RELIGIOUS RIGHTS AND THE MARGIN OF APPRECIATION

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I. INTRODUCTION

This essay critiques the operation of the margin of appreciation (MoA) within the ECHR system with respect to religious rights.[1] It submits that the sophisticated manner in which the ECtHR uses the MoA as an instrument of supervision renders it a defensible conceptual and intellectual instrument for international bodies supervising polycentric rights claims, which is commonly the case in relation to religious rights. The MoA necessarily has to be complex but that does not necessarily render the outcome of its application as uncertain. The identification or otherwise of consensus as crucial to the application of the MoA. That being so, it is submitted that it is the issue of 'framing' the question or issue to which consensus relates, that is crucial to the application of the MoA. Indeed, it is commonly determinative thereof. Finally, the essay highlights the importance to the application of the MoA of the national domestic processes of reasoning, contestation and evaluation.

Each section considers aspects of the MoA but with specific reference to ECHR jurisprudence relating to religious rights. Section 2 examines the place of religious rights in the ECHR. Section 3 briefly examines the relationship between religion and human rights. Section 4 addresses the jurisprudence of the European Court of Human Rights (ECtHR) on religious rights. Section 5 critiques the role and operation of the MoA in religious cases, including the major decisions in which the MoA has been central to the outcome. Section 6

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[1] For more general critiques see D Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2011-12) 14 *Cambridge YB of European Legal Studies* 381 (updated at http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf); A Legg, *The Margin of Appreciation in International Human Rights Law Deference and Proportionality* (Oxford, Oxford University Press, 2012); D McGoldrick, 'A Defence of the Margin of Appreciation and An Argument for its Application by the Human Rights Committee' (2016) 65 *ICLQ* 00 (forthcoming).

contains a case study of the Judgment of the Grand Chamber of the ECtHR in *Fernandez Martinez v Spain* in 2014. Section 7 offers some concluding reflections.

II. THE PLACE OF RELIGION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Although it might appear an obvious point, it should be clearly stated that, on any historical or textual basis, religious rights should bear significant weight in the ECHR system. The protection of religious rights and religious identities has a strong historical pedigree.[2] The inclusion of Article 9 ECHR on 'Freedom of thought, conscience and religion' and of 'religion' as a prohibited ground of discrimination in Article 14 were relatively uncontroversial.[3] The right to education in Article 1 of Protocol 2 was qualified by the obligation on states to 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' Freedom of religion is reflected in all of the major international and regional human rights treaties. It is a classic civil right and is, in that sense, special or exceptional.[4] The MoA can be viewed as a device to accommodate differing views on the exceptionalism of religion and the consequences thereof.

II. RELIGION AND HUMAN RIGHTS

Whatever the place of religion in the ECHR, religions and human rights can be nonetheless be understood as constituting different and competing normative orders. Thus the relationship between religion and human rights law is thus inherently unstable and ambivalent.[5] Religion professes faith in a God's (or some other higher being's) prescriptions rather than human

[2] See M Evans 'An Historical Introduction to the Freedom of Religion and Belief' in C Durham et al (eds) *Facilitating Freedom of Religion and Belief: The Oslo Coalition Deskbook* (The Hague, Kluwer, 2004), 1.
[3] See C Evans, Freedom of Religion Under The European Convention on Human Rights (Oxford, Oxford University Press, 2001) 38-50. Protection against discrimination based on religion is also reflected in Article 1 of Protocol 12 (2000) (general right to equality) (18 ratifications as of 9 November 2015).
[4] See A. Shachar, 'Demystifying Culture' (2012) 10(2) *I-CON International Journal of Constitutional Law* 429; D McPherson, 'The Claims of Religious Identities in Secular Societies' 17 (2016) *Journal of Religion & Society* (forthcoming).
[5] See R Sandberg, *Law and Religion* (Cambridge, Cambridge University Press, 2011); K. Woods, *Human Rights* (Basingstoke, Palgrave, 2014) 84-103.

laws on the rights of men or women. Religions want the protection of the human rights law for their social and institutional existence and for their beliefs and manifestations thereof. However, they are instinctively prone to resist any incursion by the laws into areas where their beliefs and decisions are assessed for compatibility with national or international secular norms, including human rights norms.[6] Particular difficulties are created if courts try to assess religious doctrines and beliefs or subject them to secular standards of rationality, proportionality and non-discrimination.[7] From a human rights perspective religious claims for autonomy are often perceived as seeking privilege and exceptionalism.[8]

Thus, religions are always in a troublesome dialectical relationship with the human rights law.[9] Major judicial decisions by the European Court of Human Rights can signal the ways in which that relationship is evolving within the more than 820 million persons who live in the communities of the 47 member states of the Council of Europe. Since the entry into force of the ECHR most states have become home to a greater multiplicity of religions with their own history and traditions. The Eastward expansion of ECHR membership after 1989 has further multiplied this effect.[10] Both across and within the now 47 member states

[6] See generally I Leigh and R Adhar, *Religious Freedom in the Liberal State*, 2nd edn, (Oxford, Oxford University Press, 2013). A contemporary example relates the compatibility of male circumcision with human rights standards, see M Germann and C Wackernagel, 'The Circumcision Debate from a German Constitutional Perspective' (2015) 4 *Oxford Journal of Law and Religion* 442; *Freedom of Religion and Living Together in a Democratic Society*, Report and Resolution of Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Doc 13851 (6 July 2015).

[7] See P Edge, 'Determining Religion in English Courts' (2012) 1 *Oxford Journal of Law and Religion* 402; R Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157; AS Hofri-Winogradow. 'A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State' (2010/11) 26 *Journal of Law and Religion* 57; *R. (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 A.C. 246 (concerning biblical beliefs in administering corporal punishment to discipline children).

[8] See MD Evans et al (eds) *The Changing Nature of Religious Rights Under International Law* (Oxford, Oxford University Press, 2015) (particularly the essays by Glendon, Bielefeldt and Petkoff); D. McGoldrick 'Religion and Legal Spaces – In Gods we Trust; in the Church, We Trust, but need to Verify' (2012) 12 *HRLR* 759.

[9] See M Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Farnham, Ashgate, 2011).

[10] See T Loenen and JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe:Where to Draw the Line?* (Antwerp, Intersentia, 2007); L. Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford, Oxford University Press, 2012).

there is a wide variety of Church-state relations.[11] At the foundation of the ECtHR's approach to religious rights within the CoE communities, and its development of the concept of the MoA to frame its human rights assessment of the consequences of those relationships, has been its repeated acceptance that 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.'[12] Thus the application of the MoA means that some restrictions on rights may vary from one State to another or even from one region to another within the same State, especially a State that has opted for a federal type of political organisation.[13] In observing that, in such cases, only serious reasons could lead the ECtHR to substitute its own assessment for that of the national and local authorities, which are closer to the realities of their country, the ECtHR stressed the subsidiary nature of the ECHR system.[14] On the foundation of variety of Church-state relations the ECtHR commonly overlays findings that in the particular issue of religious rights under dispute, as framed by the ECtHR, – be it religious dress,[15] the financing and taxation of churches[16] or the protection of the 'rights of others' in relation to forms of expression that constitute attacks on their religious

[11] See N Doe, *Law and Religion in Europe - A Comparative Introduction* (Oxford, Oxford University Press, 2011); R Adhar and I Leigh, 'Is Establishment Consistent With Religious Freedom' (2004) 49 *McGill LJ* 635; F Tulkens, 'The ECHR and Church-State Relations: Pluralism Versus Pluralism' (2008-09) 30 *Cardozo Law Review* 2575; and C Evans and CA Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) 3 *Brigham Young University Law Review* 699; J Temperman, 'Are State Churches Contrary to International Law?' (2013) 2 *Oxford Journal of Law and Religion* 119.

[12] *Müller and Others v Switzerland*, A. 10737/84, paras 30, 35; *Otto-Preminger Institut v Austria*, A. 13470/87, para 50.

