

A 'good faith' interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee

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The European Court of Human Rights (ECtHR) and UN Human Rights Committee have reached contradictory decisions in cases concerning the right to manifest religion. This discrepancy calls into question the universality of the right and is problematic from the perspective of legal certainty. Consequently, this article explores the extent to which the diverging decisions of these two bodies are compatible with a good faith interpretation of the right to manifest religion. A good faith interpretation of the right is identified by utilising the travaux préparatoires and subsequent interpretations. It is argued that by failing to scrutinise the necessity of restrictions and the role of secularism, the ECtHR has undermined this good faith interpretation and, in so doing, is not fulfilling its role as 'the conscience of Europe'.

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INTRODUCTION

The right to freedom of religion or belief, as contained in the European Convention on Human Rights (ECHR)¹ and International Covenant on Civil and Political Rights (ICCPR),² has a common origin in the Universal Declaration of Human Rights (UDHR).³ Despite these common origins, the European Court of Human Rights

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1. Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 005, entered into force 3 September 1953 (ECHR).
2. International Covenant on Civil and Political Rights 999 UNTS 171, entered into force 23 March 1976 (ICCPR).
3. Universal Declaration of Human Rights GA Res. 217A (III), UN Doc A/810 at 71 (1948) (UDHR).

(ECtHR)⁴ and UN Human Rights Committee (HRC)⁵ have reached contradictory decisions in analogous cases concerning the right to manifest religion by wearing religious clothing. A small degree of variance must be expected between the approaches of the regional ECtHR and the international HRC. However, this should not compromise the universality of human rights standards. Consequently, it is necessary to consider whether these contradictory interpretations of the right to freedom of religion or belief are both compatible with a good faith interpretation of the right.

The rules of treaty interpretation reveal that human rights standards should be interpreted in good faith in accordance with the intentions of the parties.⁶ This article identifies a good faith interpretation of the right to freedom of religion or belief by utilising original research into the *travaux préparatoires* of the ECHR, ICCPR and UDHR. This reveals that the object and purpose of the right to freedom of religion or belief is to restrict state interference with matters of conscience, in particular if motivated by the preservation of the dominant or state ideology. The right was recognised to be of particular importance for religious minorities, given their vulnerability to such interference. While the HRC's interpretation has been consistent with these aims, this article takes the view that the ECtHR has directly undermined them. By awarding states a wide margin of appreciation, the ECtHR has allowed states to interfere with the right to manifest religion, without evidence of the necessity and proportionality of such restrictions. This has led the ECtHR to legitimise a vision of state secularism that seeks to eliminate rather than protect religious freedom and prioritises secular and Christian beliefs above minority beliefs. Were the ECtHR to interpret the right to manifest religion consistently with the good faith interpretation identified in this article, its jurisprudence is more likely to be consistent with that of the HRC.

Other academic work in this field has focused on the use of the margin of appreciation in freedom of religion cases. Lewis, for example, has argued that the ECtHR does not adequately consider the necessity of the restriction on the applicants' rights.⁷ Whereas, Evans has criticised the ECtHR for unquestioningly accepting 'the elevated position of secularism'.⁸ In contrast, this article considers the broader picture by analysing the compatibility of the differing interpretations of the ECtHR and HRC with a good faith interpretation of the right to manifest religion. Although focused on the right to manifest

4. *Mann Singh v France* App no 24479/07 (ECtHR 13 November 2008); *Jasvir Singh v France* App no 25463/08 (ECtHR 30 June 2009); *Ranjit Singh v France* App no 27561/08 (ECtHR 30 June 2009).

5. *Bikramjit Singh v France* Communication no 1852/2008 (HRC 4 February 2013); *Ranjit Singh v France* Communication no 1876/2009 (2011) 32 BHRC 275; *Mann Singh v France* Communication no 1928/2010 (2013) 36 BHRC 675.

6. Arts 31–33 Vienna Convention on the Law of Treaties 1155 UNTS 331, entered into force 27 January 1980 (VCLT).

7. T Lewis 'What not to wear: religious rights, the European Court and the margin of appreciation' (2007) 56 ICLQ 395 at 408–411. See, further, MD Evans 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions' in P Cane, C Evans and Z Robinson (eds) *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) p 307; M Borovali 'Islamic headscarves and slippery slopes' (2009) 30 Cardozo Law Review 2593 at 2594.

8. C Evans 'Individual and group religious freedom in the European Court of Human Rights: cracks in the intellectual architecture' (2010–2011) 26 Journal of Law and Religion 331 at 336. See, further, M Evans 'Human rights and the freedom of religion' in M Ipgrave (ed) *Justice & Rights – Christian and Muslim Perspectives* (Washington DC: Georgetown University Press, 2009) p 115.

religion, the conclusions drawn in this article have implications for the ECtHR's use of the margin of appreciation in cases concerning other Convention rights.

This article first employs the principles of treaty interpretation, in conjunction with the *travaux préparatoires* and subsequent interpretations, to identify a good faith interpretation of the right to manifest religion. Second, the identified good faith interpretation is used to analyse the approaches of both the ECtHR and HRC in analogous cases concerning the right to manifest religion. The potential implications of the ECtHR adhering to a good faith interpretation of the right to manifest religion are elaborated. Third, it is argued that by permitting societal consensus to dictate the content of the right, the ECtHR has allowed the scope of the right to freedom of religion to be narrowed to the extent that it does not achieve its original purpose.

1. IDENTIFYING A 'GOOD FAITH' INTERPRETATION OF FREEDOM OF RELIGION OR BELIEF

The ECtHR and HRC have reached contradictory decisions in analogous cases concerning the right of Sikhs to manifest their religion by wearing the *keski* and turban.⁹ The inconsistent interpretation of the right to manifest religion has the potential to undermine its universal protection and has implications for legal certainty. Consequently, it is not possible for both approaches to be 'correct'. It is, therefore, necessary to examine which approach is most consistent with a good faith interpretation of the right to manifest religion or belief. In accordance with Art 31(1) of the Vienna Convention on the Law of Treaties, 'the general rule', '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The ECtHR has also established the principle that limitations on Convention rights 'cannot justify impairing the very essence of the right'.¹⁰ The concept of the 'essence of the right' has been interpreted to refer to 'an absolute indispensable core to the right which cannot be impaired regardless of the circumstances'¹¹ and, thus, should align with the right's object and purpose.

Recourse to the *travaux préparatoires* of human rights instruments facilitates the identification of a good faith interpretation of the right to manifest religion by revealing the context of the adoption of individual rights and the intention of the parties. However, as human rights instruments are 'living instruments', the use of the *travaux préparatoires* must be approached with caution,¹² as it may result in a static and restrictive interpretation of the right.¹³ Letsas has distinguished between the *concrete* and the *abstract* intentions of the drafters in this respect: 'they had a concrete idea of

9. *Mann Singh v France*, above n 4; *Jasvir Singh v France*, above n 4; *Ranjit Singh v France*, above n 4; *Bikramjit Singh v France*, above n 5; *Ranjit Singh v France*, above n 5; *Mann Singh v France*, above n 5.

10. *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 para 60.

11. L Hoyans 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial' (2014) *Criminal Law Review* 4 at 15.

12. Sir H Waldock 'Third report on the Law of Treaties' [1964] ILC Yearbook vol II, 58 at para 21; G Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) pp 72-79.

13. *Feldbrugge v The Netherlands* (A/99) (1986) 8 EHRR 425 joint dissenting opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt And Gersing para 24.

what human rights there are but it was their more abstract belief in the moral objectivity and universality of these rights that led them to draft the ECHR'.¹⁴ The *concrete* intentions of the drafters are reflective of society in the ten drafting states of the ECHR in the late 1940s,¹⁵ and, thus, do not assist the identification of a good faith interpretation of the right to manifest religion.¹⁶ In contrast, the *abstract* intentions of the drafters, identified through the *travaux préparatoires*, reveal the object and purpose of human rights instruments.¹⁷

In this section the principles of treaty interpretation are used to establish a good faith interpretation of the right to manifest religion. The text of the right to manifest religion is considered separately from its context and object and purpose. The evidence provided by the *travaux préparatoires* will be considered alongside the subsequent interpretation of the content of the right by the ECtHR and HRC, in order to avoid the identification of a static interpretation of freedom of religion.

(a) The text of the right to freedom of religion or belief

The text of the right to freedom of religion or belief provides a useful starting point from which to identify a good faith interpretation of the right to manifest religion. Nonetheless, as the adoption of a strict textual approach to treaty interpretation has the potential to lead to a narrow understanding of the right, this must be supplemented with the consideration of the context and object and purpose.

