), *Religion and Material Culture: the Matter of Belief* (London, 2010), 262–276, 266.

⁸⁷⁹ Meadhbh McLvor ‘Carnal exhibitions: material religion and the European Court of Human Rights’, (2015) *Ecc. L.J.* 17(1), 3-14, 9

found that since the applicant wore the cross as “a personal expression of faith”⁸⁸⁰ and not because it was a “generally recognised form of practising the Christian faith,”⁸⁸¹ this did not fall under Article 9. The ECtHR rejected the argument and noted that “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.”⁸⁸² Although the ECtHR’s understanding of the type of acts that fall under Article 9 is broader than the one taken by the UK government, the ECtHR added that a “sufficiently close and direct nexus between the act and the underlying belief”⁸⁸³ is required. This implies that if they are not viewed as external proof as to what is considered the core of religion (i.e. belief), then the use of religious objects will not be protected. It could also be argued that the ECtHR has found the cross to be a discrete,⁸⁸⁴ and therefore a passive symbol of faith that causes no harm, indoctrination or proselytising effect. Lourdes Peroni observes that this line of thought and approach by the ECtHR shows that the ECtHR privileges belief over practice and that the manifestation of a belief cannot exist prior to the internal belief.⁸⁸⁵

The *Eweida* judgment also shows that it was quite easy for the applicant to prove the connection between her underlying belief and the religious object. This is illustrated in the ECtHR’s finding that “there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in

⁸⁸⁰ *Eweida and Others v UK*, at para 58.

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.*, at 82.

⁸⁸³ *Ibid.*

⁸⁸⁴ *Ibid.*, at 94.

⁸⁸⁵ Lourdes Peroni, ‘Deconstructing “legal” religion in Strasbourg’, (2014) *Oxford Journal of Law and Religion* 3 235-257, 255.

question.”⁸⁸⁶ For many religious people outside the Protestant faith, religion or a tradition is more about doing certain rituals and acts that do not require doctrinal statements and creeds, and which do not in turn necessarily have an easy explanation of the meaning of the act or the religious symbol. As Meadhbh Mclvor notes, “as such, a restriction of protection to objects which have a definite basis in belief may end up benefiting some religious forms over others.”⁸⁸⁷

6.7 Beyond the Living Together Argument: Why is the Face so Important?

There is an on-going debate in Europe about the covering of the face with the Niqab or Burqa, as well as the headscarf (although not as controversial as the Niqab or Burqa). In the previous section it has been demonstrated that the ECtHR favours orthodoxy over orthopraxy and thus has a Protestant-biased approach. Furthermore, the Protestant line of thought was further adopted so as to consider the veil a continuation of the post-Reformation struggle for iconoclasm, fought over through the secularised language of modern law. In this part, the Protestant backdrop to the importance of the face is considered.

In *S.A.S v France*,⁸⁸⁸ the applicant, a Muslim French national of Pakistani origin, challenged the French law which imposed a blanket ban on concealing one’s face in public. She complained that this ban on the face veil prevented her from manifesting her faith and interfered with and infringed her rights under Article 9.⁸⁸⁹ The applicant mentioned that she was “content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so, depending in

⁸⁸⁶ *Eweida and Others v. The United Kingdom* at para 30.

⁸⁸⁷ Meadhbh Mclvor, ‘Carnal exhibitions: material religion and the European Court of Human Rights’ (2015) *Ecc. L.J.* 17(1), 3-14. 11.

⁸⁸⁸ *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014)

⁸⁸⁹ The applicant also complained that the ban infringed her rights under Articles 3, 8, 10, 11 and 14.

particular on her spiritual feelings.”⁸⁹⁰ The applicant further added that she agreed to remove the veil while going through security or identity checks, airports and banks.⁸⁹¹

The French government argued that the ban protected public safety and ensured “respect for the minimum set of values of an open and democratic society”. The latter underpins the principle of respect of human dignity and gender equality, and “respect of the minimum requirements of life in society”⁸⁹² which is also called the living together concept of “le vivre ensemble”. The ECtHR held that there had been no violation of Article 9. With respect to legitimate aim it found that that “under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government – or of “living together”... can be linked to the legitimate aim of the “protection of the rights and freedoms of others”.⁸⁹³

The French government doubted “the seriousness of the consequences of the ban for the applicant, given that she had admitted to refraining from wearing such a veil in public when it would raise practical obstacles, in the context of her professional life or when she wished to socialise, and had said that she wore it only when compelled to do so by her introspective mood, her spiritual feelings or her desire to focus on religious matters.”⁸⁹⁴

The French government also submitted that the restriction of the applicant’s right and the ban was justified on grounds of public safety and “respect for the

⁸⁹⁰ *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014) at para 12.