[13] See *Murphy v Ireland*, A. 44179/98 (10 July 2003) (upholding the ban of religious advertising in Northern Ireland); *Mouvement Raëlien Suisse v Switzerland* [GC], A. 16354/06, paras 64-5.

[14] *Murphy*, ibid; A Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *HRLR* 313.

[15] See M Ssenyonjo, 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work' (2007) 6 *Chinese Journal of International Law* 653; R McRea, 'The Ban on the Veil and European Law' (2013) 13(1) *HRLR* 50; D McGoldrick, 'Extreme Religious Dress: Perspectives on Veiling Controversies' in I Hare and J Weinstein (eds) *Extreme Speech and Democracy* (Oxford, Oxford University Press, 2009) 400-29; E Howard, *Law and the Wearing of Religious Symbols: European bans on the Wearing of Religious Symbols in Education* (Oxford, Routledge, 2012); M Hunter-Henin, Why the French Don't Like the Burqa: *Laïcité*, National Identity and Religious Freedom' (2012) 61 *ICLQ* 1.

[16] See *Spampinato v Italy*, A. 23123/04 (29 April 2010: inadmissible).

convictions[17] - there is similarly no common European standard or rule. Such a finding is usually a precursor to the ECtHR holding that the state will have acted within its MoA. The unstated finding is that the ECtHR has considered that it is not for it to establish such a common European standard. The consequence in human rights terms is that there is a kind of *renvoi* of the issue back to national political and legal systems. Good examples are *Lautsi v Italy*[18] the consequence of which was to return the issue to the Italian courts to await future judgments on the application of the principle of secularism under the Italian Constitution, and *Şahin v Turkey*,[19] the consequence of which was to return the issue to the Turkish jurisdiction to await political and legal developments. Subsequent to the ECtHR's findings of no violation of Article 9, constitutional and administrative provisions were effectively re-interpreted by the executive and the Parliament to allow the wearing of religious clothing at Universities and by civil servants and Members of Parliament.[20] Absent such developments at the national level, the issue will stay within the MoA, a sufficient consensus or international trend will evolve such that the ECtHR considers it appropriate to deduce the existence of a common European standard, or exceptionally, the ECtHR will consider that societal developments and understandings or international trends have evolved to the point that it is necessary and appropriate to establish a common European standard notwithstanding the absence of any greater consensus.[21] However, it must be acknowledged that a finding of no violation based on the MoA may lead to a levelling down of national protections.[22]

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[17] *Wingrove v UK*, A. 17419/90, para 58; *I.A. v Turkey*, A. 42571/98, para 25; I Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 *Res Publica* 55.

[18] [GC], A. 30814/06 (18 March 2011).

[19] A. 44774/98 (10 November 2005). For criticisms see C Evans, 'The "Islamic Headscarf " in the European Court of Human Rights' (2006) 7 *Melbourne Law Journal* 52; T Lewis, 'What not to wear: religious rights, the European Court, and the margin of appreciation' (2007) 56 *ICLQ* 395; A Vukulenko, '"Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183; P Bosset, 'Mainstreaming Religious Diversity in a Secular and Egalitarian State: the Road(s) Not Taken in *Leyla Şahin v Turkey*' in E Brems (ed), *Diversity and European Human Rights* (Cambridge, Cambridge University Press, 2013) 192-217.

[20] R Smith, 'Why Turkey Lifted Its Ban on the Islamic Headscarf' *National Geographic*, (12 October 2013), available at http://news.nationalgeographic.com.

[21] The classic example of the latter exceptional situation is *Christine Goodwin v UK*, A. 28957/95. See also K Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion' (2015) 4 *Oxford Journal of Law and Religion* 398.

[22] See E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 *HRLR* 349.

III. THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON RELIGIOUS RIGHTS

Commentators have commonly submitted that the ECtHR does not have a very strong record in protecting religious rights and point to the MoA as allowing states to reduce the historical protection afforded to those rights as times evolve and new human rights claims are made.[23] However, in the interest of a balanced perspective, it is important to acknowledge that the ECtHR's religion-related jurisprudence has been very strong in a four critical respects. First, it has considered that the values in Article 9 are at the foundations of a democratic society, that maintaining true religious pluralism is inherent in the concept of a democratic society,[24] and that the 'autonomous existence of religious communities is indispensable for pluralism in a democratic society and is at the heart of the protection' afforded by Article 9.[25] Respect for the autonomy of religious communities recognised by the State implies that the State should accept the right of such communities to govern themselves in accordance with their own rules and interests.[26] States have a duty of denominational neutrality and impartiality vis-à-vis religious communities.[27] The State's role is as the neutral and impartial organiser of the practice of religions, faiths and beliefs.[28] The State's duty of neutrality and impartiality towards religious communities and beliefs precludes it from assessing the legitimacy validity of religious beliefs as long as they attain a certain level of cogency, seriousness, cohesion and importance,[29] or the ways in which those beliefs are expressed.[30] However, what the ECtHR accepts as 'neutrality' is complex and can cover a variety of different approaches to Church-

[23] See J Martínez-Torrón, 'The (Un) Protection of Individual Religious Identity in the Strasbourg Case Law, (2012) 1 *Oxford Journal of Law and Religion* 363.
[24] *Kokkinakis v Greece*, A. 14307/88 (25 May 1993), para 31.
[25] *Hasan and Chausch v Bulgaria*, A. 30985/96, (26 Oct 2000), para 62.
[26] See *Fernandez Martinez v Spain*, considered in Part VI below.
[27] See *Sindicatul 'Pastorul cel Bun' v Romania*, [GC] A. 2330/09 (9 July 2013), (in refusing to register the applicant union, the State had simply declined to become involved in the organisation and operation of the Romanian Orthodox Church, thereby observing its duty of denominational neutrality under Article 14 ECHR).
[28] *Refah Partisi and Others v Turkey*, [GC] A. 41340/98 (13 Feb 2003), para 91. See generally R Sandberg (ed), *Religion and Legal Pluralism* (Ashgate, Farnham, 2015).
[29] See *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v Turkey*, A. 32093/10 (2 Dec 2014) (system for granting exemptions from payment of electricity bills for places of worship under Turkish law - based on an assessment by the Turkish courts on the basis of an opinion issued by the authority for religious affairs to the effect that Alevism was not a religion - thus entailed discrimination on the ground of religion: violation of Article 14 taken together with Article 9).
[30] See *Hasan and Chaush v Bulgaria*, A. 30985/96) (26 Oct 2000), para 78.

State relations.[31] Many of those approaches could reasonably be described as endorsement or preference for religion but, short of being coercive, they can survive a Convention challenge.[32] The ECtHR sees this neutral role as conducive to public order, religious harmony and tolerance in a democratic society, particularly between opposing groups.

Secondly, although it has refused to define 'religion'[33] and 'belief', the ECtHR has interpreted them very widely indeed, [34] arguably too widely.[35] Thirdly, it has afforded States little by way of MoA to impose registration, re-registration or institutional requirements on religious organisations. In *Metropolitan Church of Bessarabia and Others v Moldova*[36] the ECtHR rejected justifications based on upholding national law and constitutional principles, threat to territorial integrity, protecting social peace and understanding among believers and proportionality. Tolerance was not a substitute for recognition.[37] In *Jehovah's Witnesses of*

[31] See MD Evans and P Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 *Religion, State and Society* 205; K Koukouzelis, 'Neutrality, Religious Symbols and the Question of a European Public Space' (2008) 4 *Politics in Central Europe* 41.

