

Religious Autonomy in the ECHR ¹

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INTRODUCTION

The European Court of Human Rights (ECtHR) has often been criticized for its lack of a concept that would clarify its approach to freedom of religion. This lack of clarity has contributed to freedom of religion being a relatively weak right. This is evident in the Courts inconsistent case law, and its inconsistent theoretical reasoning, in cases dealing with individual or collective freedom of religion. However, the European Convention on Human Rights (ECHR) is called upon to defend the inalienable freedom of religion or belief and perhaps to set a standard of protection for national authorities. One who is required to set a standard needs to have an idea of what the standard is. It is argued in this article that while the concept of freedom of religion or belief itself is opaque and difficult to define, the right to religious freedom must contain certain basic factors – most importantly the right to religious autonomy. By explicating these factors, it is hoped to create a framework which allows the ECtHR to decide religious freedom cases in a more consistent and robust manner than it has done so far. It is argued that the ECtHR should explicitly recognise the right to religious autonomy. It is also suggested that principles of pluralism, neutrality and effective protection (developed by the Court itself), when adequately applied, ought to support the idea of religious autonomy and religious autonomy as a positive right attracting positive duties to provide for religious needs.

The following will not discuss the case law of the ECtHR in detail. Considering the limits of this article only the general framework and main principles determining the right to religious autonomy will be discussed.

THEORETICAL BACKGROUND

The centrepiece of human rights talk and human rights law today is the idea (or ideas) of equal worth, dignity and autonomy of every human being. There is a certain amount of

¹ This article is based on the author's doctoral dissertation at the University of Oxford.

ambiguity and variance in the understanding of philosophical ideas of autonomy, dignity and equality. However, these ideas are interlinked and captured (together with their ambiguity) in the international and regional human rights instruments. For example, the preamble of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief postulates that ‘one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings’.² It establishes further that ‘religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life’.³ Individual autonomy is reflected in the very right to freedom of thought, conscience and religion (right to have a religion or belief). It includes the freedom to change one’s religion or belief and the freedom for collective expression, which is often most important for an individual believer. It is argued here that religious autonomy is the core of freedom of religion, linked to the dignity and equal worth of all human beings. It therefore deserves to be more than a philosophical justification to freedom of religion; it deserves to be treated as a right. In fact, one can argue that this right, perhaps as a natural right, is already part of freedom of religion or belief. However, it is neither very well expressed nor protected. ‘To be something in an imperfect way does not mean, however, not to be that thing.’⁴ For example, in the case of *Pretty v UK* the Court admitted that:

Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.⁵

The same was implicitly stated about Article 9 (freedom of religion or belief) of the Convention.⁶ Nonetheless, neither individual nor collective religious autonomy are adequately protected by the ECtHR. Firstly, although the term ‘autonomy’ occasionally figures in the case law relating to freedom of religion or belief, its meaning is not clear. Secondly, even if it is one of the underlying principles to the interpretation of the Convention, it seems that it has not been valued in the practice of Article 9. Although religious autonomy must have its limits, more often than not the Court has neglected the autonomy of individuals and communities without adequate explanation, while a more sensitive approach would have been more appropriate.

What makes the question of religious autonomy particularly complex is the fact that not only individuals but also groups and religious organisations are protected under

² Declaration (adopted 25 Nov 1981) UNGA Res 36/35.

³ Ibid.

⁴ R Alexy, ‘Nature of Arguments about Nature of Law’ in LH Meyer, SL Paulson, TW Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford 2003) 9.

⁵ *Pretty v UK* (App no 2346/02) (2002) 35 EHRR 1 para 61.