⁸⁹¹ *Ibid.*, at 13.

⁸⁹² *Ibid.*, at 121.

⁸⁹³ *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014) at para 121.

⁸⁹⁴ *Ibid.*, at 53.

minimum set of values of an open and democratic society,”⁸⁹⁵ and that the grounds for a democratic society entail: gender equality, human dignity and “respect for the minimum requirements of life in society” or in other words “living together”.⁸⁹⁶

The ECtHR dismissed the arguments based on gender equality, human dignity and safety and acknowledged the harm the ban could have on Muslim women.⁸⁹⁷ However, it upheld the ban as a proportionate measure within the State’s margin of appreciation to achieve the objective of living together in society. At the heart of most debates in Europe concerning the face veil, Muslim women who wear a full face veil have been negatively stereotyped as being oppressed and in need of protection.⁸⁹⁸ Furthermore, the gender equality debate usually succeeds by revealing the veil to be a “symbol of patriarchal authority and of female subservience to men,”⁸⁹⁹ and an assault on women’s dignity.”⁹⁰⁰ Although the ECtHR did not accept the French government’s argument in *S.A.S. v France* that the veil amounts to gender equality, it did however accept that the veil is a barrier to the notion of living together. It ruled that 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.”⁹⁰¹

⁸⁹⁵ Ibid., at 82.

⁸⁹⁶ Ibid., at 77, 116, 121.

⁸⁹⁷ Ibid., at 139, 146, 152.

⁸⁹⁸ Lourdes Peroni, ‘Religion And Culture In The Discourse Of The European Court Of Human Rights: The Risks Of Stereotyping and Naturalising’, (2014) *International Journal of Law in Context*, 10(2), 195-221, 217.

⁸⁹⁹ Ralph Grillo and Prakash Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe*. MMG Working Paper 12-05, Max Planck Institute for the Study of Religious and Ethnic Diversity (2012), Available at: www.mmg.mpg.de/workingpapers (Last accessed September 2017) p.27.

⁹⁰⁰ Ibid.

⁹⁰¹ Ibid., at 122 and 141

In the debates concerning the ban that occurred in France, the concept of the “*vivre ensemble*” is strongly linked to the Republican principle of “*fraternité*” (brotherhood). The concept of seeing the face of others was put forward as a moral right,⁹⁰² and the face veil “represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of living together (le “*vivre ensemble*”).”⁹⁰³

The French government argued before the ECtHR that more than any other part of the body, the face plays a significant role in human and social interaction. It reflects one’s shared humanity with the interlocutor at the same time as one’s otherness and expresses the existence of the individual as a unique person. The effect of concealing one’s face in public places is to break the social tie and to manifest a refusal of the principle of living together.⁹⁰⁴ This, as Eva Brems notes, is a “curious combination of concrete behavioural concerns (the role of the face in human interaction) and a highly theoretical perspective”⁹⁰⁵ which she says is not supported by empirical evidence.

Stephanie Berry observes that the “living together” concept in the *S.A.S v France*, case pursues a “distinctly assimilationist agenda”, which risks that the majority will be permitted to dictate that minorities assimilate “instead of pursuing the more integrationist aims of “pluralism, tolerance and broadmindedness.”⁹⁰⁶ Vickers further maintains that “living together” is “one of the weakest legitimate

⁹⁰² Eva Brems, ‘S.A.S. v France: A Reality Check’, (2016) *NLJ* 25 1-16, 11 available at SSRN: <https://ssrn.com/abstract=2810221>

⁹⁰³ *S.A.S v France* at 17.

⁹⁰⁴ *S.A.S v France* at 82.