[32] In *Lautsi v Italy*, n 18 above, the GC re-affirmed that Article 2 of P1 was principally a protection against 'indoctrination' by the state and teachers. See though *Folgero v Norway*, [GC] A. 15472/02 (29 June 2007) and *Hasan and Eylem Zengin v Turkey* (9 October 2007) in which the ECtHR conducted a very detailed evaluation of the educational course concerned, thereby effectively narrowing the MoA. See S Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR' (2006) 55 *International and Comparative Law Quarterly* 919; V Ibarra, 'Why Appearances Matter: State Endorsement of Religious Symbols in State Schools in Europe After Lautsi' (2014) *UCL Journal of Law and Jurisprudence* 262; A Mawhinney, 'Crucifixes, Classrooms and Children: a Semiotic Cocktail', in J Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden, Brill, 2012) 93.

[33] Cf the description of religion adopted by the UK Supreme Court in *R (Hodkin and another) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77, para 57 (Lord Toulson). See also R. Dworkin, *Religion Without God* (Cambridge Mass, Harvard University Press, 2013).

[34] See D Harris et al, *Law of the ECHR*, 3rd edn, (Oxford, Oxford University Press, 2014) 592-4.

[35] The argument is that an over-broad scope effectively trivialises religion by treating arguably lesser beliefs, such as vegetarianism or veganism, as on a par with it. On positive obligations relating to a Buddist's vegetarian beliefs while in prison see *Vartic v Romania*, A. 14150/08 (17 Dec 2013).

[36] A. 45701/99) (13 Dec 2001)

[37] See also *Doğan and Others v Turkey,* A. 62649/10 (concerning the rejection of the request made by a number of Turkish nationals belonging to the Alevi faith for provision of a religious public service which, they maintain, has been granted to date exclusively to the majority of citizens, who subscribe to the Sunni understanding of Islam). Oral hearing held by GC in June 2015.

Moscow v Russia[38] the ECtHR the ECtHR found that there had been an unjustified dissolution and refusal to re-register the Jehovah's Witnesses's religious community in Moscow. In doing so it rejected six proffered justifications. In *Magyar Keresztény Mennonita Egyház and Others v Hungary*[39] the ECtHR held that the mere absence of apparent consensus on the 'framework of organizational re cognition of otherwise accepted religions'[40] could not give rise to the same degree of deference to the national authorities' assessment, especially when the matter concerned the framework of organisational recognition of otherwise accepted religions (formerly fully-fledged churches) rather than the very acceptance of a certain set of controversial teachings as a religion. Otherwise non-traditional religions could lose the ECHR's protection in one country essentially due to the fact that they were not legally recognised as churches in others. Although the ECtHR acknowledged the importance of 'historical-constitutional traditions' when judging a particular system of religion-state relations,[41] on the facts it did not accept that the scheme reflected Hungarian historical tradition fully and disregarded more recent historical developments.[42] The problematic differential treatment was not in line with state duties of neutrality and impartiality under Article 9.[43] In Kimlya and Others v. Russia[44] a requirement that a religious organization have be in existence in the region for at least fifteen years violated Article 9, interpreted in the light of Article 11. The ECtHR referred to a Report which noted that 'there were no other OSCE participating States that required the lengthy existence of a religious organisation before registration was permitted'.[45] There is similarly little by way of MoA to impose requirements on individuals to publicise or declare their religious beliefs or the absence thereof.[46] Limited elements of disclosure may be acceptable for taxation purposes.[47] Fourthly, although states are accorded a broad MoA regarding state-church religious issues, in terms of Article 14 ECHR differential treatment based on religion is treated as a 'suspect' ground of discrimination. Thus stronger reasons will be required in justification for distinctions based

[38] A. 302/02 (10 June 2010).
[39] A. 70945/11 and Others (8 April 2014), para 88.
[40] Ibid, para 68.
[41] Ibid, para 100.
[42] Ibid, para 101.
[43] Ibid, para 111.
[44] A. 76836/01 and 32782/03 (1 October 2009), paras 100-102.
[45] Ibid, para 100.
[46] *Buscarini and Others v San Marino*, [GC] A. 24645/94 (18 Feb 1999); *Sinan Isik v Turkey*, A. 21924/05 (2 Feb 2010); *Grzelak v Poland*, A. 7710/02 7710/02 (15 June 2010); *Dimitras and Others v Greece*, A. 42837/06 and others, (3 June 2010).
[47] See *Wasmuth v Germany*, A. 12884/03 (17 Feb 2011).

on a difference on religion alone and the state's MoA will be narrower even in sensitive issues such as parental rights,[48] or areas where otherwise there would be a wider MoA, such as taxation or the provision of public services.[49] Preferential treatment of one religion in such contexts will commonly found a violation of Article 14.[50] The wide MoA under Article 9 and the suspect approach under Article 14 are not logically inconsistent.[51] The latter simply reflects the strength of the contemporary prohibition against discrimination.

IV. THE MARGIN OF APPRECIATION IN RELIGIOUS CASES

A. The Role of Consensus in Determining the Margin of Appreciation

In determining the MoA in relation to religious rights the ECtHR may, if appropriate, have regard to any consensus and common values emerging from the state practices of the parties to the ECHR.[52] It makes increasing use of the comparative method to indicate the degree of any European consensus on a particular issue. Consensus is significant in terms of weighting but it is not necessarily decisive or determinative. If an emerging consensus is not based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law, this will not decisively narrow the MoA.[53] An important aspect of looking for the consensus is that the

[48] See *Hoffman v Austria*, A. 12875/87 (23 June 1993); *Palau-Martinez v France*, A. 64927/01 (16 December 2003); *Vojnity v Hungary*, A. 29617/07) (12 Feb 2013) (concerning the total removal of a father's access rights on the grounds that his religious convictions had been detrimental to his son's upbringing).
[49] See *Doğan and* Others, n 50 above.
[50] Within Article 14 the issue will turn on whether the ECtHR considers the differences in the treatment of different religions as having a reasonable and objective justification. See *Manzanas Martin v Spain*, A. 17966/10 (3 April 2012) (difference in treatment between priests of the Catholic Church and Evangelical ministers regarding the calculation of their pension rights); *O'Donoghue v UK*, A. 34848/07 (14 Dec 2010) (differential regime that those wishing to marry in the Church of England); O Mjöll Arnardóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the ECHR' (2014) 14 *HRLR* 647..
[51] Cf. Henrard, n 22 above.
[52] *Bayatyan v Armenia* [GC], A. 23459/03, para 122, ECHR 2011 (conscientious objection to military service); K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge, Cambridge University Press, 2015); Legg, n 1 above, 103-44; P Paczolay, 'Consensus and Discretion: Evolution or Erosion of Human Rights Protection?' in *Dialogue Between Judges* (Strasbourg, ECtHR, 2008) available at http://www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf,.
[53] *SH v Austria*, [GC], A. 57813/00 (3 November 2011), para 96.

jurisprudence on particular controversial issues may take significant periods of time to be established. That gives states time to reflect on comparative social, economic and scientific developments both within and across states. For example, ECHR jurisprudence on conscientious objection to military service – which is usually based on religious or equivalent beliefs - changed significantly over a 37 year period from the European Commission's decision in *Grandrath v Germany*[54] to the Grand Chamber's judgment in Bayatyan *v Armenia*,[55] the facts of which dated back to 2003. In *Bayatyan* the ECtHR considered that at the time of B's case, the overwhelming majority of Council of Europe member States had already recognised in law and practice the right to conscientious objection. Subsequently, Armenia also recognised that right. The laws of the Member States - along with the relevant international agreements - had therefore evolved so that, at the relevant time, there was already a virtual consensus on the question in Europe and beyond. In other cases the ECtHR has been satisfied with 'clear and uncontested evidence' of a 'continuing international trend'[56] or continuing international movement towards legal recognition'.[57]

Generally the working assumption of the ECtHR has been that human rights standards incrementally and progressively increase,[58] and so the MoA only tends to narrow over time. Thus consensus is normally relied upon to expand the scope of rights and restrict the scope of limitations. However, legal and social experimentation is possible within limits. It is clear that it is open to states to impose new restrictions on rights and these may fall within the MoA even if other states have not imposed them.[59] A striking illustration is the ban on the wearing in public places of clothing that is designed to conceal the face (the so-called *Burqa*-ban).[60] Of the 47 member states of the Council of Europe, only France and Belgium had