The right to freedom of religion or belief is enshrined in Art 9(1) ECHR, Art 18 ICCPR and Art 18 UDHR. Art 9(1) ECHR establishes that:

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

The text of Art 9 ECHR and Art 18 ICCPR are virtually identical, having both been based on Art 18 UDHR. The emphasis on ‘freedom’ indicates that the right is ‘primarily of a defensive nature’.¹⁸ Consequently, its central component is protection from external interference in matters of conscience including state interference. By providing ‘the right to freedom of thought, conscience and religion’, the text of these rights indicates that all forms of belief, religious or otherwise, find protection. Although the *travaux préparatoires* to the ICCPR indicate that the drafters did not agree as to whether ‘the word “belief” covered also secular belief’,¹⁹ subsequent practice confirms that it does.²⁰

14. Letsas, above n 12, p 70.

15. Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

16. Letsas, above n 12, p 74.

17. Ibid, p 72.

18. M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: NP Engel, 2nd edn, 2005) p 411.

19. Third Committee 15th Session (1960) UN doc A/4625 para 51 in MJ Bossuyt *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987).

20. *Kokkinakis v Greece* (1994) 17 EHRR 397 para 31. See also, HRC, ‘General Comment No 22’ on ‘The Right to Freedom of Thought, Conscience and Religion (Art 18)’ UN doc CCPR/C/21/Rev.1/Add.4 para 2; A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN doc E/CN.4/Sub.2/200/Rev.1, p 1.

The text of Art 9 ECHR, Art 18 ICCPR and Art 18 UDHR also reveals that the right to freedom of religion or belief comprises both the right to hold a belief and the right to manifest that belief, 'in public or private'. Although the external manifestation of religion may be restricted in accordance with the limitations clauses, it remains a fundamental element of the right, as noted by Mr Dehousse of Belgium during the drafting of the UDHR: 'It would be unnecessary to proclaim that freedom [of religion] if it were never to be given outward expression; if it were intended, so to speak, only for the use of the inner man'.²¹ Thus, the creation of the right to hold a belief was not considered by the drafters of human rights instruments to be sufficient to protect religious adherents. The right to manifest religion was deliberately included in human rights instruments in order to guard against unwarranted interference with the expression of that belief.

Four forms of manifestation expressly find protection under the right to freedom of religion, namely, worship, observance, teaching and practice. Krishnaswami, in his 1960 report, explained that this was intended to encompass all conceivable manifestations of religion.²² This has subsequently been interpreted expansively by the HRC in General Comment 22,²³ and, notably, both the ECtHR and HRC have recognised that headcoverings constitute a protected manifestation of religion.²⁴

The manifestation of religion is, nonetheless, subject to limitation in accordance with Art 9(2) ECHR and Art 18(3) ICCPR. These provisions were based on the generic limitation clause contained in Art 29(2) UDHR. The text of Art 9(2) ECHR and Art 18(3) ICCPR permits limitations to the right to manifest religion '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'. These grounds for limitation were initially envisaged to be extremely narrow, with delegates at the drafting of the UDHR referring to human sacrifice, flagellation, savage mortification and death ritual as examples of when the manifestation of religion could be legitimately restricted.²⁵ This approach was subsequently reaffirmed by the Krishnaswami report which suggested a more expansive list of justifiable limitations: '[i]nto this category fall such practices as the sacrifice of human beings, self-immolation, mutilation of the self or others, and reduction into slavery or prostitution, if carried out in the service of, or under the pretext of promoting, a religion or belief',²⁶ polygamy,²⁷ 'rebellion or subversion'²⁸ and acts contrary to peace and security.²⁹ The ground of 'the protection of the rights and freedoms of others' was, accordingly, intended to prevent religious manifestation from infringing the concrete rights of individuals, elaborated in human rights instruments.

21. UNGA Third Committee of the General Assembly, Record of 127th Meeting, held on 9 November 1948 UN doc A/C.3/SR.127, 395.

22. Krishnaswami, above n 20, p 17; PM Taylor *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005) p 221.

23. HRC, above n 20, para 4.

24. *Dahlab v Switzerland* (15 February 2001), App no 42393/98 ECHR 2001-V; *Şahin v Turkey* (2007) 44 EHRR 5 para 78. HRC, above n 20, para 4.

25. UNGA, above n 21, 390–391.

26. Krishnaswami, above n 20, p 29.

27. *Ibid*, p 30.

28. *Ibid*, p 29.

29. *Ibid*, p 30.

The ECtHR has subsequently accepted that ‘it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected’.³⁰ Consequently, in the event of an irreconcilable clash between the rights of different groups, it may be justifiable to restrict individual religious freedom in order to protect ‘the rights and freedoms of others’. However, by accepting that secularism,³¹ understood as the separation between church and state, and ‘living together’³² justify the restriction of the right to manifest religion, the ECtHR has allowed the ground of ‘the rights and freedoms of others’ to be expanded beyond the original intentions of the drafters.

The evolution of the limitations clause and the ground of ‘the rights and freedoms of others’ is not problematic, provided that restrictions are compatible with the purpose ‘for which they have been prescribed’.³³ The list of justifiable restrictions foreseen by the drafters of the UDHR is not an exhaustive list and represents a *concrete* rather than *abstract* understanding of the provision.³⁴ As suggested by Letsas, the evolution of this clause is permissible, provided that it does not impair the *abstract* intentions of the drafters.³⁵ The *travaux préparatoires* do, however, clearly reveal the *abstract* intention that the limitations clause be construed narrowly.

Furthermore, the text of Art 9(2) ECHR and Art 18(3) ICCPR indicates that once an interference with the right to manifest religion has been established, any restriction must be ‘necessary in a democratic society’. The state bears the burden of proof and must, therefore, demonstrate that the interference was justifiable and proportionate. The former UN Special Rapporteur on freedom of religion or belief has submitted:

‘[T]he burden of justifying a limitation upon the freedom to manifest one’s religion or belief lies with the state. Consequently, a prohibition of wearing religious symbols which is based on mere speculation or presumption rather than on demonstrable facts is regarded as a violation of the individual’s religious freedom’.³⁶

The ECtHR has accordingly established the principle of priority to rights³⁷ and, recognised that limitations on Convention rights ‘cannot justify impairing the very essence of the right’.³⁸ Similarly, the HRC has stressed that ‘[I]mitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Art 18’.³⁹ By requiring that the state provide evidence of the necessity of the interference, the text of the limitations clause reveals that priority should be afforded to the right to manifest religion.

30. *Kokkinakis v Greece*, above n 20, para 33.

31. *Dahlab v Switzerland*, above n 24; *Şahin v Turkey*, above n 24, paras 109–110, 114; *Dogru v France* (2009) 49 EHRR 8, para 72; *Aktas v France* App no 43563/08 (ECtHR 30 June 2009).

32. *SAS v France* (2015) 60 EHRR 11, para 153.

33. Art 18 ECHR.

34. Letsas, above n 12, p 74.

35. *Ibid*, p 72.

36. UN Commission on Human Rights, ‘Civil and Political Rights, including the Question of Religious Intolerance – Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir’ (9 January 2006) UN doc E/CN.4/2006/5 para 53.

37. *Belgian Linguistics Case (A/6)* (1979-80) 1 EHRR 252, pp 280-81.

38. *Winterwerp v Netherlands*, above n 10, para 60.

39. HRC, above n 20, para 8.

(b) The context and object and purpose of the right to freedom of religion or belief

Crawford has opined that 'the language of treaties ... will be read so as to give effect to the object and purpose of the treaty in its context'.⁴⁰ The context of the adoption of human rights instruments following the Second World War only requires brief introduction and is connected to their object and purpose. The preambles to the UDHR and ECHR reveal that the atrocities committed during the Second World War motivated the adoption of universal human rights standards. Notably, the Preamble to the ECHR reaffirms that human rights 'are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend'. Representatives at the drafting of the ECHR specifically recognised that democratic states were not immune from committing human rights abuses:

'Monstesquieu said: "Whoever has power, is tempted to abuse it". Even parliamentary majorities are in fact sometimes tempted to abuse their power. Even in our democratic countries we must be on guard against this temptation of succumbing to reasons of state'.⁴¹

The UDHR, ECHR and ICCPR were adopted to prevent a repeat of the atrocities committed during the Second World War and, *ergo*, to protect the individual from unwarranted state interference with the exercise of fundamental freedoms.