⁹⁰⁵ Eva Brems, ‘S.A.S. v France: A Reality Check’, (2016) *NLJ* 25 1-16, 11 available at SSRN: <https://ssrn.com/abstract=2810221>

⁹⁰⁶ Stephanie Berry, ‘S.A.S. v France: Does Anything Remain of the Right to Manifest Religion?’, *EJIL: Talk*, 2 July 2014.

aims" identified under the ECtHR given that the majority in *S.A.S v France* were involved in "a careful and well evidenced demolition of the standard arguments in favour of banning the veil".⁹⁰⁷ Eva Brems argues that "living together reflects the fundamental unease of a large majority of people with the idea of an Islamic face veil, and the widespread feeling that this garment is undesirable in our society".⁹⁰⁸ She also contends that the "right of others to live in a space of socialisation which makes living together easier" could pave the way to the coercive imposition of majoritarian preferences about how others should live.⁹⁰⁹

Further insight can be gained by examining the link between the ECtHR's ideas on the importance of the face in Christian and consequently Protestant theology.⁹¹⁰ In the Bible, the importance of the face is mentioned several times and in various verses. It is stated that God created man in the best image (in his image) and that "My heart says of you, *Seek his face, Your face, Lord, I will seek.*"⁹¹¹ Furthermore, the Bible notes "we all, *who with unveiled faces* contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit."⁹¹² Another verse from Corinthians illustrates the importance of the face: "For God, who said, Let light shine out of darkness, made his

⁹⁰⁷ Lucy Vickers, "Conform or Be Confined: *S.A.S. v France*", *Oxford Human Rights Hub*, 8 July 2014.

⁹⁰⁸ Eva Brems, "*S.A.S. v France* as a Problematic Precedent", *Strasbourg Observers*, 9 July 2014.

⁹⁰⁹ *Ibid.*

⁹¹⁰ Bernard Ramm, *Protestant Biblical Interpretation: A Textbook of Hermeneutics* (Baker Book House, 1970) 48.

⁹¹¹ The Bible: Psalm 27:8.

⁹¹² The Bible: 2 Corinthians 3:18 (emphasis added).

light shine in our hearts to give us the light of the knowledge of God's glory displayed in the face of Christ."⁹¹³

On the concept of living together, equality, brotherhood and agape, the Bible is also very clear. In the book of Romans, it states "May the God of endurance and encouragement grant you to *live in such harmony with one another*, in accord with Christ Jesus, that together you may with one voice glorify the God and Father of our Lord Jesus Christ. Therefore, *welcome one another as Christ has welcomed you*, for the glory of God."⁹¹⁴ Further the Bible requests people to love one another,⁹¹⁵ live in harmony with one another,⁹¹⁶ *show hospitality to one another*,⁹¹⁷ *be likeminded towards one another*,⁹¹⁸ *submit to one another*,⁹¹⁹ *serve one another*,⁹²⁰ *and be devoted to one another*.⁹²¹ Relating this language and concepts to the *S.A.S. v France* case, one could easily see similar, if not identical, line of thought and language used by the ECtHR whereby it considers the veil as a barrier to the "living together" and notes that "the face plays an important role in social interaction"⁹²² without substantial evidence.

6.8 Conclusion

In this chapter, it was demonstrated that Abrahamic religions easily fall within the concepts, terms and definitions of religion set by the ECtHR. However, it was argued that even amongst applicants before the ECtHR considered to be religious

⁹¹³ The Bible: 2 Corinthians 4:6.

⁹¹⁴ The Bible- Romans 15:5-7 (emphasis added).

⁹¹⁵ The Bible- John 13:35.

⁹¹⁶ The Bible- Romans 12:16 (emphasis added).

⁹¹⁷ The Bible 1 Peter 4:9 (emphasis added).

⁹¹⁸ The Bible- Romans 15:5 (emphasis added).

⁹¹⁹ The Bible- Ephesians 5:21, 1 Peter 5:5 (emphasis added).

⁹²⁰ The Bible- Galatians 5:13 (emphasis added).

⁹²¹ The Bible-Romans 12:10 (emphasis added).

