

VALUE-NEUTRALITYITY OF THE EUROPEAN COURT OF HUMAN RIGHTS

Natia Gamkhitashvili

Master's Programme in International Law and Human Rights

Supervisor: Catarina Krause

Åbo Akademi University

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ngamkhit@abo.fi

73220

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Author: Natia Gamkhitashvili

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Supervisor: Catarina Krause

Abstract:

The European Convention on Human Rights is considered as one of the most effective human rights regimes in the world. It is the primary role of the European Court of Human Rights to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and its Protocols by interpreting and applying the Convention.

In order to enhance monitoring and enforcement of compliance with the Convention regime by the States, the Court has framed “a sophisticated jurisprudence, whose progressive tenor and expansive reach have helped to propel the system forward. It has become an important autonomous source of authority in the European human rights system with a significant impact on the domestic legal systems of the members thereof. Accordingly, the Court has been strongly criticised by all kinds of actors for transcending its restricted role of determining whether a State has encroached upon a Convention right and for entering the realm of the legislature through the judicial activism.

However, the Court has been equally criticised for using the margin of appreciation doctrine as a pro-government tool in relation to morally, ethically, politically or otherwise highly controversial issues. While both sides of the criticism - expansion of the role beyond strictly determined confines and separate examples of restrictive approach - have been examined and criticised extensively, much less is spoken of the Court’s decency as such. Accordingly, this thesis examines the value-neutrality of this highly authoritative and influential Court and covers both major stages of case examination: determination of the scope of the Convention provisions and assessment of justifiable limitations.

Having regard to the limited scope of the thesis, the analysis is narrowed down to two different areas, corresponding with the major steps of the case examination: defining the protective scope of the Convention provisions is particularly relevant with respect to the institution of marriage; whereas the issue of permissible limitations, albeit also crucial in connection with marriage, is predominantly surfaced in relation to religious symbols.

Keywords: European Court of Human Rights, value-neutrality, restrictive approach, scope of the Convention provisions, living instrument doctrine, justifiable limitations, proportionality assessment, marriage, traditional concepts, heteronormativity, religious symbols, legitimate aims, secularism, prejudice.

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Table of Contents

1. Introduction	1
1.1. Background	1
1.2. Purpose and limitations	4
1.3. Methods and sources	5
2. The ECtHR and the ECHR.....	8
2.1. Interpretation of the scope of the Convention provisions	8
2.1.1. Interpretive methods in a nutshell	8
2.1.2. Living instrument doctrine	11
2.2 Interpretation of permissible limitations	15
3. Marriage and the ECtHR.....	22
3.1. Right to marry and found a family	22
3.2. Marriage as an outstanding institution?	24
3.2.1. Excluding divorce?	24
3.2.2. Superior to de facto relationships?	32
3.3. Marriage as a heteronormative construct?	35
3.3.1. Unattainable for the non-conforming?	35
3.3.1.1. Trans persons	35
3.3.1.2. Homosexuals	42
3.3.2. Excluding adoption for the non-conforming	47
4. Religious symbols and the ECtHR	52
4.1. Freedom of thought, conscience and religion	52
4.2. Legitimate aims under Article 9	55
4.2.1. Religious symbols as jeopardising the neutrality of service?	55
4.2.1.1. When displayed in public institutions	55
4.2.1.2. When displayed by users of public services	60

4.2.2. Religious symbols as a powerful external manifestation?	63
4.2.2.1. Non-Christian symbols	63
4.2.2.2. Non-Christian symbols v. Christian symbols	66
4.3. Other category?	69
4.3.1. Religious symbols as contrary to gender equality?	69
4.3.2. Religious symbols as a barrier to social interaction?	73
4.3.3 Religious symbols as a political tool?	76
Conclusion	78
Bibliography	84

Abbreviations

Commission	European Commission on Human Rights
Contracting States/Parties	Parties to the European Convention on Human Rights
Convention	European Convention on Human Rights
Court	European Court of Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
Member States	Parties to the European Convention on Human Rights
States	Parties to the European Convention on Human Rights
Strasbourg Court	European Court of Human Rights
UDHR	Universal Declaration of Human Rights

1. Introduction

1.1. Background

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (hereafter “Convention” or “ECHR”)¹ is considered as one of the most effective human rights regimes in the world.² It was adopted in 1950 as a response to the cataclysmic WWII and entered into force in 1953.³ The Convention was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights (hereafter “UDHR”)⁴ as well as principles and values supported by Western Europe by making them binding.⁵ The Convention was adopted within the Council of Europe, with a view to achieving a greater unity between its members for safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.⁶ All 47 member states of the Council of Europe, 28 of which currently are members of the European Union, have ratified the Convention (hereafter “States”, “Member States” or “Contracting States”).⁷

The Convention contains a wide range of civil and political rights as well as guarantees ensuring the protection and exercise thereof.⁸ Since its adoption, the Convention has been amended several times to supplement original substantive guarantees with many additional rights.⁹ The authority to oversee the implementation of the Convention was originally vested in two bodies of the Council of Europe - the European Commission on Human Rights (hereafter “Commission”) and European Court of Human Rights (hereafter “Court”, “ECtHR” or “Strasbourg Court”) while the task is currently undertaken solely by the Court, which was set

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, concluded 4 November 1950, entered into force 3 September 1953, 213 U.N.T.S. 222.

² Keller, Helen & Stone Sweet, Alec, 2008. *A Europe of rights: the impact of the ECHR on national legal systems*. Oxford: Oxford University Press, p. 3

³ *Ibid*, p. 5.

⁴ Universal Declaration of Human Rights, concluded 10 December 1948, 217 A (III).

⁵ Harris, David, O'Boyle, Michael, Bates, Ed, & Buckley, Carla, 2018. *Law of the European Convention on Human Rights*, 4th edition. Oxford: Oxford University Press, pp. 1-3.

⁶ Council of Europe. *Statute of the Council of Europe: London*, concluded 5 May 1949. London: H.M.S.O. Article 1(a)

⁷ See Council of Europe. *Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=cDKc1kQT

⁸ E.g. Articles 2-14; See also Articles 1-2 of Protocol No. 1 (protection of property and right to education), Article 5 of Protocol No. 7 (equality between spouses).

⁹ See Protocols No. 1, 4, 6, 7, 12, 13 and 16; Protocols 11 and 14 – the so-called amending protocols.

up in 1959.¹⁰ It ensures the observance of the engagements undertaken by the High Contracting Parties to the ECHR and the Protocols thereto by interpreting and applying the Convention.¹¹ Considering that non-nationals and non-residents can also bring cases under the Convention concerning matters within a Contracting State's jurisdiction, in addition to the combined number of population of all the Contracting States which is over 800 million people, the ECtHR has the largest territorial jurisdiction of any permanent court in the world.¹² Hence, what was previously treated by international law as a domestic matter, has been brought within a large-scale international system of protection and supervision, requiring Contracting States to act in a particular way towards individuals within their jurisdiction.¹³

The Court possesses all of the formal power required for it to acquire dominance over the evolution of the Convention regime and has produced dense and elaborate constructions of Convention rights and, thus, guidance to national authorities for the application of the instrument.¹⁴ In order to enhance monitoring and enforcement of compliance with the Convention regime by the States, the Court has framed "a sophisticated jurisprudence, whose progressive tenor and expansive reach has helped to propel the system forward."¹⁵ By modifying the law from what it was, the Court has risked entering the domain of elected legislative bodies - the process known as "judicial activism".¹⁶ This holds particularly true having regard to the explicit statement that the Convention is a law-making treaty, seeking the interpretation which would maximise the realisation of the aim and achieve the object of the treaty. Hence, the Court has become "an important autonomous source of authority"¹⁷ in the European human rights system with a significant impact on the domestic legal systems of the members thereof.¹⁸

¹⁰ See further on the supervisory mechanism until and after 1998 in Harris et al., *supra* note 5, pp. 30-39; Jacobs, Francis, White, Robin & Ovey, Clare (eds.), 2014. *The European Convention on Human Rights*, 7th edition. Hampshire: Oxford University Press, pp. 8-10.

¹¹ Article 32(1).

¹² Jacobs et al., *supra* note 10, p.17

¹³ *Ibid*, p. 65; See further Bates, Ed, 2010. *The evolution of the European convention on human rights: from its inspection to the creation of a Permanent Court of Human Rights*. Oxford: Oxford University Press.

¹⁴ Keller & Stone Sweet, *supra* note 2, p. 15.

¹⁵ See further *Ibid*, pp. 3-7.

¹⁶ Mahoney, Paul, 1990. "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", *Human Rights Law Journal*, Volume 11, pp. 57-89, at 58-59.

¹⁷ See further Keller & Stone Sweet, *supra* note 2, pp. 3-7.

¹⁸ See further on the influence on specific states Keller & Stone Sweet, *supra* note 2, pp. 31-674.

By the same token, the Court has been strongly criticised by some judges of the same Court,¹⁹ academics²⁰ and politicians²¹ for transcending its restricted role of determining whether a State has encroached upon a Convention right, which eventually resulted in various attempts to reform the system. The enhanced role and judicial activism, among others, has called for the debate on the future role of the Court in Four High Level Conferences and four outcome declarations.²² All four declarations underscore the subsidiary role of the Court, echoing Article 1 of the Convention: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” The principle of subsidiarity in the specific context of the Court means that “the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task.”²³ Furthermore, Protocol 15, when ratified, will add the principle of subsidiarity to the Preamble of the Convention.²⁴ The Protocol also entails reference to the principle’s “doctrinal corollary”,²⁵ and a tool of judicial self-restraint²⁶ - the doctrine of the margin of appreciation. The margin of appreciation is one of the important tools used by the ECtHR to respect regional differences.²⁷

¹⁹ E.g. *Golder v. the United Kingdom*, (App. 4451/70), 21 February 1975, Series A No 18, (1979-80) 1 EHRR 524, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 39; *Marckx v Belgium*, (App. 683374), 13 June 1979, Series A No 31, (1979/80) 2 EHRR 330, Dissenting Opinion of Judge Sir Gerald Fitzmaurice, para. 31; *X and others v. Austria*, (App. 19010/07), 19 February 2013 [GC], ECHR 2013, Joint Partly Dissenting Opinion of Judges Casadevali, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, para. 23.

²⁰ E.g. Popelier, Patricia, Lambrecht, Sarah & Lemmens, Koen (eds.), 2016. Criticism of the European Court of Human Rights, 1st edition, Law and Cosmopolitan Values, Volume 9.

²¹ E.g. Hürriyet Daily News. Turkey debates the non-retroactive death penalty, available at <http://www.hurriyetdailynews.com/opinion/taha-akyol/turkey-debates-the-non-retroactive-death-penalty--105678>; Hungarian Spectrum – reflections on politics, economics, and culture. Hungarian NGOs Embrace Civil Disobedience, available at <http://hungarianspectrum.org/tag/european-court-of-human-rights/>; CIS Arbitration Forum. Russian Constitutional court denies enforcement of ECHR decision on Yukos, available at <http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/>.

²² See further on the reform of the Court, including the conferences on Council of Europe. *Reform of the Court*, available at <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>

²³ High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration, concluded 19 February 2010, Follow-up, Principle of Subsidiarity, para. 1.A.2.

²⁴ Article 1 of Protocol No. 15.

²⁵ Keller & Stone Sweet, *supra* note 2, p. 6.

²⁶ Mahoney, *supra* note 16, p. 82.

²⁷ Donoho, Douglas Lee, 2001. “Autonomy, self-governance, and the margin of appreciation: Developing a jurisprudence of diversity within universal human rights”, *Emory International Law Review*, Volume 15, pp. 391-466, at 451.

1.2. Purpose and limitations

Even though the doctrine of margin of appreciation does not *per se* represent a pro-government tool and is instead aimed at stressing the subsidiary character of the Convention,²⁸ it poses a certain risk; a constant risk of being too restrained by deferring too much of the Court's own responsibility to national authorities particularly with respect to politically or legally sensitive cases when it is difficult for the Court to decide one way or the other.²⁹ Indeed, in contrast to the areas where the Court has used its activism to enhance the protection of human rights,³⁰ some morally-sensitive or otherwise controversial issues have been handled in a relatively permissive manner through the excessive deference to the Member States. In doing so, the Court has been criticised for contributing to obsolete or conservative moral views or even prejudices against minority groups or practices. Thus, is the Court's approach to the controversial areas actually inconsistent with its traditional, well-established manner of case examination? If so, is it truly underlain by certain biases and sentiments?

While the first facet of the system - expansion of the role beyond strictly determined confines - as well as separate examples of the permissive approach, as will be shown below, have been examined and criticised extensively, much less is spoken of the Court's decency as such. Accordingly, the purpose of the present thesis is to examine the value-neutrality of this highly authoritative and influential Court. For the present purposes, value-neutrality shall be defined as the situation in which a judge in a controversial situation is impartial and not influenced by personal beliefs, attitudes, or values and/or a situation that may often be more theoretical than real.³¹

It goes without saying that the thesis does not serve the purpose of redrafting the judgments under review by suggesting alternative solutions to the questionable reasoning, let alone diminishing the ECtHR's role or the achievements.³² Instead, the discourse will be confined to the examination of the approach adopted by the Court in the controversial areas, based on which an effort will be made to identify its views and assess the value-neutrality thereof. Taking into

²⁸ *Handyside v. the United Kingdom*, (App. 5493/72), 7 December 1975, Series A No 24, (1979-80), 1 EHRR 737, para 48; Mahoney, *supra* note 16, p. 83.

²⁹ *Ibid*, p. 82.

³⁰ See Chapter 2.2.1.2. *Living instrument doctrine*

³¹ See, *mutatis mutandis*, Oxford University Press. *Oxford Reference*, available at <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803115135202>; Compare with the principle of value-neutrality in the social sciences in Zecha, Gerhard, 1992. "Value-neutrality and Criticism", *Journal for General Philosophy of Science / Zeitschrift für allgemeine Wissenschaftstheorie*, volume 23, issue 1, pp. 153-164, at 154-156.

³² See Brems, Eva (Ed.), 2012. *Diversity and European human rights: rewriting judgments of the ECHR*, Cambridge, New York: Cambridge University Press on 18 redrafted judgments of the Court.

account the limited scope of the thesis, the analysis will be confined to two such areas within the ECtHR's consideration - the institution of marriage and religious symbols. While generally speaking, marriage is a good example in terms of strong debates deriving from the divergence of moral views, prejudicial overtones prevail in the global controversy around religious symbols. Therefore, having regard to the limited scope of the examination, the findings in relation to these two areas are not necessarily reflective of the Court's general attitude to other morally, ethically or politically challenging issues.

1.3. Methods and sources

It is noteworthy that the substantive rights of the Convention fall under two main categories - limitable and illimitable rights. Illimitable rights consist only of the 'scope' and every interference therewith is tantamount to a violation of that right,³³ whereas limitable rights prescribe both the "scope" and "limit", that is permissible justifications for the interference. Most of the rights in the Convention are limitable and, either expressly or by implication, provide for the possibility of a justifiable limitation. Accordingly, the first step for the Court in deciding whether there has been a breach of the Convention is to determine protective ambit or scope of the relevant provision(s) in order to establish if there has been an interference with a Convention right or not. It will then turn to balancing the interests of the community against the interests of the individual by examining the "limits" to the scope of the protected rights.³⁴ Notably, the criticism regarding inconsistency covers both major stages of the Court's scrutiny – the examination of the length of the protective ambit of the Convention provisions and the extent of justifiable restrictions thereon.³⁵ Defining the protective scope of the Convention provisions is particularly relevant with respect to the institution of marriage. Whereas, the issue of permissible limitations, albeit also crucial in connection with marriage, is surfaced predominantly in relation to religious symbols.

³³ See for example Articles 3; 4(1), 7(1), 9(1). See further discussion on Article 9 in *Chapter 4.1. Freedom of thought, conscience and religion*.

³⁴ Notably, once it becomes clear that a particular action or inaction falls under the protective ambit of that right the bearer of a right can only lay claim to that right's protection if a given set of facts apply. However, the Court does not always pay separate attention to this question and oftentimes simply assumes that there is an interference once it has established that a claim comes within the scope of protection of a certain Convention provision. See further on the scope and limit division in Brems (Ed.), *supra* note 32, pp. 66-68; See further on six different categories of rights providing for the possibility for intervention in Gerards, Janneke, 2019. *General Principles of the European Convention on Human Rights*. Cambridge: Cambridge University Press, pp. 19-30;

³⁵ See further *Chapter 2. ECtHR and ECHR*.

This being clarified, the upcoming analysis will be carried out in three substantive chapters. The first substantive chapter - *Chapter 2. ECtHR and ECHR* - will explore the Court's traditional approach to the two major stages of examination - determining the length of the scope and permissible limitations - in two sub-chapters. This general substantive chapter will be followed by two specific substantive chapters concerned with the above-mentioned areas – marriage and religious symbols. Since the first stage of the examination relating to the scope is relevant with respect to the institution of marriage, the first specific substantive chapter - *3. Marriage and the ECtHR* - will discuss marriage in the light of the respective general sub-chapter. Thereafter, the Court's approach to religious symbols will be illuminated in *4. Religious symbols and the ECtHR*, bearing in mind the findings of the respective general sub-chapter regarding permissible limitations. The specific substantive chapters will initially explore briefly the right to marry and found a family and the freedom of thought, conscience and religion under the Convention respectively. Eventually, the Court's approach will be analysed through the major characteristics of the institution of marriage and religious symbols that usually underlie the evolving controversies. Notably, however, various characteristics under *Chapter 4. Religious symbols and the ECtHR* will be discussed in two different sub-chapters based on whether they fall within the legitimate aims of the relevant Convention provision or not.

The upcoming discourse will entail references to the provisions of the Convention which is a binding treaty³⁶ of the primary status within the sources of international law.³⁷ Other primary sources of international law, such as international custom and the general principles of law recognised by civilized nations, will be excluded from the consideration. Instead, reference will be made to common European ground/European consensus and European values, as adopted by the Court.³⁸ Considering the very specific focus of the thesis as well as the fact that the Convention provisions acquire meaning through the Court's binding interpretations,³⁹ the analysis will evolve primarily around the Court's case law.⁴⁰ Furthermore, along with the

³⁶ “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” - Article 2(1)(a) of the Vienna Convention on the Law of Treaties, concluded 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S, 331.

³⁷ United Nations, Statute of the International Court of Justice, adopted 26 June 1945, 993 USTS, Article 38(1).

³⁸ See *Chapter 2.2.1. Interpretation of the scope of the Convention provisions*.

³⁹ Koskenniemi, Martti, 2001. “Human Rights, politics and love”, *Mennesker & Rettigheter*, Volume 4, pp. 33-44 at 36.

⁴⁰ The cases brought before the Court are considered in a single-judge formation, in Committees of three judges, in Chambers of seven judges or in a Grand Chamber of seventeen judges, the judgments of the latter being arguably more authoritative than that of the rest – Article 26(1).

judgments/decisions⁴¹ of the majority, the opinions of (partly) dissenting/concurring judges⁴² are equally paramount in examining the Court's value-neutrality. A systematic analysis of dissenting opinions helps us to gain a deeper understanding of the reasoning of the majority speaking for the Court.⁴³

The cases discussed are confined to applications from individuals claiming to be the victims of a violation by one of the High Contracting Parties, excluding any kind of inter-state claims.⁴⁴ The cases will be reviewed separately as well as in comparison with other case law of the Court and the reports of the former Commission, which held an important role in assisting the Court by expressing an opinion as to whether there had been a violation.⁴⁵ This comparative approach is aimed at drawing a parallel between the established outlooks of the ECtHR and the attitude towards the areas under examination – marriage and religious symbols. Nevertheless, it is noteworthy that the Court is not formally bound by its previous interpretations and judgments as such, but usually follows and applies its own precedents for the sake of legal certainty, equality before the law and the orderly development of the Convention case law.⁴⁶

Wherever possible, the comparison will also be made between the approach of the Court and the views of the United Nations Human Rights Committee (hereafter "HRC"), expressed through its General Comments or considerations regarding individual communications. The HRC was established to monitor the implementation of the International Covenant on Civil and Political Rights (hereafter "ICCPR") – a legally binding international treaty and the universal counterpart of the ECHR.⁴⁷ Even though the views of the HRC are not binding for the Court, they are sometimes taken into account while examining the alleged violation of the

⁴¹ The Court first checks the compliance of the individual applications with formal requirements of admissibility and will either declare an application inadmissible for failing to be in line with the admissibility criteria by means of a decision or will move to the examination of the merits to pronounce if there had been a violation of the Convention by means of a judgment – Articles 35, 38 and 45(1).

⁴² Any judge is entitled to deliver a separate opinion if a judgment does not represent, in whole or in part, the unanimous opinion of the judges - Article 45(2).

⁴³ Bijsterveld, van Sophie, 2017. "A Typology of Dissent in Religion Cases in the Grand Chamber of the European Court of Human Rights", *Religion and Human Rights*, volume 12, pp. 223-232 at 224.

⁴⁴ Articles 33-34.

⁴⁵ Notably, however, the reports of the commission were not legally binding either on the Court or the respondent States. See further on the Commission in Fribergh, Erik and Villiger, Mark E., 1993. "The European Commission of Human Rights" in *The European System for the Protection of Human Rights*, R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), pp. 605-620. Dordrecht: Nijhoff.

⁴⁶ *Cossey v. the United Kingdom*, (App. 10843/84), 27 September 1990, Series A No 184, (1991) 13 EHRR 622, para. 35; *Christine Goodwin v. the United Kingdom*, (App. 28957/95), 11 July 2002 [GC], ECHR 2002-VI, para. 74.

⁴⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, UNTS volume 999, p. 171. See Articles 28 and 40 and the Optional Protocol to the ICCPR.

Convention.⁴⁸ Other non-binding authoritative sources such as scholarly articles will be used to assist the analysis in the assessment of the value-neutrality since the above-mentioned characteristics are not always expressly conveyed by the Court and, therefore, call for various interpretations.

2. The ECtHR and the ECHR

2.1. Interpretation of the scope of the Convention provisions

2.1.1. Interpretive methods in a nutshell

As noted, like any other human rights provisions, rather short Articles of the Convention have no meaning independent from the way they are interpreted by the relevant authority. It is the primary role of the Court to interpret the Convention and the Protocols thereto.⁴⁹ In doing so, the Court relies on various methods of interpretation as a united, single operation, the most relevant, for the purposes of the present analysis, of which is discussed below.⁵⁰

Teleological or purposive approach has been the most influential method of interpretation.⁵¹ According to this principle, the Court is required to ascertain the scope of the provisions in the light of the object and purpose thereof.⁵² It has been deemed essential to seek the interpretation which enables the realisation of the aim of the treaty⁵³ - “the protection of individual human rights” and the promotion of the ideas and values of a democratic society, presupposing pluralism, tolerance and open-mindedness.⁵⁴ By contrast, the ordinary meaning of words is also frequently used with a view to interpreting the Convention and might entail references to dictionaries.⁵⁵ The Court has also stressed that the interpretation of the Convention provisions

⁴⁸ See Chapter 2.2.1.1. *Interpretive methods in a nutshell*; See further on the interrelation between the ECHR and the ICCPR in Dijk, van Pieter, Hoof, van Fried, Rijn, van Arjen & Zwaak, Leo (eds.), 2018. *Theory and Practice of the European Convention on Human Rights*, 5th edition. Cambridge: Intersentia Ltd., pp. 73-78.

⁴⁹ Article 32(1).

⁵⁰ *Golder v. the UK*, *supra* note 19, para. 30; See more comprehensively in Jacobs et al., *supra* note 10, pp.64-83.

⁵¹ Jacobs et al., *supra* note 10, p. 64.

