Margin of appreciation in context of freedom of religion (Article 9 of the European Convention on Human Rights) in the interpretation of the European Court of Human Rights

by

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Abstract

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This thesis addresses numerous key points on the application of the margin of appreciation principle in relation to Article 9 (2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('Convention').

In general terms, the margin of appreciation doctrine means that the State is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right. The margin of appreciation is given to Contracting States to allow variation amongst them in terms of interpretation of the rights guaranteed.

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1. Introduction

This thesis addresses numerous key points on the application of the margin of appreciation principle in relation to Article 9 (2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('Convention').

In general terms, the margin of appreciation doctrine means that the State is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right. The margin of appreciation is given to Contracting States to allow variation amongst them in terms of interpretation of the rights guaranteed. Underlying the doctrine is the understanding that the legislative, executive and judicial organs of a state party to the Convention basically operate in conformity with the rule of law and human rights and that their assessment of the national situation in cases that go to Strasbourg can be relied upon.

The margin of appreciation doctrine has many manifestations in the Convention (e.g. see Article 5 and 6 and 14; it has been instrumental as well in the Application of Article 15 when deciding whether there is public emergency), however that of Article 9 is considered to be relevant in this paper.

First I will provide a general overview of the margin of appreciation doctrine (definition, underlying motive, scope, critique, main traits) then, I will elaborate and analyze the application of the margin of appreciation approach specifically in context of Article 9 (and all of its pre-conditions) involving the case law as well.

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If we look at Articles 8-11 of the Convention, we can see that the rights guaranteed and protected (e.g. freedom of religion, freedom of expression) shall be limited and interference with the exercise thereof is allowed on specific grounds related to public interest, stipulated in paragraph (2) of each Article.

2. Definition and the origins of the margin of appreciation

The national margin of appreciation can be defined in the Convention context as the freedom to act; maneuvering, breathing or 'elbow room', or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative, and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention. If we take a look at what the margin of appreciation doctrine literally means we can see that according to the Oxford English Dictionary 'appreciation' means the 'perception of delicate impressions or distinctions'. A margin in its sense is defined as 'the limit below or beyond which something ceases to be possible or desirable.' It would appear to us at first glance that the margin is the latitude allowed to the States in striking a balance between a right guaranteed by the Convention and a permitted derogation.

Despite the relatively long historical development of the margin of appreciation doctrine in Convention terms and its antecedents in the jurisprudence of the domestic courts of States, it is nevertheless surprisingly difficult to define the margin of appreciation, let alone its precise boundaries.

The origins of the margin doctrine lie in the administrative review jurisprudence of the French Conseil d'Etat and equivalent continental institutions, and in martial law. The French

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notion of the 'marge d'appréciation' can be compared to the German principles of 'Beurteilungspielraum'.

The first category of cases to which the margin principle has been applied are those dealing with national derogations from Convention guarantees in emergency situations under Article 15.9

After the 'Lawless Case' both the Commission and the European Court of Human Rights ('Court') began the incorporation of margin doctrine into their non-emergency case analysis, focusing it most particularly on the Articles containing express limitation clauses qualifying the rights and freedoms guaranteed (primarily Articles 8-11.)

The margin doctrine was born into Convention jurisprudence in the Commission Report in the Cyprus cases. In Greece v. United Kingdom, applications were lodged with the Commission alleging multiple violations of Convention provisions by the United Kingdom, which was then administering the island of Cyprus. United Kingdom pleaded Article 15 of the convention, allowing States to derogate from Convention provisions in case a public emergency threatens the life of a nation.

The question was raised as to what were the powers of the Commission, when a State, invoking Article 15, departed from the obligations laid down in the Convention.

The Commission held that it was "competent to pronounce on the existence of a public danger which, under Article 15, would grant to the Contracting Party concerned the right to derogate from the obligations laid down in the Convention." The Commission also considered that it was "competent to decide whether measures taken by a Party under Article 15 of the Convention had been taken to the extent strictly required by the exigencies of the

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The Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.”

Since the Belgian Linguistic case, both the Commission and the Court have wrestled with the incorporation of the national margin principles, which emerged in the early derogation cases into their jurisprudence in other types of cases. These cases may be organized into three subject matter categories: a) **Criminal and Civil Due Process** cases arising under Articles 5 and 6; **"Personal Freedoms"** cases, with sub-categories arising under Articles 8-11; and **Discrimination** cases arising under Article 14.

The other important aspect of the Belgian Linguistic case is how the principles of supervisory function and main analysis are applied. Through this case, the margin doctrine entered into the Court's consideration of the 'Personal Freedoms' Articles, thus becoming an important standard in the Court's repertoire. The Court never bridges its use of the margin doctrine in these cases by linking it to its foundations, martial law and review of administrative discretion in the French Conseil d'Etat and equivalent institutions in other continental states. The original use of the doctrine within Article 15 derogation context, clearly an exceptional situation bearing little resemblance to the kinds of "ordinary" rights restriction situations envisaged in the operation of the "Personal Freedoms" Article.

The second important methodological mainstay to emerge from **Belgian Linguistic** is the place of the principle of proportionality, and its relation to other of the Court's tests. With regard to the development of the general supervisory function, note the linkage of legitimate aim of state action (reasonable relationship of proportionality between the means employed and the aim sought to be realized to "regard to the principles...in democratic societies...")

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11 Belgian Linguistic case 1 EHRR 252 (1968)
These are the very components of supervisory function and margin doctrine analysis which come into prominent play on all of the "Personal Freedoms" articles cases which follow.

Judge Wold in his dissenting opinion in the Belgian Linguistic case argues that every human right granted by the Convention must be the same in all the contracting States. The right to education (Belgian Linguistic case revolves around that) must have exactly the same content in all the Member States which have ratified the Convention. The majority opinion contravenes this basic aim of the Convention when it states that human right of education "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and the individuals." This demonstrates that the majority view goes outside the scope of the Convention. Judge Wold remarks that it would be a very dangerous road to embark upon if the articles of the Convention were to be interpreted in such a way as to allow the member States to regulate the human rights "according to the needs and resources of the community." Judge Wold holds the view that such interpretation can not be accepted. I strongly disagree with this interpretation. In my opinion, it carries the Court into questions of each Member State.

Judge Wold has pointed out that "it is true that the competent national authorities are frequently confronted with situations and problems which call for different legal solutions. But this fact has no relevance when we are interpreting the content of the different concepts of human rights in the Convention. We can not have different concepts of human rights in the different member States. That applies ...to all the concepts of the Convention...(which) must be interpreted in the same way for all European states. We must find a "European" interpretation."

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12 Belgian Linguistic case 1 EHRR 351. (1968)
3. Main characteristics and the scope of the doctrine

The doctrine was first explained by the Court in Handyside v. UK. The doctrine has been first manifested in relation of Article 10 (2), and since then the application thereof has been extended to other Convention Articles as well, such as Article 9. The foregoing case has concerned a restriction on freedom of expression. The Court had to consider whether a conviction for possessing an obscene article could be justified in virtue of Article 10 (2) as a limitation on freedom of expression, which was necessary for the 'protection of morals'. The Court stated: "...state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements (of morals) as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them...Nevertheless, Article 10 (2) does not give Contracting States an unlimited power of appreciation. The Court ... is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with European supervision." 

Why need supervision?

Deeply rooted historical and cultural differences separate countries constituting the parties of the Convention.

The Nordic and Mediterranean mentalities are powerful factors setting out the diversities prevalent in European national legal systems which must be acknowledged by the Convention. The incorporation of of newly freed Central and Eastern European nations formerly in the Soviet sphere may bring about East-West fault lines within the Council's

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13 Handyside v. UK A 24 (1976); 1 EHRR 737
14 Handyside v. UK A 24 (1976); 1 EHRR 737 paras 48-49.
membership. These nations have began their tenure without any democratic tradition whatsoever. Another important fault line demarcates the English common law from the continental code law traditions. A line may also be drawn between unitary States parties and those with federal system of governance. Moreover a difference between national systems which allow for *a posteriori* constitutional challenge of the act and those which, in principle, recognize *a priori* review only also has a bearing on the application of the Convention.

Another significant fault line is that separating national legal systems which incorporate the Convention in domestic law from those which do not.

Language differences have always ranked as a major diversifying influence among the nations.

Finally, each of the sovereigns maintains its own unique Constitution, laws and instrumentalities bearing upon the protection of basic rights. In the light of the foregoing national differences make it necessary to allow a margin of appreciation and make it difficult to develop a "European standard".