Human rights bodies have subsequently accepted the necessity of restrictions placed on political ideologies that are *prima facie* incompatible with this aim. Thus, although the European Commission on Human Rights has indicated that fascism, communism and neo-Nazi principles may fall within 'belief' for the purposes of Art 9 ECHR,⁴² human rights bodies have consistently accepted that the restriction of the manifestation of these beliefs is necessary in a democratic society⁴³ and, in the case of political parties motivated by these ideologies, have held complaints to be an abuse of rights under Art 17 ECHR.⁴⁴

The atrocities committed during the Second World War also informed the adoption of the right to freedom of religion or belief. The right had been enshrined in the national constitutions of many UN Member States prior to the adoption of international human rights instruments.⁴⁵ Furthermore, the potential for the denial of freedom of religion to lead to international tensions had been recognised on an international stage and the

40. J Crawford 'Sovereignty as a legal value' in J Crawford and M Koskeniemi, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) p 123.

41. Statement of M Teitgen (France) at Consultative Assembly 1st Session in Council of Europe Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights *Volume I: Preparatory Commission of the Council of Europe, Committee of Ministers Consultative Assembly 11 May-8 September 1949* (The Hague: Martinus Nijhoff, 1975) p 40.

42. D Harris, M O'Boyle, E Bates and C Buckley Harris, *O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2nd edn, 2009) p 426.

43. *X v Italy* (1976) 5 DR 83; *Hazar and Açık v Turkey* (1991) 72 DR 200; *X v Austria* (1963) 13 CD 42.

44. *Communist Party of Germany v the Federal Republic of Germany* App no 250/57 (ECommHR 20 July 1957); *BH, MW, HP and GK v Austria* (1989) 62 DR 216. See also, *MA v Italy* Communication 117/1981 (HRC 10 April 1984) para 13.3.

45. ECOSOC 'Commission on Human Rights Drafting Committee International Bill of Rights' 11 June 1947 UN doc E/CN.4/AC.1/3/Add.1, pp 101-116.

rights of religious minorities had previously been included in peace treaties and the League of Nations minority protection regime.⁴⁶ This history of protecting religious freedom was influential during the drafting of the ECHR. The Italian representative, Mr Cingolani, described freedom of religion as ‘the most sacred right of all’.⁴⁷ Whereas, the Irish representative, Mr Everett, stressed that ‘[c]ivil and religious freedom are but two of the fundamental rights of man ... If the Council of Europe achieved no other end than the guarantee of those two rights, it will have justified its existence’.⁴⁸ Given the context of the adoption of human rights instruments and the prevalence of the right in national constitutions, the inclusion of the right to freedom of religion or belief in international human rights instruments was uncontroversial.

During the drafting of the UDHR and ECHR, representatives expressed particular concern about interference with the freedom of religion or belief of those who do not subscribe to the dominant religious or political ideology. The Dutch representative at the drafting of the UDHR noted that ‘in the seventeen and eighteenth centuries ... those who practised a religion other than that of the head of the state had been persecuted in many countries’.⁴⁹ More contemporaneously, state representatives were concerned about state interference with freedom of religion or belief, motivated not only ‘Hitlerism’ and Fascism⁵⁰ but also the Communist East.⁵¹ In the context of Eastern Europe, Mr Norton, the Irish representative to the Consultative Assembly of the ECHR, warned of ‘a new type of “Statism”’ and in particular that:

‘An effort is being made there to put out the light of the Church – not only of one church but of almost all churches. There, an effort is being made to say to men and women that they shall worship in the way prescribed by the state, and not in the way dictated by their own consciences’.⁵²

Thus, the drafting of the right to freedom of religion or belief reveals the intention to protect the religious from interference by the state and, notably, from restrictions or interpretations of religion informed by the prevalent religious or political ideology.

The right to freedom of religion or belief has not been interpreted to prohibit state religions or ideologies.⁵³ However, those who do not subscribe to these beliefs must

46. MD Evans *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997) pp 55–57.

47. Statement of Mr Cingolani (Italy) at Consultative Assembly 1st Session in Council of Europe, above n 41, p 62

48. Statement of Mr Everett (Ireland) at Consultative Assembly 1st Session in Council of Europe, above n 41, pp 102–104.

49. Statement of Mr Van der Mandele (The Netherlands) at ECOSOC, Record of 215th Meeting held on 25 August 1958 UN doc E/SR.215, p 644.

50. Statement of Mr Wilson (United Kingdom) at ECOSOC, Commission on Human Rights Drafting Committee Second Session 21st Meeting, held on 4 May 1948 UN doc E/CN.4/AC.1/SR.21 p 7; UNGA, 145th Plenary Meeting 27 September 1948, p 189; Teitgen, above n 41, p 40; Statement of Mr Kraft (Denmark) at Consultative Assembly 1st Session in Council of Europe, above n 41, p 66; Statement of Mr Foster (United Kingdom) at Consultative Assembly 1st Session in Council of Europe, above n 41, p 96.

51. Statement of Mr Norton (Ireland) at Consultative Assembly 1st Session in Council of Europe, above n 41, pp 128–130.

52. *Ibid.*

53. HRC, above n 20, para 9. *Darby v Sweden* (1989) 56-A DR 166 annex to the decision of the Court cited in C Evans *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) p 80.

not be disadvantaged in the exercise of this right. This view has been stressed by the HRC, in General Comment No 22:

'If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under Art 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.'⁵⁴

Similarly, the ECtHR has repeatedly stressed 'the state's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs',⁵⁵ in particular, in relation to the exercise of its powers.⁵⁶ Consequently, the existence of a state religion or ideology does not justify the unequal treatment of those who subscribe to a different ideology.

While the object and purpose of the right to manifest religion is state non-interference with the religious freedom of all individuals, the drafters of human rights instruments in the post-War period recognised that religious minorities were particularly vulnerable to such interference. The Chairperson of the drafting committee of the UDHR, Eleanor Roosevelt, opined that rather than providing targeted minority rights protection, 'the best solution of the problem of minorities was to encourage respect for human rights'.⁵⁷ The delegation of the United Kingdom submitted that 'the declaration already fully protected the rights of all minorities', pointing, specifically, to the right to freedom of religion as evidence of this.⁵⁸ The drafters of human rights instruments, thus, had the *abstract* intention that human rights standards should protect religious minorities from state interference.

The HRC has subsequently reiterated the importance of freedom of religion or belief for religious minorities and has 'view[ed] with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they ... represent religious minorities that may be the subject of hostility on the part of a predominant religious community'.⁵⁹ Likewise, the ECtHR has emphasised that '[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it [freedom of religion or belief]'.⁶⁰ Consequently, the specific vulnerability of religious minorities to interference with this right has been recognised by both the drafters and monitoring bodies of human rights instruments.

54. HRC, above n 20, para 10.

55. *Şahin v Turkey*, above n 24, para 107.

56. *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 para 116; *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (2009) 48 EHRR 17 para 97.

57. Statement of Mrs Roosevelt (USA) at UNGA, Third Committee of the General Assembly, Record of 161st Meeting, held on 27 November 1948 UN doc A/C.3/SR.161, p 724. See also, Statements of Mr Loufti (Egypt), Mrs Mehta (India) and Mr Lebeau (Belgium) at ECOSOC, Commission on Human Rights, Third Session, Summary Record of the 73rd Meeting held on 15 June 1948 UN doc E/CN.4/SR.73, pp 5–6.

58. Statement of Mr Davies (United Kingdom) at UNGA, Third Committee of the General Assembly, Record of 162nd Meeting, held on 27 November 1948 UN doc A/C.3/SR/162 pp 730–731.

59. HRC, above n 20, para 2.

60. *Kokkinakis v Greece*, above n 20, para 31.

(c) A good faith interpretation

The text, context and object and purpose reveal that the central component of a good faith interpretation of freedom of religion or belief is non-interference with matters of conscience. This encompasses a requirement that states refrain from and prevent interference with the public and private manifestation of *all* religions and beliefs, without distinction. Furthermore, states must not prioritise a religious or political ideology above individual religious freedom, including minority beliefs and manifestations. While the right to manifest religion was intended to be construed widely, its limitation clause was intended to be construed narrowly. This, therefore, suggests that state non-interference and the equal treatment of different beliefs should be the default position.