⁹²² *S.A.S. v France* at para 122.

such as Muslims, Jews and other Christians there is a bias towards the Protestant faith. By dividing the case law in three groups (other Christians, other Abrahamic and Non-Abrahamic) it was possible to examine the influence of Protestantism on the three denominations separately. It was proven that distortions occur in all claims to religious freedom before the ECtHR but occur more strongly the further away a culture is from the idea of religion presupposed within Article 9 ECHR. A fresh analysis of the case law including religious symbols was offered and judgments concerning Muslims, mainly concerning the wearing of the headscarf (hijab), was included to demonstrate that judgments in these cases are a continuation of the post-Reformation struggle for iconoclasm, fought over through the secularised language of modern law. It has been argued that the Western legal systems have backdrops of Christian theological concepts that have spread through the process of secularisation. As a result, non-Christian religions are being “freed” from their character as false or idolatrous (pagan) religions prior to entering the sphere of the secular Western law. The case law has shown that there is a considerable amount of pressure placed on Muslims to abstain from undertaking “idolatrous” practices. As a result, Muslims are obliged to justify their practices by doctrinal evidence and where this proves difficult, they in turn have to “expunge their cultures of idolatrous elements, exacerbating a tendency that is already latent within the Islamic tradition”.⁹²³

It has also been proved that Article 9 in its present format and the ECtHR judgments are biased in favour of the Protestant theology. The two kingdoms of Luther, the private realm of the conscience and the public realm of the (sinful) body,

⁹²³ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75, 63.

are reflected today in the split between the assertion of religious freedom in Article 9(1) ECHR and the limitations expressed in Article 9(2) ECHR and are therefore the benchmark from which the judicial interpretations and decisions by the ECtHR are taken. No matter how wide or narrow the scope of practice or manifestation is, it is still interpreted by the ECtHR using the assumption that all cultures have religion and that this includes the teaching and dictates of one's religion and not of one's tradition. The ECtHR does not take into account that some cultures may not have religion or that some traditional practices do not fall within the scope of protection without distortions taking place so that those cultures and traditions fit into the religious Protestant framework of Article 9. The belief-based, doctrinal Protestant approach to religion that the ECtHR follows is challenging for applicants who are unable to demonstrate an adequate link between the use of a religious object and their underlying religious beliefs or traditions. Whilst the connection was easily made in *Eweida v UK*, it was dismissed in *Jones v UK*, where the ECtHR held that placing a photograph on the applicant's daughter's grave was not a practice of religion. Furthermore, if one goes back to the *Lautsi* case it is clear that the "ostensibly atheistic demand for the removal of the crucifix is really the iconoclasm at the heart of Christianity presented in secular form."⁹²⁴

⁹²⁴ Prakash Shah, 'Does Durkheim Enhance Our Understanding of Law and Religion' Legal Studies Research Paper No. 212/2015 at p.9. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694566 [last accessed in January 2016].

Chapter 7

Conclusion

In this thesis it was argued that the current framework as well as the judicial interpretations and applications of Article 9 ECHR, are biased in favour of the Christian Protestant view. Taking into account Balagangadhara's theory on religion as an explanatory intelligible account of the cosmos and itself, it has been shown that religion cannot be a universal in all cultures and should be treated as a phenomenon in the world. Consequently Balagangadhara's theory allows one to consider a type of cultural diversity according to which some cultures have religion while others do not. This further raises the question as to what happens when different cultures come under a legal system that is heavily influenced by Protestantism.

The framework for studying religion in the Western culture derives from a Protestant background, even in the realm of comparative religion. Religion does not exist in all cultures and the assertion that all cultures have a religion, an idea which has also been adopted and elaborated within the human sciences, is itself a claim of Protestant theology, albeit since secularised.⁹²⁵ This had a great influence on Western legal systems in general and Article 9 of the European Convention on Human Rights in particular. It was demonstrated in this thesis that the format in which Article 9 ECHR was drafted, interpreted, and applied, is influenced by Protestant theology. The two kingdoms of Luther, the private realm of the conscience and the public realm of the (sinful) body, are reflected today in the split

⁹²⁵ See section 2.5 in this thesis.

between the assertion of religious freedom in Article 9(1) ECHR and the limitations expressed in Article 9(2) ECHR and are the benchmark from which the judicial interpretations and decisions by the ECtHR are made.