⁵² *Saadi v the United Kingdom*, (App. 13229-03), 29 January 2008 [GC], (2008) 47 EHRR 427, ECHR 2008-nyr, para. 62.

⁵³ E.g. *Wemhoff v. Germany*, (App. 2122-64), 27 June 1968, Series A No 7, (1979-80) 1 EHRR 55, para. 8; *Golder v. the UK*, *supra* note 19, para. 36.

⁵⁴ *Soering v. the United Kingdom*, (App. 14038/88), 7 July 1989, Series A No 161, (1989) 11 EHRR 439, para. 87; *Handyside v. the UK*, *supra* note 28, para. 49.

⁵⁵ E.g. *Luedicke, Belkacem and Koç v. Germany*, (Apps. 6210/73, 6877/75 and 7132/75), 28 November 1978, Series A No 29, (1981) 2 EHRR 149, para. 40.

“must be in harmony with the logic of the Convention”⁵⁶ and that “the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols.”⁵⁷

In finding the meaning of the terms and notions in the text of the Convention, the Court also takes into account other sources of international law, including relevant international law treaties, even where the respondent State is not a party to a specific treaty,⁵⁸ as well as practices of international and national courts, keeping in mind its specific jurisdiction over the Convention.⁵⁹ For instance, the Court has underscored the importance of the application of the general principles of international law, humanitarian law, etc.⁶⁰ Specific instruments have equally been applied, primary example of which is the Vienna Convention on the Law of Treaties (1969) which served as a guide for the Court in developing the methods of interpretation.⁶¹ Other examples include references to the provisions of the ICCPR,⁶² the United Nations Convention on the Rights of the Child,⁶³ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶⁴ the International Labour Organisation Conventions,⁶⁵ etc. Other non-binding sources have also played a role in the interpretation of the Convention by the Court.⁶⁶ The Court is also well-known for its consideration of the judgments of the International Court of Justice⁶⁷ as well as General Comments and the case law of the HRC.⁶⁸

Nonetheless, the interpretation of the Court is not always in harmony with that of the universal international standards since, among others, the Court takes into account the laws of the Contracting States in search for the common European ground i.e. the consensus among them.

⁵⁶ *Leander v. Sweden*, (App. 9248/81), 26 March 1987, Series A No 116, (1988) 9 EHRR 433, para. 78.

⁵⁷ *Maaouia v France*, (App. 39652/98), 5 October 2000 [GC], (2001) 33 EHRR 1037, ECHR 2000-X, para. 36

⁵⁸ *Marckx v Belgium*, *supra* note 19, para. 41.

⁵⁹ See, e.g. *Demir and Baykara v. Turkey*, (App. 34503/97), 12 November 2008 [GC], (2009) 48 EHRR 1272, ECHR 2008-nyr, para. 85.

⁶⁰ E.g. *Hassan v the United Kingdom*, (App. 29750/09), 16 September 2014 [GC].

⁶¹ Articles 31-33 of the Vienna Convention. See *Golder v. the UK*, *supra* note 19, para. 29.

⁶² *Ilacu and others v Moldova and Russia*, (App. 48787/99), 8 July 2004 [GC], (2005) 40 EHRR 1030, ECHR 2004-VII.

⁶³ *E.B. v. France*, (App. 43546/02), 22 January 2008 [GC], ECHR 2008-nyr.

⁶⁴ *X v. Latvia*, (App. 27853/09), 26 November 2013 [GC].

⁶⁵ *National Union of Rail, Maritime and Transport Workers v the*, (App. 31045/10), 8 April 2014.

⁶⁶ *Sørensen and Rasmussen v. Denmark*, (Apps. 52562/99 and 5262-/99), 11 January 2006 [GC], (2008) 46 EHRR 572, ECHR 2006-I - European Social Charter; *Önerlyildiz v Turkey*, (App. 48939/99), 30 November 2004 [GC], (2005) 41 EHRR 325, ECHR 2004-XII - recommendations of Committee of Ministers and Parliamentary Assembly.

⁶⁷ *Cyprus v. Turkey*, (App. 25781/94), 10 May 2001 [GC], (2001) 35 EHRR 731, ECHR 2001-IV, ECHR 1996-VI.

⁶⁸ See Chapters 2 and 3.

Both the former Commission and the Court have utilised comparative surveys of the laws of the Contracting States as a guide to interpretation of the scope of the Convention rights. Furthermore, the method has also been applied to the review of the elements of the proportionality assessment – the second stage of the decision-making - namely what is “necessary” or “reasonable” in a “democratic society.”⁶⁹

Notably, however, the precise legal meaning of the notions and concepts included in the ECHR can differ for each legal system. Therefore, when interpreting or defining such terms, the Court has to choose between respecting the national meaning of such a notion and adopting a definition of its own. Giving preference to the national definition of certain notions, according to the Court, would pose the risk of the States trying to circumvent the Court’s supervision by narrowly defining the terms and notions that determine the Convention’s applicability. With a view to preserving the integrity of the objectives of the Convention and the equal level of protection in all States, the ECtHR has stressed that a European, autonomous definition should usually prevail, even though the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration in any such interpretation.⁷⁰

Once the Court has exhausted the primary means of interpretation, including, but not limited to, the above-mentioned methods, recourse may be had to, *inter alia*, preparatory works to the Convention as supplementary means of interpretation. The purpose of the *travaux préparatoires* is it to either confirm a meaning determined based on the primary methods, or to establish the meaning where it would otherwise be obscure or unreasonable.⁷¹ However, according to the Grand Chamber, *travaux préparatoires* “are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if the existence of such a right was supported by the growing measure of common ground that had emerged in a given area.”⁷² The Court is particularly cautious of the use of preparatory works considering that the Convention shall be interpreted dynamically - the so-called evolutive interpretation.⁷³

⁶⁹ Jacobs et al., *supra* note 10, pp. 80-81.

⁷⁰ *Engel and others v. the Netherlands*, (Apps. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72), 8 June 1976, Series A No 22, (1979-80) 1 EHRR 64, para. 80-81; *Beyeler v. Italy*, (App. 33202/96), 5 January 2000 [GC], (2001) 33 EHRR 1224, ECHR 2000-I. See further on autonomous interpretation in Gerards, *supra* note 34, pp. 67-68; Letsas, George, 2007. *A theory of interpretation of the European Convention on Human Rights*. Oxford [UK], New York: Oxford University Press, pp. 37-57; Letsas, George, 2004. “The Truth in Autonomous Concepts: How to Interpret the ECHR”, *European Journal of International Law*, Volume 15, Issue 2, pp. 279–305.

⁷¹ *Saadi v. the UK* [GC], *supra* note 52, para. 62; See also Article 32 of the Vienna Convention.

⁷² (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 125, 8 November 2016)

⁷³ Jacobs et al., *supra* note 10, p. 66.

2.1.2. *Living instrument doctrine*

The original nature and purpose of the Convention have obviously changed since the 50s considering the deep, systematic transformation of the broader environment in which the regime is embedded.⁷⁴ Changing ethical standards, including rising human rights standards, technological progress and changing social relationships have brought about new types of problems to be resolved by the Strasbourg Court.⁷⁵ “A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.”⁷⁶ In order to retain an increasingly high standard required in the area of the protection of human rights⁷⁷ by, among other means, adapting the content of the rights under the European Convention to current situations, the Court has introduced the concept of “living instrument”: the Convention shall be interpreted in the light of present-day conditions, having regard to the developments and commonly accepted standards of the Member States of the Council of Europe.⁷⁸ Thus far, the phrase “the Convention is a living instrument” has been used in around thirty cases⁷⁹ with a view to guaranteeing rights that are “practical and effective”, not that are “theoretical or illusory”.⁸⁰

The evolutive approach has played a predominant role in the development of the case law under, among others, Article 8 - Right to respect for private and family life⁸¹ - including in the context of same-sex marriage, as will be discussed below. For instance, regardless of the fact that at the time when the Convention was drafted it was regarded as permissible and normal in many European countries to draw a distinction in some areas between the “illegitimate” and the “legitimate” family, the Court concluded that Article 8 no longer made any distinction between the “legitimate” and the “illegitimate” family in the area in question in the light of the evolved “present-day” conditions.⁸² It was also declared later on that the notion of “family life”

⁷⁴ See further Keller & Stone Sweet, *supra* note 2, p. 5.

⁷⁵ See further Mowbray, Alastair, 2005. “The Creativity of the European Court of Human Rights”, *Human Rights Law Review*, volume 5, issue 1, pp. 57-79. See also Brems, Eva; Gerards, Janneke. H. (eds.), 2013. *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights*. New York, Cambridge: Cambridge University Press, pp. 17-37.

⁷⁶ *Micallef v. Malta*, (App. 17056/06), 15 October 2009 [GC], ECHR 2009, para. 81.

⁷⁷ *Selmouni v. France*, (App. 25803/94), 28 July 1999 [GC], (2000) 29 EHRR 403, ECHR 1999-V, para. 101.

⁷⁸ The concept was first introduced in *Tyrer v. the United Kingdom*, (App. 5856/72), 25 April 1978, Series A No 26, (1979-80) 2 EHRR 1, para. 31; *Marckx v Belgium*, *supra* note 19, para. 41; *Dudgeon v. the United Kingdom*, (App. 7525/76), 22 October 1981, Series A No 45, (1982) 4 EHRR 149, para. 60.

⁷⁹ Jacobs et al., *supra* note 10, p. 77.

⁸⁰ E.g. *Golder v. the UK*, *supra* note 19, p. 18, para. 35; *Luedicke, Belkacem and Koç v. Germany*, *supra* note 55, pp. 17-18; para. 42; *Marckx v Belgium*, *supra* note 19, para. 31.

⁸¹ Article 8(1); “Everyone has the right to respect for his private and family life, his home and his correspondence.” See further *Chapter 4. Religious symbols and the ECtHR*

⁸² *Marckx v Belgium*, *supra* note 19, paras. 31 and 41.

is not confined solely to families based on marriage and may encompass other *de facto* relationships, having regard to a number of relevant factors in the determination.⁸³ Moreover, on account of a rapid evolution of social attitudes towards same-sex couples in many member States and the corresponding tendency for affording legal recognition to same-sex couples, the Court considered it artificial to maintain the view that the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, did not fall within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.⁸⁴ Likewise, telephone conversations were regarded as covered by the notions of “private life” and “correspondence”, even though such conversations are not expressly mentioned in Article 8.⁸⁵ It has also been stressed that in the twenty first century, the right of transsexuals to personal development and to physical and moral security cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone, as not quite one gender or the other, is no longer sustainable.⁸⁶

The traditional concept of “slavery” has been recognised to have evolved into a notion encompassing various contemporary forms of slavery, including trafficking.⁸⁷ By the same token, the scope of the prohibition of torture under Article 3⁸⁸ has also been extended:

“The Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies... Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant’s person caused “severe” pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.”⁸⁹

⁸³ *X, Y and Z v. the United Kingdom*, (App. 21830/93), 22 April 1997, (1997) 24 EHRR 143, ECHR 1997-II, para. 36.

⁸⁴ *Schalk and Kopf v Austria*, (App. 30141/04), 24 June 2010, ECHR 2010, paras. 93-94; See also *Vallianatos and other v. Greece*, (Apps. 29381/09 and 32684/09), 7 November 2013 [GC], para. 73.

⁸⁵ *Klass v Germany*, (App. 5029/71), 6 September 1978, Series A No 28, (1979-80) 2 EHRR 214, para. 41.

⁸⁶ *Christine Goodwin v. the UK* [GC], *supra* note 46, para. 90

⁸⁷ *Rantsev v. Cyprus and Russia*, (App.25965/04), 7 January 2010, paras. 280-281.

⁸⁸ Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

⁸⁹ *Selmouni v France* [GC], *supra* note 77, paras. 101-105.

The recognition and gradual expansion, within pertinent confines, of environment-related human rights constitutes the creditable paradigm of the notion since none of the Convention provisions make any reference to environmental human rights, making them an exclusive product of the Court's creativity. A thorough analysis of the Court's relevant case law illustrates the trend towards reading environment-related human rights primarily into Articles 2 and 8, even though the use of the Convention provisions "as a means of generating environmental rights is heavily circumscribed."⁹⁰ As clarified by the Court, although "there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."⁹¹ The violation of Article 8 has been found for the failure of the authorities to fulfil their positive obligations - the obligation on the part of national authorities to take necessary measures to safeguard a right⁹² or to adopt reasonable and suitable measures to protect the rights of the individual.⁹³ For instance, failure to inform the public about the hazards and the procedures to be followed in the event of a major accident as a result of the activities of a "high-risk" chemical factory has been considered as such.⁹⁴ The Court has also extended the scope of Article 8 beyond the cases where the pollution is directly caused by the State and has recognised the State's responsibility for the failure to regulate private industry properly.⁹⁵ For example, notwithstanding the fact that the State was not directly responsible for the pollution, severe environmental pollution was held to be in breach of Article 8 on account of its adverse effects, which prevented the applicant from enjoying his home in such a way as to affect his private and family life adversely.⁹⁶ Notably, by virtue of the "living instrument" and "progressive" interpretation, some dissenting judges have acknowledged that Article 8 embraces the right to healthy environment and, therefore, to protection against pollution and different sorts of nuisances, which were practically unknown at the time when the Convention was drafted.⁹⁷

⁹⁰ Right to life and Right to respect for private and family life respectively. Jacobs et al., 2014, p. 403.

⁹¹ E.g. *Hatton v. the United Kingdom*, (App. 36022/97), 8 July 2003 [GC], (2003) 37 EHRR 611, ECHR 2003-VIII, reversing 2 October 2001, (2001) 34 EHRR 1, paras. 96 and 122.

⁹² *Hokkanen v. Finland*, (App. 19823/92), 23 September 1994, Series A No 299-A, (1994) 19 EHRR 139.

⁹³ *López Ostra v. Spain*, (App. 16798/90), 9 December 1994, Series A No 303-C, (1995) 20 EHRR 277. On positive obligations see Council of Europe, 2007. "Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights", *Human rights handbooks*, No. 7.

⁹⁴ E.g. *Guerra and others v. Italy*, (App. 14967/89), 19 February 1998, (1998) 26 EHRR 357, ECHR 1998-I, para. 35.

⁹⁵ *Hatton v. the United Kingdom* [GC], *supra* note 91, para. 98.

⁹⁶ *López Ostra v. Spain*, *supra* note 93, paras. 51-52

⁹⁷ *Hatton v. the United Kingdom* [GC], *supra* note 91, Joint Dissenting Opinion of Mr. Costa, Mr. Ress, Mr. Türmen, Mr. Zupančič and Mrs. Steiner, paras. 2-5.

The Court's case law in the area of evolutive interpretations goes even further than the mere expansion or recognition of new concepts under the provisions of the Convention. *Bayatyan v Armenia* (2011) is a landmark case concerning a refusal to undertake the military service on conscientious grounds. According to Article 4(3)(b), "forced or compulsory labour" shall not include [...] any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service." The phrase "in countries where they are recognised" had been interpreted by the Commission as not entailing a right to the conscientious objection as such and the corresponding obligation of the State. However, the Grand Chamber of the Court took note of the increasing recognition of such a right by the Member States and reversed the Commission's approach. By virtue of the "living instrument" doctrine, the Grand Chamber concluded that Article 9 should no longer be read in conjunction with Article 4(3)(b) and recognised a right to conscientious objection under Article 9.⁹⁸

The judicial activism of the Court is perhaps the most evident and central in the development of its approach to the death penalty. According to Article 2(1), no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. In the *Soering* case (1989), the Court refused to accept that Article 3 could be interpreted as prohibiting capital punishment while Article 2 permitted it. It was, again, underscored that the Convention is to be read as a whole and Article 3 should, therefore, be construed in harmony with the provisions of Article 2. Eventually, it was concluded the drafters of the Convention could not have intended to include a general prohibition of the death penalty in Article 3 since that would nullify the clear wording of Article 2(1). The Court also took note of the drafting of Protocol No. 6 - concerning the abolition of the death penalty - as a subsequent written agreement, and regarded it as showing that the intention of the Contracting Parties was to adopt the normal method of the amendment of the text in case States wished to abolish the capital punishment in time of peace.⁹⁹ By contrast, in *Al-Saadoon and Mufdhi v. the United Kingdom* (2010), the Court confirmed that Article 2 has been amended so as to prohibit the death penalty in all circumstances. In doing so, the Court utilised the European consensus tool and referred to the evolution of the position of the States in this regard: all but two of the Member States had then signed Protocol No. 13 - concerning the abolition of the death penalty in all circumstances - and all but three of the States which

⁹⁸ *Bayatyan v. Armenia*, (App. 23459/03), 7 July 2011 [GC], ECHR 2011, para. 109.

⁹⁹ *Soering v the UK*, *supra* note 54, para. 103.

had signed it had ratified it.¹⁰⁰ Hence, the European consensus tool can be used alongside the “living instrument” doctrine as the dominant or one of a multitude of mechanisms for establishing a contemporary context in which the wording of the Convention should be interpreted.¹⁰¹

Thus, the Court has furnished itself with various “jurisprudential tools”,¹⁰² enabling it to be flexible in fulfilling its tasks. Accordingly, it has been able to “stretch” the scope of the rights under the Convention to the extent which had not been envisaged by the drafters or even to reverse those which had been explicitly regulated by the drafters in a certain way.

2.2. Interpretation of permissible limitations

As noted, with respect to limitable rights, after determining that there has been an interference with the scope of a Convention right, the Court examines if the interference can be justified under the permissible limitations. Generally speaking, the Court adopts rather narrow interpretation of justifiable exceptions.¹⁰³ For instance, in the Case of *Sidiropoulos and others v Greece* (1998), the Court noted that “exceptions to freedom of association must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive”,¹⁰⁴ which holds true of all the limitations to Articles 8 to 11.¹⁰⁵ Conditions for restrictions under limitable provisions are different for different rights but there are many general requirements and principles that apply to almost all of the Convention rights. These include the requirements of lawfulness, a legitimate aim and of a fair balance between the interests involved in a case.¹⁰⁶

According to the requirement of lawfulness, an interference with the Convention must be “prescribed by law” or, in other words, be “in accordance with law”. The lawfulness of an interference is usually determined based on four requirements: “basis in domestic law”; the accessibility of the legal basis; and certainty and foreseeability of the interference, restriction

¹⁰⁰ *Al Saadoon and Mufdhi v. the United Kingdom*, (App. 61498/08), 2 March 2010 [GC], ECHR 2010 (extracts), para. 120; See also Brems & Gerards (eds.), *supra* note 74, pp. 33-35 on the reversal of the original interpretation of limited trade union rights.

¹⁰¹ Brems & Gerards (eds.), *supra* note 74, pp. 36.

¹⁰² *Ibid*, para. 35.

¹⁰³ E.g. *Klass v Germany*, *supra* note 85, para. 42.

¹⁰⁴ *Sidiropoulos and others v. Greece*, (App. 26695/95), 10 July 1998, (1999) 27 EHRR 633, ECHR 1998-IV, para. 38.

¹⁰⁵ Jacobs et al., *supra* note 10, p. 342.

¹⁰⁶ See articles 15, 16, 17 and 18 on special possibilities and conditions for restriction; Gerards, *supra* note 34, p. 19.

or limitation.¹⁰⁷ Notably, the Court has implicitly defined the requirement of “prescribed by law” as an autonomous concept and has not set any procedural standards or specific types of law for the validity of the legal basis.¹⁰⁸ Otherwise, it would have been difficult to apply the notion to different legal systems of the forty-seven Member States.¹⁰⁹

The requirement of a legitimate aim is explicitly mentioned in the express limitation clauses and has been extended by the Court also to those Convention provisions which contain implied restrictions.¹¹⁰ Unlike the latter, the former provisions set forth exhaustive lists of the aims which can legitimately be served. Such aims might entail the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others, the protection of the reputation or rights of others, maintaining the authority and impartiality of the judiciary, etc. Even though such exhaustive enumeration is useful in the sense that it narrows down the possibility for restricting fundamental rights, its practical usefulness is reduced by the broadness of the wording.¹¹¹ In fact, the Court has accepted almost any general interest that reasonably could be served by a public authority, sometimes without specifying which one of the legitimate aims is considered applicable. A rather vague asserted aim might also be reclassified as one that is clearly mentioned in a limitation clause.¹¹² Furthermore, it has been explicitly stated by the ECtHR that it is normally relatively easy for respondent Governments to argue that the measure actually pursued a legitimate aim. Notably, the cases in which the Court rejected one or more of the cited aims and, therefore, found a breach purely owing to the absence of a legitimate aim, are still rare. Wherever some of the aims, cited by the States, are considered illegitimate by the Court, if at least one legitimate aim can be accepted, the ECtHR will normally proceed with the assessment of the necessity of the interference in light of the accepted legitimate aim and will not delve further into the illegitimate nature of the rejected objectives.¹¹³

On the other hand, the Court has expressly emphasized that the clauses permitting interference with the Convention rights must be interpreted restrictively and that exceptions to a general

¹⁰⁷ *Sunday Times v the United Kingdom*, (App. 6538/74), 26 April 1979, Series A No 30, (1979-80) 2 EHRR 245, para. 48

¹⁰⁸ . E.g. *Leyla Şahin v. Turkey*, App. (44774/98), 10 November 2005 [GC], (2007) 44 EHRR 99, ECHR 2005-IX, para. 88.

¹⁰⁹ Gerards, *supra* note 34, pp.199 -219 and Jacobs et al., *supra* note 10, pp. 343-347.

¹¹⁰ Express: Articles 8-11, Article 1 of Protocol No. 1; Art. 2 of Protocol No. 4. Implied: Articles 14.

¹¹¹ Gerards, *supra* note 34, p. 220.

¹¹² E.g. *Vrzić v. Croatia*, (App. 43777/13), 12 July 2016, ECHR 642, para. 62

¹¹³ *Merabishvili v. Georgia* [GC], (App. 72508/13), 28 November 2017, ECHR 1070, paras. 197 and 295-296.

rule cannot be given a broad interpretation.¹¹⁴ In few cases, the Court has found that an aim did not fit in the list of the stated aims and, therefore, did not meet the requirements of the Convention.¹¹⁵ It has refused to accept, among others, objectives that derived purely from a tradition,¹¹⁶ were expressive of discrimination or prejudice,¹¹⁷ clearly reflected gender stereotypes¹¹⁸ or which reflected general biased assumptions or prevailing social prejudice in a particular country.¹¹⁹ Notably, the Court tends to examine closely and discover the existence of any hidden illegitimate aims that were secretly more important than the ones presented by the States considering the context of the interference as well as supplementary sources such as legislative history and statements of politicians in the news media.¹²⁰ Therefore, irrespective of the wide area of interests accepted by the Court, objectives presented by the States have to fit into one of the aims expressly mentioned in the Convention at the very least. But, generally speaking, the test of legitimate aim does not play a large role in the Court's review of the justifiability of restrictions and the primary focus is on the third main requirement for permissible limitations - proportionality review.¹²¹

The requirement of fair balance, also referred to as the requirement of necessity or proportionality in the wider sense, does not have a uniform definition. Nevertheless, although not strictly adhered to, several elements of the test have been distinguished and applied in the Court's case law.¹²² According to the ECtHR, the necessity test implicitly requires the assessment of whether the interference complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued" (proportionality in the strict sense) and whether the reasons given by the national authorities to justify it are "relevant and sufficient".¹²³ Additionally, in some cases, the Court has adopted another requirement of the

¹¹⁴ *Perinçek v. Switzerland [GC]*, (App. 27510/08), 15 October 2015, para. 151

¹¹⁵ E.g. *Nolan and K v. Russia*, (App. 2512/04), 12 February 2009, para. 73; *Khodorskovskiy and Lebedev v Russia*, (Apps. 11082/06 and 13772/05), 25 July 2013, para. 844.