2. CONTRADICTIONARY DECISIONS AND APPLYING A GOOD FAITH INTERPRETATION OF THE RIGHT TO MANIFEST BELIEF

While the ECtHR has developed an extensive body of jurisprudence in relation to the right to manifest religion by wearing religious clothing, it was not until 2011 that the HRC was given the opportunity to engage fully with this issue. Between 2011 and 2013, the HRC decided the cases of *Bikramjit Singh v France*, *Ranjit Singh v France* and *Mann Singh v France*, concerning the right of Sikhs to wear the turban in identity documents and the *keski* to state schools.⁶¹ These cases were directly analogous to the cases of *Mann Singh v France*, *Jasvir Singh v France* and *Ranjit Singh v France* that had previously been decided by the ECtHR.⁶² Despite the similar background and wording of Art 9 ECHR and Art 18 ICCPR, the ECtHR and HRC reached contradictory decisions in these cases. This section, first, compares the mandates, jurisdiction and evolution of the case law of the ECtHR and HRC, in order to ascertain the extent to which key differences may explain this divergence. Second, the decisions of the ECtHR and HRC in the analogous cases are analysed against the identified good faith interpretation of the right to manifest religion.

(a) Comparing the ECtHR and the HRC

The divergence in the jurisprudence of the ECtHR and HRC may, in part, be explained by the evolution of the jurisprudence in this field, as well as the distinct roles and mandates of these bodies. The HRC has not had the opportunity to develop extensive case law in relation to freedom of religion generally,⁶³ or the right to manifest religion

61. *Bikramjit Singh v France*, above n 5; *Ranjit Singh v France*, above n 5; *Mann Singh v France*, above n 5.

62. *Mann Singh v France*, above n 4; *Jasvir Singh v France*, above n 4; *Ranjit Singh v France*, above n 4.

63. The HRC has primarily considered the right to freedom of religion in the context of education, (see for example, *Hartikainen v Finland* Communication no 40/1978 (HRC 9 April 1981); *Waldman v Canada* Communication no 694/1996 (1999) 7 IHRR 368; *Leirvåg v. Norway* Communication no 1155/2003 (2004) 19 BHRC 635), compulsory military conscription (see, for example, *Muhonen v Finland* Communication no 89/1981 (HRC 8 April 1985); *Brinkhof v The Netherlands* Communication no 402/1990 (1994) 1–2 IHRR 1992; *Foin v. France* Communication no 666/1995 (1999) 7 IHRR 354), the registration of religious communities (see, for example, *Malakhovsky v Belarus* Communication no 1207/2003 (2006) 13 IHRR 60) and indoctrination (*Kang v Republic of Korea* Communication no 878/1999 (2003) 10 IHRR 932).

by wearing religious clothing, more specifically.⁶⁴ In contrast, the ECtHR's Art 9 case law has developed considerably since its decision in *Kokkinakis v Greece* in 1993,⁶⁵ and there is a significant body of jurisprudence concerning the right to manifest religion by wearing religious clothing.⁶⁶

The ECtHR's early jurisprudence on religious clothing has significantly influenced the evolution of its subsequent jurisprudence. Principles established in cases concerning Turkey have subsequently been applied in cases concerning France, including *Jasvir Singh* and *Ranjit Singh* considered here.⁶⁷ Although the ECtHR is not bound by precedent and the French cases could have been distinguished from the Turkish cases on the basis of both the facts and the margin of appreciation, from the perspective of legal certainty, it would appear to be preferable for the ECtHR to decide these cases consistently. The HRC, in contrast, did not have an established body of jurisprudence and, thus, was better able to evaluate *Bikramjit Singh*, *Mann Singh* and *Ranjit Singh*, considered here, on the basis of the evidence presented.

The differing jurisdiction and normative status of the jurisprudence of the ECtHR and HRC may also provide some explanation for the discrepancy between the analogous cases. The ECtHR has compulsory jurisdiction in respect of the 47 Member States of the Council of Europe, states which have a predominantly Christian or secular tradition.⁶⁸ In contrast, although the HRC only has jurisdiction to receive individual communications in respect of those states that have ratified Optional Protocol 1,⁶⁹ it hears cases concerning a more diverse range of states than the ECtHR. Nonetheless, with the exception of Monaco, Switzerland and the United Kingdom, all Member States of the Council of Europe have permitted individual communications to the HRC.⁷⁰

The ECtHR issues legally binding judgments, in contrast to the non-binding 'views' of the HRC. Drzemczewski has argued that the ECHR is *sui generis* because the 'law transcends the traditional boundaries drawn between international law and domestic

64. Prior to the recent cases, the HRC had considered this issue under Art 26 ICCPR in *Singh Bhinder v Canada* Communication no 208/1986 (HRC 28 November 1989) and, under Art 18, in *Hudoyberganova v Uzbekistan* Communication no 931/2000 (2005) 19 BHRC 581. However, the State did not justify the restriction, as required by Art 18(3) ICCPR.

65. *Kokkinakis v Greece*, above n 20. See, the Strasbourg Consortium for a comprehensive list of jurisprudence <<http://www.strasbourgconsortium.org/portal.case.php?pageId=10>> last accessed 22 April 2016.

66. *Karaduman v Turkey* (1993) 74 DR 93; *Dahlab v Switzerland*, above n 24; *Şahin v Turkey*, above n 24; *Phull v France* (11 January 2005) App no 35753/03 ECHR 2005-I; *Köse and 93 others v Turkey* (24 January 2006) App no 26625/02 ECHR 2006-II; *Kurtuluş v Turkey* (24 January 2006) App no 65500/01 ECHR 2006-II; *El Morsli v France* App no 15585/06 (ECtHR 4 March 2008); *Mann Singh v France*, above n 4; *Dogru v France*, above n 31; *Aktas v France*, above n 31; *Jasvir Singh v France*, above n 4; *Ranjit Singh v France*, above n 4; *SAS v France*, above n 32; *Ebrahimian v France* (26 November 2015) App no 64846/11 ECHR 2015.

67. *Dogru v France*, above n 31; *Aktas v France*, above n 31; *Jasvir Singh v France*, above n 4; *Ranjit Singh v France*, above n 4.

68. Albania, Turkey and Azerbaijan are notable exceptions.

69. Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171, entered into force 23 March 1976.

70. United Nations Treaty Collection, Chapter V Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&lang=en> last accessed 22 April 2016.

law'.⁷¹ Consequently, the ECtHR has permitted states a margin of appreciation in cases where a clear consensus has not emerged in Europe,⁷² to ensure that it does not overstep the boundaries of state sovereignty. Nonetheless, as recognised by the European Commission on Human Rights, excessive deference to state sovereignty has the potential to undermine the purpose of the ECHR.⁷³ The ECtHR should, therefore, ensure that the margin of appreciation does not prevent it from acting as the 'conscience' of Europe.⁷⁴

In contrast, as the decisions of the HRC are not legally binding and it does not recognise the principle of the margin of appreciation, it is arguably less concerned with state sovereignty. This perhaps gives the HRC more scope than the ECtHR to reach decisions that are unpopular with states. However, in practice, this has also meant that states do not always comply with the decisions of the HRC.⁷⁵

On the basis of these differences, some variance must be expected between the approaches of the regional ECtHR and the international HRC. Nonetheless, this should not lead to uncertainty over the scope of protected rights nor call into question the universality of rights.⁷⁶ It is, therefore, necessary to analyse the reasoning that has resulted in this discrepancy and consider the extent to which the two bodies' decisions are compatible with the identified good faith interpretation of the right to manifest religion.

(b) Mann Singh (ECtHR) and Mann Singh and Ranjit Singh (HRC)

In *Mann Singh*⁷⁷ heard by the ECtHR and *Ranjit Singh*⁷⁸ and *Mann Singh*⁷⁹ heard by the HRC, the right of a Sikh man to manifest his religion by wearing a turban on a photograph affixed to an identification document was considered. Both bodies acknowledged that the requirement that the applicants appear without their turban in these photographs interfered with their right to manifest religion. Before the HRC, France sought to justify the interference on the grounds of 'public order' and 'public safety' under Art 18(3) ICCPR.⁸⁰ Despite recognising that the aim of the restriction was legitimate,⁸¹ the HRC considered the proportionality of the restriction:

'[T]he state party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly

71. A Drzemczewski 'The *sui generis* nature of the European Convention on Human Rights' (1980) 29 ICLQ 54 at p 54.

72. *Şahin v Turkey*, above n 24, para 109. See also, *Dogru v France*, above n 31, para 72.

73. *X v United Kingdom* Application No 4451/70, Report of the Commission of 1 June 1973, Series B no 16, at 12 et seq, 31.