Judgments in the ECtHR disfavour non-Christians in general and non-Protestants in particular. The interpretation and application of Article 9 by the ECtHR requires applicants to distort their traditions and customs while using a secularised language, and to present their practices as “false” religions. The belief-centred approach that the ECtHR takes explains how manifestations, such as wearing particular clothes, are seen as “symbols” exemplifying beliefs, leaving open various interpretations as to what these “symbols” represent. This makes it difficult for people outside the conventional European understanding of religion and religious practice to make sense of Article 9 without having to distort themselves to fit into the current system, which has a Protestant theological backdrop. This leads to a situation where customs and traditions are recognised in the ECtHR if and only if the majority, which in the West happens to be heavily influenced by the Protestant line of thought, approves of such recognition. Consequently this also dictates the way through which recognition is applied.

If it is accepted that some cultures do not have religion, it follows that they do not have a claim to religious freedom under the framework of Article 9. While this might prevent some cultures from obtaining the protection of Article 9, it could be defended on the ground that treating them as having religion merely distorts their character and presents a false picture of reality.

The ECtHR recognises freedom of religion to be a vital aspect of human lives

and one of the foundations of a “democratic society”. However, this right is not absolute and manifestations can be limited or restricted by States provided that good reasons are provided. Furthermore, it tends to protect more firmly “the cerebral, the internal and the theological ... dimensions of religion and belief”, while paying less attention to “the active, the symbolic and the moral dimensions”.⁹²⁶ Furthermore, it is noted that “underlying the Court's case law is the idea that religion is primarily an inward feeling; a “matter of individual conscience”.⁹²⁷ Many of the judgments of the ECtHR show that Christian Protestant applicants, and those individuals from religions who can rely on doctrinal proofs for their beliefs, are more difficult to restrict and easier to interpret than those who base their beliefs, thoughts or traditions on practices rather than doctrines. Such examples range from confiscating religious audio tapes and a cassette tape player, which the ECtHR considered as being not essential to manifesting a religion,⁹²⁸ to removing incense sticks and massage oils from an applicant’s prison cell where again the ECtHR again deemed these as not essential for the manifestation of belief.⁹²⁹ Other applicants have had to prove that a certain tradition is a religion in order to qualify for the protection of Article 9.⁹³⁰ In this thesis it has been proved that there is only a limited place for non-Abrahamic tradition(s) and non-Protestant beliefs under Article 9.

The ECtHR faces an immense challenge if it were to cultivate a pluralistic

⁹²⁶ Carolyn Evans, ‘Religious Freedom in European Human Rights Law: The Search For a Guiding Conception’ in M Janis and C Evans (eds), *Religion and International Law* (The Hague, 1999), 396

⁹²⁷ *Ibid.*, at 396. See also Julie Ringelheim, ‘Rights, Religion, and the Public Sphere: the European Court of Human Rights in Search of a Theory?’, in L Zucca and C Ungureanu (eds), *Law, State and Religion in the New Europe: debates and dilemmas* (Cambridge, 2012), 293 (the quotation is taken from *97 members of the Gldani Congregation of Jehovah Witnesses v Georgia*, Application no 71156/01 (ECtHR, 3 May 2007) (2007) 46 EHRR 613 at Para 130).

⁹²⁸ *Austrianu v. Romania*, Application no. 16117/02 (2013).

⁹²⁹ *Kovalkovs v Latvia* Application no. 35021/05 (2012) ECtHR 280 (ECHR).

⁹³⁰ *X. v. United Kingdom*, Application No. 7291/75 (1977).

ethos as this seems impossible to attain under the present wording and interpretations of Article 9 given it is only through the prism of “religion’ that non Abrahamic traditions are viewed. One possible solution may be to redraft Article 9 in light of the current pluralist and diverse society that Europe has become so that it includes traditions as a phenomenon separate from religion and drop the “universalistic” reference to religion. But this is highly unlikely given the political, historical, social and economic contexts that religion is associated with.