⁶ Ibid para 82.

today's human rights law. As Nickel has pointed out, one of the differences between contemporary human rights and natural law is that contemporary human rights are more willing to recognise the importance of family and community in the lives of individuals.⁷ One could argue that in that sense individual autonomy (as understood in philosophy and acknowledged as a basis of individual (religious) freedom) transfers into the sphere of group rights and autonomy of religious communities. However, it is not as simple as it may appear. One of the complications is that religious communities themselves have a right to freedom of religion under human rights law. Collective rights have been a matter of serious debate.⁸ To put it simply, the principal question in discussion of collective rights is who comes first: the individual or the group? It is perceived here that the community (and the autonomy of the community) is essential to individual autonomy. Thus the principal justification of collective rights is that individual self-determination often requires a collective dimension.

For the purposes of further discussion religious autonomy can be formulated as follows: religious autonomy means a right to determine, both at the individual and collective level, what one's belief is (*forum internum*) and the ways and importance of the manifestation of it (*forum externum*). It should be stressed that autonomy is linked to equal worth and the dignity of all human beings rather than being conditional on the concept of humans as rational beings. As M. Nussbaum has pointed out:

...even, if a certain group of religious beliefs (or even all beliefs) were nothing more than retrograde superstition, we would not be respecting the autonomy of our fellow citizens if we did not allow them these avenues of inquiry and self-determination.⁹

THE SPHERE(S) OF AUTONOMY – THE STRUCTURE OF FREEDOM OF RELIGION IN THE ECHR

Freedom of religion or belief under the ECHR is generally perceived to include two interrelated elements: 1) freedom to adopt or have a religion or belief of one's own choice (*forum internum*) and 2) freedom to manifest that religion or belief (*forum externum*).¹⁰ Thus, the structure of Article 9 of the ECHR suggests that there is a divide between what a person believes and actions based on these beliefs. This structure also suggests that

⁷ JW Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press, Berkeley 1987) 8-10.

⁸ It should be pointed out that there are terminological but also substantial variations when different theorists talk about collective rights and beneficiaries of these rights. See, for example, comparison made by Y Tamir, 'Against Collective Rights' in LH Meyer, SL Paulson, TW Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford 2003) 192-198.

⁹ MC Nussbaum, 'Religion and Women's Equality: the Case of India' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 343.

¹⁰ ECHR Art 9.

there is a private/public divide in understanding of religion or belief. This public/private divide is rooted in the liberal understanding of freedom of religion or belief. Neither of these divides is necessarily recognised by believers themselves. What is most valuable for a believer is usually the possibility of expressing one's convictions alone or in community. In the believers mind there may not be any meaningful distinction between beliefs and action. From the religious point of view 'what good is it ... if a man claims to have a faith, but has no deeds?'¹¹ While these beliefs/actions and public/private divides are echoed in the state neutrality debate, they also have implications on how beliefs and religions are defined in legal practice. The current approach taken by the ECtHR indicates that while the Court is accepting the autonomy of the individual to determine his beliefs in *forum internum*, it has seen its task as to determine what a manifestation of religion or belief is, leaving little autonomy to an individual in this regard. It is argued in this article that there ought to be a right to religious autonomy in determining, both at the individual and collective level, both what one's belief is, and the ways and importance of the manifestation of it. For the right of religious autonomy to be a meaningful one, the ECtHR ought to take into account and sometimes accept at face value just exactly what individuals have to say about their beliefs (especially when dealing with unknown or minor religions or beliefs). In consequence a more subjective definition of beliefs and actions based on those beliefs is needed. The subjective (autonomy based) definition does not mean that manifestation of religion or belief cannot be limited under Article 9 (2).

The structure of Article 9 also indicates that *forum internum* (the inner sphere) is absolute. Freedom to adopt or have a religion or belief is generally considered as an absolute right and cannot be subjected to State interference. Thus, religious autonomy to determine one's beliefs should theoretically be absolute in this sphere. However, the freedom to manifest one's religion or belief is not absolute; it can be limited under Article 9 (2). Autonomy cannot be absolute in this sphere as external restrictions ultimately affect the scope of ones' autonomy. However, the scope of the *forum internum* seems to be defined very narrowly in the ECtHR's practice. As pointed out by M. D. Evans the current approach taken by the Court indicates that '...the forum internum is very much a sphere of inner personal conviction and offers little by way of substantive protection to those seeking to protect the lifestyle generated by their beliefs from the intrusion of the state.'¹² This has allowed States considerable scope to require individuals to act in a way that violates their religion or belief.