[54] A. 9532/81 (1986).
[55] [GC] A. 23459/03 (7 July 2011).
[56] See R Sandland, 'Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights' (2003) 11 *Feminist LS* 191.
[57] *Oliari and Others v Italy,* A. 18766/11 and 36030/11 (21 July 2015). The three concurring judges found a violation on the basis of different, narrower reasoning that was not related to consensus or international trends.
[58] See *Demir and Baykara v Turkey,* A. 34503/97, para 146.
[59] See P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 HRLJ 4 (on social experimentation).
[60] See A Ferrari and S Pastorellivi (eds), *The Burqa Affair Across Europe* (Farnham, Ashgate 2013); E Brems (ed), *The Experiences of Face Veil Wearers in European and the Law* (Cambridge, Cambridge University Press, 2014).

actually imposed such bans. Nonetheless, in *S.A.S. v France*[61] in 2014 the ECtHR considered that there was no European consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.[62] The ECtHR held that having regard in particular to the breadth of the MoA accorded to France, the ban could can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'.[63] A detailed analysis of the ECtHR's practice with respect to consensus published in 2013 concluded that, 'consensus analysis is a sound and constructive idea'.[64] However, even when judges accept the concept of looking for consensus in determining the MoA, there have been cases where have been significant and often very critical dissents on how it should be assessed.[65]

B. Critiques of the Application of the Margin of Appreciation in Religious Rights Cases

A particular criticism relates to the framing or formulation of the issue or question relating to religious rights to which consensus does or does not attach. The answer can vary depending on the formulation. In *Şahin v Turkey*[66] the narrow factual issue was the regulation of religious clothing in a university. There was no uniform European conception of the significance of religion in society or the wearing of religious symbols in educational institutions but there was a virtual consensus on whether adult women in universities could wear religious clothing. Alongside Turkey only two other European states prohibited the wearing of religious clothing in Universities. The ECtHR chose the first formulation of the consensus issue. The different outcomes of the Chamber and the Grand Chamber in *Lautsi v Italy*, concerning the display of crucifixes in classrooms, can also be explained by how the

[61] [GC], A.43835/11, paras 106-59 (1 July 2014). Cf the approach *Ahmet Arslan v Turkey*, A. 41135/98 in which the prohibition of a peaceful religious event in the streets was held to amount to a disproportionate interference with religious freedoms.
[62] ibid, para 156.
[63] ibid, para 157. Importantly though the ECtHR rejected a number of other justifications offered by France related gender equality, human dignity, ibid, paras 118-120. See Marshall, n 102 below; *Freedom of Religion and Living Together*, n 6 above.
[64] See L Wildhaber et al, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' 33 (2013) *HRLJ* 248 at 262. Similarly, Kratochvíl, n 87 below, 357. For the argument that consensus fails to provide epistemic justification for the belief that human rights are universal see E-J K Kim, 'Justifying Human Rights: Does Consensus Matter? (2012) 13 *Human Rights Rev* 261.
[65] See *Folgero v Norway*, [GC] A. 15472/02.
[66] [GC], A. 30943/96.

issue was framed.[67] In *Murphy v Ireland*[68] the ECtHR unanimously held that there was no clear consensus between the Contracting States as to the manner in which to legislate for the broadcasting of religious advertisements and no 'uniform conception of the requirements of the protection of the rights of others' in the context of the legislative regulation of the broadcasting of religious advertising.[69]

C. The Wide Margin of Appreciation and the 'Fair Balance' in Religion Cases

It is notable that the MoA has been invoked in many of the leading and most controversial cases concerning concerned religious rights either in terms of their direct limitation, as in *Şahin v Turkey*[70] or because of their putative effect in limiting or being limited by other rights, as in *Otto-Preminger v Austria*,[71] *Wingrove v* UK,[72] *Murphy v Ireland*,[73] *Lautsi v Italy*;[74] *Eweida v UK*,[75] and *S.A.S. v France*.[76] The latter is the context in which the MoA is

[67] A. 30814/06 (18 March 2011). See McGoldrick, n 84 below; G. Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case' (2013) 13 *HRLR* 287; M Lugato, 'The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity' (2013) 52 *Catholic Legal Studies* 49.
[68] A. 44179/98 (10 July 2003).
[69] *Murphy v Ireland*, A. 44179/98 (10 July 2003), paras 67, 81. The prohibition related only to advertising in the audio-visual media.
[70] [GC] A. 44774/98 (10 November 2005). For criticisms see C Evans, 'The "Islamic Headscarf " in the European Court of Human Rights' (2006) 7 *Melbourne Law Journal* 52; T Lewis, 'What not to wear: religious rights, the European Court, and the margin of appreciation' (2007) 56 *ICLQ* 395; A Vukulenko, '"Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183; P Bosset, above n 20.
[71] A. 13470/87 (20 Sept 1994), paras 46- 50. In *Giniewski v France* A. 64016/00, para 52 (3 January 2006) and *Aydin Tatlav v Turkey*, A. 50692/99 (2 May 2006), paras 27-28 distinguished between publications which were gratuitiously offensive, as in *Otto-Preminger* and those which were not inherently offensive.
[72] A. 17419/90 (25 November 1996). See the debate between P Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech' (1997) *EHRLR* 364 and A Lester, 'Universality Versus Subsidiarity: a Reply' (1998) *EHRLR* 73.
[73] A. 44179/98 (10 July 2003). See A Geddis, 'You can't say 'God' on the radio: Freedom of expression, religious advertising and the broadcast media after Murphy v Ireland' (2004) 9 *EHRLR* 181.
[74] A. 30814/06 (18 March 2011). See P Ronchi, 'Crucifixes, Margin of Appreciation and Consensus' (2011) 13 *Ecclesiastical Law Journal* 287; Special Issue of (2011) 6 *Religion and Human Rights* 203 ff; Temperman, n 33 above; D McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom', 11(3) *HRLR* (2011): 451; L Zucca, 'Lautsi: A Commentary' (2013) 11 *International Journal of Constitutional Law* 218.
[75] See I Leigh and A Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3 *Oxford Journal of Law and Religion* 2.

most commonly and visibly applied.[77] It has assumed even more significance as the ECtHR, through its case law, has expanded the scope of ECHR rights through its interpretation of the ECHR as a 'living instrument' and thereby developed the scope of procedural and positive obligations.[78] Thus in *Karaahmed v Bulgaria*[79] there was a failure to take adequate steps to prevent or investigate the disruption of Muslim prayers by offensive and violent demonstrators.

What is notable is that in many cases concerning religious rights, the ECtHR not only affords states a MoA, but a 'wide' one at that. The scope of the MoA afforded directly relates to the strictness of review. Broadly speaking, the wider the margin, the less strict the scrutiny[80] and vice versa.[81] As noted, the basis for affording a wide margin of appreciation is the wide variety of constitutional models governing relations between States and religious denominations in Europe.[82] Thus in *Sindicatul 'Pastorul cel Bun' v Romania*[83] the ECtHR, after referring to the lack of a European consensus on such relations,[84] considered that the State enjoyed a wider MoA in this sphere. This encompassed the right to decide whether or not to recognise trade unions that operated within religious communities and pursued aims that might hinder the exercise of such communities' autonomy.[85] However, six judges dissented, partly on the basis that, although constitutional models governing relations between the different European States and religious denominations varied greatly, none of them excluded members of the clergy from the right to form trade unions.[86]

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[76] See M Hunter-Henin, 'Living Together in an Age of Religious Diversity' (2015) 4 *Oxford Journal of Law and Religion* 1.
[77] See J Kratochvíl 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) NQHR 324; O Bakircioglue, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 *German LJ* 711.
[78] See E Brems and J Gerards (eds), *Shaping Rights in the ECHR: The Role of the ECtHR in Determining the Scope of Human Rights* (Cambridge, Cambridge University Press, 2013).
[79] A. 30587/13, (24 February 2015).
[80] See *Obukhova v Russia*, A. 34737/03 (8 January 2009).
[81] However, this is only a generalisation or starting point, see *Alajos Kiss v Hungary*, A. 38832/06, (20 May 2010).
[82] See I Leigh and R Adhar, 'Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012) 75 *Modern Law Review* 1064.
[83] [GC] A. 2330/09 (9 July 2013).
[84] Ibid, para 61.
[85] Ibid, paras 168-171.
[86] Joint Partly Dissenting Opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse And Jäderblom, para 10.