Article 9 in its present format is unable to offer strong protection to the “traditions” of the non-Abrahamic applicants. The assessment of the claims from non-Abrahamic applicants should not be defined by presupposed Christian parameters such as doctrines, beliefs and books, but rather by the tradition itself that does not necessarily refer to beliefs, doctrines and texts. As Maleiha Malik says, “[r]eligion . . . needs to be categorised within a wider frame than religion and belief.”⁹³¹

It has also been proved in this thesis that Article 9 and accompanying jurisprudence results in discrimination against non-Abrahamic, other Abrahamic and other Christian religions. Even though human rights law can accommodate in various ways diverse religions and tradition it only does so through the predetermined ideas and concepts that were developed by the secularisation of Christian liberty through its Protestant lineage.⁹³² Hence despite secularisation, Protestantism becomes the

⁹³¹ Maleiha Malik, ‘The “Other” Citizens: Religion in a Multicultural Europe’, in *Law, State and Religion In the New Europe: Debates And Dilemmas* 93, 95-96 (Lorenzo Zucca & Camil Ungureanu eds., 2012).

⁹³² Jakob De Rover and S.N. Balagangadhara, *Liberty, Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India* 30 *History of Political Thought* (2009), 111-139.

benchmark from which other faiths and denominations are understood, as well as the criterion by which judicial interpretations and decisions by the ECtHR are made.

This Protestant background, whether directly or indirectly, sets the terms for what is required to protect non-Christian and other Christians religions as well as non-Abrahamic traditions. Non-Abrahamic traditions are viewed as a variant of religion or some “kind” of religion, which is also set by Protestant thought. As shown in this thesis, the ECtHR constantly refers to beliefs, doctrines and texts when assessing Article 9 claims. Protestantism therefore becomes the prototype form of assessment while other non-Abrahamic traditions become its variant. Moreover, there has emerged a new dynamic between the secular and the religious whereby non-Abrahamic traditions are not referred to as idolatrous or embodiment of false religions but what was false or idolatrous is now referred to in the secular world as “violators of human rights law, gender equality and the rule of law.”⁹³³

The ECtHR’s decisions on the veil and other religious garments and symbols reflect Calvin’s words that it was when the world began to delight in vests, garments and other material things, rather than seeking Christ in his Word, sacraments and spiritual graces asserts, that the first stage of the corruption into idolatry happened.⁹³⁴ The ECtHR continues to marginalise orthopraxy, symbols and the sensory (sight) requirements for religious beliefs and practices⁹³⁵ and still requires the “believer” to abolish objects, which is a clear expression of Protestant theology.

⁹³³ Prakash Shah, ‘In pursuit of the Pagans: Muslim law in the Legal Context’ (2013) JLP 45(1) 58-75, 58.

⁹³⁴ Jakob De Roover, ‘A Kingdom of Another World: Christianity, Toleration and the History of Western Political Thought’ (DPhil Thesis, University of Ghent 2005) 138.

⁹³⁵ See *S.A.S. v France* Application No. 43845/11 (ECtHR Judgment of 1 July 2014), *Dahlab v. Switzerland* Application no.42393/98, (Dec) ECHR 2001-V, (inadmissible), *Lautsi v Italy* (language used to interpret the presence of the crucifix), *Leyla Sahin v. Turkey* [2005], Appl. no. 44774/98, *Austrianu v. Romania*, Application no. 16117/02 (2013) (confiscation of religious tapes- Inadmissible)

The description of the cross for example as a mute and passive symbol in the *Lautsi* case is reminiscent of sixteenth century iconoclastic language. Orthodoxy or a dogmatic/belief-centred approach (doctrines and beliefs) remains crucial in assessing claims in the ECtHR as opposed to orthopraxy or a practice-centred approach (objects and practices based on tradition rather than doctrines). By focusing merely on belief, texts and doctrines in considering issues of religion the ECtHR is “culturally dependent on 1700 years of Christian history, so ingrained as to be invisible.”⁹³⁶ This does not require the deconstruction of human rights given Protestant origins. What is necessary is a concept of religion which abandons the pretentious claim of universality.

⁹³⁶ Aaron R. Petty, ‘Religion, Conscience, and Belief in the European Court Of Human Rights’, *The Geo. Wash. Int’l. L. Rev.* 2016 (48), 807, 850.

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