The Convention provides for a two-stage review of complaints by States Parties, individuals companies, individuals, etc. alleging violations of rights guaranteed in the Convention. The European Commission of Human Rights, on recommendation of its staff rejects all but a very small percentage of applications at the initial admissibility stage. The Commission decides whether or not to forward a matter to the Court and in cases in which so decides, the aggrieved party has its second chance to invoke Europe's conscience in its favour. The system is dependent on the defendant State to repair any breach of the norm as determined by the Court. All Council of Europe Member of States are bound by the Convention to
conform their national human rights protection orders to the pronouncements of the Strasbourg Court. These structural arrangements create a vertical tension between the international and national authorities. This tension is exacerbated by the conflict between the grant to the Convention organs of supervisory power over the states' obligations, and the authority granted to States Parties in several Articles of the Convention to restrict rights. To find a balance in this conflict, the Strasbourg organs have, among other methods made increasing use of the doctrine of national margin of appreciation or discretion. The Convention provides for a two-stage review of complaints by States Parties, individuals, companies, individuals, etc. alleging violations of rights guaranteed in the Convention. The European Commission of Human Rights, on recommendation of its staff rejects all but a very small percentage of applications at the initial admissibility stage. The Commission decides whether or not to forward a matter to the Court and in cases in which so decides, the aggrieved party has its second chance to invoke Europe's conscience in its favour. The system is dependent on the defendant State to repair any breach of the norm as determined by the Court. All Council of Europe Member of States are bound by the Convention to conform their national human rights protection orders to the pronouncements of the Strasbourg Court. These structural arrangements create a vertical tension between the international and national authorities. This tension is exacerbated by the conflict between the grant to the Convention organs of supervisory power over the states' obligations, and the authority granted to States Parties in several Articles of the Convention to restrict rights. To find a balance in this conflict, the Strasbourg organs have, among other methods made increasing use of the doctrine of national margin of appreciation or discretion. I endorse the idea of providing a certain discretion, elbow room to state authorities, since it
is impossible to define precisely the content of certain values and notions implied in the text of the Convention in a European context, in a uniform way, as they vary in each culture (and country) within Europe. For example, the conception of morals changes from time to time and from place to place: *there is no uniform conception of morals.* (In Müller v. Switzerland\textsuperscript{15} the Court held that it was not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals.) I assume that since state authorities are close to the source of conflict, they are able to make a more reasonable and appropriate judgment. For example in terms of morals, state authorities are in a better position to give an opinion as to the prevailing standards of morals in their country. However, this power conferred thereon should not be unlimited, which gives rise to European supervision. At this point I am inclined to raise the following question: how can the Court serve its designated purpose of supervision and adopt a just final decision if it yields ground to national authorities being more competent in the questions at issue? Well, even if the Court is not best placed to resolve a certain question, I believe that its supervision should not be avoided, it is highly desirable, its authority on final ruling must be maintained by all means as its supervision can resolve controversial issues, since sometimes state authorities may err as well, even if they are held to be the most competent in certain questions.

Some sort of 'European standard and consensus' can be perceived among the national laws of the parties to the Convention as to what is or is not necessary in a democratic society to interfere with protected rights.\textsuperscript{16} The burden of the state to justify its exceptional interference is increased at the event of a European wide-standard of toleration. In the case

\textsuperscript{15} Müller v. Switzerland A 133 (1988); 13 EHRR 212 para 35-6

of Dudgeon v. UK\textsuperscript{17} it has been established that "in the great majority of the Member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices ... as in themselves a matter to which the sanctions of the criminal law should be applied", suggesting that there is an extensive standard of toleration prevailing in the majority of the Member States of the Council of Europe.

If there is no consensus, the Court is more likely to defer the choice made by the State. However, it is open to a State to argue that, notwithstanding an established European consensus against the interference, there are reasons particular to its democratic society which are sufficiently strong to justify limiting an individual's rights there.\textsuperscript{18}

Such a consensus can be extremely valuable to the Court to rely on if a highly controversial, fundamental moral issue, where a solution favoring one outcome over another will appear to the disappointed side to depend entirely on the premise from which the argument starts (e.g. euthanasia, abortion) is at bar.\textsuperscript{19}

The doctrine of margin of appreciation has as a matter of fact been heavily criticized by scholars, arguing that the idea that in the absence of a uniform conception of public morals in Europe, Contracting States are better placed to assess local values and their application to particular cases lends weight to the idea of moral relativism and compromising the universality of human rights.\textsuperscript{20}

What strikes me at this point is that is it preferable that the Court restricts the enjoyment of protected human rights under the Convention in virtue of protecting morality and it relies

\textsuperscript{17} Dudgeon v. UK A 45 (1983) 4 EHRR 149 PC para 56-61.
"logically upon an undefined, ill-defined, or simply contentious notion of morals?"\(^{21}\)

I think that if the Court relies on legitimate aims at the limitation of human rights, and a uniform conception of the former or of a notion related to the interference is not available, then the definition, content, interpretation of those aims and related notions should be appropriate, suited to the relevant country in each case.

There was a very interesting case from 1994 I wish to refer to here, titled **Otto-Preminger-Institut v. Austria**\(^{22}\) establishing that just as in the case of morals, "*it is not possible to discern* throughout Europe *a uniform conception of the significance of religion in society*". "Even within a single country such conceptions may vary."\(^{23}\) In this case the right of freedom of expression was directed against the religious freedom of others. An association had been prevented from showing a satirical film purporting to be set in heaven due to concerns of offending Roman Catholics. The Court could not establish what constituted a permissible interference with the exercise of right to freedom of expression, if there was a conflict with the respect of the religions of others. Therefore a certain margin of appreciation has been left to national authorities in assessing the extent of the necessity of such interference. However, the State’s margin of appreciation cannot be a wide one as an interference with the right to freedom of expression may exceptionally be permitted, must be narrowly interpreted. \(^{24}\)

Commentators have addressed the problem of the supervisory function, endeavoring to reduce the discretion of the States and to impose a stricter standard of supervision: The question is whether the discretion of the national authorities is not too wide. It can not be

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21 Handyside v. the UK 1 ECHR 737. para 49.
22 Otto-Preminger-Institut v. Austria (1994) 19 EHRR 34.
23 Otto-Preminger-Institut v. Austria (1994) 19 EHRR 34. para 50.
assumed that the Convention contains vague or unclear expressions to which for the Strasbourg organs can no independently give a sufficiently concrete meaning. That assumption would give rise to a situation that would be unacceptable in the light of the whole system i.e. that the meaning of those expressions would be largely determined by the law or the conduct of each individual State or by the standard derived from a comparison on that point between the contracting States.  

In *Sunday Times v. UK* it has been established that the scope of the margin of appreciation is subject to the objectivity of the interest to be protected and being the reason of limitation. The Court drew a contrast between the relative objectivity of two interests which constitute a ground for limitation: one is 'maintaining the authority and impartiality of the judiciary', the second is the 'protection of morals'. The former left a narrower margin to the State, since it is objectively ascertainable, whilst the latter was subject to a wide notion of what 'morals' were.

As far as the scope of the doctrine is concerned, the margin of appreciation doctrine is applied differentially, with the degree of discretion allowed to the State varying according to the context.

A State is allowed a considerable discretion in cases of public emergency arising under 15 as I have referred to it above, and in case of public morals. The necessity of involving state authorities at the event the issue of public morals has arisen, has been explained above in greater detail.

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26 *Sunday Times v. UK* A 30 (1979) 2 EHRR 245 PC.
27 *Sunday Times v. UK* A 30 (1979) 2 EHRR 245 PC.
The margin of appreciation will be *wide* as well, if "there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues. As we will see below at the freedom of religion cases, the diversity of practice between the States on the issue of regulating the wearing of religious symbols in educational institutions and, thus, the lack of a European consensus give rise to the width of the margin. A critique has been formulated as to the wide application of the doctrine in case Barford v. Denmark\(^\text{30}\). "When it is applied widely, it appears to give a state a blank cheque or to tolerate questionable national practices or decisions, it may be argued that the Court has abdicated its responsibilities."\(^\text{31}\) As we will see below at Leyla Sahin v. Turkey\(^\text{32}\) Judge Tulkens has expressed his critique in his dissenting opinion in terms of the justification of the width of the margin of appreciation given to the state (Turkey) and the absence of the European supervision.

At the other extreme, the margin of appreciation is *limited* where 'a particularly important facet of an individual's identity or existence is at stake. Margin of appreciation is reduced almost to vanishing point in certain areas, as where the justification for a restriction is the protection of the authority of the judiciary.\(^\text{33}\) Further, it has been laid down in Leyla Sahin v. Turkey\(^\text{34}\) that the margin of appreciation is narrower for negative obligations of the State arising from the Convention.\(^\text{35}\)

It has been argued in the case law of the Court that the nature of the aim of the restriction

\(^{30}\) Barford v. Denmark A 149 (1989), 13 EHRR 493
\(^{32}\) Leyla Sahin v. Turkey 2005 -XI; 44 EHRR 99 dissenting opinion of Judge Tulkens para.16.
\(^{34}\) Leyla Sahin v. Turkey 2005 -XI; 44 EHRR 99
\(^{35}\) Leyla Sahin v. Turkey 2005 -XI; 44 EHRR 99 para. 16.
and also the nature of the activities involved will affect the scope of the margin of appreciation. The Court has established, for example that the margin of appreciation will be narrow when an intimate area of one's sexual life is involved or when it falls within the inner core of the right to respect one's private life. Yet the margin of appreciation is said to be more extensive where the protection of morals is in issue, as I have outlined above and in the realm of religious beliefs where a variety of diverse practices is said to exist (see below at the religious freedom cases). The difficulty lies not so much in allowing the margin of appreciation doctrine as in deciding precisely when and how to apply it to the facts of particular cases.

It is important to note that the overall scheme of the Convention is that the primary responsibility for the protection of human rights lies with the Contracting Parties. The Court is there to monitor their action, exercising a power of review. In terms of the duty of the Court to review national decisions, it has been outlined in the above mentioned case of Handyside v. UK that the Court examines the relevant case, relying on the facts and arguments, evidence adduced by the applicant in the domestic legal system and at the international level. "The Court must decide,........, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient...."