The right to religious autonomy as understood in this article entails also the right of religious communities to determine what their beliefs are, and the ways and importance of manifesting them. Thus, another substantial question relating to spheres of religious

¹¹ James 2: 14.

¹² MD Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP, Cambridge 2008) 293.

autonomy is whether there is, in the case of collective autonomy, a *forum internum* corresponding to that of the individual, and similarly untouchable? The untouchable *forum internum* would be the sphere which is completely (theoretically) shielded off from State interference. It would be the sphere of collective autonomy, which could not be limited under Article 9 (2) of the ECHR. However, boundaries between *forum internum* and *forum externum* are even more muddled when we are talking about religious communities and not individuals. One could argue that at the collective level everything is manifestation of religion or belief (of individuals collectively; or even by an institution finding its legitimacy (in human rights terms) in the collective will/choice of individuals). If all at the collective level is manifestation of religion or belief then it should be open to limits under Article 9 (2). Nevertheless, there is a tendency to think that certain internal matters (like teachings, offices, structure and membership) fall completely (or mostly) into the competences of the religious community. Interference into these matters may affect collective religious autonomy, but also the religious autonomy of individuals in *forum internum* and *forum externum*. In this regard one should consider whether there is an absolute freedom of communities in some areas. At first glance the easiest solution here would be to delineate a set of issues deemed to be internal matters of the community, which are fully shielded from State interference. ‘Render unto Caesar the things which are Caesar’s, and unto God the things that are God’s’.¹³ This Biblical quotation has a multitude of interpretations and in modern day links up to the idea of separation of State and Church. Locke, for example, has esteemed it ‘above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and other’.¹⁴ McConnell rightly points out that:

The flaw in Locke’s prescription is not with its desirability but with its congruence to reality...Even conceding, with Locke, that “the care of souls is not committed to the civil magistrate,” there remain numerous and inevitable potential conflicts between the demands of civil society and demands of faith. Indeed, the very boundary between sacred and secular is a point of contention on which persons of various religious and secular persuasions will inevitably disagree.¹⁵

Professor Durham, for example, has tried by comparing different European countries, the United States and OSCE, to map out common core areas where collective autonomy is absolute or near absolute.¹⁶ He identifies three main areas of possibly exclusive matters of a religious community: (1) the inner domain of faith, doctrine and polity; (2) the core

¹³ Matthew 22:21.

¹⁴ J Locke, ‘Essay on Toleration’ in Vol 6 of The Works of John Locke (1823; photo reprint, 1963) 1, 9.

¹⁵ MW McConnell, ‘Believers as Equal Citizens’ in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 94.

¹⁶ W Cole Durham Jr, ‘The Right to Autonomy in Religious Affairs: A Comparative View’ in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 686-714.

ministry; (3) the core administration.¹⁷ He points out that his chart corresponds in many respects to the OSCE commitments recorded in the 1989 Vienna Concluding Document.¹⁸ From Durham's discussion and synthesis of country reports it seems there is a vague common ground on collective religious autonomy in Europe. However, he does not *expressis verbis* conclude anything definitive on absolute autonomy in some areas of communal religious activity which could emerge as a principle or norm at the European level.

In the light of this it is not surprising that it is not possible to determine a list of core areas in the ECtHR practice which could constitute *forum internum* of religious communities. However, there are certain areas where collective religious autonomy seems to have gained strong (although probably not absolute) protection. Minnerath contends that the right to religious autonomy has found strong support under the ECHR and this can be seen in two levels. Firstly, 'the Court has recognised the importance of a crucial threshold condition for autonomy by recognising the right of religious organisations to acquire legal entity status'.¹⁹ The Court has emphasised that the individual right to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. 'Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.'²⁰ Minnerath further argues that the second and 'deeper' level of protection of religious autonomy is evident in cases rejecting States' efforts to intervene or otherwise take sides in religious disputes.²¹