74. Statement of Lynn Ungoed-Thomas (United Kingdom) at Consultative Assembly 1st Session in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights Volume 2: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly 10 August–18 November 1949* (The Hague: Martinus Nijhoff, 1975) p 174.

75. HRC, 'Observations finales concernant le cinquième rapport périodique du France' UN doc. CCPR/C/FRA/CO/5 para 7.

76. This also raises the issue of applicants undertaking forum shopping, which falls outside the scope of this article.

77. *Mann Singh v France*, above n 4.

78. *Ranjit Singh v France*, above n 5.

79. *Mann Singh v France*, above n 5.

80. *Ranjit Singh v France*, above n 5, para 5.3.

81. *Ibid.* para 8.4.

visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the state party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residence permits'.⁸²

The HRC also considered the potential for the initial interference to result in continuing violations of the applicants' rights 'because he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks'.⁸³ By scrutinising the justifications given by the state for the restriction of the right to manifest religion, the HRC was able to assess the proportionality of the interference and, in particular, identify the potential for repeat violations to flow from the original restriction. On the basis of the lack of evidence of the necessity of the restriction, the HRC found a violation of Art 18 ICCPR. Thus, the HRC prioritised the applicants' right to manifest their religion above the justifications given by the state. This approach conforms with the requirement that the state evidence the necessity of limitations and, thus, is compatible with a good faith interpretation of the right.

In contrast, in *Mann Singh v France*, the ECtHR found that the application was manifestly ill-founded and, therefore, inadmissible, on the basis that the state has a wide margin of appreciation in matters concerning 'public safety' and 'public order'. In direct contrast to the HRC, the ECtHR accepted that the removal of the turban was necessary to allow the identification of the driver and avoid fraud,⁸⁴ despite the lack of evidence to support this conclusion. By not engaging with the necessity and proportionality of the restriction on the applicant's rights, the ECtHR, in effect, reversed the burden of proof under the limitations clause and placed the onus on the applicant to prove that the state had acted unreasonably. When the approach of the ECtHR is compared to that of the HRC, it becomes apparent that the margin of appreciation inhibited the ECtHR from examining evidence of the necessity of the restriction on the applicant's rights, as required by Art 9(2) ECHR. This is incompatible with a good faith interpretation of the right to manifest religion, which establishes that the grounds of limitations are to be construed narrowly and that the burden of proof lies with the state.

Had the ECtHR applied a good faith interpretation of the right, *Mann Singh* may have been decided differently. In the absence of evidence of the necessity of the restriction of religious freedom, the ECtHR should have prioritised the applicant's right and found a violation. Nonetheless, this outcome cannot be taken for granted. Had the case been found to be admissible, the adversarial process in the ECtHR may have given France the opportunity to provide additional evidence of the necessity of the interference with the applicant's right to manifest religion. In the event that this demonstrated that the removal of the turban made it easier to identify the applicant and helped to combat fraud, then the application of the margin of appreciation and a finding of no violation would be legitimate on the grounds of 'public safety' and 'public order'. However, a more rigorous decision-making process would have provided a more satisfactory outcome for the applicant⁸⁵ and been

82. Ibid.

83. Ibid.

84. *Mann Singh v France*, above n 4.

85. This raises questions about the role of the ECtHR and whether it should act as a constitutional court or provide individual justice. This falls outside the scope of this paper. See further, K Dzehtsiarou and A Greene 'Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism' (2013) Public Law 710.

faithful to the idea that limitations be narrowly construed and subject to the requirements of necessity and proportionality.

(c) *Jasvir Singh and Ranjit Singh (ECtHR)* and *Bikramjit Singh (HRC)*

A similar comparison can be drawn between the cases of *Bikramjit Singh*⁸⁶ heard by the HRC and *Jasvir Singh*⁸⁷ and *Ranjit Singh*,⁸⁸ heard by the ECtHR, involving the expulsion of the Sikh applicants from state schools in France for refusing to remove the *keski*. The expulsion of the applicants from school was pursuant to Loi no 2004-228, which prohibits the wearing of ostentatious religious symbols in state schools in order to uphold the principle of *laïcité*.⁸⁹

In *Bikramjit Singh*, the HRC considered that the prohibition on wearing religious symbols in state schools in order to uphold 'the constitutional principle of secularism (*laïcité*)'⁹⁰ pursued the grounds of 'the rights and freedoms of others', 'public order and safety'.⁹¹ The HRC was willing to acknowledge the value of secularism: 'the principle of secularism (*laïcité*), is itself a means by which a state party may seek to protect the religious freedom of all its population'.⁹² However, it was 'of the view that the state party has not furnished compelling evidence that by wearing his *keski* the author would have posed a threat to the rights and freedoms of other pupils or to order at the school'.⁹³ In particular, the penalty of expulsion from school was considered to be disproportionate and not based on the conduct of the applicant himself.⁹⁴ The HRC was, thus, not willing to accept that the restriction of the applicant's right to manifest religion was justified by the pursuit of secularism alone. The HRC found a violation of Art 18 ICCPR as there was insufficient evidence of the necessity of the restriction and the penalty for wearing the *keski* was disproportionate.

In the cases of *Jasvir Singh v France* and *Ranjit Singh v France*, the ECtHR built on its earlier jurisprudence concerning the restriction of the right to manifest religion on the basis of 'the constitutional principle of secularism'⁹⁵ and found the claims to be manifestly ill-founded.⁹⁶ The ECtHR found that the expulsion of the applicants from state schools was not disproportionate to the aim pursued: 'the protection of the rights and freedoms of others' and 'public order' through the pursuit of secularist policies in state schools. Notably, the ECtHR did not consider whether the individual applicants posed a threat to 'the rights and freedoms of others', as the measures taken in pursuit of *laïcité* fell within the state's margin of appreciation.⁹⁷

86. *Bikramjit Singh v France*, above n 5.

87. *Jasvir Singh v France*, above n 4.

88. *Ranjit Singh v France*, above n 4.

89. *Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*. The concept of *laïcité* is found in Art 1 of the French Constitution and refers to the separation of church and state. It is similar to secularism.

90. *Bikramjit Singh v France*, above n 5, para 8.2.

91. *Ibid*, para 8.6.

92. *Ibid*.

93. *Ibid*, para 8.7.

94. *Ibid*.

95. *Dahlab v Switzerland*, above n 24; *Köse and 93 others v Turkey*, above n 66; *Dogru v France*, above n 31.

96. *Jasvir Singh v France*, above n 4; *Ranjit Singh v France*, above n 4.

97. *Ibid*.

The distinction between the ECtHR and HRC's decisions can be attributed to the extent to which they were willing to engage with the necessity of restrictions justified by the pursuit of secularism. The HRC has questioned the necessity of restrictions in schools on the basis 'that respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols'.⁹⁸ In contrast, the ECtHR has permitted France a wide margin of appreciation in the absence of an established consensus on this issue in Europe.⁹⁹ This has led the ECtHR to uncritically accept the legitimacy of restrictions of religious freedom justified by the pursuit of secularist policies.

Although secularism is not expressly mentioned as a ground for the limitation of the right to manifest religion, to the extent that this principle seeks to protect 'the rights and freedoms of others' and 'public order', it is possible to justify the extension of the limitations clause within a good faith interpretation. However, this is not by itself sufficient to establish that the restriction of the applicant's rights is necessary in a democratic society. In order to prevent unnecessary state interference with religious freedom, the limitations clause must be construed narrowly and restrictions must be proportionate.

(I). THE PRIORITISATION OF SECULARISM ABOVE RELIGIOUS FREEDOM

A good faith interpretation of religious freedom requires that priority is afforded to the right itself and that the necessity of limitations is evidenced. In the context of secularism, Bielefeldt, the former UN Special Rapporteur on the freedom of religion or belief, has stressed that freedom of religion is a 'first order' principle, whereas 'neutrality' is a 'second order' principle, '[t]urning the order of things upside down and pursuing a policy of enforced privatization or societal marginalization of religions in the name of "neutrality" would thus clearly amount to a violation of human rights'.¹⁰⁰ This understanding has been confirmed in the ECtHR by Judge Bonello, who stressed that 'secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance ... are not values protected by the Convention, and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion'.¹⁰¹

However, in *Jasvir Singh and Ranjit Singh*, the ECtHR did exactly this. In cases concerning religious clothing the ECtHR has stressed that 'an attitude which fails to respect that principle [secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Art 9 of the Convention'.¹⁰² Contrary to a good faith interpretation, the ECtHR has prioritised the pursuit of secularism above individual religious freedom. As states are permitted a wide margin of appreciation, the ECtHR does not consider the necessity of restrictions on the applicants' rights. This approach is particularly problematic, as the ECtHR has not scrutinised the extent to which secularism, in practice, pursues one of the permissible grounds of restriction.