The supervision concerns both the aim of the measure challenged and its 'necessity', it
covers not only the basic legislation but also the decision applying it, even one given by an independent court. The Court's supervision would be illusory, if it did no more than examine the decisions delivered by the competent national courts in isolation, it must view them in the light of the case as a whole.

The Court must decide, on the basis of the data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient.44

The question has arisen in Sunday Times v. UK45 whether the review function of the Court was restricted to examining whether the authorities had acted in good faith in assessing what the Convention allowed. It has been established that: "Good faith, even the good faith of an independent decision-maker like a court, will not be sufficient of itself."46

The margin of appreciation doctrine serves as a mechanism by which a tight rein is kept on state conduct, depending on the context.47 It reminds me at some point to the judicial review of administrative law being in force in the Hungarian legal system.

Now I will be engaged with the margin of appreciation doctrine only in context of Article 9 of the Convention.

The Commission has consistently observed that this provision guarantees primarily "the sphere of personal beliefs and religious creeds, the area which is sometimes called the forum internum."

But the provision also covers "acts which are aspects of the practice of a religion or belief in

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45 Sunday Times v. UK A 30 (1979); 2 EHRR 245
46 Sunday Times v. UK A 30 (1979); 2 EHRR 245 para 59.
a generally recognized form". 48

The group of Articles 8-11 contain very similar limitation clauses (2) in each Article. The difference between each of these limitation clauses lies in the variance of the legitimate aims sought to be protected.

5. The 5 stage process of the margin of appreciation in terms of freedom of religion

In general, the Court has set up a successive, 5 stage process in terms of the limitations and the margin of appreciation doctrine in Articles 8-11, including Article 9 as well. The stages are as follows:

a) the identification of the right

b) the identification of the interference

c) consideration of whether the interference is prescribed by law, including both the external (Convention) and the internal understanding of the 'law'

d) determining what objectives, legitimate aims, interests are sought to be protected by the interference

e) deciding whether the interference is necessary in a democratic society i.e. whether the state gives relevance for relevant and sufficient reasons for the interference and those reasons are proportionate to the limitation of the applicant's enjoyment of his right, in which connection the margin of appreciation is the most important.

As far as freedom of religion limitation clause (Article 9 (2)) is concerned, the draft Convention initially used a general limitation clause similar to the clause used in the UN Universal Declaration of Human Rights. Ultimately, there has been a shift from such general

limitation clause to specific limitations for each right in the group of Articles 8-11.\footnote{Harris, O'Boyle & Warbrick: Law of the Convention of the European Court of Human Rights 2nd edition, Oxford University Press, p. 426.}

The text of the limitation clause in Article 9 is as follows: Article 9 (2) **Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.**

It is interesting to note that the right of freedom of thought and conscience is not subject to limitation, only the right to manifest one religion or beliefs. We can see that the interference with the exercise of an Article 9 (1) freedom (freedom to manifest one's religion or beliefs) can be justified if all of the following three **pre-conditions** are met:

1) **the interference must be prescribed by law**
2) **the interference must have a legitimate aim: public safety, protection of public order, health or morals, protection of rights and freedoms of others**
3) **the interference is necessary in a democratic society.**

In context of religious freedom cases, the identified right will be freedom to manifest one's religion or belief. The interference will be the action(s) taken by the State which has limited the applicant's right to manifest his or her religion or belief either in accordance with or by violating the Convention provisions. If the interference is proved to be proportionate to the legitimate aim (public safety, protection of public order, etc) and necessary in a democratic society, then such an interference of the state is justified and in accordance with Article 9 (2) of the Convention. **In assessing whether an interference is 'proportionate to the legitimate aim', the European Court and the Commission of Human Rights have relied**
on the principle of margin of appreciation, which they concede to States when their institutions make the initial assessment of whether the interference is justified.

In the following part of this paper, I will analyze the case law occurred only in terms of the application of the margin of appreciation doctrine in context of Article 9.

I will separate three different parts, each dealing with a pre-condition mentioned above.

5.1. Prescribed by law

The first important element is 'prescribed by law'. The term 'prescribed by law' refers to that the margin of appreciation is given to both to the domestic legislator and to the judicial bodies among others, that are called upon to interpret and apply the laws in force.\(^{50}\)

The essence of the 'prescribed by law' requirement is captured in two ideas: first, the law must be adequately accessible, the citizen must be able to have an indication that is adequate in the circumstances and secondly, the law must be formulated with sufficient precision to enable the citizen to regulate his conduct.: he must be able to foresee to a degree that reasonable in the circumstances, the consequences which a given action may entail.\(^{51}\)

Before starting to touch upon the most significant cases I have discovered in relation to Article 9 (2) and our first condition referred to above, i.e. 'prescribed by law', it may be important to suggest that the Court does not endorse interferences based on what it perceives to be laws and practices influenced by the communist pasts of States admitted

\(^{50}\) Harris, O'Boyle & Warbrick: Law of the Convention of the European Court of Human Rights 2nd edition, Oxford University Press, p. 349.

\(^{51}\) Sunday Times v. UK A 30 (1979) 2 EHRR 245 para 49.
since 1989. (see for example Turek v. Slovakia\textsuperscript{52}; Rotaru v. Romania\textsuperscript{53}, however these are not religious freedom cases).

In \textbf{Hasan and Chaush v. Bulgaria}\textsuperscript{54} the 'prescribed by law' requirement has not been met for the first time: "For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise."\textsuperscript{55} The Court has found, therefore, that the interference with the internal organization of the Muslim community and the applicants' freedom of religion was not “prescribed by law” in that it was arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability.

\textbf{Hasan and Chaush v. Bulgaria}\textsuperscript{56} has paved the way for establishing violations of Article 9 on the basis of States not complying with this criterion.

In \textbf{Kuznetsov v. Russia}\textsuperscript{57} the Court had found no legal basis for breaking up a religious event conducted on the premises lawfully rented for that purpose, the interference was not “prescribed by law”. The Court did not even proceed to determine whether the interference

\textsuperscript{52} Turek v. Slovakia 57986/00 2006
\textsuperscript{53} Rotaru v. Romania 28341/95. 2000
\textsuperscript{54} Hasan and Chaush v Bulgaria 2000-XI; 34 EHRR 1339 GC.
\textsuperscript{55} Hasan and Chaush v Bulgaria 2000-XI; 34 EHRR 1339 GC. para 86.
\textsuperscript{56} Hasan and Chaush v Bulgaria 2000-XI; 34 EHRR 1339 GC.
\textsuperscript{57} Kuznetsov and others v. Russia 184/02 2007.
of the State pursued a legitimate aim and was necessary in a democratic society.\(^{58}\)

Another interesting group of cases concern religious holidays and faith-based days of rest. In modern states where a secular calendar also prescribes public holidays and regular days of rest, the secular calendar shall be in accordance with the requirements of at least some religious calendars and regulations. Problems may arise when the government appears to prefer certain creeds over others. A related case titled \textit{Kosteski v. Former Yugoslav Republic of Macedonia}\(^{59}\) concerned the right to observe holidays of one's professed religion, which is embedded in the manifestation of religious freedom. The applicant employee was fined for absence on Muslim holiday. The Court was concerned about the sincerity of the petitioner's belief. The Court has not considered unreasonable to view the absence without permission a disciplinary matter, since \textit{some level of substantiation} must be required to avoid any negative consequence imposed on the employee by the employer. The fine for absence was not disproportionate and may, in the circumstances of this case, be regarded as justified in terms of \textit{as prescribed by law} and necessary in a democratic society for the protection of the rights of others.\(^{60}\) Accordingly, there has not been any violation of Article 9 of the Convention.

In a recent case \textit{Gütl v. Austria}\(^{61}\), from 2009 the applicants were Jehova Witnesses who are not covered by the statutory exemption of Austrian alternative service law allowing an exemption from military service for ministers of recognized religious societies. The Court has observed that 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

\(^{58}\) Kuznetsov and others v. Russia 184/02 2007. para 74.
\(^{59}\) Kosteski v. Former Yugoslav Republic of Macedonia, Application No. 55170/00, 2006.
\(^{60}\) Kosteski v. Former Yugoslav Republic of Macedonia, Application No. 55170/00, 2006, para 39.
which Article 9 affords. However, the applicant has been discriminated against on the
ground of his religion as a result of the application of the above mentioned discriminatory
provision. There has therefore been a violation of Article 14 taken in conjunction with
Article 9 of the Convention.\textsuperscript{62}

5.2. Legitimate aims

The second element I intend to deal with is 'legitimate aims'.