Although collective autonomy has gained strong protection in certain circumstances, it should be pointed out that the Court has not explicitly recognised either the absolute or limited right to collective religious autonomy. The Court has emphasised the importance of autonomous existence of religious communities.²² This indicates that a right to collective religious autonomy is potentially embraced by the Court. However, it needs to be clearly acknowledged and its content clarified. There are also several cases where religious autonomy has not been respected. For example, State interference into doctrinal matters was considered to be justified in the case where the State refused to grant

¹⁷ For a more detailed description of the areas see *ibid* 697.

¹⁸ *Ibid* 694. Similar commitments are recorded in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (n 2 above).

¹⁹ R Minnerath, 'The Right to Autonomy in Religious Affairs' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitation Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 311; *Serif v Greece* (App no 38178/97) (2001) 31 EHRR 20; *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 13; *The Holy Synod of the Bulgarian Orthodox Church and Others v Bulgaria* (App nos 421/03; 35677/04) ECHR 22 May 2007.

²⁰ *Metropolitan Church of Bessarabia and Others v Moldova* (n 19 above) para 118; *Hasan and Chaush v Bulgaria* (App no 30985/96) (2000) 34 EHRR 35 para 62.

²¹ *Serif v Greece* (n 19 above); *Metropolitan Church of Bessarabia and Others v Moldova* (n 19 above); *Hasan and Chaush v Bulgaria* (n 20 above).

²² *Hasan and Chaush v Bulgaria* (n 20 above).

approval necessary for access to slaughterhouses with a view to performing ritual slaughter in accordance with the ultra-orthodox religious prescriptions.²³ The core administration issues have had fluctuating degrees of protection as well. For example, it appears in *Lamaiz El Majjaoui and Stichting Touba Moskee v the Netherlands* that in the Court's view the restrictions on appointment of an imam do not necessarily involve autonomy of a religious community.²⁴ Thus, although there are areas of collective religious autonomy which have obtained more protection by the ECtHR, it is impossible at this stage to determine whether there is *forum internum* of religious communities, (in the concept of freedom of religion of the ECtHR), which is completely shielded off from State interference. The other question is whether there ought to be one.

Von Campenhausen rightly argues, (from the German context), that in determining the religious communities' own matters, due respect and great weight ought to be given to ecclesiastical self-understanding.²⁵ However, he argues, the State cannot let religious communities determine its field of competence either, suggesting that the legislator needs to find a careful balance between the self-determination right of religious communities and the law that applies to all. When limiting the right to self-determination for churches through a law that applies to all, the self-understanding of the church has to be given special consideration.²⁶ This kind of broad autonomy of religious communities only allows limited, qualified interference (mandatory, least restrictive).

Although the distinction between *forum internum* and *forum externum* is problematic, it is valuable as a reminder that there are areas of individual or collective autonomy, which need to be absolute or deserve higher protection from State interference for the sake of the freedom being a meaningful one. Moreover, there are areas of communal religious manifestation which deserve broad autonomy, especially taking into account that this is important for the protection of individual religious autonomy both in *forum internum* and *forum externum*. The ECtHR should give serious regard to communities' and the individual's self-understanding, (self-determination), of their beliefs and actions motivated by them. This practice has been largely missing in the ECtHR. Thus for the right of religious autonomy to be a meaningful one, the ECtHR ought to take into account and sometimes accept at face value just exactly what individuals or communities have to say about their beliefs (especially when dealing with unknown or minor religions or beliefs). The right to religious autonomy means the right to self-determination. This right is absolute in *forum internum* and limited in *forum externum*. However, it should not be forgotten that distinction between these

²³ *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 June 2000.

²⁴ See *Lamaiz El Majjaoui and Stichting Touba Moskee v the Netherlands* (App no 25525/03) ECHR 20 Dec 2007.

²⁵ A Freiherr von Campenhausen, 'Church Autonomy in Germany' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 80.