¹¹⁶ See e.g., *Pla and Puncernau v Andorra*, (App. 69498/01), 13 July 2004, (2006) 42 EHRR 522, ECHR 2004-VIII, para. 62;

¹¹⁷ E.g. *Y.Y. v. Turkey*, (App. 14793/08), 10 March 2011, paras. 77-78.

¹¹⁸ E.g. *Konstantin Markin v. Russia*, (App. 30078/06), 22 March 2012 [GC], para. 143.

¹¹⁹ E.g. *Biao v. Denmark*, (App. 28590/10), 25 March 2014, para. 126.

¹²⁰ E.g. *Khordokovskiy and Lebedev v. Russia*, (Apps. 11082/06 and 13772/05), 25 July 2013, paras. 843-844; *Baka v. Hungary*, (App. 20261/12), 23 June 2016 [GC], paras. 143-151 and 156-157; Gerards, *supra* note 34, pp. 225-226.

¹²¹ See further on the requirement of legitimate aim in Gerards, *supra* note 34, chapter 9; See further on specific legitimate aims Jacobs et al., *supra* note 10, pp. 347-359.

¹²² The tests of the requirement were examined for the first time in *Handyside v. the UK*, *supra* note 28.

¹²³ *Sunday Times v the UK*, *supra* note 107, para. 62. See also *Handyside v. the UK*, *supra* note 28, para. 50.

proportionality assessment (in the wider sense), that is the availability of the “least restrictive means” or “least intrusive means”.¹²⁴

The test of the “pressing social need”¹²⁵ is a case-specific test which can be determined only on the basis of the particular circumstances of the case. It requires the existence of a genuine, objective and a sufficiently important need to introduce certain restrictions.¹²⁶ Thus, apparently, it is not sufficient that interference serves legitimate interests; they should additionally be “pressing”.¹²⁷ Furthermore, the Court has inserted an additional element of effectiveness or appropriateness of the restriction in its “pressing social need” test: if a measure cannot contribute to realising the aims pursued, it can hardly be accepted that there is a pressing need for doing so. Nevertheless, the matter of effectiveness is usually left to the national authorities.¹²⁸

Along with the presence of “pressing social need”, there shall be a proportionate balance between the means used and the legitimate aim pursued - proportionality in the strict sense.¹²⁹ In other words, it is inherent in the Convention to strike a fair balance between fundamental rights of an individual applicant and interests of others.¹³⁰ To that end, the Court takes into account the weight of the individual interest affected, the seriousness of the interference, the importance of certain governmental aims and the need for the interference to achieve such aims. It will accordingly be decided whether the general interests are strong enough to outweigh the Convention rights and freedoms of the individuals affected.¹³¹ The Court usually leaves the balancing exercise to the national authorities if the margin is wide and confines itself to the superficial assessment thereof to ensure that the national-decision-making was not manifestly disproportionate.¹³² By contrast, where the case involves the aspect which is linked to the main values and principles underlying the Convention, or there is a strong European consensus on the importance of a right, it will require particularly strong interest to justify the restriction of a right.¹³³ However, the test of balancing the interests involved does not necessarily imply

¹²⁴ See Gerards, *supra* note 34, chapter 10 for the comprehensive review of the test of necessity, proportionality or fair balance.

¹²⁵ E.g. *Editions Plon v. France*, (App. 58148/00), 18 May 2004, para. 55.

¹²⁶ E.g. *Vajnai v. Hungary*, (App. 33629/06), 8 July 2008, paras. 54-55.

¹²⁷ Gerards, *supra* note 34, p. 467.

¹²⁸ E.g. *Editions Plon v France*, *supra* note 125, para. 55. See further on the “pressing social need” test in Gerards, *supra* note 34, pp. 234- 236.

¹²⁹ *Handyside v. the UK*, *supra* note 28, para 49.

¹³⁰ *Soering v the UK*, *supra* note 53, para. 89.

¹³¹ Gerards, *supra* note 34, p. 244; E.g. *X and Others v Austria* [GC], *supra* note 19, para.144.

¹³² E.g. *Hardy and Maile v. the United Kingdom*, (App. 31965/07), 14 February 2012, para. 218-231.

¹³³ Gerards, *supra* note 34, p. 245; E.g. *Eweida and others v. the United Kingdom*, (Apps. 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013, ECHR 2013, para. 94.

making a choice between conflicting rights where one prevails over the other. With respect to both negative and, even more so, positive obligations, sometimes it is more important to seek for the reconciliation or for a middle ground.¹³⁴

According to the third element of necessity, a limitation can only be justified if the reasons for the adoption by the national authorities of respective measures are relevant and sufficient.¹³⁵

This requirement can be read as implying that “there must be a certain importance to the restrictions, as well as certain adequacy and appropriateness of the restriction to serving objectives of general interest.”¹³⁶ To be more precise, the test of relevance can be described as identifying the arguments that have been advanced in support of a restriction and to assess whether they make sense *in abstracto* while the sufficiency test guides the Court in determining if these arguments are weighty enough in the concrete case to justify the interference. Thus, the sufficiency test comes close to a test of balancing but is more one-sided and focuses on the question of whether the restriction actually and reasonably served to achieve the aims pursued, while the balancing entails a comparison between the interests served by a restriction and the interests affected by it. The assessment of sufficiency comes even closer to the requirement of the pressing social need and sometimes is merged therewith without any clear conceptual or argumentative distinction.¹³⁷

Last but not the least, the test of the least restrictive means requires that a measure adopted by the national authorities is the least intrusive or harmful yet able to effectively contribute to realising the legitimate objectives pursued.¹³⁸ Since it is difficult for the Court to assess if an alternative means would be just as effective as the chosen measure, the test is seldom decisive for the outcome of the case and is applied rarely, primarily as one factor in determining the overall balance of reasonableness of the interference.¹³⁹ The Court is more likely to pay attention thereto if the applicant has clearly referred to the availability of a less intrusive means¹⁴⁰ or if the Court has afforded a narrow margin of appreciation to the State.¹⁴¹

¹³⁴ See further on the “fair balance”, “proportionality” or “necessity” test in Gerards, *supra* note 34, pp. 242-258. See also Gerards, Janneke, 2013. “How to improve the necessity test of the European Court of Human Rights”, *International Journal of Constitutional Law*, volume 11, issue 2, pp. 466–490.

¹³⁵ *Delfi AS v. Estonia*, (App. 64569/09), 16 June 2015 [GC], para 162.

¹³⁶ Gerards, *supra* note 34, p. 231

¹³⁷ See e.g., *Stomakhin v. Russia*, (App. 52273/07), 9 May 2018, paras. 109 and 118; See further on “the relevant and sufficient test” in Gerards, *supra* note 34, pp. 239-242.

¹³⁸ E.g. *Nada v. Switzerland*, (App. 10593/08), 12 September 2012 [GC], ECHR 2012 [GC], para. 183. Compare: *Animal Defenders International v. the United Kingdom*, (App. 48876/08), 22 April 2013 [GC], para. 110;

¹³⁹ See e.g., *Lashmankin and Others v. Russia*, (App. 57818/09), 7 February 2017, para. 422.

¹⁴⁰ See e.g. *Animal Defenders International v the UK* [GC], *supra* note 138, para. 122

¹⁴¹ *Ibid*, para. 124 on narrow margin; *Biblical Centre of the Chuvash Republic v. Russia*, (App. 33203/08), 12 June 2014, para. 59. See further on the test of the “least restrictive means” in Gerards, *supra* note 34, pp. 236-239.

Unlike the aforementioned test of necessity, or the proportionality in the wider sense, the Court tends to adopt a different approach in relation to implied limitation clauses as well as to discrimination-related cases under Article 14. The implied limitation clauses which, unlike expressly limitable provisions, do not entail express requirements and conditions for a restriction, have been reviewed by the Court based on a different formula: “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such extent that the very essence of the right is impaired.”¹⁴² Nevertheless, even if the essence of the right seems to have been impaired, it does not automatically render it inviolable and the Court might still allow for a certain degree of a restriction and balancing. Therefore, this approach is used in a very similar way as the normal balancing test.¹⁴³

As concerns the cases entailing the claims regarding discrimination under Article 14, the structure is as follows: Firstly, the Court will check if the allegation of the differentiated treatment falls within the scope of rights and freedoms safeguarded by the substantive provisions of the Convention and its Protocols along with the Article 14 - prohibition of discrimination. Then it will be reviewed if the alleged reason for the differentiated treatment is one of the grounds listed in Article 14: “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” It is also crucial that applicants can compare themselves with a group of persons who were treated differently notwithstanding their analogous or relevantly similar positions against discriminatory differences in treatment – the “comparability test”.¹⁴⁴ Finally, the Court will examine if the treatment in question is capable of an objective and reasonable justification.¹⁴⁵ In a similar vein, review under Protocol 12 – general prohibition of discrimination – entails the assessment of the discrimination grounds, a comparable group and the justification. However, the applicant has to show that the differentiated treatment concerns any rights set forth in national law which, including rights granted by legislative measures as well as those granted by common law rules and by international law.¹⁴⁶

¹⁴² E.g. *Ashingdane v. the United Kingdom*, para. 57.

¹⁴³ See further on the test of “the essence of a right” in Gerards, *supra* note 34, pp. 253-255.

¹⁴⁴ Hamilton, Frances, 2017. “The Case for Same-Sex Marriage before the European Court of Human Rights”, *Journal of Homosexuality*, volume 65, issue 12, at 12.

¹⁴⁵ E.g., *Kafkaris v Cyprus*, (App. 21906/04), 12 February 2008 [GC], (2009) 49 EHRR 877, ECHR 2008-nyr. Jacobs et al., *supra* note 10, pp. 640-655.

¹⁴⁶ *Ibid*, p. 660.

It is paramount to highlight the crucial role of the doctrine of margin of appreciation which has been introduced by the Commission and the Court¹⁴⁷ to facilitate the assessment of the necessity and proportionality of an interference.¹⁴⁸ The distinction shall be made between substantive and structural uses of the term: in the first sense for saying whether the applicant had a particular right (in relation to public interests), and whether the Court will review the decision of national authorities in the other.¹⁴⁹ A State is allowed a certain degree of discretion when it takes a legislative, administrative or judicial action bearing on a Convention right.¹⁵⁰ National authorities will have a spectrum of choices available for fulfilling their duty of implementation and as long as their choice remains within this spectrum, the interference will not be contrary to the Convention.¹⁵¹ The margin of appreciation afforded to a State applies both to the assessment of the pressing social need implied by the notion of “necessity” and to choosing the means for achieving the legitimate aim.¹⁵² There is no clear criterion for the application of the doctrine or determination of the limits thereto. Nevertheless, it can be discerned from the case law that the margin will normally be narrower when “fundamental values and essential aspects of private life”,¹⁵³ “a particularly important facet of an individual’s existence or identity”,¹⁵⁴ or national security¹⁵⁵ are at stake. In contrast, the margin will be wider when there is no European common ground - the above-mentioned consensus among the member States of the Council of Europe,¹⁵⁶ particularly if the issue concerns morals.¹⁵⁷ The situation is less clear in relation to allegedly discriminatory practices but it is more likely that the European Court will conclude that there is also a wider margin of appreciation.¹⁵⁸ Thus, the doctrine fits into the scheme of the evolutive interpretation by representing a balance between the interpretative domain of the Court and the domain of national authorities; or the balance between judicial activism (in the form of the evolutive interpretation) and judicial self-restraint

¹⁴⁷ *Handyside v. the UK*, *supra* note 28, para. 47.

¹⁴⁸ *Hristozov and others v. Bulgaria*, (Apps. 47039/11 and 358/12), 13 November 2012, ECHR 2012, Partly Dissenting Opinion of Judge Kalaydjieva.

¹⁴⁹ Jacobs et al., *supra* note 10, p. 332;

¹⁵⁰ Harris et al., *supra* note 5, pp. 14-15.

¹⁵¹ Mahoney, *supra* note 16, p. 78.

¹⁵² *Handyside v. the UK*, *supra* note 28, para. 48-49; *Leander v Sweden*, *supra* note 56, para. 59.

¹⁵³ *X and Y v. the Netherlands*, (App. 8978/80), 26 March 1985, Series A No 91, (1986) 8 EHRR 235, paras. 24-27; Compare *Dudgeon v. the United Kingdom*, *supra* note 78, para. 52.

¹⁵⁴ E.g. *X and Others v Austria* [GC], *supra* note 19, para. 148.

¹⁵⁵ E.g. *Leander v Sweden*, *supra* note 56 and *Klass v Germany*, *supra* note 85.

¹⁵⁶ E.g. *X, Y and Z v. the UK*, *supra* note 83, para. 44. Compare: *Marckx v Belgium*, *supra* note 19 and *Dudgeon v. the United Kingdom*, *supra* note 78.

¹⁵⁷ E.g. *Sunday Times v the UK*, *supra* note 107, para. 59; *Rasmussen v. Denmark*, *supra* note 66.

¹⁵⁸ Hamilton, *supra* note 144, p. 10

(exercised through the doctrine of margin of appreciation), representing “two sides of the same coin”.¹⁵⁹

Hence, even though the permissible limitations under the Convention provisions have been defined as having a rather complex content, the Court does not always carry out a comprehensive scrutiny of each and every requirement of the justifiability assessment. However, generally speaking, it has adopted a narrow interpretation of justifiable exceptions to the Convention rights and freedoms.

3. Marriage and the ECtHR

3.1. Right to marry and found a family

The right to marry and to found a family is guaranteed by Article 12 of the Convention which reads as follows: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”¹⁶⁰ The right to marry and found a family is closely related to the right to respect for private and family life, as enshrined in Article 8: “Everyone has the right to respect for his private and family life, his home and his correspondence.”¹⁶¹

However, in contrast to Article 12 which guarantees the right to marry and to found a family as such, Article 8 prohibits interference with an already existing family unit. In other words, Article 12 is the *lex specialis*¹⁶² for the right to marry,¹⁶³ while Art 8 has more general scope, is not confined solely to marriage-based relationships and may also encompass other *de facto* “family ties” where the parties are living together outside marriage (i.e. out of wedlock).¹⁶⁴

Furthermore, unlike Article 8 of the Convention, Article 12 does not include a paragraph allowing for an interference in accordance with the law and in the case of necessity in a

¹⁵⁹ See further Mahoney, *supra* note 16.

¹⁶⁰ See also Article 16 of the UDHR and Article 23 of the ICCPR.

¹⁶¹ Article 8(1). See further on Article 8 European Court of Human Rights, 2018. “Guide on Article 8 of the European Convention on Human Rights”, available at https://www.echr.coe.int/documents/guide_art_8_eng.pdf

¹⁶² *Lex specialis* is a Latin phrase which means “law governing a specific subject matter”. The doctrine states that a law governing a specific subject matter overrides a law that only governs general matters - <https://definitions.uslegal.com/l/lex-specialis/>

¹⁶³ *Parry v. the United Kingdom*, (App. 42971/05), 28 November 2006, ECHR 2006-XV., Section II.B.

¹⁶⁴ *Johnston and others v. Ireland*, (App. 9697/82), 18 December 1986, Series A No 112, (1987) 9 EHRR 203, para. 56-57; *Van Der Heijden v the Netherlands*, (App. 42857/05), 3 April 2012 [GC], para. 50; *Schalk and Kopf v Austria*, *supra* note 84, para. 101.

democratic society while serving one of the legitimate aims. Instead, limitations are expressed through the reference to “according to the national laws governing the exercise of this right”.¹⁶⁵ Nonetheless, the general reference to national laws does not mean that States may completely restrict the right to marry. In examining a case under Article 12, the Court does not apply the tests of “necessity” or “pressing social need” which are used in the context of Article 8 but determines whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate. Moreover, the margin accorded to the States is not unlimited: the limitations shall not restrict or reduce the right to marry in such a way that the very essence of the right is impaired.¹⁶⁶ Thus, regardless of the special way in which the limitation under Article 12 is drafted, the Court will apply a test similar to the traditional proportionality assessment while clearly ensuring maximum respect for national legislation and national policy choices.¹⁶⁷

To summarise, “Article 12 asserts a relatively narrow right (or possibly rights) to marry and found a family, subject to a wider power on the part of states to regulate the exercise of the right.”¹⁶⁸ The line in which the freedoms under Article 12 are interpreted in a more limited manner than those protected under Article 8 is reinforced by the fact that neither the former Commission nor the ECtHR have ever established under Article 12 a positive obligation.¹⁶⁹

While the upcoming analyses evolve primarily around Articles 8 and 12, Article 14 - containing a prohibition of both direct and indirect discrimination¹⁷⁰ - is also of special relevance and reads as follows: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” However, unlike other provisions, it has no independent existence since it has effects solely in relation to “the enjoyment of the rights and freedoms” safeguarded by other Convention provisions. Nevertheless, it is an autonomous provision in the sense that it does not presuppose a breach of one or more of such provisions of the

¹⁶⁵ Jacobs et al., *supra* note 10, p. 395

¹⁶⁶ E.g., *O'Donoghue and Others v. the United Kingdom*, (App. 34848/07), 14 December 2010, paras. 83-84.

¹⁶⁷ *Frasik v Poland* 2010, para. 89; Gerards, *supra* note 34, pp. 29-30.

¹⁶⁸ Harris et al., *supra* note 5, p. 735.

¹⁶⁹ See further Sloot, van der Bart, 2014. “Between fact and fiction: an analysis of the case-law on Article 12 of the European Convention on Human Rights”, *Child and Family Law Quarterly*, volume 26, issue 24, pp. 397-420.

¹⁷⁰ See *Biao v. Denmark* [GC], *supra* note 119, para. 89 and 103 respectively

Convention.¹⁷¹ Furthermore, Protocol 12 enshrines a general prohibition of discrimination without requiring any link to the rights within the ambit of the Convention: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹⁷² Recapping, it is not a purpose of the upcoming chapters to examine, let alone to assert, whether the considered differentiated treatments satisfy the test which was adopted by the Court for discrimination-related cases. Instead, the aim of this Chapter is to make a deduction regarding the Court’s perspective on marriage from the argumentation and proportionality assessment it has provided.

3.2. Marriage as an outstanding institution?

3.2.1 Excluding divorce?

The Court had to decide on the issue of divorce for the first time in *Johnston v Ireland* (1986). The case concerned the absence of a law provision for divorce and for recognition of the family life of persons living in a *de facto* family relationship after the breakdown of the marriage of one of those persons. According to the Court, the right to marry under Article 12 covered only the formation of marital relationships and not the dissolution thereof, unlike Article 16 of the UDHR¹⁷³ on which it was based. Having regard to the *travaux préparatoires*, the Court stressed that the omission of the right was deliberate, also taking note of its exclusion from the Article 5 of the Protocol No. 7 which guarantees certain additional rights to spouses in the event of dissolution of marriage. Therefore, it was concluded to be impossible, by means of the evolutive interpretation, to derive from Article 12 a right to divorce that was not included in the Convention at the outset. It was also underscored that even if the prohibition on divorce was to be seen as a restriction on capacity to marry, it could not have been regarded as injuring the substance of the right guaranteed by Article 12 “in a society adhering to the principle of monogamy”.¹⁷⁴

It is noteworthy that the dissenting judge, already in 1986, stressed that marriage and divorce is one of those areas where an abuse of a dominant position shall be avoided unlike those

¹⁷¹ In the sense that it does not presuppose a breach of one or more of such provisions - *Kafkaris v Cyprus* [GC], *supra* note 145, para. 159.

¹⁷² Article 1(1) of Protocol No. 12.

¹⁷³ "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

¹⁷⁴ *Johnston and others v Ireland*, *supra* note 164, paras. 52-53.

occasions where individual interests can be subordinated to those of a group. However, the judge did not go so far as to recognise the right to divorce as a fundamental right and simply confined its disapproval to the complete exclusion of any possibility of seeking the civil dissolution of a marriage.¹⁷⁵ One year later, the Court dealt with the case of *F. v. Switzerland* (1987) which happens to constitute the only one in the early case law in which a violation of Article 12 was accepted.¹⁷⁶ According to the Court, although Article 12 does not include the right to divorce and remarry, if national legislation allows divorce, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions, including temporary prohibition of remarriage¹⁷⁷ or, as established later on, a failure to conduct divorce proceedings within a reasonable time¹⁷⁸.

In the case of *Ivanov and Petrova v. Bulgaria* (2005), the Court went further by suggesting that Article 12 could potentially be violated “in cases where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party”¹⁷⁹. However, the Court did not maintain the same approach in the subsequent, recent case of *Babiarz v Poland* (2017).¹⁸⁰ The case concerned the applicant’s inability to obtain a divorce from his wife without her consent as a result of which he could not marry his *de facto* partner, the mother of his 11-year-old child. Even though the applicant had been cohabitating with the child’s mother throughout the 11 years, the Court did not impose on the Polish authorities a duty to accept the applicant’s petition for divorce without the consent of the “innocent” spouse since the refusal of that consent was not “contrary to the reasonable principles of social coexistence”, as required by the Polish law.¹⁸¹ As a result, no violation of Article 12 or 8 was found.

The Court, first and foremost, reiterated that positive obligations of the State might be inherent in securing the respect for private life under Article 8 of the Convention even in the sphere of relations between individuals. These obligations arising, however, did not impose on the Polish authorities a duty to accept the applicant’s petition for divorce. The discussion as to the positive obligations never went any further and was followed by the need for affording wide margin of appreciation to States for determining the steps to be taken and in reconciling the competing

¹⁷⁵ *Ibid*, Separate Opinion, Partly Dissenting and Partly Concurring, of Judge De Meyer, paras. 5-6.

¹⁷⁶ See further on overall analysis of the Court’s case law under Article 12 in Sloom, *supra* note 169, p. 402.

¹⁷⁷ *F v. Switzerland*, (App. 11329/85), 18 December 1987, Series A No 128, (1998) 10 EHRR 411, para. 38.

¹⁷⁸ *Chernetskiy v. Ukraine*, (App. 4316/07), 8 December 2016, paras. 28-34.

¹⁷⁹ *Ivanov and Petrova v. Bulgaria*, (App. 15001/04), 14 June 2011, para. 61.

¹⁸⁰ *Babiarz v. Poland*, (App. 1955/10), 10 January 2017.

¹⁸¹ *Ibid*, paras. 17 and 57.

personal interests at stake in that sense.¹⁸² After the reference to positive obligations arising under Article 8 of the Convention, the discussion continued with the duty to accept the applicant's petition for divorce. Therefore, it is obscure whether the majority chose to analyse the case from the perspective of a State interference with the applicant's Articles 8 and 12 rights – negative obligations - or from the perspective of the positive obligations arising therefrom.¹⁸³

Generally speaking, the claims that the Court has assessed from the perspective of positive obligations under Article 8 include, among others, issues relating to effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake and efficient criminal-law provisions are required. In particular, effective protection of children and other vulnerable individuals;¹⁸⁴ safeguarding the individual's physical integrity by extending to questions relating to the effectiveness of a criminal investigation;¹⁸⁵ protecting a minor against malicious misrepresentation;¹⁸⁶ provision of civil-law remedies capable of affording sufficient protection;¹⁸⁷ securing health,¹⁸⁸ etc. The ECtHR has also articulated procedural obligations under Article 8 according to which the decision-making process, leading to measures of interference, must be fair and such as to afford due respect to the interests safeguarded to the individual by that Article.¹⁸⁹ As noted, the Court did not elaborate on specific positive obligations which were referred to and nor can they be identified based on the case law since it is unclear how the issue of divorce is comparable to the areas where the recourse to positive obligations was necessary.