The need to maintain public order has been justified in Cha'are Shalom Ve Tsedek v.
France.\textsuperscript{63} The applicant association alleged that French authorities refused to grant approval
necessary for access to slaughterhouses with a view to performing ritual slaughter in
accordance with the ultra-orthodox religious prescriptions of its members. The Court
maintained that such interference of the State was prescribed by law, pursued a legitimate
aim, namely protection of public health and public order.\textsuperscript{64}

There was in the present case a reasonable relationship of proportionality between the
means employed and the aim sought to be realized. The margin of appreciation left to the
State “particularly with regard to establishment of the delicate relations between the State
and religions" has not been too excessive or disproportionate, it was compatible with
Article 9 (2).\textsuperscript{65}

In the case of Manoussakis and Other v. Greece\textsuperscript{66} there were public order grounds to
justify making the setting up a place of worship subject to approval by the State. The
applicants maintained that their conviction by the Heraklion Criminal Court infringed
Article 9 of the Convention. The Court was of the opinion that the impugned conviction had

\textsuperscript{63} Cha'are Shalom Ve Tsedek v. France 27417/95 2000
\textsuperscript{64} Cha'are Shalom Ve Tsedek v. France 27417/95 2000. para 84.
\textsuperscript{65} Cha'are Shalom Ve Tsedek v. France 27417/95 2000. para 84.
\textsuperscript{66} Manoussakis and Others v. Greece; European Court of Human Rights, 59/1995/565/651. 1996;
such a direct effect on the applicant Jehovah Witnesses' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued (i.e. protection of public order), accordingly there has been a violation of Article 9. It is worth to cite the opinion of the Court expressed in this case in terms of the margin of appreciation doctrine. "In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society... Further, considerable weight has to be attached to that need when it comes to determining, .... whether the restriction was proportionate to the legitimate aim pursued." 67

The Court has followed Manoussakis and Other v. Greece in Metropolitain Church of Bessarabia and others v. Moldova 68 in recognizing that States are "entitled to verify whether a movement or association carries on ostensibly in pursuit of religious aims, activities which are harmful to the population." 69 The Court upheld the State's claim that refusing to recognize the applicant Church was intended to protect public order and safety. 70

The next important legitimate aim we have to pay attention to is 'the protection of the rights and freedoms of others'.

In Kokkinakis v. Greece 71 Mr. Kokkinakis, a Jehovah Witness has been sentenced to prison and has been arrested beforehand several times for proselytism (i.e. attempting to convert people to another religion) in Greece. A prohibition on proselytism was inserted in several European constitutions (e.g. Cyprus, Azerbaijan), among which the Greek is probably the

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68 Metropolitan Church of Bessarabia and others v. Moldova (2002) 35 EHRR 306
70 Metropolitan Church of Bessarabia and others v. Moldova (2002) 35 EHRR 306 para 111.
best known in Europe.\textsuperscript{72}

In terms of the margin of appreciation approach the Court has consistently held that "a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision... The Court’s task is to determine whether the measures taken at national level were justified in principle and proportionate."\textsuperscript{73} In this case at issue, the Court must have weighed the requirements of the protection of the rights and liberties of others against the conduct of the applicant, convincing his neighbour to converting into another religion, amounting to proselytism. The Greek courts have established the liability of Mr. Kokkinakis, however they failed to specify in what way he had attempted to convince his neighbour by improper means. Accordingly, the conviction of Mr. Kokkinakis has not been justified in the circumstances of the case by a pressing social need. "The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society ... for the protection of the rights and freedoms of others".\textsuperscript{74}

This case has been invoked by the Court in case of \textit{Larissis and Others v. Greece}\textsuperscript{75} where the prosecution, conviction and punishment of the applicant airmen for offenses of proselytism amounted to interferences with the exercise of their freedom to manifest their religion or belief. The Greek government reasoned that relevant actions were taken against these applicants with the aim of protecting the rights and freedoms of others.\textsuperscript{76} The Court

\begin{itemize}
\item \textsuperscript{72} Renata Uitz:Freedom of religion in European Constitutional and International Case Law Strasbourg, Counc il of Europe 2007. p. 61.
\item \textsuperscript{73} Kokkinakis v. Greece (14307/88) 1993. para 48.
\item \textsuperscript{74} Kokkinakis v. Greece (14307/88) 1993. para 47-49.
\item \textsuperscript{75} Larissis and Others v. Greece (140/1996/759/958–960) 1998.
\item \textsuperscript{76} Larissis and Others v. Greece (140/1996/759/958–960) 1998. para. 43.
\end{itemize}
argued that the impugned measures essentially pursued the legitimate aim of protecting the rights and freedoms of others, making a reference at this point to the foregoing Kokkinakis case.\textsuperscript{77}

The above mentioned two cases have demonstrated that proselytism may be important in the context of the legitimate aim of protecting the rights and freedoms of others and States enjoy a wider margin of appreciation.

The term 'protecting the rights and freedoms of others' implies the instance when religious freedom conflicts with another Convention right.

It has been clearly manifested in the case of \textit{Otto-Preminger-Institute v. Austria} \textsuperscript{78} (I have referred to this case above on page 6. in context of being impossible to set up a uniform conception about the significance of religion in society), where freedom of expression has been directed against the religious feelings of others. As I have described above, the applicable Austrian legal provisions required a balancing exercise between freedom of artistic expression (showing a satirical film to bet in heaven) and the rights of others, including respect for religious beliefs. These two Convention rights conflicted against each other. The Court considered that the means employed (seizure and forfeiture of the above mentioned film which constitutes an interference with the freedom of artistic expression) were not disproportionate to the legitimate aim pursued (protection of the rights of others, such as the respect for religion) and therefore the national authorities did not exceed their margin of appreciation in this respect. There has been no violation of Article 10 (freedom of expression), since the respect for the religious beliefs of others has been a legitimate aim to

\textsuperscript{77} Larissis and Others v. Greece (140/1996/759/958–960) 1998. para. 44.
\textsuperscript{78} Otto-Preminger-Institute v. Austria (1994) 19 EHRR 34. para 46-47.
place a limitation on the right to freedom of expression. "Those who choose to exercise the
freedom to manifest their religion,... cannot reasonably expect to be exempt from all
criticism. They must tolerate and accept the denial by others of their religious beliefs...
"
However, the way in which religious beliefs and doctrines are opposed or denied is a matter
which may be objectionable and engage the responsibility of the State to ensure the peaceful
enjoyment of the right to freedom of religion guaranteed under Article 9 of the
Convention."79 Prof. Renata Uitz, in her above mentioned book titled Freedom of religion in
European Constitutional and Case Law argued that the protection of religious freedom may
require governments to enact legislation which protects believers from interference with
their religious exercise, but does not secure protection against insult or criticism of one's
religious beliefs.80 I endorse this view of Prof. Renata Uitz, since one can not disturb for
example the religious worship of another person (manifestation, religious exercise must be
protected), but the exercise of freedom of expression, especially if it is artistic, is more
significant than tolerating the criticism on one's religion. The interference with freedom of
expression in the foregoing case (Otto-Preminger-Institute v. Austria) is not proportionate
with the legitimate aim of respecting the rights of others. There is no uniform conception of
the requirements of 'the protection of the rights of others' in relation to attacks on religious
convictions.81 The Court remains to be of the view that the prohibition of blasphemy does
not violate the Convention per se,82 as there is no consensus among the Member States for
its abolition.83 According to Prof. Renáta Uitz, the difficulty lies in the fact that while

79 Renata Uitz: Freedom of religion in European Constitutional and International Case Law Strasbourg, Council of
81 Renata Uitz: Freedom of religion in European Constitutional and International Case Law Strasbourg, Council of
Europe 2007 pp. 152.
82 see e.g. I.A.v. Turkey, 42571/98, 2005, para 25; Aydin Tatlav v. Turkey 50692/99., 2006, para 24.
freedom of speech or artistic freedom is not absolute, the protection of religious sensitivities does not appear to be a sound reason justifying limitations imposed upon free speech, nor does the protection of freedom of religion entail a right to have one's religious beliefs respected by others either.84

A *wide* margin of appreciation is available as well if freedom of religion conflicts with a right other than the freedom of expression. Given the way in which religion or belief affects many aspects of the life of the believer, the right to manifest a religion or belief will often have the potential to conflict with other rights and such conflicts often generate great anger and contention between the parties involved. Consequently, the Court in these cases often give a wide margin to States to interfere with manifestations of religion or belief in order to protect the rights and freedom of others.85

In case of confronting human rights, I think it is important to strike a balance between them. The State must take care not to give total priority over the right. Only if one of the rights is 'absolute' will it take complete priority over another right.86

5.3. "Necessary in a democratic society"

The third important factor we need to examine is related to the term of Article 9(2), i.e. 'necessary in a democratic society'.

What does 'necessary' mean in this context? In the above mentioned case, *Handyside v. UK*87 the Court explained the meaning thereof as follows: The Court notes...that, while the adjective 'necessary'... is not synonymous with 'indispensable', neither has it the flexibility

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87 Handyside v. UK A 24 (1976); 1 EHRR 737 para 48.
of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.

The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it is for the Court to give the final ruling on whether a restriction is reconcilable with the rights protected by the Convention.

5.3.1. Neutrality and impartiality

At this point, I aspire to touch upon the role and responsibilities of the state concerning neutrality and impartiality.

Whilst approaching Article 9 from the perspective of an individual works well when an individual is challenging the manner in which the state has acted in relation to their personal enjoyment of a particular aspect of that right, it works less well in situations in which what is really at stake is the approach the state either to the religion or belief.

For example in Hasan and Chaush v. Bulgaria, the Court has emphasized that the role of the state was not to 'take sides' by endorsing one religious community at the expense of another but was to act in an even-handed fashion, concluding that 'a failure by the authorities to remain neutral in the exercise of their powers...must lead to the conclusion that the state interfered with the believer's freedom to manifest their religion.' Unsurprisingly, the same approach has been taken in cases which have been brought not by individuals but by religious communities themselves. The leading case remains that of the Metropolitan Church of Bessarabia v. Moldova, which concerned the refusal of the Moldovan authorities

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88 Hasan and Chaush v. Bulgaria 2000-XI; 34 EHRR 1339 GC. para. 78.
to grant official recognition to the applicant Church which had the practical effect of making both the Church as an organization and the religious activities of its adherents unlawful. The Court said that "in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the state has a duty to remain neutral and impartial." 90

Such duty to remain neutral and impartial has now been re-iterated on many occasions and it is clear that any evidence that the state has failed to act in such a fashion in its dealings with religious bodies will require justification under Article 9 (2) if it is not to amount to a breach of Article 9.