²⁶ *Ibid* 85; BVerfGE 53, 366 (401); 66, 1 (22); 72, 278 (289).

spheres of autonomy is very problematic. The fact that it is problematic itself attracts the duty to take into account/accept what believers and communities themselves see as their religion or belief, and the manifestation of it. The limits to religious autonomy can be more adequately dealt with under Article 9 (2) of the ECHR. The main problem seems to be that the ECHR has not *expressis verbis* recognised the *right* to individual religious autonomy. Explicitly recognising this right is important to show the values that Article 9 protects, namely the equal worth and dignity of all human beings.

PLURALISM, NEUTRALITY AND AUTONOMY

One way of looking at neutrality in political theory is where a State stays neutral towards various ideals of the good life. In the context of freedom of religion or belief it means that a State does not favour one religion or belief over another, and does not put forward policies which advance the ideals of some citizens and hinder others. ‘Such a doctrine is a doctrine of restraint.’²⁷ However the social reality of Europe talks about something else. The Council of Europe has forty seven member states. There is a multitude of different State and Church relationships in Europe. For example, there are States with established churches and States with some religious communities enjoying the status of recognised churches. Some States include secularism as one of their fundamental constitutional values. Many European countries have multi-tiered systems for religious communities with different rights and different degrees of autonomy. Traditional religious communities still play a significant role in public life in many countries. There are no completely egalitarian relationships of State with all religious or belief communities.

Although traditional relationships between State and Church are not *per se* in conflict with the Convention, States have an obligation to guarantee freedom of religion or belief and non-discrimination for everybody. It is argued here that this ought to apply both to countries which endorse certain religions and to countries which impose secularism and strict separation of state and church as a value in their constitutional systems (secularism is not an ideologically neutral commitment). Thus Article 9 and principles underpinning the Convention (including neutrality) may be challenging for existing relationships between State and religions. The following will move on to point out some principal statements the Court itself has made about the principle of neutrality.

The ECtHR has repeatedly emphasised the State’s role as the neutral and impartial organiser of the exercising of various religions, faiths and beliefs and has pointed out that this role is conducive to public order, harmony and tolerance in a democratic society. Thus rather than using neutrality to describe a specific relationship between State and religion it has emphasised that the State has a duty to remain neutral and impartial in

²⁷ J Raz, *The Morality of Freedom* (OUP, Oxford 1988) 110.

relation to various religions and beliefs, which is important for the preservation of pluralism and the proper functioning of democracy.²⁸ The Court has also elaborated as to what that means. It has stated that a State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.²⁹ The latter makes a very strong point about autonomy of religious individuals or communities. Although the meaning of the principle of neutrality is imperfectly expressed and carried out by the ECtHR³⁰, the neutrality as expressed above should be seen as one of the basic guarantors for the equal worth, dignity and autonomy of all human beings. It can be argued that neutrality has been interpreted by the Court as impartiality, that is, as an obligation to respect religious choices of citizens, whether or not they adapt to the widespread religious beliefs in the country, and whether such beliefs are popular or unpopular.³¹ Although the Court's practice refers to the duty of States to refrain from assessing the legitimacy of religious beliefs or the ways in which those beliefs are expressed, the same neutrality and impartiality principle ought to apply to the ECtHR itself.

It should be noted that it is a myth that States (or even international Courts) are, or can be ideologically neutral. As Fredman has put it '...the illusion of neutrality disguises particular value commitments. Autonomy and individualism are themselves value commitments...'.³² In similar lines it needs to be suggested that the principle of neutrality ought not to be morally sterile. It ought to be a principle which protects both individual and collective religious autonomy and recognises its link to equal worth and dignity of all human beings. This also suggests that neutrality in the context of the ECHR ought to be cultivated as substantive neutrality as opposed to formal neutrality.