In assessing whether there exists a pressing social need for the measure in question and, in particular, whether the interference was proportionate[87] to the legitimate aim pursued, regard has to be had to the 'fair balance' which has to be struck between the relevant competing interests and in respect of which the state enjoys a MoA.[88] The breadth of the MoA to be accorded to the state can be crucial to the ECtHR's conclusion as to whether the challenged provision struck a fair balance.[89] In delimiting the extent of the MoA the ECtHR has regard to what is at stake therein.[90] Where a particularly important facet of an individual's existence or identity is at stake, the MoA allowed to the State will normally be restricted.[91] It might be thought that the external manifestation of one's religious beliefs were such an important facet but the ECtHR has not given such a manifestation the additional weight it might bear if considered as an aspect of identity within Article 8.[92] If the process was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism.[93] Significance is also attached to whether the measure deprived the alleged victim of the core contents of a Convention right. Thus in *Sindicatul 'Pastorul cel Bun' v Romania*[94] applicant union's members could form a trade union that pursued aims compatible with the Church's Statute and did not call into question the Church's traditional hierarchical structure and decision-making procedures. The applicant union's members were are also free to join any of the associations currently existing within the Romanian Orthodox Church which had been authorised by the national courts and operated in accordance with the requirements of the Church's Statute.[95]

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[87] Spielmann, n 1 above, (updated version), observed that 'the proportionality principle constitutes the strongest bulwark against the over-use of the margin of appreciation doctrine', at 22.

[88] See J Christofferson, *Fair Balance: Proportionality, Subsidiarity and Primarity in the ECHR* (Oxford, Oxford University Press, 2009).

[89] *A, B and C v Ireland* [GC], A. 25579/05, para 231 (concerning access to abortion).

[90] *Şahin v Turkey* [GC], A. 30943/96, para 110 (concerning the wearing of Islamic headscarves in educational institutions).

[91] *Evans v UK* [GC], A. 6339/05, (2008) 46 EHRR 34, para 77 (concerning an ex-partner's consent for the use of frozen embryos).

[92] See J Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' (2015) 15 *HRLR* 377.

[93] *Sahin v Germany*, A. 30943/96, para 46 et seq. (11 October 2001).

[94] [GC] A. 2330/09 (9 July 2013).

[95] Ibid para 170. In the view of the six dissenting judges the national court did not take into account the competing interests and did not perform a balancing exercise to assess the proportionality of the adopted measure in relation to the applicant union's rights, n 96 above, para 5.

In terms of whether the MoA applies and its width, it will be significant if the relevant law or policy is considered to reflect the 'profound moral views of the people of the state'[96] or 'concerns a question about the requirements of morals'.[97] There will usually be a wide MoA if the State is required to strike a balance between competing private and public interests or competing rights and interests that are protected under the ECHR. Many religious rights cases are of this type. Again much turns of how the ECtHR frames or conceptualises the issues. The more abstract the framing the wider the MoA and vice versa. In *Eweida and Others v UK*,[98] the ECtHR only found a violation in one of the cases, *Eweida*, in which it framed the issue as a balance between an individual's right to manifest their religion and the employer's wish to project a certain corporate image.[99] This framing made it more likely that the ECHR right would weight more heavily in the balance and result in a violation, which it did. In the other cases it found no violation where the balancing interest was the protection of the health and safety of nurses and patients (*Chaplin*),[100] providing a public service which was effective in terms of practicality and efficiency and which complied with the overarching policy of not discriminating on grounds of sexual orientation (*Ladele*),[101] and action by a private employer which was intended to secure the implementation of its policy of providing a service without discrimination (*McFarlane*).[102] The framings in the latter three cases made the likelihood of a finding of non violation much greater, and indeed that was the result in each case. Where ECHR rights deserve equal respect the MoA should in principle be the same irrespective of which party brings the proceedings.[103] In some cases it could be argued that the ECtHR has to readily accepted the interests being balanced against religious rights. In *Phull v France*[104] a claim that the obligation to remove turban at security check at airport

[96] *A, B and C v Ireland* [GC), A. 25579/05, para 241. For criticism of the deference to internal moral views see the partly dissenting opinion of six judges; S Krishnan, 'What's the Consensus: The Grand Chamber's decision on abortion in A, B and C v Ireland' (2010) *EHRLR* 200.
[97] *Stübing v Germany*, A. 43547/08, para 61.
[98] A. 48420/10, 59842/10, 51671/10 and 36516/10), para 109 (wearing of religious symbols by employees). See R MCrea, 'Religion in the Workplace: *Eweida and Others v UK*' (2013) 77 *Modern Law Review* 277; J Maher, 'Eweida and others: A New Era for Article 9?' (2014) 63 *ICLQ* 213.
[99] Ibid, paras 94-95.
[100] Ibid, paras 98-100.
[101] Ibid, paras 102-106.
[102] Ibid, 107-110.
[103] *Axel Springer AG v Germany*, A. 39954/08, para 87 (discussing articles 8 and 10 ECHR).
[104] A. 35753/03 (11 Jan 2005). Followed in *El Mosrli v France*, A. 15585/06 (4 March 2008) (Muslim woman refused to remove her veil in a French consulate during an identity check).

violated Article 9 was manifestly ill-founded on the basis that, 'security checks in airports are undoubtedly necessary in the interests of public safety' and the 'arrangements for implementing them.... fell within the [state's] margin of appreciation, particularly as the measure was resorted to only occasionally'. It can reasonably be argued that the ECtHR could have found that individual's treatment was outside an acceptable MoA because the state could have applied a less restrictive alternative - as in *Phull* – via a walk-through scanner or hand-held detector.[105]

The meaning or impact of the public expression of a religious belief will differ according to time and context.[106] As noted, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions.[107] What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. Country specific religious sensitivities can provide relevant and sufficient reasons justifying interference with an individual's freedom of expression under Article 10.[108] There is a wider MoA to impose restrictions on religious advertising than on commercial expression.[109] However, if the ECtHR considers that the particular expression concerns a matter of public interest, then a reduced MoA applies.[110] Finally, an element to which the ECtHR increasingly directs its attention is whether the national decision-making process, seen as a whole, provides for the requisite protection by weighing up the interests at stake in detail and in depth.[111]

V. CASE STUDY: FERNANDEZ MARTINEZ V SPAIN

[105] See SO Chaib, '*Suku Phull v France* rewritten from a procedural justice perspective: taking religious minorities seriously' in Brems, n 20 above, 218-240. It is also striking that some decision by the Human Rights Committee under the International Covenant on Civil and Political Rights (1966), which asserts that it does not afford states a MoA, have found violations in cases where, on essentially the same facts, the ECtHR has found cases manifestly inadmissible. See *Ranjit Singh v France,* Cmn No. 1876/2000 and *Mann Singh v France,* Cmn No. 1928/2010, *Bikramjit Singh v France,* Cmn No 1852/2008 (all concerning the wearing of turbans by Sikhs, discussed in McGoldrick, n 1 above.
[106] See *Dahlab v Switzerland* (admiss dec.) A. 42393/98, ECHR 2001-V).
[107] Ibid.
[108] Ibid, paras 71-82.
[109] Ibid, para 70.
[110] *Murphy v Ireland,* A. 44179/98 (10 July 2003), para 67.
[111] See *Murphy v Ireland,* A. 44179/98 (10 July 2003); *Fernandez-Martinez v Spain* [GC], A. 56030/07, paras 123-53, (12 June 2014); *Sindicatul*, n 93 above; Saul, 'The European Court of Human Rights's Margin of Appreciation and the Processes of National Parliaments' (2015) 15(4) *HRLR* 00.