The state's neutrality and impartiality is of particular importance for issues concerning religious clothing and religious symbols. As we will see below, the case law considered has established that the state must remain neutral and impartial when it has dealings with religious believers and organizations. In some cases, as indicated below, the Court has gone even further and suggested that states are under a variety of positive obligations with regard to the freedom of religion and belief and in the case of Leyla Shain v. Turkey it referred to its having 'frequently emphasized the state's role as the neutral and impartial organizer of the exercise of various religions'. In cases such as Kokkinakis v. Greece 91 and Larrisis and Others v. Greece92 emphasized that the role of the State was to ensure that there was a 'level playing field' between believers (and between believers and non-believers). This has put the state in a rather different position from that which it previously occupied. Rather than being required to ensure that it remains neutral and impartial in its dealings with

religions and with believers, its role becomes one of ensuring that religious life within the state is neutral and impartial, which is an important difference.

Neutrality and impartiality means that the state ought to have no interest in internal organizational issues unless the results are such as to endanger the public order, health, morals and rights and freedom of others. It should refrain from engaging internal affairs, thus reinforcing the principle of autonomy. For example, in the case of Serif v. Greece, the Court said that 'in democratic societies the state does not need to take measures to ensure that religious communities are brought under a unified leadership.' Such an approach casts the role of the state as a 'facilitator' of organizational and individual religious freedom. An alternative model, which seems to be the dominant model now, takes a different approach, emphasizing the responsibility of the state to ensure the realization of all Convention rights, emphasizing the need for the freedom of religion and belief to be seen and understood in the broader context of democratic society. In the Kokkinakis case the Court said that 'the freedom of thought, conscience and religion is one of the foundations of a democratic society....the pluralism indissociable from a democratic..depends on it.' It also said that 'in democratic societies..it may be necessary to place restrictionss on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.'

5.3.2. Pluralism and secularism

If the state is neutral and impartial in its dealings with religious organizations and believers, then it will have the practical effect that of fostering a climate of pluralism and tolerance.

93 Serif v. Greece, no. 38178/97, para 52, ECHR 1999-IX.
This raises some issues. Most religious systems advance truth claims, which are absolutist in nature.

For example, in the case of Serif v. Greece the applicant argued that his freedom of religion had been violated by his being convicted to assuming the functions of the leader of the Muslim community in Rodopi, the leadership of which was in dispute. The Court said that 'Although it recognizes that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.'95 This suggests that the state is not only entitled but may be required to exercise a form of oversight over the internal life of religious communities in the interests of ensuring pluralism and tolerance. A question arises at this point. The state's stepping in and sorting out of the problem may fail to respect the principle of autonomy and demonstrate the degree of neutrality and impartiality which the state must show in its dealings with the believers. These concerns, i.e. promoting pluralism and tolerance and respecting the beliefs and autonomy of others can be balanced.

In the of Metropolitan Church of Bessarabia v. Moldova the Government had argued that by recognizing the Applicant Church as a legal entity it would broaden the rift within the Orthodox community. The Court rejected this argument, saying that the 'state's duty of neutrality... is incompatible with any power...to assess the legitimacy of religious beliefs, and requires the state to ensure that conflicting groups tolerate each other, even when they

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95 Serif v. Greece, no. 38178/97, para 52, ECHR 1999-IX. para. 53.
originated in the same group.\textsuperscript{96}

In this case the promotion of pluralism seems to have been given enhanced weight when constructing the content of the obligation to ensure that 'conflicting groups tolerate each other'. This might be contrasted with the case of the \textbf{Surpreme Holy Council of the Muslim Community v. Bulgaria}, in which the Court placed more emphasis on the role of the state as the promoter of tolerance.

In both the \textbf{Metropolitan Church of Bessarabia}\textsuperscript{97} case and in the \textbf{97 Members of the Gladini Congregation} cases the Court made it clear that 'neutrality' and 'impartiality' cannot be used to justify a failure to protect the rights of believers under Article 9.

The Court has said on numerous occasions that democracy is the only political model compatible with the Convention and it is entitled to act in order to preserve the integrity and proper functioning of the internal democratic structures of the state. For example in \textbf{Socialist Party of Turkey and Others v. Turkey}\textsuperscript{98} the Court rejected claims by Turkey that Turkey had been entitled to ban political parties. 'The fact that such a political project is considered incompatible with the current principles and structures of the Turkish state does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way in which a state is currently organized, provided that they do not harm democracy itself.'\textsuperscript{99}

The Court has expressed the view in \textbf{Refah Partisi and Others v. Turkey}\textsuperscript{100} that the

\begin{itemize}
  \item \textsuperscript{96} Metropolitan Church of Bessarabia and others v. Moldova (2002) 35 EHRR 306 para 123.
  \item \textsuperscript{97} Metropolitan Church of Bessarabia and others v. Moldova (2002) 35 EHRR 306
  \item \textsuperscript{98} Socialist Party of Turkey and Others v. Turkey no. 26482/95, 12 November 2003.
  \item \textsuperscript{99} Socialist Party of Turkey and Others v. Turkey no. 26482/95, 12 November 2003. para 47.
  \item \textsuperscript{100} Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1
\end{itemize}
principle of *secularism* is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and *democracy*.  

Although it is not a typical head scarf case, as we will see below, it relies on the principle of *secularism* as well. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention. In *Refah Partisi v. Turkey* it has been established by the Court that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions on the manifestation thereof with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting the beliefs of others.  

The State is a neutral and impartial organizer of the exercise of various religions, this role is conducive to public order, religious harmony and tolerance in a democratic society.  

The policy of the political party, Refah was to apply some of sharia’s private-law rules to a large part of the population in Turkey (namely Muslims), within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, thus the dissolution of Refah pursued several legitimate aims, involving the protection of public order and the rights and freedoms of others as well.  

In *Freedom and Democracy Party (ÖZDEP) v. Turkey* the Court has laid down that 'there can be no justification for hindering a political group solely because it seeks to debate in public the situation part of the state's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone

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101 Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1 para 93.  
102 Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1 para 111.  
103 Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1 para 91.  
104 Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1 para 127.  
105 Freedom and Democracy Party (ÖZDEP) v. Turkey no. 23885/94. ECHR 1999-VIII.
concerned.’ This highlights the fact that religious believers and religious communities are to be welcomed as participants in the public life of the state, including participation in the democratic process should they wish to do so. In this case the Court also said that 'a political party may promote a change in the law or the legal and constitutional structures of the state on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles.’

In the case of Turkey the Court has said in the Refah Partisi case that 'the principle of secularism is certainly one of the fundamental principles of the state which are in harmony with the rule of law and respect for human rights and democracy.'

Turkey was entitled to place restrictions on the wearing of religious clothing and the display of religious symbols provided that these restrictions were legitimate and proportionate under Article 9 (2) of the Convention.

The next few, so-called 'head scarf, religious dress' cases will point out whether the state has proceeded properly and overstepped the limits of his margin of appreciation in terms of establishing whether the prohibition of wearing a head scarf under certain circumstances amounted to an interference with the manifestation of one's religion. These cases (including Refah Partisi v. Turkey as well) center around the principle of secularism, which is closely related to the values underpinning the Convention.

A very important milestone decision in the group of religious dress cases is Leyla Sahin v. Freedom and Democracy Party (ÖZDEP) v. Turkey no. 23885/94. ECHR 1999-VIII. para 97.

Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1 para 98.

Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1 para 93.

Turkey. The applicant, Leyla Sahin complained that a rule (circular) prohibiting students at Istanbul University from wearing a head scarf at class or during exams was contrary to Article 9 of the Convention. For example she has been denied access to an examination of her at the University, because she was wearing a head scarf. She argued that the head scarf was compatible with the principle of secularism guaranteed in Turkey by the Constitution. The Government maintained that secularism was a key element in Turkey remaining a liberal democracy and since the head scarf was associated with extreme 'religious fundamentalist movements', its display posed a threat to Turkish secular values. The Court ruled that the relevant dress restrictions were proportionate to the legitimate aims of upholding public order and of protecting the rights and freedoms of others. In reaching the conclusion that the restrictions on head scarfs were 'necessary in a democratic society', a heavy emphasis has been placed on the principles of secularism and equality. In terms of the margin of appreciation, the applicant alleged that the State has overstepped the limits of his margin of appreciation, however wide it might be. States had a margin of appreciation how to regulate education, since the regulation thereof may vary in time and in place, according to the needs and resources of the community and the distinctive features of different levels of education.

This case involved the legitimacy of a ban on the wearing of Islamic head scarves in a state-run university in Turkey. The Court observed that: 'it is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. ...the relevant authorities should
wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.\footnote{114}{Leyla Sahin v. Turkey 2005-XI; 44 EHRR 99 para 116.} It illustrates the point that the state is entitled to look to the character of its institutions as well as to the functioning of its democratic system and ensure that they are consonant with the national ethos. It is important to emphasize however, that the Court has not said in the above referred cases that either the state or state-run institutions must be secular in nature. It has said that since secularism is compatible with pluralism and democracy it is legitimate for a state to project a secularist ethos whilst respecting the rights and freedoms of others. Those who engage in public life, including believers and belief communities, may do so on the condition that they respect the principles of democracy and human rights, of tolerance and pluralism.