This leads to the discussion of another leading principle, often figuring in the practice of the ECtHR. The ECtHR has repeatedly stated that religious pluralism is one of the cornerstones of a democratic society. The idea of religious pluralism was expressed in the often referred to *Kokkinakis* case:

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

²⁸ *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8 para 107; *Manoussakis and Others v Greece* (App no 18748/91) (1996) 23 EHRR 387 para 47; *Hasan and Chaush v Bulgaria* (n 17 above) para 78; *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37 EHRR 1.

²⁹ *Church of Scientology Moscow v Russia* (App no 18147/02) ECHR 24 Sept 2007 para 72; *Metropolitan Church of Bessarabia v Moldova* (n 19 above) para 123.

³⁰ The deficiencies are most explicit in the way the Court determines who has freedom of religion or belief under the ECHR.

³¹ J Martínez Torrón, 'Religious Liberty in European Jurisprudence' in M Hill (ed), *Religious Liberty & Human Rights* (University of Wales Press, Cardiff 2002) 106-107.

³² S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford 2008) 20.

agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.³³

In the case of *The Moscow Branch of the Salvation Army* the Court stated that besides political parties and other associations, associations formed for the purposes of proclaiming or teaching religion are important for the proper functioning of democracy.

A number of points can be made on the basis of the above statements from the ECtHR practice on pluralism. Firstly, the principle of pluralism requires that not only religious beliefs but other beliefs are recognised and protected. The *Kokkinakis* case seems to imply that the distinction between religious and non-religious beliefs is not important in terms of Article 9 of the ECHR. However, this is a point of contention. Secondly, pluralism is built on the genuine recognition of diversity of associations with various beliefs. Thus not just diversity of individual beliefs but also diversity of associations and communities with various beliefs are important from the point of view of pluralism. Thirdly, the ECtHR clearly links the principle of pluralism to democracy. Pluralism seems to be an obligatory element of democracy, which is the only political model considered compatible with the Convention.³⁴ There can be no democracy without pluralism.³⁵

From the above it could be concluded that diversity and pluralism are good and enriching for a democratic society. The fundamental right to freedom of religion or belief would not have much content to it if diversity of beliefs were not accepted. Raz, for example, has argued that ‘to be autonomous a person must not only be given a choice but he must be given an adequate range of choices’³⁶. He also argues that ‘valuing autonomy leads to the endorsement of moral pluralism’³⁷. In not taking Raz’s point further than that, it should be pointed out that the precondition to autonomy is respect to diversity of religions and beliefs. Also, State neutrality is a precondition for pluralism. However, Trigg warns that:

Pluralism, in the sense of divergent beliefs unwilling to communicate with each other, is a threat to the functioning of democracy. The ‘preservation of pluralism’ advocated by the European Court cannot be the ultimate aim of any democracy. It could all too easily result in the establishment of self-contained groups refusing mutual dialogue. The problem with elevation of such ‘pluralism’ into an essential component of democracy, rather than its by-product, is that the emphasis of differences means that each system becomes locked into its own world. Pluralism becomes relativism, and relativism removes the possibility of a common rationality.³⁸

³³ *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397 para 31.

³⁴ *Barankevich v Russia* (App no 10519/03) ECHR 26 Jul 2007; *The Moscow Branch of the Salvation Army v Russia* (App no 72881/01) ECHR 5 Oct 2006 para 60; *Christian Democratic Peoples Party v Moldova* (App no 28793/02) ECHR 14 Feb 2006 paras 62-63.

³⁵ *Refah Partisi (The Welfare Party) and Others v Turkey* (n 28 above) para 44.

³⁶ J Raz (n 27 above) 373.

³⁷ *Ibid* 399.

³⁸ R Trigg, *Religion in Public Life: Must Faith Be Privatized?* (OUP, Oxford 2007) 148.