98. HRC, Concluding Observations of the Human Rights Committee – France UN doc CCPR/C/FRA/CO/4, 31 July 2008, para 23.

99. *Şahin v Turkey*, above n 24, para 109. See also, *Dogru v France*, above n 31, para 72.

100. H Bielefeldt 'Freedom of religion of belief – a human right under pressure' (2012) 1 Oxford Journal of Law and Religion 15 at 32.

101. *Lautsi and Others v Italy* (2012) 54 EHRR 3 Judge Bonello's concurring opinion para 2.2 [emphasis added].

102. *Dogru v France*, above n 31, para 72. See also, *Şahin v Turkey*, above n 24, paras 113–114.

(II). SECULARISM AS THE PROTECTOR OF INDIVIDUAL RELIGIOUS FREEDOM?

The margin of appreciation afforded to France, in *Jasvir Singh and Ranjit Singh*, is based on the presumption that the pursuit of state secularism, through the separation of church and state, is compatible with Convention rights.¹⁰³ The ECtHR has accepted that state secularism complies with the role of the state as the ‘neutral and impartial organiser’.¹⁰⁴ Furthermore, McGoldrick has suggested that ‘both the ECtHR and HRC have accepted [secularism], seeks to protect the religious freedom of all its population’.¹⁰⁵ As noted by the ECtHR in *Kokkinakis*, limitations on the right to manifest religion may be necessary in order to reconcile the competing rights of different groups.¹⁰⁶ Thus, to the extent that secularism seeks to protect ‘the rights and freedoms of others’ by protecting individual religious freedom, restrictions on religious freedom can be justified.

However, while the HRC has scrutinised whether secularism does in fact pursue ‘the rights and freedoms of others’, the ECtHR has uncritically accepted this as given. Yet, secularism is an ‘abstract principle’¹⁰⁷ and is open to competing interpretations.¹⁰⁸ Notably, the former UN Special Rapporteur on the freedom of religion or belief, Asma Jahangir, expressed concern:

[w]hile recognizing that the organization of a society according to this principle [secularism] may not only be healthy, but also guarantees the fundamental right to freedom of religion or belief, she is concerned that, in some circumstances, the selective interpretation and rigid application of the principle has operated at the expense of the right to freedom of religion or belief’.¹⁰⁹

Thus, the compatibility of secularism with the pursuit of the ‘rights and freedoms of others’ should not be taken for granted. ‘Benevolent secularism’, according to Adhar, ‘is a philosophy obliging the state to refrain from adopting and imposing *any* established beliefs ... upon its citizens’.¹¹⁰ Although not strictly neutral,¹¹¹ as benevolent secularism seeks to uphold the freedom of religion or belief of individuals by promoting non-interference by the state in matters of conscience, this would appear to be compatible with a good faith interpretation of freedom of religion or belief.

In contrast, “hostile” secularism says the state should actively pursue a policy of established unbelief’.¹¹² The goal of hostile secularism is the separation of church and state,¹¹³ through the elimination of religion from the public sphere, rather than

103. *Şahin v Turkey*, above n 24, para 114.

104. *Ibid*, para 107. *Dogru v France*, above n 31, para 106.

105. D McGoldrick ‘A defence of the margin of appreciation and an argument for its application by the Human Rights Committee’ (2016) 65 ICLQ 21 at p 52.

106. *Kokkinakis v Greece* above n 20, para 31.

107. *Ebrahimian v France*, above n 66, Dissenting opinion of Judge De Gaetano.

108. R Adhar ‘Is secularism neutral?’ (2013) 25 Ratio Juris 404.

109. ECOSOC ‘Civil and Political Rights, including the Question of Religious Intolerance: Report submitted by Asma Jahangir, Special Rapporteur on freedom of religion or belief Addendum 2 – Mission to France (18 to 29 September 2005)’ (8 March 2006) UN doc E/CN.4/2006/5/Add.4, para 96.

110. Adhar, above n 108, p 409.

111. *Ibid*, p 420.

112. *Ibid*, p 411.

113. R Sandberg and N Doe ‘Church-state relations in Europe’ (2007) 1 Religion Compass 561 at 565

the protection of religious freedom. The restriction of individual religious freedom on the basis of hostile secularism is incompatible with a good faith interpretation of the right for a number of reasons. First, by prioritising the separation of church and state above individual religious freedom, hostile secularism does not seek to protect 'the rights and freedoms of others'. Second, the elimination of religious manifestations from the public sphere is incompatible with the text of the right, which explicitly establishes 'the right to manifest religion in *public* and in *private*'. Third, the pursuit of the separation of church and state as an inherent good is analogous to the pursuit of a political ideology.¹¹⁴ Under a good faith interpretation of freedom of religion or belief, state interference with individual religious freedom must not be motivated by the preservation of state ideologies. Fourth, hostile secularism disadvantages minority religious practices which do not conform as easily as Christian and secular manifestations to the privatisation of religion.¹¹⁵ Thus, in Western Europe, the pursuit of hostile secularism disproportionately impacts religious minorities, contrary to the concerns and intentions of the drafters of human rights instruments. This suggests that the state is not neutral in exercising its powers, contrary to a good faith interpretation.

Adhar has also warned that '[a] benevolent secularism can, overtime, unerringly slide into a hostile secularism'.¹¹⁶ Thus, restrictions on the right to manifest religion in order to uphold secularism should not be uncritically accepted, without oversight by human rights bodies. Yet, by permitting France a wide margin of appreciation in *Jasvir Singh and Ranjit Singh*, the ECtHR unquestioningly accepted that state secularism seeks to protect 'the rights and freedoms of others'. This is problematic from the perspective of a good faith interpretation as by interfering with religious freedom and seeking to eliminate religion from the public sphere, the prohibition on the wearing of 'ostentatious religious symbols' in schools pursues a vision of hostile secularism.

Although in *Bikramjit Singh* the HRC accepted that 'secularism (*laïcité*), is itself a means by which a state party may seek to protect the religious freedom of all its population',¹¹⁷ it did not automatically accept that all measures adopted in the name of *laïcité* seek to uphold religious freedom. For the HRC, secularism is a tool by which to achieve religious freedom rather than an end in itself. Thus, while the HRC may be willing to accept restrictions on Art 18 ICCPR, justified by benevolent secularism, measures that pursue hostile secularism clearly contravene this right.

(III). RELIGIOUS SYMBOLS AS A THREAT TO 'THE RIGHTS AND FREEDOMS OF OTHERS' AND 'PUBLIC ORDER'

If the state is able to demonstrate that the pursuit of secularism seeks to protect 'the rights and freedoms of others' or 'public order', in accordance with a good faith interpretation, it must still evidence the necessity of any restrictions imposed on this basis. The difference between the jurisprudence of the ECtHR and HRC can also be

114. J Temperman *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Leiden: Martinus Nijhoff, 2010) p 140.

115. Evans, above n 7, p 305; M 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 & Society* 205; PG Danchin 'Islam in the secular *nomos* of the European Court of Human Rights' (2010–2011) 32 *Michigan Journal of International Law* 663 at 689.

116. Adhar, above n 108, p 415. See also 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 at 1083.

117. *Bikramjit Singh v France*, above n 5, para 8.6.

attributed to the extent to which the bodies were willing to accept that the presence of religion in the public sphere constituted a threat to ‘the rights and freedoms of others’ or ‘public order’.

The approach of the ECtHR to date has been motivated by the concern that those wearing religious symbols in the public sphere may be ‘seeking to provoke a reaction, proselytizing, spreading propaganda or undermining the rights of others’.¹¹⁸ However, by attributing a meaning to religious symbols, the ECtHR prejudices the ‘threat’ posed by the individual to ‘the rights and freedoms of others’ and ‘public order’. The ECtHR has accepted that the crucifix ‘is an essentially passive symbol’,¹¹⁹ whereas, the *hijab* is a ‘powerful external symbol’.¹²⁰ In practice, this distinction has led to different results in cases concerning religious freedom. In *Eweida and Others v United Kingdom*¹²¹ the ECtHR accepted that the right to manifest religion by wearing a crucifix,

‘is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others’.¹²²

In contrast, in *Şahin*, the ECtHR accepted that restrictions on the *hijab* legitimately pursue the ‘aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others’.¹²³ Accordingly, the communication of the applicant’s religion through the wearing of a crucifix is necessary to sustain pluralism and tolerance in society, whereas the limitation of the *hijab* is necessary to achieve similar ends.