Judge Tulkens has expressed his concern on the majority decision in his dissenting opinion. Among other concerns, he did not agree with the justification of the width of the margin of appreciation, i.e. the diversity of the states on regulating the wearing of religious symbols in educational institutions and thus the lack of the European consensus in this sphere. He pointed out that actually \textit{none} of the Member states has a ban on wearing religious symbols in university education.\footnote{115}{Leyla Sahin v. Turkey 2005-XI 44 EHRR 99 GC dissenting opinion of Judge Tulkens para 12.} I do not agree with this critique of Judge Tulkens. As I have mentioned above, however, there is a sort of European consensus in the matter of the interference, it is open to free choice for a state to argue that there are reasons particular to its democratic society which are sufficiently strong to justify limiting an individual's rights there. We can not resolve properly a certain question, conflict and say that x, y is the way something should be regulated or done in practice by relying on an arithmetical exercise of
simply adding up the number of states participating in the practice.

In Dahlab v. Switzerland\textsuperscript{116} a schoolteacher in Switzerland has challenged the measure prohibiting her to wear a head scarf at school while teaching, which amounted to an interference of her freedom of conscience and religion. The Court argued that this measure was justified and proportionate to the legitimate aim, i.e. the protection of the rights and freedom of others and maintained that Geneva authorities did not exceed their margin of appreciation, the measure they took (prohibiting the wearing of the head scarf in the context of her activities as a teacher) was reasonable, because it was a potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents and it breached the \textit{denominational neutrality in schools}. In this case the protection of the neutrality of the state educational system was contrasted with freedom to manifest one's religion. The Court has determined that state school teachers had to tolerate proportionate restrictions on their freedom of religion. In this case the national authorities enjoyed a \textit{wider margin of appreciation} in restricting the exercise of a freedom, since the applicant schoolteacher has been bound to the state by a special status and freely accepted by her own determination the requirements deriving from the principle of denominational neutrality in schools.\textsuperscript{117}

Is the balance to be struck in a different fashion when the teaching of older children or young adults is at issue? Much will depend on the contextual circumstances but, once again, the state has a \textit{wide margin of appreciation} in determining the necessity of any restriction. For example, in Kurtulmus v. Turkey\textsuperscript{118} the Court dismissed an application from an associate professor at Istanbul University who had been subjected to disciplinary

\textsuperscript{116} Dahlab v. Switzerland No. 42393/98.; 2001-V DA.
\textsuperscript{117} Dahlab v. Switzerland No. 42393/98.; 2001-V DA.
\textsuperscript{118} Kurtulmus v. Turkey no. 65500/01, EXCHR 2006-II.
procedures for wearing a head scarf at work, endorsing the approach adopted in the Dahlab case and in Leyla Sahin v. Turkey referred to above.\footnote{119}.

\textbf{In Dogru v. France}\footnote{120} a schoolgirl refused to take off her head scarf at physical education classes. She was expelled from school eventually for breaching the duty of assiduity by failing to participate actively in physical education and sports classes.\footnote{121} The Court considered that in the present case the ban on wearing the head scarf during physical education and sports classes and the expulsion of the applicant from the school on grounds of her refusal to remove it, constituted a “restriction” on the exercise of the applicant's freedom of religion. Such an interference complained of mainly pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order.\footnote{122}

The conclusion reached by the national authorities that the wearing of a veil, such as the Islamic head scarf, was incompatible with sports classes for reasons of health or safety is not unreasonable. The Court accepted that the penalty imposed is merely the consequence of the applicant's refusal to comply with the rules applicable on the school premises.\footnote{123}

\textbf{In the case of Köse and Others}\footnote{124}, the Court also considered that the principles of secularism and neutrality at state school and respect for the principle of pluralism were clear and entirely legitimate grounds justifying refusing pupils wearing the head scarf admission to classes when they refused – despite the relevant rules – to remove the Islamic head scarf. It has been laid down that State schools are not religious schools and are part of the Turkish

\begin{itemize}
\item \footnote{119} Leyla Sahin v. Turkey 44774/98. 2005-XI 44 EHRR 99 GC
\item \footnote{120} Dogru v. France 27058/05. Strasbourg, 2008
\item \footnote{121} Dogru v. France 27058/05. Strasbourg, 2008 para 8.
\item \footnote{122} Dogru v. France 27058/05. Strasbourg, 2008 para 60.
\item \footnote{123} Dogru v. France 27058/05. Strasbourg, 2008 para 64.
\item \footnote{124} Köse and others v. Turkey 37616/02. Strasbourg, 2008.
\end{itemize}
educational system, guaranteeing the principle of secularism and religious pluralism.\textsuperscript{125} Let's take a look at another case, which is related to the display of the crucifix for a change. In \textbf{Lautsi v. Italy}\textsuperscript{126} the applicant alleged that the display of the sign of the cross in the classrooms of the Italian state-school attended by her children constituted interference incompatible with the freedom of belief and religion. The Court has established that in countries where the great majority of the population owe allegiance to one particular religion, the manifestation of symbols of that religion may constitute pressure on students who do not practice that religion or those who adhere to another religion.\textsuperscript{127} The Court has pointed out that the schooling of children is a particularly \textit{sensitive} area in which the compelling power of the State is imposed on minds which still lack the critical capacity which would enable them to keep their distance from the message derived from a preference manifested by the State in religious matters. The Court considered that the presence of the crucifix in classrooms goes beyond the use of symbols in specific historical contexts. It restricted the right of schoolchildren to believe or not believe. It is reasonable to associate the crucifix with Catholicism (the majority religion in Italy), the display of which in a classroom is conflicted with educational pluralism which is essential for the preservation of "\textit{democratic society}" within the Convention. In the light of the foregoing arguments, there has been a violation of Article 9 of the Conviction. The Court has set forth that national authorities enjoyed a \textit{wide} margin of appreciation in relation to complex and sensitive questions closely linked to \textit{culture and history}.\textsuperscript{128} The display of religious symbol at public places did not exceed the margin of appreciation left to

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\textsuperscript{125} Köse and others v. Turkey  \\
\textsuperscript{126} Lautsi v. Italy (30814-06) 2009, Strasbourg para 50.  \\
\textsuperscript{127} Lautsi v. Italy (30814-06) 2009, Strasbourg para 50.  \\
\textsuperscript{128} Lautsi v. Italy (30814-06) 2009, Strasbourg para 50.  
\end{flushleft}
States.

We could see in these head scarf and crucifix cases that the State enjoyed a **wider** margin of appreciation on account of the principle of **denominational neutrality** in religion matters in school, which is embedded within the principle of **secularism and educational pluralism**. Religious freedom may be restricted by the requirements of secularism, in light of the values underpinning the Convention. **Secularism is an important element of democracy**, the respect and protection of which underlies the whole Convention.

I think it is important to touch upon religious identity at this point. People manifest their religion through symbols, e.g. the cross and the veil. Michael Ipgrave states it is a "reminder of the new life and hope which gives the believer meaning and purpose, and thus constitutes their deepest identity."\(^{129}\)

### 5.3.3. Religious symbols and identity

The issue of wearing religious symbols in public areas is clearly a contentious issue. Not all of the things which are of symbolic significance to religious believers are things which can be worn or displayed.

In **Sofianopoulos v. Greece**, the applicants argued that they should be able to record their religious affiliation on their official identity cards if they wished to do so, to make their beliefs known publicly. The Court noted that it was for the state to determine what information was appropriate and said that 'the purpose of the identity card is not to bolster its bearer's religious feelings. This demonstrates that the state may place restrictions on the individuals' public declaration of their faith.

What is actually a religious symbol?

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In the Otto-Preminger-Institut case, the Court defined religious symbol as 'objects of religious veneration'. A broader view would be to see an 'object of religious veneration' including all those things which form an element in the religious life of a believer and contribute to the exercise of the freedom to manifest their religion or belief in worship, teaching, practice and observance. This might embrace items as diverse as forms of clothing, utensils, written materials, pictures, buildings, etc. For example, the Court in the early case of X and the Church of Scientology v. Sweden considered an 'E Meter', which is a religious artefact used to measure the state of the electrical characteristics of the 'static field' surrounding the body and believed to reflect or indicate whether or not the confessing person has been relieved of the spiritual impediment of their sins. The religious nature of the artefact was not contested, however the E-meter was not an object of religious veneration. Simply because something is considered to be a religious symbol does not mean that there is a right for it to be publicly visible. The question is what is to count as a manifestation of religion or belief. If, for example, the question concerns whether an individual may wear a prayer shawl, a cross, a turban, or a head scarf in a public setting, it does not matter whether those items are or are not religious symbols: the relevant question is whether that person is manifesting their religion or belief by the wearing or the displaying of it. This is clear from those cases which have dealt with issues concerning religiously-inspired clothing. For example, in the case of the Moscow Branch of the Salvation Army v. Russia the Court accepted that 'it is indisputable for members..wearing uniforms were particular ways..manifesting the Salvation Army's religious beliefs' and in Leyla Sahin v. Turkey

130 Otto-Preminger-Institute v. Austria (1994) 19 EHRR 34.
131 Otto-Preminger-Institute v. Austria (1994) 19 EHRR 34. para 47.
132 X and the Church of Scientology v. Sweden 17 DR 68 at 72 (1979)
134 Leyla Sahin v. Turkey 2005 -XI; 44 EHRR 99
the Grand Chamber endorsed the view of the Chamber that: 'The applicant said that, by wearing a head scarf, she was obeying a religious precept...her decision to wear the head scarf may be regarded as motivated...by a religion...the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic head scarf in universities, constituted an interference with the applicant's right to manifest her religion.' The Court approached the matter on the basis of the wearing of the head scarf being a 'manifestation' of religion or belief.  