He makes a valid point that different religions can also be respected because they should all be contributing to discussion of the nature of the common good. ‘A society content with the fact of divergent beliefs is already fragmenting. There must be a public space where all voices can be heard, and perhaps agreements achieved.’³⁹ The ECtHR itself has stressed that a principle characteristic of democracy ‘is the possibility it offers of resolving a country’s problems through dialogue’.⁴⁰

A couple of further points need to be made here. Evans has rightly pointed out that there has been a recent shift in the practice of the ECtHR. He has observed that, by shifting its focus away from the right of the individual and towards the role of the state in matters of religion, the Court has endorsed a form of ‘neutrality’ which is potentially at odds not only with aspects of religious liberty itself, but also with long-established models of church-state relations.⁴¹ ‘This is deeply problematic for all religious believers since it is tantamount to elevating secularism in the name of pluralism, and achieving this by ‘sanitising’ public life of traces of the religious.’⁴² Thorson Plesner similarly suggests that the practice of the ECtHR is often built on ‘secular fundamentalism’, which undermines human rights and conflicts with the purpose that secularism is – or should be – aiming to secure in the first place: the equal freedom and rights of all inhabitants to live according to their conceptions of “the good”, and peaceful coexistence in a plural society.⁴³

It is suggested here, that there is another, equally worrying tendency in the ECtHR which is inspired by the largely Christian background of Europe. This tendency is reflected in earlier cases like *Johnston and Others v Ireland* (concerning non-availability of a divorce)⁴⁴, *Otto-Preminger Institute v Austria* (concerning conflict between artistic expression and religious freedom)⁴⁵ and in the more recent case of *Pretty v UK* (concerning euthanasia)⁴⁶. For example, Lester and Uccellari strongly argue in the context of the United Kingdom that:

The religious lobby, drawn from the three Abrahamic religions, has exerted powerful pressure and successfully influenced the outcome of proposed law reforms on the termination of pregnancies, medically-assisted suicide and human fertilisation. The secular lobby would argue that law making in these areas should be based on evidence and the wider public interest, not on religious ideology and dogma.⁴⁷

³⁹ Ibid.

⁴⁰ *Metropolitan Church of Bessarabia and Others v Moldova* (n 19 above) para 116.

⁴¹ MD Evans (n 12 above) 291.

⁴² Ibid 312.

⁴³ I Thorson Plesner, ‘The European Court on Human Rights: Between Fundamentalist and Liberal Secularism’ (Paper for the seminar on *The Islamic Headscarf Controversy and the Future of Freedom of Religion or Belief*) <<http://www.strasbourgconference.org>> accessed 30 Sept 2008.

⁴⁴ *Johnston and Others v Ireland* (App no 9697/82) (1986) EHRR 203.

⁴⁵ *Otto-Preminger v Austria* (App no 13470/87) (1994) 19 EHRR 34.

⁴⁶ *Pretty v UK* (n 5 above).

⁴⁷ A Lester, P Uccellari, ‘Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution’ (2008) 5 EHRLR 567.

The powers of traditional churches are still strong and especially in Eastern Europe have aggressively re-established their influence in State's affairs. It has had an affect on laws regulating religion or belief. The influence of (traditional) religions in the democratic process is not in itself a problem as long as personal autonomy and minority religions and beliefs are protected. However, the ECtHR ought to be prepared at least to question its own judgements being influenced by certain beliefs and world views (whether religious or secular).

PRINCIPLE OF EFFECTIVE PROTECTION

The principle of effective protection is explicitly, or implicitly present in many judgements of the ECtHR. This means, first of all, that the Court is inclined to look beyond appearances and formalities, and to focus on the realities of the position of the individual. The ECtHR has emphasised numerous times that it is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective.⁴⁸ However, it is not entirely clear what would qualify as effective protection of freedom of religion or belief. Does it impose a duty on States just to refrain from interference into the enjoyment of the freedom or does it require protection from third parties or even facilitation of religion or belief?

The practice of the ECHR does not leave any doubt that the Court has to some extent recognised the positive obligations of States. For example, in the case of *Otto-Preminger v Austria* the Court clarified the duty to protect stating that:

...the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines.⁴⁹

Although the outcome of the case was controversial, it indicates a positive duty of the State, under Article 9, to protect persons from attacks by third parties.