The ECtHR has found this distinction to be legitimate even when applicants have chosen to wear less ostentatious religious symbols such as the *keski* rather than the turban¹²⁴ and a bandana rather than a *hijab*.¹²⁵ The approach of the ECtHR has, thus, led to the presumption that while manifestations of Christianity are to be tolerated, manifestations of Islam and Sikhism can be legitimately viewed as a threat.

In contrast to the ECtHR, no attempt has been made by the HRC to attribute meanings to religious symbols in order to justify their differential treatment. Furthermore, the diverse composition of the HRC,¹²⁶ coupled with the established principle that ‘the concept of morals should not be drawn exclusively from a single tradition’,¹²⁷ reduces the likelihood that the HRC will prioritise one ideology above others in the future.

118. *Ebrahimiyan v France*, above n 66, Partly concurring and partly dissenting opinion of Judge O’Leary. See also *Şahin v Turkey*, above n 24, para 112.

119. *Lautsi and Others v Italy*, above n 101, para 72.

120. *Dahlab v Switzerland*, above n 24.

121. *Eweida and Others v United Kingdom* (2013) 57 EHRR 8, para 94.

122. *Ibid.*

123. *Şahin v Turkey*, above n 24, para 111.

124. *Jasvir Singh v France*, above n 4.

125. *Dogru v France*, above n 31.

126. Under Art 31(2) ICCPR, ‘[i]n the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems’.

127. K Boyle ‘Freedom of religion in international law’ in J Rehman and SC Breau (eds) *Religion, Human Rights and International Law: a Critical Examination of Islamic State Practices* (Leiden: Martinus Nijhoff, 2007) p 43.

In addition to imputing a meaning to religious symbols, the ECtHR has also been criticised by commentators,¹²⁸ and dissenting judges in the ECtHR¹²⁹ for not requiring evidence of the threat posed by individual applicants in cases concerning religious clothing. McGoldrick has argued that '[t]he threat comes not from the single individual but from the combined effect of all the religious individuals concerned'.¹³⁰ This understanding suggests that it is the presence of religious symbols in the public sphere, rather than the actions of individuals that poses a threat to 'the rights and freedoms of others' and 'public order'. However, the threat posed by the presence of religious symbols is unsubstantiated. Indeed, Judge Power argued in *Lautsi*:

'The display of a religious symbol does not compel or coerce an individual to do or to refrain from doing anything ... It does not prevent an individual from following his or her own conscience nor does it make it unfeasible for such a person to manifest his or her own religious beliefs and ideas'.¹³¹

As the right to manifest religion explicitly encompasses public manifestations, the mere presence of religion in the public sphere cannot per se constitute a threat to 'the rights and freedoms of others'. Moreover, the possible discomfort of the majority at the increased visibility of minority religious symbols in Western Europe cannot justify their elimination, as there is no right not to be offended within the ECHR.¹³² It is submitted that the only threat posed by the presence of religious symbols in schools is to hostile secularism. However, as noted above, in its hostile form, secularism does not seek to protect 'the rights and freedoms of others' but rather seeks to eliminate religion from the public sphere. As this is not the purpose for which limitations were prescribed, and in the absence of a demonstrable threat to either 'public order' or 'the rights and freedoms of others', secularism does not justify the restriction of the right to manifest religion.

In *Jasvir Singh* and *Ranjit Singh*, the ECtHR did not require evidence of a threat posed by the individual applicants. This approach is incompatible with a good faith interpretation of the right as it undermined the intention that non-interference with religious freedom should be the default position, unless restrictions are proven to be necessary. In direct contrast, in *Bikramjit Singh*, the HRC was not willing to accept that secularism was sufficient to justify restrictions on the applicant's right without evidence of 'a threat to the rights and freedoms of other pupils or to order at the school'.¹³³

(IV). THE IMPLICATIONS OF A GOOD FAITH INTERPRETATION OF FREEDOM OF RELIGION IN CASES CONCERNING SECULARISM

In practice, the HRC has prioritised the right to manifest religion above the pursuit of secularism in accordance with a good faith interpretation of the right. Measures that restrict religious freedom cannot be justified by secularism alone, but rather must respond to a threat posed by the individual manifestation of religion to 'the rights and freedoms of others' or 'public order'. In contrast, as a result of the margin of

128. See, for example, C Evans 'The "Islamic scarf" in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 52; Evans and Petkoff, above n 115, p 208.

129. *Şahin v Turkey*, above n 24, dissenting opinion of Judge Tulkens para 10; *Ebrahimian v France*, above n 66, partly concurring and partly dissenting opinion of Judge O'Leary.

130. McGoldrick, above n 105, p 52

131. *Lautsi and Others v Italy*, above n 101, concurring opinion of Judge Power.

132. *Handyside v United Kingdom* (1979-80) 1 EHRR 737 para 49.

133. *Bikramjit Singh v France*, above n 5, para 8.7.

appreciation, the ECtHR has adopted an uncritical approach when states have invoked secularism as the basis of the limitation of an individual's religious freedom. This approach has been demonstrated to be incompatible with a good faith interpretation of religious freedom.

Had the ECtHR engaged with the necessity of restricting *Jasvir Singh* and *Ranjit Singh's* rights it is likely to have found a violation. The educational sphere has been central to the pursuit of *laïcité* in France since 1905.¹³⁴ However, prior to 2004 it was not considered necessary to impose blanket restrictions on the wearing of religious symbols by pupils, in order to uphold this principle.¹³⁵ Therefore, the necessity of such measures must be questioned. The 2004 law signalled a shift towards a hostile form of secularism that seeks to eliminate religion from the public sphere rather than upholding individual religious freedom. In the absence of a demonstrable threat posed by the presence of religion in society, this is incompatible with a good faith interpretation of the right to manifest religion.

This does not imply that states cannot invoke secularism as a justification for the restriction of religious freedom. Rather, the ECtHR should adopt a more nuanced approach and exercise a higher level of scrutiny when states invoke the secularism justification. The restriction of the manifestation of religion by state representatives, as in *Dahlab v Switzerland*¹³⁶ and *Ebrahimian v France*,¹³⁷ is a more complex issue which perhaps requires a degree of deference to the state's margin of appreciation. Such restrictions are more clearly linked to the separation of church and state, than the restrictions in *Jasvir Singh* and *Ranjit Singh*. It is possible to envisage how such measures seek to ensure the neutrality of the state and its representatives and, thus, guarantee the freedom of religion or belief of all members of society.

Nonetheless, such measures still pursue a form of hostile secularism, which seeks to eliminate religion from the public sphere. While those with a preference for a secular state may perceive that they are treated equally within such a system, those individuals who do not share this worldview may feel disadvantaged. As noted by Judge Power, '[n]eutrality requires a pluralist approach on the part of the state, not a secularist one. It encourages respect for all world views rather than a preference for one'.¹³⁸ Thus, while a margin of appreciation can be justified in cases concerning state representatives, this does not warrant complete deference and must go 'hand in hand with a European supervision'.¹³⁹ In particular, the ECtHR must monitor whether such measures disproportionately disadvantage minority religions.

3. SOCIETAL CONSENSUS, EVOLUTIVE INTERPRETATION AND RELIGIOUS DIVERSITY

It has been argued that the ECtHR's jurisprudence is inconsistent with a good faith interpretation of freedom of religion. This can be attributed to the award of a wide margin of appreciation, which has prevented the ECtHR from scrutinising evidence

134. 1905 *Loi de Séparation des Églises et de l'État*.

135. While the *Conseil d'Etat* had given schools discretion in this respect following the 1989 *affaire du foulard*, it had expressly noted that religious symbols were not per se incompatible with *laïcité*. *Avis du Conseil D'État Du 27 Novembre 1989, Sur le Port du Voile à L'Ecole*.

136. *Dahlab v Switzerland*, above n 24.

137. *Ebrahimian v France*, above n 66.

138. *Lautsi and Others v Italy*, above n 101, Concurring opinion of Judge Power.

139. *Şahin v Turkey*, above n 24, para 110.

of the necessity of restrictions and the extent to which the measures in question pursue a permissible ground of limitation. This margin of appreciation has been justified on the basis of the lack of consensus in Europe regarding the role of religion in society.¹⁴⁰ Yet, at the time of the adoption of the ECHR, the drafters recognised the importance of the right to manifest religion. Indeed, the French representative at the drafting of the ECHR, Mr Teitgen, described freedom of religion or belief as an example 'of the fundamental undisputed freedoms'.¹⁴¹ Instead, the lack of consensus can be attributed to societal developments and, in particular, in the Western European context, decreased religiosity amongst the population,¹⁴² alongside the discomfort of the majority with the visible presence of minority religions.