The focus on the 'wearing' of religious symbol has the capacity to distort our understanding of what a religious symbol actually is. As we have seen above, the Court has accepted without hesitation the claim that wearing a head scarf may be a manifestation of Islamic belief. What converts it into a religious symbol is the nature of the significance with which it is invested. What does the word 'wearing' cover?

For example, a girl with an Islamic head scarf or a boy with a skull-cup might reasonably be described as 'wearing' a symbol of their religious commitment. Likewise with a piece of jewellery. It is less obvious that a male Sikh carrying a kirpan in his belt is 'wearing' as opposed to 'carrying' a symbol of his religiosity.

What does the term the 'public area' cover? One approach would be to take the words 'public area' literally and limit the scope thereof to those places which are public in the sense of being open and accessible to all, such as streets, parks. If combined with a narrow view of what was meant by a 'religious symbol' and by the term 'wearing', so narrow an approach would empty the subject of of much of its interest. Should a broader view be taken of what

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comprises a 'religious symbol', so as to include those things which are a marker of religious affiliation rather than 'symbols' per se. This would permit situations in which certain forms of religious dress are prohibited from being seen in public at all to be included within its scope. If a broad approach was taken to what comprises a religious symbol, then taking a similarly broad approach to what is to be understood as a 'public area'—such as, for example, any situation in which a religious symbol might be seen by a member of the public—the result would be a situation in which the public visibility of anything which was representational of religion or belief would fall within its scope. Although any restrictions on the public visibility of religion would still need to be justified in terms of Article 9 (2), it would have the practical effect of requiring religious believers and religious bodies to account for their presence in the community in a fashion which fails to respect the basic principles regarding the freedom of religion or belief set out in the Kokkinakis case referred to above, which emphasises the significance of religion and religious diversity as an institutional component of a flourishing plural democratic society rather than as something which needs to be explained and justified.\textsuperscript{137}

The context in which the wearing of religious symbols and clothing has received the most attention is that of public educational institutions. We must dwell at this issue a little bit in more detail since it is relevant and pertaining to the subject of this thesis, particularly concerning for example the case of Leyla Sahin v. Turkey\textsuperscript{138} and Dahlab v. Switzerland\textsuperscript{139} referred to above.

In many states, education is not only directly provided by the state but is also provided in privately run educational institutions under a general regulatory scheme. Moreover, state

\textsuperscript{138} Leyla Sahin v. Turkey 44774/98. 2005-XI 44 EHRR 99 GC
\textsuperscript{139} Dahlab v. Switzerland No. 42393/98.; 2001-V DA.
education may sometimes be directly provided through educational facilities provided by private bodies, many of which are religious in origins or remain religious in both name and ethos. In the light of this diversity of approach within member states of the Council of Europe, and the diversity of provision available within each state itself, it is to be expected that the state will enjoy a considerable margin of appreciation in determining the balance to be struck between the right of the individual to manifest their religion or belief and the need to protect the rights and freedoms of others and to avoid such institutions becoming places of indoctrination rather than education. In conducting this balancing act, the state must be mindful of the need to be neutral and impartial in its approach, but at the same time it should be acting in a fashion which encourages pluralism and tolerance. The tension between these latter considerations is particularly problematic in the educational context. On the one hand, children and young adults need to be free to make up their own minds on matters of belief, yet in order to do so they need to be introduced to those beliefs.

I will consider the situation of the teachers and students separately.

The teacher as an individual enjoys the freedom of thought, conscience and religion and must not exploit their teaching position to impose personal beliefs that are inconsistent with conscientious beliefs of their pupils. Being in the position of having authority over children, young students may give their views a particular weight. Having chosen to work in an educational environment, a range of restrictions may legitimately be placed upon teachers when they are working in the classroom in order to ensure that an educational environment appropriate to the school in question is maintained and the human rights of parents and children are respected.

As far as students are concerned, can children manifest their religious beliefs through the
wearing of religiously inspired clothing or symbols while attending lessons, and whether restrictions on such clothing or symbols are compatible with the notion of 'respect'. The resolution of such questions must depend on the facts of each case, but it must be ensured that any restrictions placed upon the manifestation of religion or belief by pupils are necessary and in the pursuit of legitimate aims of public safety, health, order, or the protection of the rights and freedoms of others. A further complexity is that the younger the child, the greater may be the impact of preventing that child from wearing a symbol or item of clothing which they habitually wear as they may be less able to understand the effect which it might have on others and the reasonableness of a restriction in the interests of fostering mutual tolerance, such understanding to the older child or young adult. In the above referred Dahlab case the Government made it clear that the prohibition on religious symbols and clothing did not extend to pupils, as they did not think this was necessary in order to maintain the secular nature of its schools and to preserve the separation of church and state. In the case of Leyla Sahin v. Turkey, however, the Court accepted that such restrictions might legitimately be placed on students at University if this were motivated by the desire to uphold the secular nature of the institution (the assessment of whether this was necessary largely being a matter that fell within the margin of appreciation of the state.)

Difficulties may arise when employers justify restrictions on the grounds of hygiene, health or safety where the employer offers a service to the public and perceives that restrictions are required in order to promote the business, for example on the basis that the public would prefer employees dressed in a particular manner. 140

Decisions to remain within, or convert to, or publicly express or not, a particular faith or way of life could be all viewed as exercises of choice by the particular people involved in

those decisions.

It has been claimed that liberal-minded people living in broadly secular societies too often treat religious belief as superstitious nonsense, a collection of weirdly unscientific claims that must surely be swept away over time by the greater powers of reason. Anne Phillips has suggested in her book titled 'Multiculturalism without culture' that globalization may sustain and even strengthen religious belief. Greater inequality and heightened environmental damage mean a lot of people will be looking for alternatives to materialism and individualism.\textsuperscript{141}

The values embedded in democracy, involving for example secularism (and neutrality in state schools in terms of religion) are often invoked in Article 9 (2) case law of the Court, especially in relation of the term 'necessary in a democratic society.'

We could see in the foregoing cases I have referred to in context of the third condition, 'necessary in a democratic society' that the margin of appreciation of the state was wider, since in a democratic society opinions on the relationship between the state and religions may reasonably differ widely, especially, if it comes to regulating the wearing of religious symbols in educational institutions. As I have pointed out above in Otto-Preminger-Institut v. Austria, it is not possible to discern throughout Europe a uniform conception of the significance of religion in society\textsuperscript{142} and the meaning or impact of the public expression of a religious belief will differ according to time and context, as the Court put it in Dahlab v. Switzerland\textsuperscript{143}.

5.4. Proportionality

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\textsuperscript{142} Otto-Preminger-Institut v. Austria 1994; Series A no. 295-A, para 50.
\textsuperscript{143} Dahlab v. Switzerland no. 42393/98, ECHR 2001-V
\end{flushright}
The Court has settled upon a requirement of *proportionality*.

In *Sunday Times v. UK*\(^{144}\) the Court has established that taking into consideration all the factors (I have outlined above), the Court may find that the interference might have been 'necessary in a democratic society', and then it reaches the final resolution by formulating the question as to whether the limitation on the applicant's right implied in the Convention was *'proportionate' to legitimate aims concerned* sought to be protected.\(^{145}\) A State will actually be in a stronger position if the domestic institutions have themselves addressed the issue of proportionality of interference with the applicant's right, but because of its ultimate responsibility, the Court will review, and may differ from, the results of even the most careful domestic scrutiny.\(^{146}\)

6. **Variables determining the scope of the margin of appreciation in case of freedom of religion**

The dearth of case law means that the classification of a range of variables determining the scope of margin is fraught with difficulty. Yet, the analysis of case law provides some guidelines for factors instrumental in understanding the Strasbourg organs' margin of analysis and proportionality appraisal under Article 9.

The first important group concerns a) issues relating to *State Church and Others*.

Many Contracting States have the system of an established or State church. The Convention does not prohibit the system as such.\(^{147}\)

The Commission has moreover, granted national authorities a certain discretionary power to determine the conditions and requirements for the membership of such a system.

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\(^{144}\) *Sunday Times v. UK* A 30 (1979); 2 EHRR 245

\(^{145}\) *Sunday Times v. UK* A 30 (1979); 2 EHRR 245 para 67 PC.


In particular, for the purpose of collecting church taxes, national authorities have a "wide discretion" to assess the conditions on which an individual may validly be regarded as having left a religious denomination.\textsuperscript{148}

The Strasbourg organs have to hold the existence of blasphemy law applicable only to Christianity to constitute discrimination on the ground of religion may be considered as part of this deferential position.\textsuperscript{149}

This may be treated as the Strasbourg organs' implicit endorsement of a margin of appreciation in view of the particular religious milieu and tradition in national societies. How long this restraint based on national traditional values can be sustained is doubtful in light of the increasing recognition of religious equality among Member States. It does not sit well with the Court's approach to the \textit{San Marino} case, which involved the requirement of taking a religious oath before holding a parliamentary office. The Court has found a violation of Article 9, rejecting the government's argument that this practice had lost its original religious meaning and should be considered as simply manifesting a national traditional value.\textsuperscript{150}

The second important variable is related to 'Proselitysm'

The issues of balancing competing interests under Article 9 can be illustrated by evaluation of the extent to which proselytism is allowed. The right to manifest religious belief guarantees an attempt to proselytize and convert others, but this must be weighed against the latter's negative right not to accept such belief. The controversy revolves around whether an approach can be viewed as an innocent exchange of ideas and discussion or as a form of harassment or even the application of undue pressure.