In June 2014, in *Fernandez Martinez v Spain*,[112] the Grand Chamber held that a decision not to renew the contract of a priest, who was married with five children, to teach Catholic religion and morals, following the publication of an article disclosing his membership of the 'Movement for Optional Celibacy', did not violate his right to private life under Article 8. As a case study it illustrates many of the key arguments in this essay. First, the complex and sophisticated manner in which the ECtHR uses the MoA as an instrument of supervision. Secondly, that it is the issue of framing that is crucial to the application of the identification or otherwise of consensus. Thirdly, the importance in the application of the MoA of the national domestic processes of reasoning, contestation and evaluation. Fourthly, the use of the MoA in the inevitable balancing of Convention rights. The ECtHR's shift from simply respecting the autonomy of religious organisations to a less protective one which required a detailed consideration of the balancing of interests in individual cases has been a subtle one.[113] Fifthly, that even where the ECtHR is clear that it is an area where states have a MoA, reasonable judges may disagree on whether a fair balance has been struck in an individual case.

Fernández Martínez (FM) became a Catholic priest in 1961. In 1984 he applied to the Vatican for dispensation from celibacy. He did not receive a reply until 1997. In 1985 he had married in a civil ceremony and he and his wife had five children. Between 1991 and 1997 FM had taught Catholic religion and ethics in a State high school in the Murcia region under an annually renewable contract. He was employed and remunerated by the State. However, according to a 1979 Agreement between the Spanish State and the Holy See, the renewal of the contracts for teachers of Catholic religion in public schools was subject to the approval of the local Bishop. Between 1991 and 1997 that approval was forthcoming notwithstanding FM's marital status and despite him not having received the required dispensation from the Vatican. In November 1996 the Murcia newspaper *La Verdad* published an article about the 'Movement for Optional Celibacy' of priests (MOCEOP) of which FM was an active member. The article included comments by a number of participants indicating their

[112] A. 56030/07.

[113] See I Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 *Ecclesiastical Law Journal* 266; C Evans and A Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the US and the European Court of Human Rights' (2012) 1 *Oxford Journal of Law and Religion* 91; JD van den Vyver, 'State Interference in the Internal Affairs of Religious Institutions' (2012) 26 *Emory International Law Review* 1; *Fernandez Martinez* case, part V below.

disagreement with the Church's position on abortion, divorce, sexuality and contraception. FM was named in the article and it was illustrated by a picture of FM with his family. On 15 September 1997 FM was granted dispensation from celibacy by the Vatican in a *rescript*, which also released him from the rights and duties associated with his former clerical status. The *rescript* further indicated that he could no longer teach religion in public institutions, unless the local Bishop decided otherwise, 'according to his own prudent judgment and provided that there [was] no scandal'. On 29 September 1997 the Bishop of Cartagena informed the Ministry of Education that it was not renewing FM's contract since '[FM's] situation [had become] a matter of public and common knowledge', thus creating a 'scandal'.

FM challenged the decision in domestic employment tribunal and courts. Ultimately, FM's *amparo* appeal with the Constitutional Court was dismissed. The Constitutional Court emphasised the constitutionality of the system of selecting and recruiting teachers of Catholic religion in State schools and pointed out that religious education teachers in Spain had a special status which justified taking into account their religious beliefs when they were chosen. It noted that the reason for the non-renewal decision had been a newspaper article which had given rise to a 'scandal' – according to the arguments of the Diocese – because it had made public two personal characteristics of FM already known to the Diocese: his family situation as a priest who was married and had several children, and his membership of the Movement for the Optional Celibracy of Priests (MOCEOP), which challenged certain precepts of the Catholic Church. That publicity constituted the factual basis for what the Bishop regarded as the 'scandal'.

FM submitted that the non-renewal of his contract of employment was a violation of his right to respect for private and family life under Article 8 of the European Convention on Human Rights. In 2012 a Chamber of the Court, by six votes to one, held that there had been no violation of Article 8. FM's request that the case be referred to the Grand Chamber was accepted. By nine votes to eight the Grand Chamber held that there had been no violation of Article 8. Although the ECtHR held that the application should be examined under Article 8 there was extensive consideration of FM's Article 9 right to freedom of thought and religion and the Church's right to autonomy.

Agreeing with the parties, the GC found that the non-renewal decision pursued the legitimate aim of protecting the rights and freedoms of others, namely those of the Catholic Church, and in particular its autonomy in respect of the choice of persons accredited to teach

religious doctrine.[114] The central focus was on whether the limitation on FM's Article 8 rights were necessary in a democratic society. The GC framed the case as one in which it had to weigh up the interests at stake so as to rule on a conflict between two rights that were equally protected by the ECHR. This balancing exercise concerned FM's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other. The State was called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued. In this context, the State had a wide MoA.[115] The GC observed that religious communities were traditionally and universally existed in the form of organised structures. Where the organisation of the religious community was at issue, Article 9 must be interpreted in the light of Article 11, which safeguarded associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompassed the expectation that they would be allowed to associate freely, without arbitrary State intervention. The autonomous existence of religious communities was indispensable for pluralism in a democratic society and was thus an issue at the very heart of the protection which Article 9 afforded. It had a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable.[116]

Concerning the internal autonomy of religious groups, Article 9 did not enshrine a right of dissent within a religious community. In the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual's freedom of religion was exercised by the option of freely leaving the community.[117] In that

[114] See I Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 *Ecclesiastical Law Journal* 266; C Evans and A Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the US and the European Court of Human Rights' (2012) 1 *Oxford Journal of Law and Religion* 91; JD van den Vyver, 'State Interference in the Internal Affairs of Religious Institutions' (2012) 26 *Emory International Law Review* 1; *Fernandez Martinez* case, part V below.
[114] Ibid, para 122.
[115] Ibid, para 123.
[116] Ibid, para 127.
[117] This point on dissent is interesting because in *Eweida and Others*, n 85 above, the ECtHR moves its jurisprudence more firmly into the necessity for balancing and away from notions of non-interference, see M Pearson, 'Article 9 at a Crossroads: Interference Before and After *Eweida*' (2013) 13 *HRLR* (2013) 580. Of course, a less strict application of the non-

context, the Court re-emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and its view that this role was conducive to public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. Respect for the autonomy of religious communities recognised by the State implied, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It was therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that existed or might emerge within them.[118] Apart from very exceptional cases, the right to freedom of religion under the Convention excluded any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs were legitimate. Moreover, the principle of religious autonomy prevented the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty.[119] Where questions concerning the relationship between State and religions, on which opinion in a democratic society may reasonably differ widely, were at stake, the role of the national decision-making body must be given special importance. That would be the case in particular where practice in European States was characterised by a wide variety of constitutional models governing relations between the State and religious denominations.[120]

As a consequence of their autonomy religious communities could demand a certain degree of loyalty from those working for them or representing them. In this context the nature of the post occupied by those persons was an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned. In particular, the specific mission assigned to the person concerned in a religious organisation was a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty.[121] A mere allegation by a religious

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interference doctrine will necessarily mean that more issues will turn on the scope of the MoA afforded in relation to the particular religious issue. In some judgments the ECtHR has used both grounds, see *Cha'are Shalom ve Tsedek v France* (27 June 2000), C Zoethout, 'Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter' (2013) 35 *Human Rights Quarterly* 651.

[118] *Fernández Martínez*, para 128.

[119] Ibid, para 129, citing, *Svyato-Mykhaylivska Parafiya v Ukraine,* A. 77703/01 (14 June 2007), para 146.