Even though the case was distinguished from *Johnston and Others* for not being concerned with an absolute impossibility to obtain a divorce,¹⁹⁰ the Court did reiterate that neither Article 12 nor 8 can be interpreted as conferring on individuals either a right to divorce or a favourable outcome in divorce proceedings; that the *travaux préparatoires* of the Convention indicate clearly that it was an intention of the Contracting Parties to expressly exclude such a right from the scope of the Convention.¹⁹¹ As noted by the Judge Sajó, the Court was wrong in upholding

¹⁸² *Babiarz v. Poland*, *supra* note 180, paras. 17, 47 and 57.

¹⁸³ *Ibid*, Dissenting Opinion of Judge Pinto de Albuquerque, footnote 31.

¹⁸⁴ E.g., *X and Y v. the Netherlands*, *supra* note 153, paras. 23-27.

¹⁸⁵ *Osman v. the United Kingdom*, (App. 23452/94), 28 October 1998, (2000) 29 EHRR 245, ECHR 1998-VIII, para. 128;

¹⁸⁶ *K.U. v Finland*, (App. 2872/02), 2 December 2008, (2009) 48 EHRR 1237, paras. 45-49.

¹⁸⁷ E.g., *X and Y v. the Netherlands*, *supra* note 153, paras. 24-27; *Söderman v. Sweden*, (App. 5786/08, 12 November 2013 [GC], para. 85.

¹⁸⁸ E.g., *Vasileva v. Bulgaria*, (App. 23796/10), 17 March 2016, para. 63-69;

¹⁸⁹ E.g., *Buckley v. the United Kingdom*, (App. 20348/92), 25 September 1996, (1997) 23 EHRR 101, ECHR 1996-IV, para. 76.

¹⁹⁰ *Babiarz v Poland*, *supra* note 180, para. 51.

¹⁹¹ *Ibid*, paras. 49 and 56.

Johnston to exclude the right to divorce from the scope of Article 12. The Judge noted that simply because a certain expression was excluded from the text, does not mean that it could not be found in other principles of the Convention and in the social developments relating to such matters. He quoted the Grand Chamber judgment in *Magyar Helsinki Bizottsag v Hungary* (2016) that *travaux préparatoires* “are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if the existence of such a right was supported by the growing measure of common ground that had emerged in a given area.”¹⁹² Indeed, divorce was, at the time of the judgment in *Babiarz*, legally permissible in all 47 Council of Europe Member States.¹⁹³ It is also worthwhile to recall that preparatory works to the Convention should have served only as a supplementary means of interpretation once the Court had exhausted the primary methods. Clearly, the Court did not use them to either confirm a meaning determined based on the primary methods or to establish the meaning where it would otherwise be obscure or unreasonable.

Accordingly, unlike the number of areas discussed in *Chapter 2.2.1.2. Living instrument doctrine* where the Court utilised evolutive interpretation to be in line with increasing social acceptance of certain trends, the majority in this case based its decision on a strictly confined approach (for the applicant). This permissive approach contrasts significantly also with the statement of both the Commission and the Court that the Convention is a law-making instrument and not a treaty based on reciprocity between states, which means that its provisions must not be interpreted restrictively. On the contrary, it can be argued in this regard that avoiding narrow interpretation of the protection is the foremost rule of interpretation applicable to the Convention.¹⁹⁴

Judge Pinto also refuted the majority’s argument that the Court cannot derive from the Convention a right that was not included in or deliberately excluded therefrom. He reminded the majority of the case *Young, James and Webster v the UK*¹⁹⁵ where the Court, by means of evolutive interpretation, acknowledged the existence of the negative freedom of association in spite of the explicit rejection of its inclusion in the *travaux préparatoires*.¹⁹⁶ Therefore, it was necessary for the Court to at least reconsider *Johnston* thirty years later for the sake of keeping

¹⁹² *Magyar Helsinki Bizottsag v Hungary*, (App. 18030/11), 8 November 2016 [GC], para. 125.

¹⁹³ Ireland and Malta, the last two European States with prohibitive laws, waived blanket ban on divorce in 1996 and 2011 respectively.

¹⁹⁴ Brems & Gerards (eds.), *supra* note 74, p. 69.

¹⁹⁵ *Young, James and Webster v. the United Kingdom*, (Apps. 7601/76 and 7801/77), 13 August 1981, Series A No 44, (1982) 4 EHRR 38, paras. 51-52

¹⁹⁶ *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Pinto de Albuquerque, para. 13.

up with the present-day conditions.¹⁹⁷ Instead, while maintaining that Article 12 did not cover the right to divorce, the case was plainly distinguished from *Johnston and Others* for not being concerned with an absolute impossibility to obtain a divorce under family law in Poland on account of either a blanket restriction or a blanket prohibition.¹⁹⁸ Notably, however, the dissenting judge Pinto also accepted that the prohibition on divorce may be an admissible restriction to the right to remarry if it is couched in clear terms and applied in a proportionate way.¹⁹⁹

The instant case was also distinguished by the majority from the case of *Ivanov and Petrova* which recognised the possibility of facing an issue under Article 12 “in cases where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party.” Moreover, according to the Court, there were no insurmountable legal impediments for the applicant in *Babiarz* on the possibility to remarry after divorce.²⁰⁰ Notably, the domestic authorities, as well as the Court, had explicitly recognised that there had indeed been a complete and irretrievable marriage breakdown and that the reconciliation was unlikely as the applicant had consistently rejected all attempts to do so with his wife.²⁰¹ Nonetheless, this did not deter the Court from finding that there was no violation of Article 12. Nor did the fact that the divorce actually served as a necessary precondition of the right to marry in the present case.²⁰² As a result, the applicant’s wife, allegedly the “weaker”²⁰³ side of the dispute, was effectively able to veto the formalisation of her *de jure* husband’s relationship with his new partner, even long after it was clear that their marriage had broken down.²⁰⁴ In this regard, it is particularly relevant to make reference to the case of *Andrzej Piotrowski v Poland* (2016).

The case is almost identical to *Babiarz* and was submitted to the ECtHR shortly before. The Chamber composed of the same judges and the application was declared inadmissible for being manifestly ill-founded due to the lack of any appearance of violation of the applicant’s right to marry.²⁰⁵ The judges drew the conclusion based on almost identical arguments: positive

¹⁹⁷ *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Sajó, paras. 3-4.

¹⁹⁸ *Babiarz v Poland*, *supra* note 180, *para.* 51.

¹⁹⁹ *Ibid*, Dissenting Opinion of Judge Pinto de Albuquerque, *para.* 35.

²⁰⁰ *Babiarz v Poland*, *supra* note 180, *para.* 50.

²⁰¹ *Ibid*, *paras.* 16 and 54.

²⁰² *Ibid*, Dissenting Opinion of Judge Sajó, *paras.* 18-20.

²⁰³ See discussion regarding the term “weaker” in *Chapter. 3.2.2. Superior to de facto relationships?*

²⁰⁴ Strasbourg Observers, *The Unbreakable Vow: Marital Captivity in Strasbourg*, available at <https://strasbourgeoiservers.com/2017/02/09/the-unbreakable-vow-marital-captivity-in-strasbourg/#more-3499>

²⁰⁵ *Piotrowski v. Poland* (dec.), (App. 8923/12), 22 November 2016, *paras.* 54-55.

obligations of the State, exclusion of the right to divorce from the text of the Convention, lack of fault on the wife's part, the legitimate aim of protecting the weaker party, etc. However, unlike *Babiarz*, in *Piotrowski* the Court had also noted the following:

*“In so far as the applicant complained in his application that the refusal to divorce had made it impossible to him to remarry, it is noted that no submissions were made either in the divorce proceedings or before the Court to show the existence of a stable and long-lasting relationship with another woman. The applicant merely referred to his relationship with her as viable. Nor did he refer before the Court to any concrete marriage plans frustrated by the refusal to obtain the divorce. On the contrary, in his observations he stated that he was not willing to marry again. It has not been shown that failure to obtain a divorce and the legal fiction of his continuing marriage prevented him from enjoying his personal life to the full.”*²⁰⁶

In fact, the same judges had acknowledged the potential of the refusal of divorce to make remarrying impossible but rejected the application since the applicant had not presented any evidence to prove so. By contrast, the applicant in *Babiarz* had demonstrated that he had been in a stable and long-lasting relationship with his partner of 12 years and the mother of his 11-year-old daughter, who he was unable to marry due to the inability to get divorced. The arguments were acknowledged both by the Government and the Court. Nevertheless, the same judges of *Babiarz* as in the *Piotrowski* did not discuss that, as noted, the divorce served as an actual precondition to the remarriage and instead concentrated on the fact that there were no insurmountable legal impediments on the possibility to remarry after divorce.

Interestingly enough, in the *Johnston* case (1986), the Court held that it was inconceivable that the applicant would be able to marry as long as his marriage to his wife had not been dissolved “in any society espousing the principle of monogamy”.²⁰⁷ While in *O'Donoghue and Others v. the United Kingdom* (2010), it was accepted that limitations on the right to marry laid down in the national laws may comprise substantive provisions based on generally recognised considerations of public interest, in particular concerning, among others, “the prevention of bigamy”.²⁰⁸ Nevertheless, the Court fails to notice that in many cases, such as *Babiarz*, the possibility of divorce would precisely serve to avoid situations of factual bigamy.²⁰⁹

²⁰⁶ *Piotrowski v. Poland* (dec.), *supra* note 205, para. 51.

²⁰⁷ *Johnston and others v Ireland*, *supra* note 164, paras. 50.

²⁰⁸ *O'Donoghue and Others v. the UK*, *supra* note 166, para. 83.

²⁰⁹ *Dijk et al.*, *supra* note 48, p. 846.

It is also noteworthy that the Court found no violation in *Babiarz* without ever balancing the two competing rights under the Convention, completely disregarding that, as mentioned above, in examining a case under Article 12, it has to determine whether the impugned interference has been arbitrary or disproportionate. Nor did it carry out the proportionality assessment under Article 8 and briefly referred to the legitimate aim of protecting the weaker party against the machinations and bad faith of the other. As illustrated by a dissenting judge Sajó, had the Court examined it, it would have inevitably leaned in the applicant's favour. According to him, Article 8 cannot be construed as conferring a right to family life with one specific person against that person's will and, therefore, the applicant's wife's claims were no more than mere interests. Thus, the situation should not have been construed as involving two competing rights where a wide margin is applicable. Also, even assuming that Article 8 does entail a right to remain married to a specific person, "it cannot be placed on an equal footing with the right not to be forced to live with someone in a legal union and not to be able to marry." In other words, the claim to keep someone as a spouse and an autonomy-based demand of a person to be free were clearly asymmetric, the latter prevailing over the former.²¹⁰

Judge Pinto also objected to the Court's superficial and contradictory examination of the legitimate objectives and that no balancing exercise was conducted between the opposed rights in question.²¹¹ He drew the Court's attention to the absence of any permissible grounds for interference under Article 12. Recognising the highly sensitive religious, ethical or moral nature of the issue at stake, the dissenting judge Pinto considered such nature irrelevant in establishing the width of the margin of appreciation. Even though the Convention is a religious-friendly test, it does not permit imposition of religious or moral values, by legislative or judicial policies, even when they are shared by the majority of the population.²¹² Hence, the width of the margin in this field of law, according to him, should have been narrow since marriage and divorce constitute fundamental issues pertaining to the social identity of individuals.²¹³

Obviously, Chamber in *Babiarz* relied on a number of problematic concepts without challenging or critiquing them.²¹⁴ It provided extremely narrow interpretation of Articles 8 and 12 by upholding the denial of divorce to the applicant in an irreparable marriage, to the extent that the very essence of his right to marry was impaired.²¹⁵ Consequently, it follows from the

²¹⁰ *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Sajó, para. 6- 10.

²¹¹ *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Pinto de Albuquerque, para. 10.

²¹² *Ibid*, para. 33.

²¹³ *Ibid*, paras. 17 and 23.

²¹⁴ Strasbourg Observers, *supra* note 204.

²¹⁵ *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Sajó, para. 21.

ECtHR's interpretation that states are allowed to determine that once a person is married, he or she is obliged to remain married with that person for the rest of his or her life, which is tantamount to "marital captivity".²¹⁶ Accordingly, Article 12 may be interpreted as a right that may be enjoyed only once in a lifetime. Such an approach contrasts with the Court's perspective on other human rights and freedoms, which may be enjoyed more than once and which rights-bearers may decide to give up. Moreover, finding that the right to divorce is not contained in Article 12, but a rapid divorce procedure is, while it does not refer to Article 6 in this respect, implies that a country may even impose an absolute prohibition on divorce but may not implement unjustified restrictions on divorce.²¹⁷

Hence, in fact, even after more than 30 years since the case of *Johnston*, when all the European states provide for the possibility of divorce under certain conditions, the Court is still of the view that there is no such thing as a right to divorce. It has not made explicit statement against an absolute impossibility to obtain divorce - because of a blanket restriction or a blanket prohibition - either. Put simply, apparently, according to the Court, individuals do not have a right to change their minds and freely get divorced without being completely dependent on third parties.

The case of *Babiarz* illustrates a strong disparity between the judges of the Court with respect to the right to divorce. Some judges endeavour to be open-minded and adopt a progressive approach in this regard but are, regrettably enough, prevailed over by the majority. As discussed, the majority have relied upon the combination of unsound arguments so as to rule against individuals' right to divorce. The right to divorce was, again, excluded from the scope of Article 12 without a proper assessment of the proportionality test and priority was given to the right to remain married to a specific person over the right not to be forced to live with someone in a legal union; rationale behind the argument being that the partner whose trust had been broken by the unfaithful partner was in a weaker position and was, thus, entitled to veto her partner's new marriage. The presence of common European ground, a weak line of reasoning and the problematic concepts turned to by the majority, all of which were easily rebutted by the dissenting judges, indicate that the Court was driven primarily by the traditional understanding of the institution of marriage and moral values.

²¹⁶ Strasbourg Observers, *supra* note 204.

²¹⁷ Sloot, *supra* note 169, p. 407.

3.2.2. Superior to *de facto* relationships?

Despite the evolution of the notion of family life, the degree of protection afforded to the different types of relationships largely varies, with the traditional heterosexual relationship of married couples at the top of the hierarchy.²¹⁸ As stressed by the former Commission earlier, more favourable treatment of the formally registered, “legitimate families”, as opposed to “illegitimate” ones, does not violate Article 8.²¹⁹ It was later clarified by the Court that marriage remained an institution which is widely accepted as conferring a particular status on those who enter it.²²⁰ Does, however, careful scrutiny of the case law suggest that, from the Court’s stance, the institution of marriage is *ipso facto* superior to non-formalised, *de facto* family relationships?

In the case of *Van der Heijden v Netherlands* (2012), the applicant complained about the refusal of the Dutch authorities to exempt her from testifying in criminal proceedings against her long-term partner. She had been cohabiting with the partner for eighteen years and had two children together, both of whom had been recognised by the latter. The applicant further described and it was never contested that her relationship was to all intents and purposes identical to marriage or a registered partnership except that it had never been formalised. Nevertheless, due to the absence of a legally binding agreement, the Grand Chamber regarded the relationship as fundamentally different from that of a married couple or a registered partnership, only the latter two being entitled to the testimonial exemptions. It was also noted that even though both marriage and marriage-like relationships were treated in an equal manner in other fields of Dutch law, considerations governing those fields were distinguishable from the public interest in the prosecution of a serious crime in question. Accordingly, to hold otherwise, as explained by the Court, it would create a need either to assess the nature of unregistered relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union a relationship characterised precisely by the absence of the formality.²²¹ As a result, no violation of Article 8 was found while Article 14, in conjunction with Article 8, was not examined.

The purpose of the right not to give evidence, as accepted by the Grand Chamber, was to protect family relationships: “to prevent witnesses from being faced with a moral dilemma by having to make a choice between testifying, and thereby jeopardising their relationship with the

²¹⁸ *Jacobs et al.*, p. 373.

²¹⁹ *B., R and J v. the Federal Republic of Germany* (Com.), (App. 9639/82), 15 March 1984.

²²⁰ *Burden v. the United Kingdom*, 2008, para. 63.

²²¹ *Van der Heijden v. the Netherlands* [GC], *supra* note 164, para. 69

suspect, or giving perjured evidence in order to protect that relationship.”²²² As already noted, *de facto* family relationships equally enjoy the protection of the Article 8. However, the applicant was found to fall outside the ambit of the “protected” family relationship to which the testimonial privilege exception was attached as she had chosen not to register formally her union and, therefore, had to accept the legal consequence that flowed therefrom.²²³ Interestingly enough, the Dutch law provided testimonial privilege for a rather broad category of persons, including, *inter alia*, various relatives as well as former spouses and former registered partners²²⁴ – persons who are no longer married or registered as a partnership and who, logically speaking, no longer live together and may not even have any children together. By contrast, the Court found no violation in the present case which involved the applicant who had maintained a stable family life with the person against whom she was asked to testify merely on the ground that her relationship was of the *de facto* nature.²²⁵

The dissenting judges reflected on the Court’s concern as to the need to assess the nature of unregistered relationships in a multitude of individual cases if the majority had held otherwise: “the information concerning, for example, cohabitation and the presence of children can be found in the public registries and in the municipal personal records database.” It was also noted that there was no particular difficulty in applying the same principle of equal treatment - as in other branches of the Netherlands law which drew no distinction between marriage, registered partnership and other forms of living together as a couple - *a fortiori* when it comes to giving evidence in judicial proceedings even though those other areas were governed by different considerations.²²⁶

The dissenting judges also reflected on the majority’s reference to the lack of common ground and their favour of a wide margin of appreciation in relation to the testimonial privilege. Acknowledging that indeed, there was no consensus in this matter among the Member States, the dissenting judges noted that there were at least thirty-eight member States that recognised a right of testimonial privilege in criminal proceedings, twenty-two of whom afforded such a right to persons in the same situation as the applicant. Therefore, according to them, there was some common ground in this area and a majority of States would *de facto* have exempted the applicant from testifying in such a case. This observation enabled the judges to conclude that

²²² *Van der Heijden v. the Netherlands* [GC], *supra* note 164, paras. 25 and 65.

²²³ *Ibid*, paras. 25 and 76.

²²⁴ *Ibid*, para 24

²²⁵ *Ibid*, Joint Dissenting Opinion of Judges Casadevall and López Guerra, paras. 5-8.

²²⁶ *Ibid*, Joint Dissenting Opinion of Judges Tulkens, Vajić, Spielmann, Zupančič and Laffranque, para. 10.

“once again, the relative nature of the Court’s approach to the existence of a consensus [...] raises the question whether it should not be “disentangled” from the margin of appreciation in certain types of cases.”²²⁷

Apparently, the above-mentioned moral dilemma - having to make a choice between testifying, and thereby jeopardising the relationship with the suspect, or giving perjured evidence in order to protect that relationship - was easily disregarded by the Court merely on account of the absence of the formal registration. In this regard, it remains elusive how such formalistic approach could actually serve the accepted legitimate aim - protection of family life or the interests of criminal investigation - if the privilege is dependent primarily on formal requirements rather than actual scenarios.

The recent case of *Babiarz* is of utmost importance also in relation to the protection of *de facto* relationships for concluding that the protection of *de facto* families under Article 8 did not mean that particular legal recognition had to be accorded thereto.²²⁸ While Judge Sajó analysed the case on the basis of personal autonomy, as already discussed above, the Judge Pinto gave a thorough account of the protection of *de facto* family life under Article 8, claiming that respect for family life required biological and social reality to prevail over a legal fiction, which the Court failed to fulfil.²²⁹

Recapping that the notion of family life under Article 8 entails both marriage-based relationships and other *de facto* family ties where the partners are living together out of wedlock, the judges criticised the majority for neglecting that the failure to obtain a divorce and to remarry had an adverse impact on many aspects of legal and social life of the members of the new family. Legally speaking, cohabitation in Poland did not grant any rights or obligations to the cohabitating partners, while social implications entailed a lesser degree of social acceptance and certain forms of stigmatisation.²³⁰

It is also relevant to recall that the majority in *Babiarz* upheld as the legitimate aim the protection of “innocent”, therefore “weaker”, party against the “machinations” and “bad faith” of the other.²³¹ The majority ignored that secular law considers marriage to be a voluntary union - there is no right to live as a married couple against the will of the other party - and considered

²²⁷ *Van der Heijden v. the Netherlands [GC]*, *supra* note 164, Joint Dissenting Opinion of Judges Tulkens, Vajić, Spielmann, Zupančič and Laffranque, para. 5

²²⁸ *Babiarz v Poland*, *supra* note 180, para. 54.

²²⁹ *Ibid*, Dissenting Opinion of Judge Pinto de Albuquerque, para. 11.

²³⁰ *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Pinto de Albuquerque, paras. 4-9; *Ibid*, Dissenting Opinion of Judge Sajó, para. 12.

²³¹ *Babiarz v Poland*, *supra* note 180, para. 52.

a mere interest or emotional well-being as a legitimate ground for an interference. However morally reprehensible to leave the spouse under tough circumstances, it is hard to approve of the denial of divorce as a punishment for immorality and the continuation of marriage as a consequence of guilt in the twenty-first century.²³²

In summary, the majority allowed “the domestic courts to concede to the innocent spouse a one-sided, unconstrained *de facto* veto on divorce”²³³ and on the full enjoyment of the *de facto* family life. Simply because the applicant had formalised his relationship with his *de jure* wife, the Court permitted mere interests of the latter – the “innocent” spouse - to override the legitimate rights, separately and combined, of all the rest involved: the applicant, his long-standing cohabitee and their child. Obviously, the Court approaches marriage from a conservative perspective, protecting the traditional marriage and family in lieu of upholding more liberal interpretation according to which marriage is a juridical construct in which two individuals lay down the terms and conditions under which they wish to arrange their lives and possessions.²³⁴ Also, the Court tolerates the situation where two unmarried people live together with a child for eleven years while one of them remains legally married to someone else.²³⁵ Thus, in the pursuit of morality, a green light is given to, what one could argue, a morally concerning situation merely on account of the absence of necessary formalities, turning *de facto* family relationships into marriage.

3.3. Marriage as a heteronormative construct?

3.3.1. Unattainable for the non-conforming?

3.3.1.1. Trans persons

The traditional gender system rests on the belief that there are only two sexes and naturalises sexual interactions between “opposite” bodies, sexes and genders.²³⁶ It safeguards gender

²³² *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Sajó, paras. 9-11.

²³³ *Ibid*, Dissenting Opinion of Judge Pinto de Albuquerque, para. 27.

²³⁴ Sloot, *supra* note 169, p. 398.

²³⁵ See further *Babiarz v Poland*, *supra* note 180, Dissenting Opinion of Judge Sajó, para. 14.

²³⁶ Sex refers to each person’s physical features relating to sex, including genitalia, and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty – European Court of Human Rights 2013. *Third Party Intervention by the Human Rights Centre of Ghent University, R.L. & P.O. v. Russia* (Application nos. 36253/13 and 52516/13), p. 2, available at <https://hrc.ugent.be/wp-content/uploads/2019/02/RLnPO-tpi.pdf>

Gender refers to a social construct which places cultural and social expectations on individuals based on their assigned sex - European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), *Glossary*, https://www.ilga-europe.org/resources/glossary/letter_g

inequality based on clearly categorised social roles and genital division of male and female. People who make gender transitions “disrupt cultural expectations that gender identity is an immutable derivation of biology” and thereby present a challenge to heteronormativity²³⁷ - belief that only heterosexual relationships are normal or right and that men and women have naturally different roles.²³⁸ Accordingly, the heteronormative framework considers nonconformity²³⁹ as abnormal, immoral, sinful sickness²⁴⁰ and expects, among others, trans people - all persons whose gender identity/expression does not (always) (completely) match their assigned sex or the gender identity which society attaches to it - to conform to the gender binary system by transforming convincingly and permanently. Unlike many homosexual (or bisexual people),²⁴¹ whose non-conforming sexuality may not be immediately apparent to others, many transgendered or transsexual persons²⁴² do not or cannot “pass” (conceal the fact that they are differently gendered) and, therefore, are the most frequently targeted group for social persecution. The desire to fit into society and avoid stigma, ostracism and danger imposes on trans people a great challenge to “pass” as cisgender – someone whose sex assigned at birth matches their gender identity.²⁴³ The dilemma is even greater if an individual has a

²³⁷ See further Schilt, Kristen and Westbrook, Laurel, 2009. “Doing Gender, Doing Heteronormativity: “Gender Normals,” Transgender People, and the Social Maintenance of Heterosexuality”, *Gender & Society*, volume 23, issue 4, pp. 460-464.