\textsuperscript{148} No. 10616/83, Gottesman v. Switzerland, 40 DR 284, at 289.
\textsuperscript{149} Wingrove v. UK Judgment of 25 November 1996, para 50.
\textsuperscript{150} Buscarini v. San Marino, judgment of 18 February 1999.
This assessment must inevitably depend on the combination of such factors as the manner in which an approach takes place, including its frequency, the existence of an element of coercion or persuasion, the personal circumstances of the recipients of information, as well as the nature of their relationship with those promulgating their belief. The Strasbourg organs often replace the outcomes of the national authorities' assessment.

The competing factors instrumental in setting out the standard of proportionality can be exemplified by the Larissis case, which concerned Greek Air Force officers convicted of the crime of proselytism. The Strasbourg organs drew a distinction between the proselytizing on the airmen and that on civilians. The Commission required the national authorities to bear an onerous evidentiary standard to prove a "pressing social need." As the relevant civilians were not subjected to any form of pressure or constraint, both the Court and Commission concluded that the conviction at issue was disproportionate. In the Larissis case the Strasbourg organs have abandoned the rhetorical reference to the margin of appreciation, making their language consistent with the intense scrutiny of the merits.

The third important variable is 'positive obligations'. The Strasbourg organs have consistently held that Article 9 guarantees not only a negative aspect of freedom of religion, i.e. the protection against unjustified interference by the State, but also positive obligations inherent in an effective 'respect' for the individual's freedom of religion.151

In relation to positive obligations, issues of prisoners and conscientious objectors have special relevance to the 'margin analysis' under Article 9.

The fourth important variable is related to prisoners.152
Prisoners rights as a whole must be balanced against the legitimate aims pursued by national authorities in the interests of protecting public safety and order and preventing crime. They are susceptible to a *broad scope of national discretion*. One notable feature emerging from the earlier case law is the reluctance of the Strasbourg organs to recognize a form of interference with prisoner's freedom of religion in a number of instances. For example, the Commission refused to evaluate complaints under the second paragraph of Article 9 as regards the absence of a proper Kosher diet for an Orthodox Jewish prisoner\(^{153}\), the refusal to provide a religious book containing a section on the martial arts,\(^ {154}\) and a complaint raised by a high caste Sikh who refused to wear prison clothes and clean the floors.\(^ {155}\)

The last important variable is *'conflict with the military hierarchy'*\(^ {156}\). The most controversial aspect would be whether the Convention would allow room for inherent restrictions with respect to issues touching on the armed forces. Would an armed personnel be subject to greater limitations than the civilian? The Strasbourg organs' view on this issue is that the Convention is equally applicable to armed personnel. The inherent limitations should not be accepted simply on the ground of military discipline.\(^ {156}\) In the Kelac case the Court did not find any interference regarding the military organ's decision to dismiss a judge advocate from the army on the ground of his demeanor allegedly supporting an Islamic fundamentalist group.

The last important variable covers *'Conscientious objectors, pacifists and others'*.\(^ {156}\)

The Strasbourg organs have repeatedly emphasized that the Convention does not conscientious objectors the right to exemption from military service. Whether to grant such

\(^{153}\) No. 5947/72 X. v. UK, Decision of 5 March 1976, 5DR 8.
\(^{154}\) No. 6886/75, X. v. UK, Decision of 18 May 1976, 5 DR 8.
\(^{155}\) No. 8231/78, X v. UK, 28 DR 5 at 38.
\(^{156}\) Kalac v. Turkey, judgment of 1 July 1997, para 28.
a right or to create an alternative service depends on national discretion.\textsuperscript{157}

The Commission rejected the complaint raised by a Jehova's Witness, who was sentenced to imprisonment for his objection to compulsory substitute service\textsuperscript{158}, and a pacifists complaint that he was not exempted from the military service because of non-religious, rather than religious character of his convictions.\textsuperscript{159}

Similarly, the Commission did not recognize the complaint raised by a Quaker who objected to the proportion of his taxes spent on military purposes and requested the transfer of this portion for peaceful purposes.\textsuperscript{160}

7. The width of the margin of appreciation, general policy, conclusion

I am of the view that being the Convention and the Court supranational, some elements referred to in the text of the Convention or related to the interference at issue are attached to each State to such an extent that it is simply impossible for a supranational court to make an appropriate judgment in the case, even if critiques maintain that the margin of appreciation left to the States are sometimes too wide, the interference applied by the relevant State may differ from that prevailing in the great majority of the States and the Court tend to fail to serve its designated purpose of surveillance.

As we could see, in order to ensure that limitations on freedom of religion do not curtail that Convention right to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that the conditions elaborated above (e.g. prescribed by law, legitimate aims, etc.) are met. This strict requirement constitutes a guarantee that States do not abuse their favoured position arising from the margin of

\textsuperscript{157} No 10640/83. A v. Switzerland, Decision of 9 May 1984, 38 DR 219, at 223.
\textsuperscript{158} No 2299/64, Grandrath v. Germany, Commission's Report of 12 December 1966, Committee of Minister's Decision, 29 June 1967, 10 Ybk 626.
\textsuperscript{159} No. 10410/83, N v. Sweden, Decision of 11 October 1984, 40 DR 203.
\textsuperscript{160} No. 10358/83, C v. UK, Decision of 15 December 1983, 37 DR 142.
appreciation.

The fact that the Court maintains its role as a supervisor makes it difficult to determine in advance how wide the margin of appreciation may be in a particular case.\textsuperscript{161}

The Court sees the subject of the margin of appreciation as an area in which there is considerable variation in practice and in consequence, it grants states a relatively broad margin of appreciation. This does not give the state an unfettered discretion to determine whether a restriction is proportionate to the aim pursued. It has been persuasively argued that the margin of appreciation is a second order principle and that the state is constrained by an overarching primary principle of ensuring that there is a 'priority to rights'\textsuperscript{162} and the Court itself has stressed that although the state enjoys considerable leeway–it does so only up to a point. Not only is the national assessment subject to European scrutiny in order to ensure that it does indeed meet the requirements of proportionality on the facts of the case, but it is always open to the Court to narrow that margin should a more general consensus on the relationship between the state and the manifestation of religion emerge.

In the meanwhile it also follows from this that different responses to similar situations will be acceptable within the Convention framework, providing that they properly reflect a balancing up on the particular issues in the contexts in which they emerge. This means that the decisions of the Court in relation to Article 9 (2) must be treated with extreme caution: for example, just because a restriction on the wearing of a religious symbol has been upheld on one case does not mean that a similar restriction will be upheld in another, where the context may be different.\textsuperscript{163}


As I have described above some relevant factors to the width of the margin are the level of consensus on the issue among Contracting States\(^\text{164}\), the extent to which the matter interferes with the core of an applicant's private life\(^\text{165}\), the importance of the right to a democratic and pluralistic society (see the religious dress cases and Refah Partisi v. Turkey\(^\text{166}\)) and the circumstances and the background of a particular case\(^\text{167}\). While in theory there is no difference between the margin of appreciation in relation to particular Articles, States in Article 9 cases tend to be given a wide margin of appreciation. The relationship between States and religions in their territories is an inherently controversial one.

As we have seen, generally a wider margin of appreciation is granted to States if a Convention right (e.g. freedom of expression) conflicts with Article 9 of the Convention (since there is no uniform conception on the requirements of 'the protection of the rights of others' in relation to attacks on religious convictions); the interference is associated with proselytism; the interference concerns sensitive areas such as culture and history or denominational neutrality in state schools (States have a margin of appreciation on the regulation of education and the wearing of religious symbols in educational institutions) or the principle of secularism and religious pluralism which are among the indispensable conditions of democracy and the guarantors of democratic values underpinning the Convention (since in a democratic society opinions on the relationship between the state and religions may reasonably differ widely).

The dearth of case law relying on the margin of appreciation in the context of Article 9 makes it difficult to identify any general policy in this field.

\(^{164}\) Sunday Times v. UK

\(^{165}\) Manoussakis and others v. Greece

\(^{166}\) Refah Partisi (The Welfare Party) and others v. Turkey 2003. 37 EHRR 1

Two main reasons can be discerned for the *heightened standard of proportionality* in general. Firstly, freedom of religion, including religious tolerance and pluralism, represents one of the most foundational rights in European democracy. Secondly, there is no room for the margin of appreciation in limiting rights connected to the so-called forum internum, referred to above, as these are designated by the Convention as of an absolute nature.\(^{168}\)

I hold the view that the principle of margin of appreciation strikes a balance between the role of the State and the Court by granting elbow room to the State and the power of review to the Court. This solution may result in less error.

In the light of the foregoing, I highly endorse the principle of the margin of appreciation in context of Article 9 and I am looking forward to see even more and more decisions of the Court related to this matter.

\(^{168}\) Yutaka Arai-Takahashi: The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the European Court of Human Rights p. 100.