However, the positive duty to provide (facilitate) is perhaps the most controversial duty. Alexy points out that the idea of positive protection is hardly problematic when one is concerned with things like the protection from third parties. 'Problems arise in the case of entitlements such as state subsidies.'⁵⁰ First of all it should be noted that neither at the individual or collective level is there a clear or systematic approach to the facilitation of religion or belief. Cases which could be said to deal with the positive duty to provide are very much tied to the specific circumstances of the case and do not necessarily allow broad generalisations on the Courts approach to these duties. However, there is a sign that

⁴⁸ *Leila Şahin v Turkey* (n 28 above) para 136.

⁴⁹ *Otto-Preminger v Austria* (n 45 above).

⁵⁰ R Alexy, *A Theory of Constitutional Rights* (OUP, Oxford 2002) 149.

in relation to individual freedom there is a developing concept of positive duties to provide when the issue involves discrimination on religious grounds or conscientious objection to military service.⁵¹ In this regard there may be a developing duty to provide exemptions from generally applicable laws, when to do otherwise would mean discriminating on the grounds of religion or belief.

It is suggested here that religious autonomy calls for pluralism, sharing sovereignty and accommodation of religious diversity. In this regard a clearer point is made about positive duties of the State to provide for religious needs. It makes this point because equal worth and dignity of all human beings are emphasised.

Freedom of religion or belief cannot be effectively protected if reasonable accommodation of religious needs is not provided, especially when non-accommodation results in discrimination. This is important as some religious individuals or communities may otherwise lack the opportunity to fully (effectively) enjoy their freedom. People can only be autonomous if the State creates the conditions for valuable autonomy.⁵² As Fredman has put it:

...human rights hold out more than just the promise of freedom from State interference with their exercise. Human rights are based on a much richer view of freedom, which pays attention to the extent to which individuals are in a position actually to exercise those rights. This positive view of freedom carries with it a substantive view of equality. Given that human rights promote freedom by removing constraints, the promise of equality must require all to be in a position actually to enjoy that freedom.⁵³

Moreover, in theory the concept of neutrality is tightly connected to the concept of equality. Neutrality can be divided into formal and substantive neutrality. For example, formal neutrality developed by liberal theorists like Rawls means: if the state is to treat citizens equally, it should not give preference to one religious individual over another, nor to the religious over the non-religious.⁵⁴ Formal neutrality as formal equality does not take into account differences in religious needs. Neither does it recognise the possibility that difference-blind neutrality and neutrality without accommodating differences may lead to injustice and discrimination.

It is suggested here that the ECtHR ought to use parameters like neutrality, pluralism, effective protection and the right to religious autonomy as being linked to the equal worth and dignity of all human beings, in order to start an assessment of State's positive duties to facilitate religion or belief. The emphasise on neutrality, pluralism, effectiveness and autonomy are specifically important as facilitation of religion or belief raises questions not so much about available resources to spend, but more about States' and society's

⁵¹ *Thlimmenos v Greece* (App no 34369/97) (2001) 31 EHRR 411.

⁵² J Raz (n 27 above) 426.

⁵³ S Fredman (n 32 above) 9.

⁵⁴ J Rawls, *Political Liberalism* (Columbia University Press, New York 1993).

attitudes towards religion or belief, and the position of religion in society and in the public sphere. Using these criteria as a starting point would fortify freedom of religion not only as a negative right, but also as a positive right which then can be balanced against justifications put forward by the State. This does not mean that the Court cannot make decisions taking into account the specific facts of the case. There can well be reasons (justifications) for not facilitating religion or belief. The Court ought to test those using parameters like effective protection, neutrality and the right to autonomy in making its assessment.

CONCLUSION

It needs to be noted that it is not entirely clear what sort of role the ECtHR sees itself playing in freedom of religion or belief cases. The Court seems to have been cautious in developing any clear or systematic approach to freedom of religion or belief. This has led to the undermining of values which are underpinning the Convention – namely equal worth, dignity and autonomy of every human being. A more principled approach is needed from the Court to live up to the tasks it has been called upon to undertake.