²³⁸ Cambridge University Press, *Cambridge Dictionary*, available at <https://dictionary.cambridge.org/dictionary/english/heteronormative>

²³⁹ The term non-conforming, for the purposes of the present thesis, entails trans persons and homosexual people.

²⁴⁰ E.g. Gagné and Tewksbury, pp. 87 and 91.

²⁴¹ Homosexuals shall be understood as the group of people whose partner’s gender is the same as the individual’s since people are classified as homosexual on the basis of their gender and the gender of their sexual partner(s). Thus, the term focuses on sexuality rather than on identity - https://www.ilga-europe.org/resources/glossary/letter_h

²⁴² Transgender(ist) persons - individuals who live, or desire to live, their life performing a gender role that does not follow the socially expected one that is allegedly correlative to the sex assigned to them at birth; Who do not wish to undergo sex reassignment treatment (hormonal treatment and/or surgery) in order to create congruence between their gender identity and sex characteristics even though some transgender persons undergo some forms of treatment on their body to express their self-defined gender;

Transsexual persons: “persons who mentally, socially and sexually identify as the gender opposite to the one allegedly related to their assigned sex registered at birth; who desire to undergo – as far as medically possible – sex reassignment treatment in order to have their sex characteristics aligned with their gender identity. Distinction shall be made between pre-operative persons - persons who have not yet undergone sex reassignment surgery, but are willing to; and post-operative persons - who have undergone sex reassignment surgery - Third Party Intervention by the Human Rights Centre of Ghent University, *supra* note 236, p. 2.

²⁴³ See further Gagné, Patricia, and Tewksbury, Richard, 1998. “Conformity pressures and gender resistance among transgendered individuals”, *Social Problems*, volume 45, pp. 81–101; Carroll, Lynne, Gilroy, J. Paula, & Ryan, Jo, 2002. “Counseling transgendered, transsexual, and gender-variant clients”, *Journal of Counseling and Development*, volume 80, pp. 131–139.

strong desire to be perceived as legitimate within a relationship and/or within mainstream culture.²⁴⁴

Until 2002, the Court consistently found that the refusal for the transsexuals to marry a person of the opposite sex did not violate Article 12. In the famous 1986 case of *Rees v the United Kingdom* (1986), the Court unanimously ruled against the female-to-male transsexual applicant, who wanted to marry a woman, stating that the right to marry guaranteed by Article 12 referred to the traditional marriage between persons of opposite biological sex.²⁴⁵ Five years later, the Court considered in *Cossey v. the United Kingdom* (1991) whether there were grounds to depart from the *Rees* judgment, but held that there was no consensus in the various national approaches towards transsexualism and the traditional concept of marriage provided sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purpose of marriage. The Court also emphasised that no significant scientific developments had occurred as gender reassignment surgery still did not result in the acquisition of all the biological characteristics of the other sex.²⁴⁶

The majority's ruling was criticised particularly for establishing the link between the right to marry and the biological sex, hinting at the ability of partners to procreate. It was also stated that the main concern of Article 12 was to protect marriage as the basis of the family.²⁴⁷ The dissenting judges underscored that gender reassignment surgery does not change a person's biological sex and the fact that a transsexual is unable to procreate cannot be decisive as there are many men and women who cannot have children but, in spite of this, they unquestionably have the right to marry. Thus, according to them, the ability to procreate was not and could not be a prerequisite for marriage.²⁴⁸ The judges also reminded the Court that "marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties."²⁴⁹ Nevertheless, what the dissenting judges, and even more so the majority, failed to recall is that in the case of *Erikson and Goldschmidt v Sweden* (1989), the former Commission

²⁴⁴ Iantaffi, Alex, and Bockting, Walter, 2011. "Views from both sides of the bridge? Gender, sexual legitimacy and transgender people's experiences of relationships", *Culture, Health & Sexuality*, volume 13, issue 3, pp. 355-370, at 357.

²⁴⁵ *Rees v. the United Kingdom*, (App. 9532/81), 17 October 1986, Series A No 106, (1987) 9 EHRR 56, para 49.

²⁴⁶ *Cossey v. the UK*, *supra* note 46, paras. 40 and 46

²⁴⁷ *Ibid*, para. 43.

²⁴⁸ *Ibid*, Dissenting Opinion of Judges Palm, Foighel and Pekkanen, para 5.

²⁴⁹ *Ibid*, Dissenting Opinion of Judge Martens, para 4.5.2.

had already accepted and applied legal criterion for the determination of sex in rejecting a claim of trans person who had never undergone any surgical treatment:

*“The Commission considers that the right to marry under Article 12 of the Convention only covers the right to marry someone of the opposite sex. It accepts that this applies also where, as in the present case, the couple are not biologically of the same sex but where one of the partners has obtained the same sex status as the other partner through a voluntary act recognised under domestic law [...] Consequently, under Swedish law the applicants do not have the right to marry as they are legally of the same sex”.*²⁵⁰

It was not until 2002 that the Court did reverse its previous findings concerning the criterion for the determination of the gender of transsexuals for the purpose of marriage. In *Christine Goodwin v. the United Kingdom*, the Court took note of major social changes in the institution of marriage as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. This time it was explicitly mentioned that founding a family is not a condition of the right to marry and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the right to marry under Article 12. The argument sufficed for the Court to depart from its earlier jurisprudence and noted that it was artificial to assert that post-operative transsexuals had not been deprived of the right to marry as, according to law, they remained able to marry a person of their former opposite sex. As a result, it was concluded that even though Article 12 refers in express terms to the right of a man and woman to marry, a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual and that, therefore, the very essence of the applicant’s right to marry had been infringed.²⁵¹

Soon after the *Christine Goodwin* case, the Court clarified its position as to the continued validity of a post-operative transsexual’s marriage in *Parry v. United Kingdom* (2006). As per the domestic legislation, the transsexual applicant would be able to obtain a formal recognition of her acquired gender only after the annulment of marriage with her partner (second applicant) of 40 years and the mother of their three children. Along with the traditional concept of marriage under Article 12, that is to say between persons of the opposite gender, the decision entails reference to the Court’s finding in *Christine Goodwin* that gender might derive from the attribution at birth or from a gender recognition procedure.²⁵²

²⁵⁰ *Eriksson and Goldschmidt v. Sweden (dec.)*, (App. 14573/89), 9 November 1989.

²⁵¹ *Christine Goodwin v. the UK [GC]*, *supra* note 46, paras. 97-104.

²⁵² *Parry v. the UK*, *supra* note 163.

Nevertheless, how to regulate the effects of the change of gender in the context of marriage was, again, concluded to fall within the discretion of the Contracting State. Although a number of them had extended marriage to same-sex partners, this, according to the Court, reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the Article 12 on account of historical and social value of the institution of marriage. In establishing so, the Court used the phrase “perhaps regrettably to many” which was perceived by some as an implication that it hesitated to confirm a conservative interpretation on this point.²⁵³ As concerns Article 8, the Court drew attention to the fact that the applicants could continue their relationship in all its current essentials and could also give it a legal status through a civil partnership which carried with it almost all the same legal rights and obligations. Consequently, the application was found manifestly ill-founded.²⁵⁴

The Grand Chamber adopted the same approach in the case of *Hämäläinen v. Finland* (2014) where full recognition of the applicant’s new gender was conditional on the transformation of her marriage into a registered partnership. Despite acknowledging that the applicant was merely trying to preserve her own marriage and not to lobby for the right to same-sex marriage, the Court considered that if accepted, the claim would in practice lead to a situation in which two persons of the same sex could be married to each other and rendered the judgment accordingly. This time the application was not declared inadmissible but since the Court had expressly excluded same-sex marriage from the protective scope of Article 12 and no such right existed in Finland at the given time either, the case was examined under Article 8 only. It was observed that the present case involved issues which were subject to constant developments and, therefore, it was necessary to examine the situation in other Council of Europe member States. Considering that there was no European consensus on allowing same-sex marriages or on how to deal with an acquired gender recognition in the case of a pre-existing marriage, it was concluded that the situation in the Council of Europe member States had not changed significantly since the Court delivered its latest rulings on these issues. Hence, having regard to the absence of the European consensus over these “sensitive moral or ethical issues”, the Court afforded wide margin of appreciation to the respondent State with a view to achieving a balance between the competing public and private interests.²⁵⁵

²⁵³ Sloot, *supra* note 169, p. 412.

²⁵⁴ *Parry v. the UK*, *supra* note 163, Section III. B.

²⁵⁵ *Hämäläinen v. Finland*, (App. 37359/09), 16 July 2014 [GC], paras. 70-75

As the Grand Chamber did not elaborate on what exactly the public interest in question entailed, the dissenting judges clarified that by legally reserving marriage to heterosexual partners, the majority might have had only two legitimate aims on mind: legitimate interest in protecting the rights and freedoms of others or morals by protecting marriage in the traditional sense. With respect to the first, the judges submitted that the rights and freedoms of others would in no way be affected if the applicant and her wife were permitted to remain married despite the applicant's legal change of gender. Their continued marital relationship would not have detrimental effects for the right of others to marry, or for existing marriages. While as concerns the second legitimate aim, according to them, the protection of morals could not provide sufficient justification for the restriction of the applicant's rights in this case as there was no pressing social need since the institution of marriage would not be endangered by a small number of couples who may wish to remain married. It was further noted that the Government had not shown substantial degree of danger to morals which would warrant the interference in issue. As the applicant and her wife would continue to live together as a married same-sex couple in the eyes of many people, it was difficult to comprehend why the legal recognition of her acquired gender would have any significant (additional) impact on public morals.²⁵⁶

No less surprising was the Grand Chamber's observation that Finnish domestic law provided the applicant with several options. The first option, as suggested by the Court, was that the applicant maintained the status quo of her legal situation by remaining married and tolerating the inconvenience caused by the former identity number. Apparently, simply because domestic law did not impose annulment or dissolution of marriage after the gender reassignment, remaining married and tolerating the inconvenience caused by the former identity was to be regarded as an actual option rather than an inevitable consequence. Nonetheless, in case the applicant wished both to obtain legal recognition of her new gender and to have her relationship with her wife legally protected, the law provided for the possibility to convert their marriage into a registered partnership which did not differ from the marriage in terms of the protection afforded to family life. The Chamber went even further and reminded of the third solution – the possibility of divorce at the applicant's own discretion, labelling it as “a genuine option”.²⁵⁷ Accordingly, no violation of Article 8 of the Convention was found and, put simply, it was

²⁵⁶ *Ibid*, Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, paras. 9-13.

²⁵⁷ *Hämäläinen v Finland*, *supra* note 255, paras. 76-78 and 82-86. See further criticism of the reference to “options” in the joint dissenting opinion of Judges Sajó, Keller and Lemmens, para. 8

justified to put post-operative transsexuals in a position where they have to make a choice between the legal recognition of fully acquired new gender and a long-lasting, stable marriage.

Nevertheless, even more interesting is the following aspect of *Hämäläinen v Finland*. As discussed, the Grand Chamber found it proportionate that the transsexual applicant could not have her official identity number changed unless her wife consented to turning the marriage into a civil partnership or the couple divorced. The Court also observed that Finnish system did not allow a unilateral annulment or dissolution of a pre-existing marriage by the domestic authorities on account of the fact that one of the spouses had undergone reassignment surgery and was, thus, subsequently of the same sex as his or her spouse. Accordingly, nothing prevented the applicant from continuing her marriage.²⁵⁸ Thus, in fact, the Court legitimised *de facto* same-sex marriage of the post-operative transsexual applicant as long as she did not have her identity number changed to indicate her female gender in her official documents and her relationship remained *de jure* heterosexual.²⁵⁹

It is particularly noteworthy that the discourse regarding the right of trans people to marry is confined to the post-operative transsexuals only who, by virtue of their acquired characteristics, manage to fit into the traditional binary conceptualisations. In contrast, disappointingly enough, in a recent case of *X v. the Former Yugoslav Republic of Macedonia* (2019)²⁶⁰ the Court did not even examine a non-conforming applicant's claim against the judicial obligation to undergo genital surgery for official recognition of the new sex/gender. Notably, the Court had already established in *A.P., Garçon and Nicot v. France* (2017) that the requirement of sterilisation for gender recognition violated the applicants' personal autonomy and physical integrity under Article 8 of the ECHR.²⁶¹ Since mandatory sex reassignment surgery interferes with physical integrity in a way which is comparable to forced sterilisation, a logical next step in this evolution would have been to establish that such a requirement also violates Article 8.²⁶² However, having already found the violation of Article 8 due to the lack of a regulatory framework for the legal recognition of a new gender identity, the Court did not deem it necessary to also examine the issue of mandatory sex reassignment surgery under Article 8.

²⁵⁸ *Hämäläinen v Finland*, *supra* note 255, para 76.

²⁵⁹ See further in the next chapter.

²⁶⁰ *X v. the Former Yugoslav Republic of Macedonia*, (App. 29683/16), 17 January 2019.

²⁶¹ *A.P., Garçon and Nicot v. France*, (App. 79885/12, 52471/13 and 52596/13), 6 April 2017 (extracts), para. 135.

²⁶² Strasbourg Observers, *X v. FYROM: A circumspect compromise on trans* rights?*, available at <https://strasbourgobservers.com/2019/04/02/x-v-fyrom-a-circumspect-compromise-about-trans-rights/>

Furthermore, the dissenting judges explicitly stated that States are required to recognise only the “change of gender undergone by post-operative transsexuals”.²⁶³

Thus, if post-operative transsexuals have at least managed to attract the Court’s attention as to their right to marriage, non-conforming individuals, who do not “pass” within the mainstream binary system for whatever reasons, and thereby present a challenge to heteronormativity, are still trying to convince the Court over issues relating to gender recognition. In the meantime, many States keep requiring mental health diagnosis, medical treatment or divorce as a condition for the change of the first name or the legal recognition of the gender identity of trans persons.²⁶⁴ The heteronormativity-driven test requires from trans people to stop living between genders either by perfecting the full and complete transition through a medical means or by complying with traditional gender expectations. Otherwise, they risk being marginalized, rejected, discriminated or even physically abused. By expressly upholding the aim of maintaining conformity to the traditional gender system and, therefore, providing wide margin of appreciation for States, the Court further contributes to “a larger social climate that severely sanctions people for not conforming to society’s traditional norms concerning gender.”²⁶⁵

3.3.1.2. *Homosexuals*

Having regard to the appreciation of traditional gender system, the expectation that the Court’s ruling in *Christine Goodwin* case - the right to marry is not limited to persons who are biologically of the opposite sex - would also open up the possibility of extending Article 12 to same-sex marriages,²⁶⁶ remains yet to be realised. The Court was asked to consider the application of the right to marry specifically for same-sex couples in the famous case of *Schalk and Kopf v Austria* in 2010. The applicants had argued that the wording of Article 12 did not necessarily imply that a man could only marry a woman and vice versa. The Court, except for two judges, accepted that the right to marry enshrined in Article 12 was not in all circumstances limited to marriage between two persons of the opposite sex. However, the majority elaborated on the wording of all the other substantive Articles of the Convention which grant rights and

²⁶³ *X v. the FYRM*, *supra* note 260, Dissenting Opinion of Judges Pejchal and Wjtyczek, para. 6.

²⁶⁴ Transgender Europe (TGEU), *Trans Rights Europe Map 2018*, available at https://tgeu.org/wp-content/uploads/2018/05/SideB_TGEU2018_Print.pdf (last visited 28 May 2019).

²⁶⁵ See further Lombardi, Emilia, Wilchins, Riki Anne, Priesin, Dana and Malouf, Diana, 2002. “Gender Violence: Transgender Experiences with Violence and Discrimination”, *Journal of Homosexuality*, volume 42, issue 1, pp. 89-101.

²⁶⁶ Harris et al., *supra* note 5, p. 740.

freedoms to “everyone” or state that “no one” is to be subjected to certain types of prohibited treatment. Therefore, the choice of wording in Article 12 was regarded as deliberate, particularly taking into account the historical context in which the Convention was adopted when marriage was clearly understood in the traditional sense - a union between partners of different sex. The majority also noted that there was an emerging and rapid tendency of European consensus towards legal recognition of same-sex couples but that such States were still in minority (six out of forty-seven had legalised same-sex marriage at the given time). Accordingly, the issue was regarded as one of evolving rights with no established consensus and, “as matters stood”, the question whether or not to allow same-sex marriage was nevertheless left to regulation by the national authorities.²⁶⁷

The ECtHR was criticised for misinterpreting the language of Article 12 based on historical considerations. It has been suggested that the rationale behind the right to marry and found a family was one of freedom and protection against discrimination exerted by totalitarian politics, for instance by the Nazi regime, of which among others, gay men fell victim. Also, as concerns the explicit reference to men and women, as opposed to speaking of “everyone” or “no one”, the reason was claimed to be an egalitarian one, providing extra protection to women, for instance against arranged marriages, and not that the drafters thought a man could only marry a woman or vice versa, as assumed by the Court.²⁶⁸ Critics further explain that the text-driven traditional approach by the European Court was not, in fact, necessary; that arguably, any argument based on the intention of the drafters of the European Convention in the 1950s is erroneous as they had no “conscious ambition” to protect heterosexual marriage since same-sex marriage would have been unthinkable at the time.²⁶⁹

Therefore, it has been argued that the Court should have used an enhanced expressive power and played an active role in norm-setting by clearly explaining that same-sex couples have a right to marriage equally that requires legal protection.²⁷⁰ In failing to do so, the Court’s judgment in the case of *Schalk and Kopf* has been regarded as a dramatic example of its reluctance to depart from the specific language of the convention and the intent of its drafters. It has been viewed as an illustration of the Court respecting the will of the states rather than the applicants’ contention that the needs of today require states to permit civil marriage for same-

²⁶⁷ *Schalk and Kopf v Austria*, *supra* note 84, paras. 55-61 and 105.

²⁶⁸ Sloot, *supra* note 169, p. 404.

²⁶⁹ Johnson, Paul, 2015. “The Choice of Wording must be Regarded as Deliberate: Same-sex Marriage and Article 12 of the European Convention on Human Rights”, *European Law Review*, volume 40, issue 2, pp. 207-224, at 220. Hamilton, *supra* note 144, p. 15.

²⁷⁰ E.g. Brems (Ed.), *supra* note 32, pp. 244-245.

sex couples.²⁷¹ In this regard, it is noteworthy that the HRC has adopted the same approach in relation to Article 23(2) of the ICCPR.²⁷² It was concluded that since the article is the only substantive provision in the ICCPR which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”, the treaty obligation of States parties to the Covenant is to recognise as marriage only the union between a man and a woman wishing to marry each other.²⁷³

Irrespective of the criticism regarding the reluctance in *Schalk and Kopf* to grant same-sex couples access to full-fledged marriage, the Court has been praised for providing the following paradigm shift in its case law. As was briefly noted before, having taken into account a rapid evolution of social attitudes towards same-sex couples in many member States, a number of which had afforded legal recognition to same-sex couples, the Court considered it artificial to maintain that a same-sex couple cannot enjoy “family life” for the purposes of Article 8 in contrast to a different-sex couple. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, was rendered falling within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would. Furthermore, it was expressly stated that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.²⁷⁴ On the one hand, these statements indeed constitute a significant development. Yet, on the other hand, they make the Court’s decision to defer to the national authorities with respect to marriage even less comprehensible.²⁷⁵ This holds particularly true having regard to its repeated statement that just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.²⁷⁶

The use of the phrase “as matters stand”²⁷⁷ by the Court while vesting the power to regulate same-sex marriages in the State has also been viewed as a promising statement. More precisely, as an indication of allowing for the possibility to re-interpret Article 12 in accordance with the “living instrument” approach as requiring states to provide for same-sex marriage should there

²⁷¹ Brems & Gerards (eds.), *supra* note 75, p. 29.

²⁷² “The right of men and women of marriageable age to marry and to found a family shall be recognized.”

²⁷³ HRC, Communication No. 902/1999. CCPR/C/75/D/902/1999; 17 July 2002; New Zealand, para. 8.2.

²⁷⁴ *Schalk and Kopf v Austria*, *supra* note 84, paras. 93- 99.

²⁷⁵ See further Hamilton, *supra* note 144, p. 10.

²⁷⁶ E.g., *Schalk and Kopf v Austria*, *supra* note 84, *Karner v. Austria*, (App. 40016/98), 24 July 2003, ECHR 2003-IX, para. 37

²⁷⁷ *Schalk and Kopf v Austria*, *supra* note 84, para. 61.

emerge the ‘European consensus’ that was lacking when the *Schalk and Kopf* case was decided.²⁷⁸ Nevertheless, so far, the Court has maintained its findings of *Schalk and Kopf* as to the right to marriage of same-sex couples in the subsequent case law.²⁷⁹

It is, however, noteworthy that in the 2015 case of *Oliari v. Italy*, the ECtHR took some step forward. The case was distinguished from *Schalk and Kopf* where the applicants had already obtained the opportunity to enter into a registered partnership. While in the *Oliari* case, the applicants still did not have any opportunity to enter into a civil union or registered partnership (in the absence of marriage) in Italy. Thus, it was resolved that the Court had to determine whether Italy had failed to comply with a positive obligation to ensure respect for the applicants’ private and family life, in particular, through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law.²⁸⁰ The Court reiterated that legal recognition in the form of civil partnerships has an intrinsic value for persons in the applicants’ position, irrespective of its legal effects, however narrow or extensive, since it would further bring a sense of legitimacy to same-sex couples.²⁸¹ Consequently, it was acknowledged that the same-sex couples shall be afforded the option of entering into a form of civil union or registered partnership to guarantee them the relevant protection. As for marriage, the approach remained the same – Convention provisions do not impose an obligation on Contracting States to grant same-sex couples access to marriage.²⁸²

A recent case of *Chapin and Charpentier v. France* (2016)²⁸³ also concerned the right to marry of a homosexual couple. The marriage of two men had been conducted by the mayor of Bègles (France) but was subsequently declared null and void by the domestic courts. The applicants submitted that limiting marriage to opposite-sex couples amounted to a discriminatory infringement of the right to marry. They also contended that they had been discriminated against, in the exercise of their right to respect for family life, on the basis of their sexual orientation. The Court held that there had been no violation of Article 12 (right to marry) in conjunction with Article 14 (prohibition of discrimination) and no violation of Article 8 (right to respect for private and family life) in conjunction with Article 14 of the Convention. In

²⁷⁸ Harris et al., *supra* note 5, p. 741. Six out of forty-seven had legalised same-sex marriage at the given time) - *Schalk and Kopf v Austria*, *supra* note 84, para. 58

²⁷⁹ *Hämäläinen v Finland*, *supra* note 255, paras. 73-74, 96; *Oliari and others v. Italy*, (App.18766/11), 21 July 2015, paras. 191-192; *Chapin and Charpentier v. France*, (App. 40183/07), 9 June 2016, paras. 36-39 where the Court ruled unanimously against the right to marriage of homosexual couples.

²⁸⁰ *Oliari and others v. Italy*, *supra* note 279, paras. 163-164.

²⁸¹ See also *Vallianatos and others v. Greece*, *supra* note 84, para. 81.