[120] Ibid, para 130, citing *Şahin v. Turkey,* above n 80 and *Sindicatul*, above n 93..

[121] Ibid, para 131, citing, *inter alia*, *Obst v Germany* and *Schüth v Germany*, below n 154.

community that there was an actual or potential threat to its autonomy was not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged was probable and substantial and that the impugned interference with the right to respect for private life did not go beyond what was necessary to eliminate that risk and did not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions were satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.[122]

By signing his successive employment contracts, FM knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree. Such contractual limitations were permissible under the Convention where they are freely accepted. Form the point of view of the Church's interest in upholding the coherence of its precepts, teaching catholic religion to adolescents could be considered a crucial function requiring special allegiance. The Court was not convinced that at the time of the publication of the article in *La Verdad*, this contractual duty of loyalty had ceased to exist. Even if FM's status as a 'married priest' was unclear, a duty of loyalty could still be expected on the basis that the Bishop had accepted him as a suitable representative to teach Catholic religion.[123] In choosing to accept a publication about his family circumstances and his association with what the Bishop considered to be a protest-oriented meeting, FM severed the special bond of trust that was necessary for the fulfilment of the tasks entrusted to him. It was not unreasonable for a church or religious community to expect particular loyalty of religious education teachers in so far as they may be regarded as its representatives. The existence of a discrepancy between the ideas that had to be taught and the teacher's personal beliefs might raise an issue of credibility if the teacher actively and publicly campaigned against the ideas in question. In this case the problem lay in the fact that FM could be understood to have been campaigning in favour of his way of life to bring about a change in the Church's rules, and in his open criticism of those rules.[124] For the GC it was necessary to take into account the specific content of FM's teaching. As a teacher of religious education a heightened duty of loyalty

[122] Ibid, para 132, citing *Sindicatul*, above n 93.
[123] Ibid, para 134.
[124] Ibid, paras 136-137.

was justified by the fact that, in order to remain credible, religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question, especially where the religion was supposed to govern the private life and personal beliefs of its followers. In assessing the seriousness of the conduct of an individual employed by the Church it was necessary to take into account the proximity between the person's activity and the Church's proclamatory mission. In the present case, that proximity was clearly very close. FM was voluntarily part of the circle of individuals who were bound, for reasons of credibility, by a duty of loyalty towards the Catholic Church, thus limiting his right to respect for his private life to a certain degree. The fact of being seen as campaigning publicly in movements opposed to Catholic doctrine clearly ran counter to that duty. In addition, there was little doubt that FM, as former priest and director of a seminary, was or must have been aware of the substance and significance of that duty. In addition, the changes brought about by the publicity given to FM's membership of MOCEOP and by the remarks appearing in the article were all the more important as FM had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to FM's own personal opinion.[125]

That FM, like all religious education teachers in Spain, was employed and remunerated by the State, was not such as to affect the extent of the duty of loyalty imposed on FM *vis-à-vis* the Catholic Church or the measures that the latter was entitled to adopt if that duty was breached.[126] The non-renewal of FM's contract of employment constituted a sanction entailing serious consequences for his private and family life. However, the Bishop had taken those difficulties into account, pointing out that FM would be entitled to unemployment benefit, which in the event he did receive.[127] The consequences for FM had to be seen in the light of the fact that he had knowingly placed himself in a situation that was incompatible with the Church's precepts. FM was aware of its rules and knew that his conduct placed him in a situation of precariousness *vis-à-vis* the Bishop and made the renewal of his contract dependent upon the latter's discretion. He should therefore have expected that the voluntary publicity of his membership of MOCEOP would not be devoid of consequences for his contract. Although FM had not received any prior warning before the decision not to renew his contract, he knew that his contract was subject to annual renewal if approved by the Bishop, thus involving the possibility for the latter to assess, on a regular

[125] Ibid, paras 138-142.
[126] Ibid, para 143.
[127] Ibid, para 145.

basis, FM's fulfilment of his heightened duty of loyalty. FM also knew that the Church had already shown tolerance in allowing him to teach Catholic religion for six years, that is, for as long as his personal situation which was incompatible with the precepts of that religion was not promoted publicly. Moreover, a less restrictive measure for FM would certainly not have had the same effectiveness in terms of preserving the credibility of the Church. It thus did not appear that the consequences of the decision not to renew his contract were excessive in the circumstances of the case, having regard in particular to the fact that FM had knowingly placed himself in a situation that was completely in opposition to the Church's precepts.[128]

The GC specifically directed its attention to the detailed review of the case by the successive domestic courts.[129] It asserted that, although Article 8 contained no explicit procedural requirements, the Court could not satisfactorily assess whether the reasons adduced by national authorities to justify their decisions were 'sufficient' for the purposes of Article 8(2) without at the same time determining whether the decision-making process, seen as a whole, provided FM with the requisite protection of his interests. The domestic courts had taken into account all the relevant factors and weighed up the interests at stake in detail and in depth, within the limits imposed on them by the necessary respect for the autonomy of the Catholic Church. The conclusions thus reached did not appear unreasonable, particularly in the light of the fact that FM, as he had been a priest and the director of a seminary, was or must have been aware, in accepting the task of teaching Catholic religion, of the potential consequences of the heightened duty of loyalty *vis-à-vis* the Catholic Church by which he thus became bound, for the purpose, in particular, of preserving the credibility of his teaching. As for the Church's autonomy, it did not appear, in the light of the review exercised by the national courts, that it was improperly invoked in the present case. The Bishop's decision not to propose the renewal of FM's contract could not be said to have contained insufficient reasoning, to have been arbitrary, or to have been taken for a purpose that was unrelated to the exercise of the Catholic Church's autonomy.[130]

In conclusion, the GC held that, having regard to the State's MoA in the present case, the interference with FM's right to respect for his private life was not disproportionate. Accordingly, there has been no violation of Article 8. Having regard to its conclusion under

[128] Ibid, para 146.
[129] Ibid, paras 147-151.
[130] Ibid, paras 147-151.

Article 8, the Court found that there was no need to examine the other complaints separately (these complaints included both articles 9 and 14).[131]

The majority and minority accepted that the domestic authorities had a wide MoA and applied what they considered to be the same test of proportionality. But they came to radically different conclusions. The finding of no violation was by 9 votes to 8. The minority, including the President of the ECtHR, vehemently disagree with virtually all aspects of the majority ruling.[132] First, the dissenters distinguished the religious decision of the Diocese, that is, the refusal to grant permission for the renewal of FM's contract, from the secular consequences attached to that decision by the national authorities. The dissenters thus drew on the distinction between FM's religious position (a 'suspended cleric') and his secular position (a teacher in a public school). The purported distinction seems rather unreal. It would effectively make the courts the arbiters of whether M had been involved in scandal.[133] Secondly, the non-renewal decision 'was taken without any prior warning and without any opportunity for the applicant to be heard'. Thirdly, the dissenters noted that the reasons for FM's 'dismissal', that was, the fact that he had created a 'scandal' – had (i) only been indicated in a rescript that was drawn up after the publication of the newspaper article; (ii) had already been publicly known to the Church, the school and the parents of the pupils long before the publication of the article; and (iii) were outside of FM's control, as it had not been he himself who had published his marital status and membership of the Movement for Optional Celibacy, but a journalist. Fourthly and finally, the dissenters criticised the Ministry for not having considered less restrictive alternatives. However, they give no indication of what those alternatives could have been.