Although the ECtHR has not engaged in a detailed re-interpretation of the scope of the right to manifest religion on the basis of the living nature of the ECHR, by permitting states a wide margin of appreciation, the ECtHR has effectively widened the permissible limitations to the right. By referencing the lack of consensus concerning the role of religion in society,¹⁴³ the ECtHR suggests that societal developments can be used to reduce as well as extend the scope of rights. Evolutive interpretation goes to the heart of both the purpose of rights and the role of the Court.

Although evolutive interpretation allows societal change to influence the interpretation of Convention rights, it should not be employed in a manner that undermines the intention of the parties. Letsas has submitted that evolutive interpretation allows 'evolution towards the moral truth of ECHR rights, not ... evolution towards some commonly accepted standard, regardless of its content'.¹⁴⁴ The purpose of human rights instruments is to protect individuals from the power of the state and the tyranny of the majority. If this purpose is to be given effect, human rights bodies must not unquestioningly ratify societal change and interpret rights on the basis of 'present day conditions'. By prioritising the preferences of the majority above the purpose and content of the right, this approach would compromise the universality of human rights standards.¹⁴⁵ Instead, evolutive interpretation should be faithful to the object and purpose of rights, while ensuring their continuing relevance for contemporary European societies.¹⁴⁶

The right to freedom of religion or belief was adopted by the ten predominantly Christian drafting states of the ECHR in 1950, at a time when Western European societies were less diverse. However, the importance of protecting religious minorities from the tyranny of the majority and interference justified by the dominant state ideology was recognised. In practice, the ECtHR has afforded a higher level of protection to Christian and secular belief as they are perceived to be 'passive' or 'neutral'. In contrast, visible manifestations of minority religious beliefs such as Islam and Sikhism, which were not prevalent in Western Europe at the time of the drafting of the ECHR, are rarely protected. Consequently, the scope of the right to freedom of

140. Ibid, para 109. See also, *Dogru v France*, above n 31, para 72.

141. Teitgen, above n 41, p 46.

142. R McCrea *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010) pp 22–23.

143. *Şahin v Turkey*, above n 24, para 109. See also, *Dogru v France*, above n 31, para 72.

144. Letsas, above n 12, p 79.

145. E Benvenisti, 'Margin of appreciation, consensus and universal standards' (1998–1999) 31 *New York University Journal of International Law and Politics* 843 at 844.

146. Letsas, above n 12, p 79.

religion or belief has not evolved to protect diverse religious groups but rather, through the limitations clause, has been narrowed in order to exclude them.

In France, *laïcité* was originally intended to protect individual religious freedom. However, Chadwick suggests that few have been willing to ‘openly grant *laïcités* guarantee of religious freedom to Islam’.¹⁴⁷ The move from ‘benevolent’ to ‘hostile’ secularism in France appears to be underpinned by the discomfort of the majority with the visible presence of difference in society.¹⁴⁸ Accordingly, *laïcité* has increasingly been interpreted to justify the pursuit of social homogeneity through the elimination of religion from the public sphere.¹⁴⁹ However, the ECtHR has not engaged with this issue in its jurisprudence. Similar critiques could be made of the ECtHR’s decision in *SAS v France*, where it accepted that restrictions on the *burqa* were necessary to ensure ‘living together’,¹⁵⁰ despite recognising the Islamophobic nature of the debate that preceded the adoption of the law.¹⁵¹ Given the concerns of the drafters that religious minorities are particularly susceptible to interference with religious freedom, it would be appropriate for human rights bodies to exert an extra level of scrutiny, when there is any possibility that the preferences of the majority are being used to justify restrictions on the rights of minorities.

The recognition that there is not a consensus in Europe regarding the role of religion in society, does not lead to the conclusion that the right to freedom of religion or belief is any less significant to religious individuals. If the ECtHR is to protect the ‘moral truth’¹⁵² of the right to manifest religion, it must ensure that it is interpreted to encompass the increasingly diverse religious communities and practices found within the Council of Europe.

CONCLUSION

Although the right to freedom of religion or belief in the ECHR and ICCPR has a common origin in the UDHR, the ECtHR and HRC have interpreted the permissible limitations to this right inconsistently. This is problematic from the perspective of the universality of human rights standards and legal certainty. This article has identified a good faith interpretation of the right to freedom of religion or belief and has used this to analyse the approaches of the ECtHR and HRC in analogous cases.

The identified good faith interpretation reveals that the right to freedom of religion or belief was intended to restrict state interference in matters of conscience, in particular if motivated by dominant political or religious ideologies. Religious minorities were recognised to be particularly vulnerable to such interference. Consequently, the drafters envisaged that the limitations clause would be construed narrowly and that states would be required to evidence the necessity and proportionality of any restrictions with reference to the grounds provided.

While the HRC’s decisions are consistent with a good faith interpretation of the right to manifest religion, this article has evidenced that the approach of the ECtHR is

147. K Chadwick ‘Education in secular France: (re)defining *laïcité*’ (1997) 5 *Modern and Contemporary France* 47 at 55–56.

148. M Hunter-Henin ‘Why the French do not like the *Burqa*: *Laïcité*: national identity and religious freedom (2012) 61 *ICLQ* 613 at 615.

149. Chadwick, above n 147, p 55.

150. *SAS v France*, above n 32, para 153

151. *Ibid*, para 149.

152. Letsas, above n 12, p 79.

incompatible with the aims of the drafters. The ECtHR has permitted states to restrict this right without requiring evidence of the necessity of the restriction and has allowed the purpose and role of secularism to go unquestioned. Thus, the ECtHR has legitimised restrictions which seek to protect a state ideology, the strict separation of church and state, ahead of the concrete right. In effect, this has led Christian and secular beliefs to receive a higher level of protection under Art 9 ECHR than minority religious beliefs. This is incompatible with the intentions of the drafters and the identified good faith interpretation of the right.

The adoption of a good faith interpretation is unlikely to lead to absolute conformity between the decisions of the ECtHR and HRC, especially as in cases concerning the manifestation of religion by state representatives the award of a margin of appreciation to the state can be justified. Nonetheless, in theory, it should lead to higher degree of conformity in terms of reasoning and in the outcome of the specific cases considered in this article. By requiring that the ECtHR engage with the necessity of restrictions, rather than simply deferring to the margin of appreciation, it would also result in a more satisfactory process for individual applicants. However, in practice, it is highly unlikely that the ECtHR will change its pre-existing lines of jurisprudence.

There is, nonetheless, the potential for the ECtHR to adopt an approach consistent with a good faith interpretation when cases are distinguishable on the facts from those previously decided. Recent controversies have concerned restrictions on the *hijab* imposed by private employers on the basis of secularism in Belgium and France¹⁵³ and the wearing of long skirts by Muslim pupils in state schools in France.¹⁵⁴ This would require that the ECtHR undertake a more nuanced consideration of both the evidence provided by the state and the compatibility of secularism with the object and purpose of the right to manifest religion. Were the ECtHR not to adopt a good faith interpretation in these instances and continue to allow states a wide margin of appreciation, this would suggest that visible symbols of minority religions cannot derive any protection under Art 9 ECHR.

Although the use of the margin of appreciation may be justifiable in some instances, this should not allow state power to go unchecked, otherwise the ECtHR would not be fulfilling its role as the 'conscience' of Europe.¹⁵⁵ If the ECtHR is to act consistently with this mandate, it must employ evolutive interpretation to ensure the continuing relevance of the right to manifest religion to European societies. Moreover, it must protect the rights of vulnerable and even unpopular individuals despite populist and democratic demands that their rights be restricted.

153. *Baby Loup case* Cass Ass Plén 25 June 2014, (2014) Rec D 1386; Case C-157/15 *Request for a preliminary ruling from the Hof van Cassatie (Belgium) lodged on 3 April 2015* — Samira Achbita, *Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (2015) 58 Official Journal of the European Union C 205/24, 17–18; Case C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA* (2015) 88 Official Journal of the European Union C 221/03, 2–3.

154. BBC News, 'France outcry over Muslim schoolgirl's skirt ban' 29 April 2015 <<http://www.bbc.co.uk/news/world-europe-32510606>> accessed 20 April 2016.

155. Statement of Lynn Ungoed-Thomas above n 74.