²⁸² *Oliari and others v. Italy*, *supra* note 279, paras. 174 and 194.

²⁸³ *Chapin and Charpentier v. France*, *supra* note 279.

particular, the majority reiterated the finding of *Schalk and Kopf v. Austria* that neither Article 12, nor Article 8 taken together with Article 14, could be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage. The Court also observed that given the short period of time that had elapsed since *Hämäläinen v. Finland* and *Oliari and Others v. Italy* judgments, it did not see any reason not to reach the same conclusion in the present case.²⁸⁴

Apparently, issues related to discrimination based on sexual orientation are regarded as distinct from that of marriage because of the lack of a consensus among Member States regarding the scope of Article 12. In order to explain the trend, it has been suggested that marriage is viewed by the European Court as having such a special status that it cannot be subjected to the usual detailed scrutiny, or even as an “untouchable, almost sacred, category”.²⁸⁵ The very fact that same-sex couples, although now recognised as having a “family life”, are not entitled to access the married state, could arguably demonstrate a certain “privileging of marital families”. One theory regarding why marriage is given such a special status by the ECtHR is that marriage is seen by the Court as a moral or religious right – the area where wide margin of appreciation is afforded. However, role of marriage is not confined to a moral dimension only and much less to the religious one, especially from the legal perspective. Civil marriage is largely about a “set of legal protections and benefits”, such as tax advantages, inheritance rights, protections in property law, post-divorce rights, right to name change, etc. Accordingly, if we move away from the religious or moral reading of marriage, it becomes much more difficult to justify the wide margin of appreciation reserved to States concerning marriage.²⁸⁶

It has been further noted that by treating marriage as fundamentally different from the rest of the family law case law involving sexualities, “structural problem has been created”: in relation to Article 8, there is a principle of “equality of familial choices”, and yet in relation to Article 12, a “specific choice” is secured.²⁸⁷ It has been also voiced that the Court created a “hierarchy among rights protected” by the ECHR.²⁸⁸ Having regard to the aim of the Convention to “protect and enforce human rights [...], it is perplexing to see it [the Court] refrain from

²⁸⁴ As summarised in European Court of Human Rights, 2019. *Factsheet - Sexual Orientation Issues*, p. 24, available at https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf

²⁸⁵ Hamilton, *supra* note 144, p. 16.

²⁸⁶ See further Hamilton, *supra* note 144.

²⁸⁷ Grigolo, Michele, 2003. “Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject”, *European Journal of International Law*, volume 14, pp. 1023-1044 at 1040.

²⁸⁸ Butler, Petra, 2008–2009. “Margin of appreciation: A Note towards a Solution for the Pacific”, *Victoria University Wellington Law Review*, volume 39, pp. 687-708, at 703.

legalising same-sex marriage.”²⁸⁹ Given the European Court’s widely developed dynamic interpretation techniques used in other cases involving Article 12, such a limited approach is not only unnecessary, but it also promotes a heterosexual view of marriage.²⁹⁰ This holds particularly true considering that on several occasions, the Court has refused to find a violation on account of, among others, the similarity between the legal regimes governing marriage of heterosexual couples and civil unions/partnerships of same-sex people in certain states. Nevertheless, it has been reluctant to subject these two category of people to the same marital regime.

Thus, it is not the type of persons who can enter marriage that has been extended by the Court, but the scope of who represent men and women for the purpose of Article 12. Bearing in mind that Article 14 of the European Convention does not have independent existence and Protocol 12 of the European Convention regarding general prohibition of discrimination remains unratified by many States,²⁹¹ there might not be sufficient protection preventing discrimination against gays or other non-conforming individuals. In this regard, the “living instrument” doctrine, which has already been used to provide the right to marry for post-operative transsexuals or recognise the family life of same-sex couples, might have been the most optimal option for the Court to have had recourse to.²⁹²

3.3.2. Excluding adoption for the non-conforming?

The Court has held on number of occasions that the notion of family life incorporates the right to respect for decisions to become a parent in the genetic sense²⁹³ but right to respect for private and family life does not guarantee the right to adopt as such.²⁹⁴ There are two categories of adoption-related cases that the Court has shown a great willingness to examine: firstly, the cases where an existing adoption, lawful under domestic law, has interfered with, or is part of, a person’s private or family life under Article 8 of the ECHR; secondly, the cases in which no

²⁸⁹ Poppelwell-Scevak, C. A. R. L, 2016. “The European Court of human rights and same-sex marriage: The Consensus Approach”, Norwegian Open Research Archives (NORA), p. 1.

²⁹⁰ Hamilton, *supra* note 144, p. 16-19.

²⁹¹ See Council of Europe, *Details of Treaty No.177*, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177>

²⁹² See further on the prospects of the option in Hamilton, *supra* note 144.

²⁹³ *Dickson v. the United Kingdom*, (App. 44362/04), 4 December 2007 [GC], (2008) 46 EHRR 927, ECHR 2007-XIII, para. 66; *Evans v. the United Kingdom*, (App. 6339/05), 10 April 2007 [GC], (2008) 46 EHRR 728, ECHR 2007-IV, para. 72..

²⁹⁴ E.g., *E.B. v. France* [GC], *supra* note 63, para. 41.

adoptive status has yet been granted and the applicant alleges discrimination on the basis of sexual orientation, in relation to the application for the authorisation to adopt.²⁹⁵

In the context of adoption by homosexuals, the Court has distinguished three types of situations: firstly, individual adoption - a person may wish to adopt on his or her own; secondly, second-parent adoption - one partner in a same-sex couple may wish to adopt the other partner's child, with the aim of giving both of them a legally recognised parental status; finally, joint adoption when a same-sex couple may wish to adopt a child.²⁹⁶ While the Court's approach has clearly developed in relation to the homosexual people's right of individual adoption, its attitude towards the second-parent adoption, and even more so to the joint adoption, still raises questions as to the value-neutrality thereof.

So far, the Court has dealt with two cases relating to individual adoption by homosexuals. In *Fretté v France* (2002), the Court considered that the refusal to authorise the adoption by a homosexual had not infringed the principle of proportionality and that, accordingly, the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention.²⁹⁷ Nonetheless, the case of *Fretté* was overturned by the Grand Chamber in *E.B. v France* (2008). The majority concluded that in refusing the applicant authorisation to adopt, French authorities had made a distinction on the basis of her sexual orientation, which had been consistently at the centre of deliberations in her regard and had been decisive for the decision to deny her the authorisation to adopt. The Court consequently found a violation of Article 14 taken in conjunction with Article 8.²⁹⁸ Notably, the Court, in holding that states may not discriminate solely on the basis of sexual orientation, analysed the issue in *E.B* without resorting to the examination of the European consensus. The approach has nevertheless been regarded as more human rights-centric in the sense that it placed the burden of proof squarely on the interfering State to justify its difference in treatment.²⁹⁹ *E.B. v France* is a landmark judgment as it reaffirms a fundamental liberal-egalitarian principle that should govern human rights adjudication, namely that no-one should suffer a disadvantage or be deprived of a liberty

²⁹⁵ See further Letsas, George, 2008. *No Human Right to Adopt? Gay and Lesbian Adoption under the ECHR*, pp. 2-3, available at SSRN: <https://ssrn.com/abstract=1215102>

²⁹⁶ *E.B. v. France* [GC], *supra* note 63, para. 33; *X and Others v Austria* [GC], *supra* note 19, para. 100.

²⁹⁷ *Fretté v. France*, (App. 36515/97), 26 February 2002, (2004) 38 EHRR 438, ECHR 2002-I, paras. 37-43.

²⁹⁸ *Ibid*, paras. 94-98.

²⁹⁹ Nozawa, Junko, 2013. "Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14", *Merkourios*, volume 29, issue 77, pp. 66-75, at 74.

or opportunity because of one's choice of a lifestyle, or because others think of him or her as less than an equal.³⁰⁰

As concerns the second-parent adoption in a same-sex couple, thus far, only two cases have been reviewed by the Court. In the case of *Gas and Dubois* (2012), the applicants were two women forming a stable same-sex couple. One of them was the mother of a child and was considered as the sole parent thereof under French law. They complained about domestic courts' refusal over the adoption request which, according to the domestic court, would have legal implications running counter to the applicants' intentions and the child's interests, by transferring parental responsibility to the adoptive parent and, thus, depriving the birth mother of her own rights in relation to the child. The applicants submitted that they had been subjected to discriminatory treatment based on their sexual orientation, in breach of their right to respect for their private life since no legal means existed in France allowing same-sex couples to have access to second-parent adoption. It was also stressed that French legislation in fact gave rise to indirect discrimination since heterosexual couples, who were also prohibited from obtaining a second-parent adoption, could at least circumvent the hindrance by marrying - an option that was not available to same-sex couples.³⁰¹

Since French law allowed only married couples to share parental rights, the Court first examined whether the applicants' situation was comparable to that of a married couple. The applicants' legal situation was not considered as such having regard to the fact that Contracting States were not obliged to grant access to marriage to same-sex couples as well as to the special status conferred by marriage. Instead, the comparison was made with unmarried different-sex couples living together in a civil partnership, like the applicants, and for whom second-parent adoption was not open either. As stressed, States may reserve this possibility for married couples even if this means that same-sex couples are precluded from the partner adoption.³⁰² Eventually, the ECtHR concluded that there had been no difference in treatment based on sexual orientation. Accordingly, violation of Article 14 of the Convention taken in conjunction with Article 8 was not found. By contrast, where unmarried heterosexual couples have access to the partner adoption, the same should apply to unmarried same-sex couples, as concluded in the following second judgment relating to the second-parent adoption by homosexuals.³⁰³

³⁰⁰ Letsas, George, 2008. *No Human Right to Adopt? Gay and Lesbian Adoption under the ECHR*, p. 17, available at SSRN: <https://ssrn.com/abstract=1215102>

³⁰¹ *Gas and Dubois v. France*, (App. 29591/07), 15 March 2012, para. 42.

³⁰² *Ibid*, paras. 68-69.

³⁰³ *X and Others v Austria* [GC], *supra* note 19, para. 153.

The second case - *X and others v. Austria* (2013) - concerned the claim of three applicants: two women who had been cohabitating for many years in a stable relationship and one of the applicants' son, who was jointly taken care of by the partners. They alleged that they had been discriminated against in comparison with different-sex couples, married or unmarried, because second parent adoption was legally impossible for a same-sex couple in Austria. The Grand Chamber found that the relationship between all three applicants amounted to "family life" within the meaning of Article 8 of the Convention.³⁰⁴ Their situation was distinguished from that of the applicants' in *Gas and Dubois v. France* where under French law second-parent adoption was not open to any unmarried couple, be they same-sex or heterosexual.³⁰⁵ The Grand Chamber accepted that the protection of the family in the traditional sense, along with the protection of the interests of the child, was a weighty and legitimate reason which might justify a difference in treatment. The majority further reiterated the delicate nature of striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities. Nevertheless, the Government was considered to have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility for an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. As a result, considering that differentiated treatment on the basis of sexual orientation allowed only a very narrow margin, Austria's claim for a wide margin of appreciation was rejected.³⁰⁶ Consequently, the majority of the Grand Chamber did find the violation of Article 14 in conjunction with Article 8³⁰⁷ but was criticised by seven dissenting judges for going beyond the usual limits of the evolutive method of interpretation by anticipating rather than accompanying or channelling change.³⁰⁸

As noted, the Court approved of two legitimate aims: the protection of the best interests of the child and preservation of traditional family. Notably, in the *Emonet* case (2008), the Court had already rejected the Government's argument that the institution of marriage guaranteed the adopted person greater stability than adoption by an unmarried couple who lived together for not being necessarily relevant nowadays.³⁰⁹ In *X and Others v Austria*, the proportionality of

³⁰⁴ *X and Others v Austria* [GC], *supra* note 19, para. 96.

³⁰⁵ *Ibid*, paras. 125-131.

³⁰⁶ *Ibid* paras. 138 and 148.

³⁰⁷ *Ibid* paras. 113-153.

³⁰⁸ *Ibid*, Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, para. 23.

³⁰⁹ *Emonet and others v. Switzerland*, (App. 39051/03), 13 December 2007, (2009) 49 EHRR 234, ECHR 2007-XIV, para. 81.

the interference under the premise of the protection of the best interest of the child was also disproved as the Government did not adduce any evidence to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes.³¹⁰ As concerns the protection of the family in the traditional sense, the Court nevertheless noted that it was a rather abstract legitimate aim, being implemented through a broad variety of concrete measures.³¹¹ Regard was additionally had to the fact that the Convention is a living instrument, to be interpreted in present-day conditions, which requires that developments in society and changes in the perception of social, civil-status and relational issues are taken into account, including the fact that there is not just one way or one choice when it comes to leading one's family or private life.³¹²

Ultimately, the Court did find the acts of national authorities contrary to the Convention, which might seem to be invalidating the concerns as to the value-neutrality. However, it is crucial to note that in finding the violation, the Court relied on the ground of unjustifiable discriminatory treatment without “stretching”, let alone waiving, the traditional concepts underlying the permissive approach. This holds particularly true considering that the Grand Chamber made triple statement to make clear that what it had to decide was a narrowly defined issue of discrimination between unmarried different-sex couples and same-sex couples with respect to second-parent adoption; that the question of second-parent adoption by same-sex couples or adoption by same-sex couples in general was strictly excluded from the discourse, the latter being the only statement ever made by the Court in relation to this third type of adoption by same-sex couples.³¹³

The Court's judgment in *X. and Others* has been regarded as furthering the discrimination that results from the exclusion of homosexual people from the category of individuals entitled to marriage and the associated rights that emerge from that label, including adoption rights. Mention has also been made of the risk that States may even restrict second-parent adoption to married persons to keep homosexual couples from adopting while retaining compliance with their obligations under the Convention. Thus, the Court was criticised for allowing Contracting States to maintain separate and unequal relationships that have otherwise been recognised as constituting a private or family life, instead of furthering the promotion and protection of

³¹⁰ *X and Others v Austria* [GC], *supra* note 19, paras. 142-146.

³¹¹ See also *Taddeucci and McCall v Italy*, (App. 51362/09), 20 June 2016, para. 93 where the Court noted that the protection of the traditional family may amount to a legitimate aim under Article 14 in some circumstances.

³¹² *X and Others v Austria* [GC], *supra* note 19, para. 139.

³¹³ *Ibid*, paras. 134, 149 and 152.

human rights.³¹⁴ Obviously, despite the inclusion of same-sex couples in the Convention's conception of family, there appears to remain some moral discomfort within the Court, like many Contracting States, in providing equal protection for family life irrespective of sexual orientation.³¹⁵

4. Religious symbols and the ECtHR

4.1. Freedom of thought, conscience and religion

Article 9 of the Convention safeguards the freedom of thought, conscience and religion: "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."³¹⁶

The "deceptively simple"³¹⁷ Article 9, as clarified by the Court, entails two aspects: "while religious freedom is primarily a matter of individual conscience [*forum internum*], it also implies, inter alia, freedom to "manifest [one's] religion [*forum externum*]." ³¹⁸ Or, as Evans puts it, the right to believe whatever one wants, which is "passive" in nature and the "active" right to express this belief through different means.³¹⁹ The "active" right to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including the display of religious symbols, as also noted by the HRC in the context of the ICCPR.³²⁰ It is evident from the wording of the provision in question that only *forum internum* aspect is granted the absolute protection while the right to manifest is subject to the limitations

³¹⁴ Nozawa, *supra* note 299, p. 74.

³¹⁵ Jacobs et al., *supra* note 10, 385.

³¹⁶ See also Article 18 of UDHR and Article 18 of the ICCPR and Article 14.

³¹⁷ Evans, Malcolm D, 1997. *Religious liberty and international law in Europe*. Cambridge: Cambridge University Press, p. 284.

³¹⁸ *Kokkinakis v. Greece*, (App. 14307/88), 25 May 1993, Series A No 260-A, (1994) 17 EHRR 397, para. 31. On the critique of "the belief-action dichotomy" see Slotte, Pamela, 2015. "International Law and Freedom of Religion and Belief: Origins, Presuppositions and Structure of the Protection Framework", *Routledge Handbook of Law and Religion*, S. Ferrari (ed.), pp. 103-118, at 110-116.

³¹⁹ Evans, *supra* note 317, p. 284.

³²⁰ E.g. *Güler and Uğur v. Turkey*, (Apps. 31706/10 and 33088/10), 2 December 2014 para. 41. Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para. 4.

prescribed by the second paragraph.³²¹ However, the difference in the degree of legal protection by no means makes the one aspect less important than the other.³²²

Article 9 is not limited to religious beliefs only, but is not synonymous with the words "opinions" and "ideas" set forth in Article 10 either: the right to freedom of thought, conscience and religion "denotes views that attain a certain level of cogency, seriousness, cohesion and importance"³²³. Thus, the protection goes far beyond the traditional, mainstream religious beliefs.³²⁴ Nevertheless, "where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief."³²⁵ In the past, the Court used the so-called "Arrowsmith test" which obliged applicants to show that it was the religion or belief that required them to act in a certain way.³²⁶ But the *Eweida* case (2013) represented a paradigm shift from the objective requirement - that the manifestations be "objectively necessary outward displays of the religion or belief..."³²⁷ - to subjective views of the applicant: "there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question", as long as there is "a sufficiently close and direct nexus between the act and the underlying belief."³²⁸ However, "the public expression of a religion or belief, although prompted by genuine personal convictions, will not always be deemed acceptable in a democratic and pluralist society where diverse (and at times competing or conflicting) interests are at stake."³²⁹ For instance, proselytism - an attempt to persuade someone to change their religious or political beliefs or way of living to your own³³⁰ - is not protected by Article 9 when it takes improper forms.³³¹

As will be illustrated below, the diverse case law of the Court comprises the restrictions imposed by the States, inter alia, on the display of religious symbols in classrooms, on the

³²¹ "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." See also Jacobs et al., 2014, p. 412.

³²² Bielefeldt, Heiner, Ghanea-Hercock, Nazila and Wiener, Michael, 2016. *Freedom of religion or belief: an international law commentary*. Oxford: Oxford University Press, p. 93.

³²³ *Bayatyan v. Armenia* [GC], *supra* note 98, para. 110; *Eweida and others v the UK*, *supra* note 133, para. 81.

³²⁴ Evans, *supra* note 317, pp. 290-291.

³²⁵ *Eweida and others v the UK*, *supra* note 133, para. 82.

³²⁶ *Arrowsmith v. the United Kingdom* (Com.), (App. 7050/75), 16 May 1977, p. 5.

³²⁷ Jacobs et al., 2014, p. 414.

³²⁸ *Eweida and others v the UK*, *supra* note 133, para. 82. See Su, Anna, 2016. "Judging Religious Sincerity", *Oxford Journal of Law and Religion*, Volume 5, pp. 28-48, at 41-48 on the criticism of this "subjective turn".

³²⁹ Pimor, Alexandra & Heenan, Susan, 2006. "Cases", *Journal of Social Welfare and Family Law*, Volume 28, Issue 3/4, pp. 323-345, at. 323.

³³⁰ <https://dictionary.cambridge.org/dictionary/english/proselytize>

³³¹ E.g. *Larissis and others v. Greece*, (App. 23772/94, 26377/94 and 23678/94), 24 February 1998, (1999) 27 EHRR 329, ECHR 1998-I, para. 45.

wearing of religious symbols at educational establishments (by public school teachers or pupils, State university professors or students), at work, in courtrooms or in public spaces, on identity photos intended for use on official documents³³² and in the context of security checks.³³³ Surprisingly, a violation of Article 9 has been found in almost none of these cases³³⁴ due primarily to the wide margin of appreciation afforded to States and the subsidiary role of the Convention mechanism in cases where the relationship between a State and religions is at stake.³³⁵

The Court has upheld State interferences in relation to religious symbols based mainly on the principles of secularism,³³⁶ neutrality and impartiality,³³⁷ pluralism and diversity,³³⁸ tolerance and social peace,³³⁹ as well as on the need to reconcile the interests of the various groups, including the freedom from proselytism or indoctrination,³⁴⁰ and the need to identify individuals.³⁴¹ Principle of secularism guides States in their role of an impartial arbiter by preventing them from manifesting a preference for a particular religion or belief. Put simply, it separates States from religions so that each remains autonomous in relation to the other with a view to preserving freedom of conscience and religion of different individuals.³⁴² Therefore, the principle is the guarantor of democratic values and the meeting point of liberty and equality.³⁴³ It also requires the State to respect, among others, the rights of parents by ensuring that public education and teaching are in conformity with their own religious and philosophical convictions.³⁴⁴ The duty of neutrality and impartiality is the corollary to the principle of secularity assuring that States will abstain from assessing the legitimacy of religious beliefs or

³³² E.g., *Mann Singh v. France (dec.)*, (App. 24479/07), 13 November 2008.

³³³ E.g., *Phull v. France (dec.)*, (App. 35753/03), 11 January 2005.

³³⁴ Compare with *Eweida and others v the UK*, *supra* note 133 and *Hamidović v. Bosnia and Herzegovina*, (App. 57792/15), 5 December 2017.

³³⁵ See particularly *S.A.S. v. France*, (App. 43835/11), 1 July 2015 [GC], para. 129.

³³⁶ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108; See further on state-religion relationship and human rights law in Temperman, Jeroen, 2010. "State–Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance", *Studies in Religion, Secular Beliefs and Human Rights*, volume 8. Leiden; Boston: Martinus Nijhoff Publishers.

³³⁷ See, *Dahlab v. Switzerland (dec.)*, (App. 42393/98), 15 February 2001, ECHR 2001-V; *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 107. *Ebrahimian v. France*, (App. 64846/11), 26 November 2015, paras. 55-57; *S.A.S. v France* [GCH], *supra* note 335, para. 127

³³⁸ *Eweida and others v the UK*, *supra* note 133, para 94; *Ebrahimian*, *supra* note 337, para. 67, *S.A.S. v France* [GCH], *supra* note 335, para. 128.

³³⁹ *S.A.S. v France* [GCH], *supra* note 335, para. 149.

³⁴⁰ *Kokkinakis*, *supra* note 318, para.18 and 33; *Dogru v. France*, (App. 27058/05), 4 December 2008, para. 62; E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 106.

³⁴¹ *S.A.S. v France* [GCH], *supra* note 335, para. 115; *Mann Singh*, *supra* note 332.

³⁴² Brems (Ed.), *supra* note 32, p. 198.

³⁴³ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 113.

³⁴⁴ Article 2 of Protocol No. 1.

the ways in which those beliefs are expressed. It also requires the States to ensure mutual tolerance between opposing groups.³⁴⁵

These being defined, it is important to identify the peculiarities of religious symbols that, from the Court's point of view, necessitate the imposition of certain restrictions thereon. It is equally necessary to ascertain if the scrutiny displays the consistency and neutrality of the argumentation in this regard. As noted, the characteristics which underlie the upcoming analysis will be categorised depending on whether they relate to the legitimate aims of Article 9 or fall under another group of interests.