Such close votes in the Grand Chamber are relatively rare and do not do much for the integrity and legitimacy of the ECtHR's jurisprudence.[134] Although the GC gave significant weight to the autonomy of the church, it is noticeable that it was not prepared to accept that a mere allegation by a religious community that there was an actual or potential threat to its autonomy was sufficient. There had to be a thorough balancing exercise between the

[131] Ibid, paras 152-155.
[132] There was a joint dissent by all 8 judges, a dissent by three judges, and two individual dissenting opinions.
[133] See also the dissenting opinion of Judge Sajò at para 5 ('The "scandal" was not convincingly translated to meet the requisite judicial standards. Or better put, it was accepted that it was above and beyond the need for such translation.')
[134] The same observation can be made in relation to the 9-8 decision in *Animal Defenders International v UK*, [GC] A. 48876/08, 22 April 2013. The majority and the minority also differed in their assessment of whether there was a European consensus.

competing interests at stake and it had to have been conducted by the national authorities.[135] What was ultimately critical for the majority was that they viewed FM as campaigning publicly in movements opposed to Catholic doctrine. For them this clearly ran counter to his duty of loyalty towards the Catholic Church. The best case to explain the eight dissenters is that the one they themselves gave. They simply saw the same case differently in relation to the establishment of the facts; the characterisation of the facts in the light of Article 8; and the application of Article 8 to the facts of the case.[136] Lawyers may appreciate the fine art involved in alternative perceptions and legal categorisations of the same facts and in assessing what is a fair balance.

But the real concern is that secular courts are claiming the prerogative to undermine religious autonomy by making secular determinations on the status of persons as employees, priest or ministers,[137] and on how religious organisations should deal, both substantively and procedurally, with members whose actions or activities are inconsistent with religious beliefs.[138] Any degree of balancing of rights necessarily gives less protection to the interest of religious organisations than does a simple deference to their religious autonomy. The decisions of the national courts must be reasoned and reasonable. They must weigh up the interests at stake in detail and in depth but, and this is crucial, they can do so within the limits imposed on them by the necessary respect for the autonomy of the particular religion in the context of their national constitutional system. The national court's conclusions will be accepted by the ECtHR as long as they do not appear unreasonable on the facts. The national authorities have to ensure that the Church's autonomy is not improperly invoked. That requires that the decision of the religious authorities must contain sufficient reasoning, not be

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[135] Following the ECtHR's balancing approach in relation to lay persons in *Obst v Germany*, A. 425/03 (23 September 2010), *Schüth v Germany*, A. 1620/03, (23 September 2010) and *Siebenhaar v Germany*, A. 18136/02 (3 February 2011). In *Schüth* the ECtHR found a violation of Article art. 8, primarily because the German courts had not engaged in a real balancing exercise between the Convention rights of the Church and those of S. See McGoldrick, n 8 above; I Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 *Oxford Journal of Law and Religion* 109.

[136] See *Fernández Martínez*, n 130 above, Joint Dissenting Opinion of the eight Judges, para 1.

[137] See P Slotte and H Årsheim, (eds) Special Issue on Ministerial Exception (2015) 4(2) *Oxford Journal of Law and Religion* 171-302.

[138] See S Smet, 'Fernández Martínez v Spain: The Grand Chamber Putting the Brakes on the 'Ministerial Exception' for Europe?' Strasbourg Observers, (23 June 2014) available at http://strasbourgobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-breaks-on-the-ministerial-exception-for-europe/. See also Baroness Hale, 'Secular Judges and Christian Law' (2015) 17 *Ecclesiastical Law Journal* 170.

arbitrary and not be taken for a purpose that was unrelated to the exercise of the religion's autonomy. A contractual acceptance of obligations of loyalty will be given weight. So too will the religious beliefs of a person who wishes to engage in teaching the morals or ethics of a particular religion. This is to preserve the right to religious freedom in its collective dimension. The effect of the MoA is thus that the ECtHR's role is necessarily more limited than it might be outside of the religious context. However, the ECtHR maintains its perception of the MoA as an instrument of supervision. The state must remain within its MoA and a 'fair balance' must be maintained between the various private interests.[139]

As noted, the majority and minority accepted that the domestic authorities had a wide MoA and applied what they considered to be the same test of proportionality. But they came to radically different conclusions. If that happened consistently it would ultimately cast doubt on the credibility of the MoA as a conceptual tool because of the resulting uncertainty in its application. Fortunately such deep divisions are rare. In the vast majority of cases the results of applying the MoA, even when it involves consideration of a complex multiplicity of factors and elements, and the balancing of equally rights, is a unanimous decision or a strong majority.[140]

VII. CONCLUDING COMMENTS

It is submitted that when properly understood the MoA is a complex, sophisticated and defensible intellectual instrument[141] for international bodies supervising polycentric rights claims, which is commonly the case in relation to religious rights.[142] It is like a multi-dimensional chess game in which a lot of pieces are in play along a number of axes. In religious cases, as in others, the MoA factors may combine and interact in different ways, sometimes pulling in different directions in the context of a single case. This complexity and uncertainty may not satisfy jurisprudential purists or pure universalists. But it represents a sensible pragmatic legal doctrine for a system applying to 47 states and over 820 million people. The consequence of affording states a MoA in religion-related cases is that an acceptable and human rights compliant overall balance can be achieved in a number of ways. Thus conceived the MoA plays a crucial role in building a complex multi-level community

[139] *Fernández Martínez*, para 114.
[140] As in *Sahin*, above n 80 and *Lautsi*, above n 18.
[141] See also Legg, n 1 above, who strongly supports the use of the MoA.
[142] See G Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian J of Law and Jurisprudence* 179.

amongst the 47 Council of Europe States. The MoA can thus assist in mediating between the idea of universal human rights and leaving space for reasonable disagreement, legitimate differences, and national or local cultural diversity.[143] It is submitted that the MoA is a sufficiently sophisticated and flexible instrument of supervision. As noted, its application can be sensitive to special historical or political considerations, the relative importance of the interest at stake, sensitive moral or ethical issues, the balancing of private and public interests, and complex scientific and technical issues. Assessing all of these kinds of factors in religion-related cannot be avoided so their explicit acknowledgment makes for more open and transparent reasoning

The MoA gives States 'room for manoeuvre'[144] while retaining strong elements of European supervision. It is submitted that the complexity of factors taken account of in ECtHR's methodology in applying the MoA, including the weight given to consensus, leads to reason-based, justificatory arguments.[145] There is thus a process of reasoning, contestation and evaluation which is engaged in by democratic Parliaments[146] and courts and, to some extent, the people.[147] Giving a significant but not necessarily determinative weight to the existence or non-existence of a consensus is a sensible and credible tool to ensure that the evolution of the ECtHR's jurisprudence keeps pace with but does not move so far ahead of societal changes within Europe that it creates significant risk of non-implementation.[148] The MoA can thus be understood as a device which, in those situations in which it is appropriate

[143] See Legg, n 1 above on 'affording appropriate respect for local values in the states' implementation of their international human rights obligations', 225.
[144] This expression is used the ECtHR's Press Releases to describe the operation of the MoA, see *Junta Rectora Del Ertzainen Nazional Elkartasuna v Spain*, A. 45892/09, (21 April 2015).
[145] See also M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American J of Comparative Law* 466; M Hunt et al, *Parliaments and Human Rights* (Oxford, Hart/ Bloomsbury, 2015). 425-583.
[146] See Saul, n 128 above.
[147] See B Petkova, 'The Notion of Consensus as a Route to Democratic Adjudication?' (2011-12) 14 *Cambridge YB of European Legal Studies* 663.
[148] On the importance to implementing human rights standards of judicial will, domestic sensitivities, public support (or at least lack of opposition), and political organization, see D Anagnostou,(ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh, Edinburgh University Press 2013).

to apply it,[149] can mediate between the idea of universal human rights and leaving space for reasonable disagreement, legitimate differences, and national or local cultural diversity.[150]

[149] It is important to re-emphacise that, as explained in Part III above, the ECtHR's religion-related jurisprudence has been very strong in a number of critical respects, and in those areas there has been little if any scope for the MoA to be accorded.

[150] See DL Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights' (2001) 15 *Emory Intl LR* 391; McGoldrick, n 1 above (2016); Henrard, n 22 above.