4.2. Legitimate aims under Article 9

4.2.1. Religious symbols as jeopardising the neutrality of service?

4.2.1.1. When displayed in public institutions

The importance of ensuring adherence to the principle of neutrality in the public service is particularly relevant with respect to State educational institutions. In the case of *Dahlab v Switzerland* (2001), the applicant submitted that the measure prohibiting her from wearing an Islamic headscarf in the performance of her teaching duties at the primary schools infringed her freedom to manifest her religion, as guaranteed by Article 9 of the Convention. In rejecting the application on the basis of being manifestly ill-founded, the Court referred, *inter alia*, to the legitimate aim of ensuring the denominational neutrality of the State primary-education system, intended to protect the religious beliefs of the pupils and their parents, regard being also had to the tender age of the children.³⁴⁶

The argument as to the neutrality was upheld and clarified in *Kurtulmuş v. Turkey* (2006) which concerned the claim by a university professor against a ban on the wearing of a headscarf when teaching mature adults at university. According to the Court, since public servants act as representatives of the State when they perform their duties, their appearance during the fulfilment of these duties shall be neutral in order to preserve the principle of secularism and its corollary, the principle of a neutral public service. The Court, however, took into account the margin of appreciation that has to be left to the States in determining the obligations on teachers in the State education system, depending on the level of education concerned (primary,

³⁴⁵ *Hasan and Chaush v. Bulgaria*, (App. 30985/96), 26 October 2010, ECHR 2000-XI [GC], para. 78; *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 107

³⁴⁶ See the upcoming chapter for further discussion on *Dahlab*.

secondary or higher). Notwithstanding the higher level of education concerned and the absence of the tender age of students, the issue was regarded as falling within the scope of the margin of appreciation of the State. To be more precise, the Court upheld that the wearing of a religious veil by the teachers of public educational institutions while teaching constitutes an expression of the teachers' religious beliefs in public in an ostentatious manner which is as such irreconcilable with the States' duty of impartiality and neutrality.³⁴⁷

Similarly, before the matter was referred to the Grand Chamber (2011), the Chamber (2009) in the *Lautsi* case considered the display of a crucifix - a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) - to the wall in each of a primary school's classrooms irreconcilable with the principle of pluralism.³⁴⁸ The Court underscored that the presence of the crucifix may have easily been interpreted by pupils of all ages as a religious sign; the risk being particularly strong among pupils belonging to religious minorities. Furthermore, negative freedom of religion - principle of secularism protects individuals not only against arbitrary interference by the State but against external pressure³⁴⁹ - was extended beyond the absence of religious services or religious education to also cover practices and symbols expressing a belief, a religion or atheism. Therefore, the compulsory display of a symbol of a particular faith in the exercise of public authority in general, and even more so in classrooms, was regarded as infringing the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. The restrictions were regarded as incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education. Consequently, there has been a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention.³⁵⁰

By contrast, two years later, the Grand Chamber overturned the judgment of the Chamber and found that there was no violation of the Convention taking into account the following factors: The Court distinguished the display of a Christian crucifix from the wearing of a headscarf by a teacher and concluded that the former could not have been associated with compulsory teaching about Christianity on account of two circumstances. Firstly, in the *Lautsi* case, it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in

³⁴⁷ *Kurtulmuş v. Turkey*, (App. 65500/01), 24 January 2006.

³⁴⁸ *Lautsi v. Italy*, (App. 30814/06), 3 November 2009, para. 56.

³⁴⁹ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 113-114.

³⁵⁰ *Lautsi v. Italy*, *supra* note 348, para. 55-58

schools; and optional religious education was possible to be organised in schools for “all recognised religious creeds”.³⁵¹ Secondly, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. The Court also noted that the applicant “retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions.”³⁵² Notably, none of these circumstances were taken into account by the Court while balancing the public and private interests in either *Dahlab* or *Kurtulmuş* or the cases which will be discussed later, rendering the applications manifestly ill-founded based primarily on the principle of neutrality in the public service.

Aside from the purely state-perspective-based argument regarding the neutrality of service in State educational institutions, the neutrality of the public hospital service was further linked to the attitude of its staff and potential doubts of their patients as to their impartiality.³⁵³ In the case of *Ebrahimian v France* (2015), the applicant had alleged that the failure to renew her employment contract as a social assistant, on the grounds that she refused to stop wearing her Islamic turban during working hours, amounted to a violation of Article 9. The Court reiterated its statement from *Kurtulmuş* that public servants act as representatives of the State when they perform their duties and the principles of secularism and neutral public service required their appearance to be neutral.³⁵⁴ Thereafter, it was indicated that “the neutrality of the public hospital service may be regarded as linked to the attitude of its staff, and requires that patients cannot harbour any doubts as to the impartiality of those treating them.”³⁵⁵ Consequently, even though the applicant had not been accused of acts of pressure, provocation or proselytism towards hospital patients or colleagues, the mere fact that the wearing by the applicant of her veil might have been perceived as an ostentatious manifestation of her religion sufficed for the Court to justify the restrictive measure.³⁵⁶ Eventually, it upheld the aim of avoiding any discriminatory conduct and ensuring that the users of the service in question enjoyed equal treatment without any distinction on the basis of religion.³⁵⁷

³⁵¹ *Lautsi and Others v. Italy*, (App. 30814/06), 18 March 2011 [GC], para. 39.

³⁵² *Ibid.*, paras. 74-75.

³⁵³ See also *Eweida and others v the UK*, *supra* note 133, para. 96-101 where the Court upheld the ban on necklace, including Christian cross, to protect the health and safety on the hospital ward.

³⁵⁴ *Ebrahimian*, *supra* note 337, para. 57. See also paras. 50, 55, 63 and 69 on great emphasis on the state’s duty of neutrality and impartiality.

³⁵⁵ *Ibid.*, §64.

³⁵⁶ *Ibid.*, §62.

³⁵⁷ *Ibid.*, §53.

It is noteworthy that the case does not entail any clarification of why the wearing of the Islamic veil alone, without any relevant evidence whatsoever, could pose a threat to the impartiality of the service provided by the applicant. For this reason, the Judge De Gaetano classified the judgment as resting on a very dangerous and false premise that impartial services cannot be guaranteed by the public officials who manifest their religious affiliations in the slightest way, “even though quite often, from the very name of the official displayed on the desk or elsewhere, one can be reasonably certain of the religious affiliation of that official.”³⁵⁸

As also stated by the Judge O’Leary, the Court’s approach in the instant case is similar to its developed case law which, unlike the present judgment, concerns educational establishments only and seeks to protect the rights and freedoms of the pupils and students.³⁵⁹ It was further observed that even in a similar case, concerning the wearing of a cross by a Christian nurse,³⁶⁰ the Court invoked a very concrete legitimate aim of protecting health and safety on a hospital ward for allowing a wide margin of appreciation for the domestic authorities.³⁶¹ Thus, to summarise, unlike other cases where general principles were translated into more concrete considerations and the Court took note of the absence of a real encroachment on the interests of others,³⁶² this case represented another instance of relying on abstract principles or ideals.³⁶³

In contrast to public servants who are bound by the principle of neutrality in the public service and have to tolerate corresponding justifiable restrictions, a blanket ban on the wearing of religious clothing and/or symbols at work by private employees is not allowed anywhere. However, the Court has not rejected the possibility of imposing such restrictions in case they pursue a legitimate aim relating to sanitary norms, the protection of health and morals, or the credibility of the company’s image in the eyes of its customers. Nevertheless, of course, these interests are not absolute and must always pass the proportionality test against the individual’s right to manifest his or her religion.³⁶⁴ For instance, in *Eweida and others v the United Kingdom* (2011), the Court found a violation of Article 9 where a private company had suspended an employee for refusing to conceal the Christian cross which she wore, while certain symbols of

³⁵⁸ *Ebrahimian*, *supra* note 337, Dissenting Opinion of Judge De Gaetano, first paragraph.

³⁵⁹ *Ebrahimian*, *supra* note 337, Partly Concurring and Partly Dissenting Opinion of Judge O’Leary, Chapter IV. Whether the measure pursued a legitimate aim.

³⁶⁰ *Eweida and others v the UK*, *supra* note 133, paras. 99-100.

³⁶¹ *Ebrahimian*, *supra* note 337, Partly Concurring and Partly Dissenting Opinion of Judge O’Leary, Chapter IV. Whether the measure pursued a legitimate aim.

³⁶² See, particularly, *Eweida and others v the UK*, *supra* note 133, paras. 94-95.

³⁶³ *Ebrahimian*, *supra* note 337, Partly Concurring and Partly Dissenting Opinion of Judge O’Leary, Chapter IV. Whether the measure pursued a legitimate aim.

³⁶⁴ *Ibid*, para. 47.

other religions (turban or hijab) were authorised and had no negative impact on British Airways' brand or image.³⁶⁵ But, since the act complained of was carried out by a private company and was not, therefore, directly attributable to the respondent State, the issue was considered in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction.³⁶⁶

Hence, in contrast to the employees of the private sector, public servants are bound by the principle of neutrality in the public service where the mere display of religious symbols has been regarded by the Court as irreconcilable with the duty of neutrality. In particular, the approach concerns, but is not limited to, educational establishments and seeks to protect the rights and freedoms of the pupils and students. The rationale behind the approach has been a subjective test resting on the potential perceptions and doubts of the users of the public services as to the impartiality of the service provided, even without any evidence of the actual threat thereto. The emphasis on the subjective dimension for the determination of the impartial image of public services contrasts with the tendency of the Court to rely on an objective criterion. For instance, in the case of *Lautsi v Italy* (2011) the Grand Chamber underscored that even if the display of crucifixes was seen as a lack of respect on the State's part for the applicant parent's right to ensure her children's education and teaching in conformity with her own philosophical convictions, the subjective perception was not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.³⁶⁷ The conclusion was made notwithstanding the fact that Catholicism was the majority religion in Italy and the compulsory display of the crucifixes in the classrooms could have more reasonably been associated with the support for Catholicism. By contrast, the subjective criterion was used with respect to Islamic headscarves which is clearly a minority practice throughout Europe.³⁶⁸

The objective criterion has also been used by the Court to determine the legitimacy of doubts with respect to a court's impartiality. According to the Grand Chamber in *Incal v. Turkey* (1998), "in deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified."³⁶⁹ Furthermore, in establishing the impartiality and independence of a court, the Court has also examined if an

³⁶⁵ *Eweida and others v the UK*, *supra* note 133, paras. 94-95.

³⁶⁶ *Ibid*, para. 84.

³⁶⁷ *Lautsi and Others v. Italy* [GC], *supra* note 351, paras. 36 and 66.

³⁶⁸ *Ibid*, para. 56.

³⁶⁹ *Incal v. Turkey*, (App. 22678/93), 9 June 1998 [GC], para. 71.

objective observer would have a cause for concern.³⁷⁰ Accordingly, the major vagueness derives from the use of the objective criterion in other areas, including those involving the display of crucifixes in a State school, while mere assumptions of individuals dominate in justifying restrictions on Islamic symbols which constitutes a minority practice.

4.2.1.2. *When displayed by users of public services*

As illustrated, it might be compulsory for teachers and all public servants to refrain from certain religious manifestations since they have voluntarily taken up posts in a public, therefore, neutral environment. Apparently, however, public servants are not the only category of individuals who can jeopardise the neutral and impartial image of the public services. Generally speaking, according to the Court, since users of public services are not State representatives, they are not bound by a duty of discretion in the public expression of their religious beliefs on account of any official status.³⁷¹ Nevertheless, these users, i.e. private citizens, might also pose some ‘threat’ to the neutrality of the State service under certain circumstances and, hence, be ordered to abstain from the public expression of their beliefs. Notably, the term “user” should be understood here in its broadest sense, that is to say any individual having dealings with the public services in a private capacity (either voluntarily or through necessity or compulsion).³⁷²

In this regard, the Grand Chamber made no distinction between teachers and students in *Leyla Şahin v Turkey* (2005).³⁷³ The case concerned the allegation of a medical student that her rights and freedoms had been violated by regulations on the wearing of, among others, the Islamic headscarf in institutions of higher education. Again, the Court was not influenced by the fact that there was no evidence to show that the applicant, through her attitude, conduct or acts, contravened the principle of pluralism - the test the Court has always applied in its case law.³⁷⁴ Instead, the Grand Chamber emphasised, and so did the Court in its subsequent case law,³⁷⁵ that the principle of secularism was the paramount consideration underlying the State’s approach to the wearing of religious symbols in universities.³⁷⁶ Notably, the case law clearly establishes that mere affirmations do not suffice; they must be supported by concrete examples

³⁷⁰ *Clarke v. the United Kingdom* (dec.), (App. 23695/02), 25 August 2005.

³⁷¹ *Ahmet Arslan v. Turkey*, (App. 41135/98), 23 February 2010, para. 48; *Ebrahimian*, *supra* note 337 para. 64.

³⁷² As defined in European Court of Human Rights, 2019: “Guide on Article 9 of the European Convention on Human Rights”, para. 95, available at https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf

³⁷³ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108.

³⁷⁴ *Ibid*, Dissenting Opinion of Judge Tulkens, para. 7.

³⁷⁵ E.g., *Dogru v. France*, *supra* note 340.

³⁷⁶ *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 116.

as only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention.³⁷⁷ Nevertheless, the ban on wearing of religious symbols in universities was considered justified and proportionate to the aim pursued, having regard to the Contracting States’ margin of appreciation in this sphere.³⁷⁸

In the case of *Dogru v. France* (2008), the Court made an additional observation. The case concerned the refusal by a French State secondary school to admit the pupil wearing a headscarf to physical education and sports classes and her subsequent exclusion from the school for noncompliance with compulsory school attendance. The Court found that the domestic authorities had not overstepped their margin of appreciation in the pursuit of ensuring compliance with health and safety requirements. Notably, the Court also stated that it transpired from the various sources that the wearing of religious signs was not inherently incompatible with the principle of secularism in schools, but became so according to the conditions in which they were worn and the consequences that the wearing of a sign might have.³⁷⁹

Nevertheless, the Court’s observation in *Dogru* was not elaborated further in the subsequent case law. A year later, several applications were submitted against France concerning prohibition on religious signs or clothing on the school premises in general - not confined solely to physical education and sports classes - and the subsequent exclusion of pupils for wearing an Islamic headscarf or a Sikh turban or “keski” (“mini-turban”).³⁸⁰ Noting that a purpose of the measures was to preserve the neutrality and secularity of teaching establishments and that they applied to all conspicuous religious symbols, the applications were declared manifestly ill-founded. The approach of the Court contrasts significantly with that of the HRC in the same context: expulsion of a pupil from a school for wearing the keski in accordance with the same French law which prohibited the wearing of symbols or clothing by which pupils manifested their religious affiliation in a conspicuous manner. The HRC, unlike the Court, concluded that the expulsion of the author was not necessary and therefore infringed his right to manifest his religion in accordance with article 18 of the Covenant.³⁸¹ In doing so, the HRC took into

³⁷⁷ E.g., *Smith and Grady v. the United Kingdom*, (Apps. 33985/96 and 33986/96), 27 September 1999, ECHR 1999-VI.

³⁷⁸ *Leyla Şahin v. Turkey* [GC], *supra* note 108, paras. 122-123.

³⁷⁹ *Dogru v. France*, *supra* note 340, para. 70.

³⁸⁰ *Gamaleddyn, Ranjit Singh and Jasvir Singh v. France* (dec.), (App. 18527/08, 27561/08 and 25463/08) 30 June 2009. Available only in French.

³⁸¹ 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teach’.

account the inability of the respondent state to furnish compelling evidence that by wearing his keski the author of the complaint would have posed a threat to the rights and freedoms of other pupils or to the order at the school. It was also noted that the harmful sanction was imposed on the author not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct. Furthermore, the pupil's permanent expulsion from the public school was regarded as disproportionate, leading to serious effects on the education to which the pupil, like any person of his age, was entitled in the State.³⁸²

Thus, from the Court's stance, teachers, who voluntarily acquire the position of state representatives, are not the only group of concern. Pupils and students are also very well capable of jeopardising the principle of neutrality, as the corollary to secularity, in State educational institutions simply by wearing religious symbols on the educational premises without posing any actual, concrete threat to the rights and freedoms of others.

It has also been accepted by the ECtHR that there may be cases when it is justified to order a witness to remove a religious symbol in a courtroom even though private citizens normally are not under such a duty; rationale behind the conclusion being that the court is a "public" establishment in which the respect for neutrality vis-à-vis beliefs may take precedence over the free exercise of the right to manifest one's religion. The case of *Hamidović v. Bosnia and Herzegovina* (2017), which concerned the punishment for refusal to remove skullcap while giving evidence before a criminal court, entails examples of the exceptions to which special rules might apply - restrictions on defendants' for the purposes of proper identification at any stage of the proceedings, including while giving evidence, *inter alia*, from behind a screen shielding them from public view.³⁸³ Bearing in mind that the applicant clearly submitted to the laws and courts of the country and that there was no indication of a disrespectful attitude, his punishment for contempt of court on the sole ground of the refusal to remove his skullcap was not considered necessary in a democratic society.³⁸⁴ While the Court also rejected the legitimate aim of maintaining the authority and impartiality of the judiciary for being excluded from the second paragraph of Article 9, the State's invocation of the protection of the rights and

³⁸² Communication No. 1852/2008, para. 8.7. Views adopted by the Committee at its 106th session (15 October–2 November 2012); Date of adoption of Views: 1 November 2012. France

³⁸³ *Hamidović v. Bosnia and Herzegovina*, *supra* note 335, paras. 41 and 22;

³⁸⁴ *Ibid*, para 42.

freedoms of others was upheld. To be more precise, for the interests of the principle of secularism and the need to promote tolerance in a post-conflict society.³⁸⁵

Notably, when implemented in specific contexts, the forms of secularism are manifold and can vary from strict separation between the public and private sphere to the state church model, which accepts an institutional cooperation between public and religious authorities, and several middle forms in between. By the abstract examination of the principle of secularism, especially in *Şahin*, the ECtHR might have ignored the complexities of secularism, which takes such various forms when implemented in specific national and historical contexts.³⁸⁶ The ECtHR has equally bypassed clarifying what the exact requirements of secularism are or how the collective commitment thereto can be balanced against the wish of some people to wear a symbol of their religious beliefs.³⁸⁷ By accepting the principle of secularism in such a general manner, the risk is that any measure taken in the name of secularism, which does not exceed the State's margin of appreciation, will be considered to be in compliance with the Convention. The approach has allowed, *inter alia*, the imposition of obligations on civil servants who deal with mature adults as well as on the recipients of public services,³⁸⁸ due to theoretical assumptions regarding the neutrality of the public service.³⁸⁹

4.2.2. Religious symbols as a powerful external manifestation?

4.2.2.1. Non-Christian symbols

In the above-mentioned inadmissibility decision of *Dahlab* (2001),³⁹⁰ the wearing by a primary-school teacher of an Islamic headscarf was also regarded as a “a powerful external symbol”, to the extent that it was difficult to reconcile with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. The Court drew the conclusion relying upon the assumption that the wearing of the headscarf as such, without any attempt of proselytism whatsoever, might have had “some kind of proselytising effect”. In doing so, regard was had to the applicant's responsibilities as a representative of the State and the “tender age” of the pupils - aged between four and eight when, according to the Court, children wonder about many things and are also

³⁸⁵ *Hamidović v. Bosnia and Herzegovina*, *supra* note 335, para. 35. Compare Article 9(2) with Article 10(2).

³⁸⁶ Brems, *supra* note 32, p. 198.

³⁸⁷ See *mutatis mutandis* Jacobs et al., *supra* note 10, p. 463.

³⁸⁸ Brems (ed.), *supra* note 392, pp. 198-199.

³⁸⁹ See also *Ebrahimian*, *supra* note 337, para 71.

³⁹⁰ *Dahlab v. Switzerland*, *supra*, note 337.

more easily influenced than older pupils. Even though, and as explicitly stated, it was very difficult for the Court to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children, the Court considered that the measure prohibiting the applicant from wearing a headscarf while teaching was “necessary in a democratic society.” Accordingly, the act of the domestic authorities, by which the applicant was prohibited from wearing a headscarf purely in the context of her activities as a teacher, was justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils’ parents. Disappointingly enough, it was completely overlooked that “the experience of being taught by a woman in traditional Islamic dress might have passed on to the children positive messages about the equality of different religious and cultural groups”. Without putting much emphasis on what it meant to the applicant to wear the headscarf and the consequences of being required to remove it, the balancing exercise of the proportionality assessment was mostly one-sided.³⁹¹

The Court’s reference in *Dahlab* to the Islamic headscarf as a powerful external symbol was reiterated by the Chamber (2004) and the Grand Chamber (2005) in *Leyla Şahin*. It is particularly crucial to keep in mind that in *Dahlab*, the Court regarded the wearing of the Islamic headscarf in front of young children at school as *per se* having an impact on children’s freedom of conscience and religion, and as a form of indoctrination and proselytism.³⁹² While, by contrast, the case of *Leyla Şahin* concerned the wearing of such a symbol in institutions of higher education and by a medical student.³⁹³ Accordingly, the judgment can also be criticised for generalising that the wearing of the headscarf by an individual constitutes a form of indoctrinating others,³⁹⁴ at least in the educational context; and even more so for defining indoctrination far too broadly by including the mere fact of the wearing of a headscarf even if the application involves a private individual - who is not under general obligation to abide by the duty of neutrality³⁹⁵ - and adult university students, whose age is far from “impressionable” or “tender”.³⁹⁶

³⁹¹ Jacobs et al., 2017, pp. 462.

³⁹² Langlaude, Sylvie, 2006. “Indoctrination, Secularism, Religious Liberty and the ECHR”, *International and Comparative Law Quarterly*, volume 55, issue 4, pp. 929-944, at p. 931.

³⁹³ *Lautsi v. Italy*, *supra* note 348 and *Lautsi v. Italy* [GC], *supra* note 351, paras. 97 and 111 respectively.

³⁹⁴ Jacobs et al., 2014, p. 418.

³⁹⁵ As stressed in *Hamidović v. Bosnia and Herzegovina*, *supra* note 335, para. 11. However, it is also noteworthy that the case of *Hamidović* is more recent and might be an indicator of the Court’s improved approach.

³⁹⁶ Langlaude, *supra* note 392, p. 933; Compare E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108 with *Ahmet Arslan v. Turkey*, *supra* note 371, where the Court found the violation concerning the wearing of an item of clothing intended to conceal the face in a public street and, therefore, the issue of proselytism or indoctrination did not arise.

Contrary to the above-mentioned approach, in the past, the Court used higher threshold for determining State indoctrination in cases relating to school pupils.³⁹⁷ However, the threshold of indoctrination is very low in recent cases which works against the individual, as illustrated by the cases related to the wearing of the headscarf. Thus, while supporting the States in avoiding pressure and indoctrination within their educational institutions, the meaning of indoctrination has been broadened to the level that it has negative repercussions on the religious freedom of individuals.³⁹⁸

Judge Tulkens has criticised the Court's approach through her very strong dissenting opinion in *Leyla Şahin*. She labelled as the most questionable part of the reasoning the Grand Chamber's statement that the wearing the headscarf represents a "powerful external symbol", which "appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality" and that the practice could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils. Judge Tulkens, first and foremost, criticised the majority for disregarding that none of the member States had extended the ban on wearing religious symbols to university education, which is intended for young adults, who are less amenable to pressure.³⁹⁹ She also responded to the Court's argument that "when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it." According to Judge Tulkens, the requirement of a pressing social need, as established by the Court's case law, could not have been satisfied by relying solely on the possible effect that the wearing of the headscarf might have on those who do not wear in case of the absence of any evidence that the religious symbol worn by the applicant had been "ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytise or to spread propaganda..."⁴⁰⁰ Judge Tulkens reminded the Court that it was not the Court's role to make an appraisal of this type of a religion or religious practice, just as it is not its role to determine in a general and abstract way the significance of wearing the headscarf or to impose its viewpoint on the applicant.⁴⁰¹

³⁹⁷ E.g., *Jimenez Alonso and Jimenez Merino v Spain*, (App. 51188/99), 25 May 2000.

³⁹⁸ Langlaude, *supra* note 392, p. 933-34.

³⁹⁹ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, Dissenting Opinion of Judge Tulkens, para. 3; See in general Gallala, Imen, 2006. "The Islamic Headscarf: An Example of Surmountable Conflict between Sharia and the Fundamental Principles of Europe", *European Law Journal*, volume 12, issue 5; Langlaude, *supra* note 392.

⁴⁰⁰ *Ibid*, paras. 4-9.

⁴⁰¹ *Ibid*, para. 8.

The dissenting Judge Tulkens also disagreed with the majority on the manner in which the two main arguments - secularism and equality - were applied: “In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.”⁴⁰² The latter argument is especially relevant considering the Court’s constant reiteration that “the role of the authorities [...] is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other”⁴⁰³. Therefore, it is doubtful that such a ban was even suitable for achieving the respect for others religious groups, religious harmony, tolerance and, eventually, the religious pluralism which is “indissociable from a democratic society”.⁴⁰⁴

4.2.2.2. *Non-Christian symbols v. Christian symbols*

The issue of a powerful external symbol was raised again in the *Lautsi* case (2009) where the Court adopted the same approach as in *Dahlab* to crucifixes, which had been displayed in primary educational schools. The Government justified the obligation to display by Italy's historical development, which gave the symbol not only a religious connotation but also an identity-linked one and at that time corresponded to a tradition. They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisations and that its presence in classrooms was justifiable on that account. Therefore, they attributed a neutral and secular meaning to the crucifix in the light of Italian history and tradition, which were closely bound up with Christianity.⁴⁰⁵ The Chamber (2009) did uphold that the symbol of the crucifix had a number of meanings but, interestingly enough, noted that since the religious meaning was predominant, the compulsory presence of the crucifix could have reasonably be seen as a sign that the State takes the side of Catholicism. Moreover, the Court stressed that in the context of public education, they are necessarily perceived as an integral part of the school environment and may, therefore, be considered as “powerful external symbols”, taking particular note of the impact of the display of the crucifix on the children, who at the material time were aged eleven and thirteen.⁴⁰⁶ Consequently, the Chamber found a violation of Article 2 of Protocol No. 1

⁴⁰² E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, Dissenting Opinion of Judge Tulkens, para. 4.

⁴⁰³ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 107; *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, (App. 71156/01), 3 May 2007, para. 172.

⁴⁰⁴ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 104.

⁴⁰⁵ See *Lautsi v. Italy* [GC], *supra* note 351, paras. 33-34 and 67.

⁴⁰⁶ *Lautsi v. Italy*, *supra* note 348, paras. 51-54.

taken together with Article 9 of the Convention for the failure to respect the rights of parents in the exercise of any functions which the States assume in relation to education and teaching, including ensuring the conformity with the parents' own religious and philosophical convictions.

By contrast, the Grand Chamber (2011) concluded that there had been no violation of Article 2 of Protocol No. 1 and that no separate issue arose under Article 9 of the Convention.⁴⁰⁷ A large majority of the judges supported the Government's argument that crucifixes were an essentially passive symbol, whose impact on individuals was not comparable to the impact of an "active conduct", i.e. didactic speech or participation in religious activities.⁴⁰⁸ It was additionally noted that the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claim that they had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.⁴⁰⁹ While as concerns their general proselytising effect, as was in the case concerning the teachers wearing headscarves, the Grand Chamber highlighted that there was no evidence that the display of a religious symbol on classroom walls may have an influence on young persons whose convictions are still in the process of being formed. Moreover, even if the display of crucifixes was seen as a lack of respect on the State's part for the applicant parent's right to ensure her children's education and teaching in conformity with their own philosophical convictions, subjective perception was not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.⁴¹⁰

The present case was explicitly distinguished from *Dahlab* where the measure prohibiting the applicant from wearing a headscarf while teaching was considered by the Court necessary in a democratic society irrespective of two circumstances: The applicant was not accused of proselytising or even of talking to her pupils about her beliefs; and it was very difficult for the Court to make general assessment as to the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The Grand Chamber considered the *Lautsi* case "entirely different" from *Dahlab* in terms of factual circumstances. It pointed out that the case of *Dahlab* concerned the measure prohibiting the applicant from wearing the Islamic headscarf while teaching, which was intended to protect the religious beliefs of the pupils of the tender age and their parents and to

⁴⁰⁷ *Lautsi v. Italy* [GC], *supra* note 351, para. 77.

⁴⁰⁸ *Ibid*, 36 and 72.

⁴⁰⁹ *Ibid*, 74.

⁴¹⁰ *Ibid*, paras. 36 and 66.

apply the principle of the denominational neutrality in schools, as enshrined in domestic law.⁴¹¹ By contrast, the decision whether crucifixes should be present in State-school classrooms, having regard to their relatively passive nature, was viewed as a matter falling within the margin of appreciation of the respondent State, especially considering that there was no European consensus on this matter.⁴¹²

The arguments regarding the passive nature of the crucifixes would perhaps have been more convincing had the Grand Chamber adopted the same approach as the Judge Power at the very least. He noted that even though symbols are silent and not capable of coercing or indoctrinating, they may nevertheless speak volumes and carry meanings. Therefore, instead of relying on the passive nature of the symbols, the judge emphasised a genuinely pluralist and religiously tolerant context in which a Christian symbol on a classroom wall could have been regarded as just another and a different world view.⁴¹³

By plainly distinguishing between *Dahlab* and *Lautsi*, the Court has created a sort of “presumption of indoctrination” for Islamic headscarves, whereas the crucifixes, owing to their intrinsic nature as passive symbols, can be placed by public powers without being considered as a form of indoctrination.⁴¹⁴ In concluding so, with respect to crucifixes, the Court took into consideration the absence of any evidence that the display of a religious symbol on classroom walls may have an influence on young persons whose convictions are still in the process of formation. Thus, it relied on a more objective criterion for regarding the crucifixes as an essentially passive symbol. Likewise, in the *Eweida* case (2013), the Court had recourse to the lack of objective evidence in determining if the wearing of a Christian cross by an employee of a private company would have any negative impact on the company’s image. Since there was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees had any negative impact on the brand or image of the private company, the cross was not considered as such either.⁴¹⁵ In *Dahlab*, however, the Court explicitly noted that it was difficult to assess the actual impact of the wearing of a headscarf on the freedom of conscience and religion of very young children without any attempt of proselytism whatsoever on the applicant’s part. Driven by the abstract assumption

⁴¹¹ *Lautsi v. Italy* [GC], *supra* note 351, para. 73.

⁴¹² *Ibid*, paras. 68-70 and 73-76.

⁴¹³ *Ibid*, Concurring Opinion of Judge Power, last paragraph.

⁴¹⁴ See further in Ronchi, Paolo, 2011. “Crucifixes, Margin of Appreciation and Consensus: the Grand Chamber ruling in *Lautsi v. Italy*”. *Ecclesiastical Law Journal*, volume 13, issue 3, pp. 287-297, at 294.

⁴¹⁵ *Eweida and others v the UK*, *supra* note 133, para. 94.

that the wearing of a headscarf has some kind of proselytising effect, it was nevertheless classified as a powerful external symbol.

To summarise, religious headscarves have been regarded by the Court as a powerful external manifestation of religion when worn either by teachers or students. The obligation to abstain from such a manifestation was upheld and extended to universities irrespective of the clear State consensus on this matter: none of the member states had extended the ban to university education, which is intended for young adults, who are less amenable to pressure. While the restrictive approach (in relation to the applicants) has been adopted with respect Islamic manifestations, Christian crucifixes, including in the same educational setting, have been viewed by the Court as passive in nature.

4.3. Other category?

4.3.1. Religious symbols as contrary to gender equality?

In *Dahlab*, and various cases thereafter, the Court assumed the proselytising effect of the wearing of a headscarf based on the fact that it appeared to be imposed on women by a precept which is laid down in the Koran and which, as the domestic court noted, is hard to square with the principle of gender equality. It, therefore, appeared difficult to reconcile the wearing of an Islamic headscarf with the message of, among others, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.⁴¹⁶

In the case of *Leyla Şahin v France*, both the Chamber (2004) and the Grand Chamber (2005) also stressed that the Islamic headscarf was contrary to the principle of gender equality seeing that it appeared to be imposed on women by a religious precept.⁴¹⁷ By perceiving a headscarf as an instrument of the oppression of women *per se*, the Court, first and foremost, overlooked the variety of reasons underpinning the wearing thereof.⁴¹⁸ The dissenting judge Tulkens, as already noted, criticised the majority for making an *ultra vires*, general and abstract appraisal as to the significance of the practice. The dissenting opinion also entails a reminder that equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. Thus, doing otherwise, would run counter to the case law of

⁴¹⁶ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 111; See, e.g., *Dogru v. France*, *supra* note 340, para. 64.

⁴¹⁷ *Ibid.* paras. 98 & 106-108; and 111 & 116 respectively.

⁴¹⁸ Wearing a headscarf might be an expression of identity, challenge to the sexual exploitation of women's bodies, vehicle for interaction between women and the rest of society. Brems, 2012, p. 204. See further pp. 204-205.

the Court, which has developed a real right to personal autonomy on the basis of Article 8. In this respect, Judge Tulkens had regard to the fact that the applicant was a young adult university student who claimed to be wearing the headscarf of her own free will and there was no proof to the contrary. Accordingly, the principle of sexual equality could not justify prohibiting a woman from following a practice which she must have been taken to have freely adopted.⁴¹⁹ Also, even assuming that the practice is the very result of pressure, it is hard to comprehend how prohibition of the burqa and the niqab could liberate oppressed women considering that such a ban will lead to their further exclusion and alienation in European societies.⁴²⁰ Thus, the experience of discrimination suffered by minority women will differ not only from the experience of discrimination suffered by men of the same minority, but from the experience of discrimination suffered by women in general.⁴²¹ Furthermore, if wearing the headscarf really was contrary to the principle of equality between men and women in any event, other States would also have a positive obligation to prohibit it in all places, whether public or private.⁴²²

Above all, as observed by Judge Tulkens, by accepting the applicant's exclusion from the university in the name of secularism and equality, the majority accepted the applicant's exclusion from "precisely the type of liberated environment in which the true meaning of these values can take shape and develop". The majority also failed to take into account that access to free and independent knowledge, as provided by university, is far more effective a means of raising awareness of the principles of secularism and equality than an obligation that is not assumed voluntarily, but is imposed. Instead, the Court in fact enabled the deprivation of that education for young women on account of the religious practice while advocating freedom and equality for women.⁴²³ Thus, the Court itself equated the wearing of the headscarf not only with a negation of secularism, but also with an alienation of women rather straightforwardly and fell "short of recognising a corollary duty to accommodate individual differences".⁴²⁴

Along with gender equality, the case encompasses another aspect of discrimination brought up by a domestic court and neglected by the Grand Chamber. In its judgment, the domestic court had noted that in Turkey, where the majority of the population were Muslims, presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination

⁴¹⁹ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, Dissenting Opinion of Judge Tulkens, paras. 9-12.

⁴²⁰ Council of Europe Commissioner for Human Rights, "Human rights in Europe: no grounds for complacency Viewpoints by Thomas Hammarberg", 2010, p. 39.

⁴²¹ Brems (Ed.), *supra* note 32, p. 205

⁴²² E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, Dissenting Opinion of Judge Tulkens, paras. 9-12.

⁴²³ *Ibid*, para. 19

⁴²⁴ Brems (ed.), *supra* note 32, pp 195 and 201.

between practising Muslims, non-practising Muslims and non-believers since anyone who refused to wear the headscarf would undoubtedly be regarded as opposing to the religion or as non-religious.⁴²⁵ Interestingly enough, the Court provided a modified account of the domestic court's statement noting that the headscarf was presented or perceived as a compulsory religious duty and, therefore, was capable of having impact on those who chose not to wear it. Accordingly, the headscarf was concluded to be in the process of becoming the symbol of a vision that was contrary to the freedoms of women and fundamental principles of secularity and equality.⁴²⁶ Obviously, the domestic court's remark went beyond the mere recognition of the potential "proselytising effect" of Islamic headscarves, as was effortlessly narrowed down by the Court. In fact, the domestic court's observation is hard to reconcile with the Court's well-established practice that State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.⁴²⁷

It is also noteworthy that with respect to the concerns regarding gender equality, positive developments were made in *S.A.S. v France* (2014), which concerned a blanket ban on the wearing of the full-face veil, including the burqa and the niqab, in public places. Before turning to the preservation of gender equality, the Grand Chamber concluded that the measure was not necessary for the legitimate aim of public safety within the meaning of Articles 8 and 9. Such a general ban on the wearing in public places of clothing designed to conceal the face was regarded as proportionate only in a context where there is a general threat to public safety, which was not shown by the Government. The Chamber also underscored that the legitimate aim could have been achieved through a less intrusive measure - a mere obligation to show the face and to identify where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud.⁴²⁸

The argument regarding gender equality under the "protection of the rights and freedoms of others" was equally rejected by the majority. It was reiterated that advancement of gender equality was indeed a major goal in the member States of the Council of Europe and was accepted that the prohibition on forcing women to conceal their face could pursue an aim which corresponds to the "protection of the rights and freedoms of others". However, this time, the

⁴²⁵ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 39.

⁴²⁶ *Ibid*, paras. 93, 112-115.

⁴²⁷ E.g. *Hasan and Chaush v. Bulgaria*, *supra* note 345, para. 78; *Refah Partisi (the Welfare Party) and Others v. Turkey*, (App. 41340/98, 41342/98, 41343/98 and 41344/98), 13 February 2003, ECHR 2003-II [GC], para. 91.

⁴²⁸ *S.A.S. v France* [GCH], *supra* note 335, para. 139.

Court took into account an empirical research presented to the Court by one of the interveners, which found that it was an erroneous assumption that women who wore the full-face veil did so for the most part under coercion.⁴²⁹ Accordingly, it refused to accept a ban on the wearing of headscarf – practice which was defended by women themselves - unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.⁴³⁰ It was also acknowledged that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs: as a result of a ban, those who choose to wear the veil are obliged to give up completely an element of their identity that they consider important; the ban may also have the effect of isolating them and restricting their autonomy as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life.⁴³¹

The Court also expressed its concern as to certain Islamophobic remarks surrounding the adoption of the domestic law and emphasised that when a State enters into a legislative process of this kind, it takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance while it has a duty to, on the contrary, promote tolerance.⁴³² In concluding that imposing a blanket ban seemed excessive, the Court took into account the number of those women who were affected by the ban, which was only a small proportion in relation to the French population of about sixty-five million and to the number of Muslims living in France.⁴³³

Hence, the Court's conclusion in *Leyla Şahin v France* that the Islamic headscarf was contrary to the principle of gender equality, considering that it appeared to be imposed on women by a religious precept, was rejected 9 years later. When presented with an empirical research rendering the assumption in question - women who wore the full-face veil did so for the most part under coercion - erroneous, the Court was finally convinced that the practice was defended by women themselves and individuals cannot be protected from the exercise of their own

⁴²⁹ *S.A.S. v France* [GCH], *supra* note 335, paras. 95-98.

⁴³⁰ *Ibid*, para 119.

⁴³¹ *Ibid*, paras. 139 and 146. See Yusuf, Hakeem, 2014. "S.A.S v France: supporting 'living together' or forced assimilation?", *International Human Rights Law Review*, volume 3, issue 2, pp. 277-302, at 296-300 on the denial by the governments involved.

⁴³² *S.A.S. v France* [GCH], *supra* note 335, para. 149

⁴³³ *Ibid*, para. 145.

fundamental rights and freedoms.⁴³⁴ Accordingly, the wearing of Islamic headscarf was no longer considered contrary to the respect for gender equality.

4.3.2. Religious symbols as a barrier to social interaction?

As noted, the Grand Chamber in *S.A.S. v. France* (2014) refused to uphold the legitimate aim of public safety as well as two values out of three under the legitimate aim of the protection of rights and freedoms of others - respect for human dignity and for equality between men and women. Nevertheless, the third value - the demands of “living together” or “respect for the minimum requirements of life in society” - was accepted as the justification for the ban in question.⁴³⁵ The majority distinguished the present case from *Ahmet Arslan and Others v. Turkey* (2010),⁴³⁶ which also concerned a ban on wearing religious clothing in public places, open to all, and found the violation of the Convention. The full-face Islamic veil, as noted in *S.A.S.*, has the particularity of entirely concealing the face, with the possible exception of the eyes, which was allegedly the sole reason behind the ban and not the religious connotation of the clothing.⁴³⁷ According to the majority, the face plays an important role in social interaction and individuals who are present in places open to all may not wish to see there such developing practices or attitudes as would fundamentally call into question the possibility of open interpersonal relationships that forms an indispensable element of community life within the society. Therefore, the Court accepted that a veil concealing the face served as a barrier raised against others, breaching the right of others to live in a space of socialisation which makes living together easier.⁴³⁸ Having regard to the “principle of interaction between individuals” and little common ground among the member States of the Council of Europe as to the question of the wearing of the full-face veil in public, the impugned limitation was regarded as necessary in a democratic society, falling within the breadth of the margin of appreciation afforded to the respondent State.⁴³⁹

The two dissenting judges, Nussberger and Jäderblom, observed that the core of the wish to protect people against encounters with others wearing full-face veils was a threat not only to “social interaction”, but also to a subjective “feeling of safety”. However, those fears and

⁴³⁴ *S.A.S. v France* [GCH], *supra* note 335, para. 119.

⁴³⁵ *Ibid*, paras. 116-122.

⁴³⁶ *Ahmet Arslan v. Turkey*, *supra* note 371.

⁴³⁷ *S.A.S. v France* [GCH], *supra* note 335, paras. 136 and 151.

⁴³⁸ *Ibid*, paras. 117, 121-122, 140

⁴³⁹ *Ibid*, paras. 153-159

feelings of uneasiness, as concluded, stemmed not from the veil itself, which – unlike perhaps certain other dress-codes – cannot be perceived as aggressive *per se*, but by the philosophy that is presumed to be linked to it.⁴⁴⁰ They also drew attention to the far-fetched and vague concept of “living together” which did not fall directly under any of the rights and freedoms guaranteed within the Convention.⁴⁴¹ Reference was made to the majority’s failure to clarify which concrete rights of others derived from the abstract principle of “living together” or from the “minimum requirements of life in society”. While acknowledging that “living together” requires the possibility of interpersonal exchange and that the face plays an important role in human interaction, Judges Nussberger and Jäderblom objected to the conclusion that human interaction is impossible if the full face is not shown. They also argued against an individual right to enter into contact with other people against their will since such a right would have to be accompanied by a corresponding obligation, which would be incompatible with the spirit of the Convention. While communication is admittedly essential for life in society, the right to respect for private life, as stressed, also comprises the right not to communicate and not to enter into contact with others in public places; in other words, the right to be an outsider.⁴⁴² Thus, as put by Judges Nussberger and Jäderblom, the majority decision sacrificed concrete individual rights guaranteed by the Convention to the abstract principle of “living together” or the “minimum requirements of life in society”.⁴⁴³

It is equally important to reiterate that while dismissing the gender equality argument, the Court took into account the fact that proportion of women who were affected by the ban was relatively small in relation to the French population in total. The number of those who choose to abide by the practice seems even more relevant with respect to the possibility of open interpersonal relationships that forms an indispensable element of community life within the society. Nevertheless, the same observation was not taken into account in the determination of the validity of the “living together” principle.

The Court did refer to a more progressive approach to limitations on the freedom to manifest a religion or belief for the purpose of protecting morals adopted by the HRC, but never followed it: “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of

⁴⁴⁰ *S.A.S. v France* [GCH], *supra* note 335, Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, para. 6

⁴⁴¹ *Ibid*, para. 5.

⁴⁴² *Ibid*, paras. 8-10

⁴⁴³ *Ibid*, para. 2

protecting morals must be based on principles not deriving exclusively from a single tradition.”⁴⁴⁴ On the contrary, the restrictive approach was adopted by the Court in two more cases against Belgium which were largely similar to the *S.A.S.*⁴⁴⁵ In *Dakir v. Belgium* (2017), the Court reiterated that the ban on the full-face veil under the municipal by-laws served the concern to ensure the observance of the minimum requirements of life in society as an element of the “protection of the rights and freedoms of others” and that the impugned ban could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of the “living together”.⁴⁴⁶ Building on the opinion of the dissenting judges in *S.A.S.*, Judge Spano further referred in his concurring opinion to the close conceptual ties between the “living together” principle and majoritarianism. The aim invoked was stressed to have derived from the ideological basis associated with the societal consensus or a majoritarian morality of how individuals should act in the public space. Therefore, they disapproved of the adoption of an aim that is in fact based on a majority’s general opinion of what is suitable and right as the basis of justifiable restrictions of Convention rights in a democratic society.⁴⁴⁷ The issue is particularly concerning considering that the Court has been established as a guardian against totalitarianism in Europe by means of the Convention - designated for the protection of liberal, egalitarian principles - including via objecting to any form of cultural subjugation and intolerance. Thus, instead of upholding the ban on arguably “misconceived” subsidiarity of the Convention and the doctrine of wide margin of appreciation, the Strasbourg Court could have aligned itself with the above-mentioned progressive, less restrictive position of the Human Rights Committee and contributed to promoting the rights of women in particular, and minority groups in general, in the absence of an actual negative impact on the majority.⁴⁴⁸ Instead, the Court chose the path which has a dangerous potential of legalising “cultural genocide” by majority against national ethnic minorities or emigrant populations, which is why it is necessary that the findings regarding the demands of living together are set aside by the Grand Chamber at the earliest opportunity.”⁴⁴⁹

⁴⁴⁴ Human Rights Committee, *supra* note 320, para 8. Yusuf, *supra* note 431, p. 288.

⁴⁴⁵ *Dakir v. Belgium*, (App. 4619/12), 11 July 2017; *Belcacemi and Oussar v. Belgium*, (App. 37798/13), 11 July 2017.

⁴⁴⁶ *Ibid*, para. 51.

⁴⁴⁷ *Ibid*, Concurring Opinion of Judge Spano Joined by Judge Karakas, paras. 4-7.

⁴⁴⁸ Yusuf, *supra* note 431, p. 288-290; See *Ibid*, pp. 292 -296 on one of the possible consequences, namely the legalisation and validation of repression and forced assimilation., of the decision in *S.A.S. v France* [GCH] and of the new “living together” jurisprudence of the Strasbourg Court.

⁴⁴⁹ Yusuf, *supra* note 431, p. 299.

Apparently, after the Court had to reject the gender equality argument, the abstract “principles” – the demands of “living together” or “respect for the minimum requirements of life in society” – were nevertheless admitted to the scope of legitimate aims in upholding the ban on the headscarves. Accordingly, the scope of the aim of “protection of rights and freedoms of others” was expanded beyond its ordinary meaning by accepting that it encompasses even such a vague notion as the “respect for the minimum requirements of life in society”.⁴⁵⁰ By characterising the headscarves as contrary thereto, the majority were seemingly driven by their general opinion of what is suitable and right as the basis of justifiable restrictions of the Convention. They thereby supported the majoritarian morality of how individuals should act in the public space and contributed to the philosophy which has been linked to veils and which triggers fears and feelings of uneasiness.

4.3.3 Religious symbols as a political tool?

In addition to the arguments concerning gender equality and the demands of social interaction, both the Chamber (2004) and the Grand Chamber (2005) in *Leyla Şahin* equated the headscarf with political extremism when discussing secularism.⁴⁵¹ While examining the historical background, the Chamber noted that the wearing of the Islamic headscarf in school and university was a recent phenomenon in Turkey and it was the subject of lively debate. According to the historical review, unlike those who were in favour of the headscarf and saw it as a duty and/or form of expression linked to religious identity, others regarded it as a symbol of a political Islam that was seeking to establish a regime based on religious precepts. The debate was said to have been fuelled with strong political overtones as a result of accession to power of a coalition government comprising the Islamist political party, which was perceived in Turkish society as a genuine threat to republican values and civil peace. Based on the situation in Turkey and the reasoning of the Turkish courts, the Court concluded that the Islamic headscarf had become a sign that was regularly appropriated by religious fundamentalist movements for political ends.⁴⁵²

Especially because Islamic headscarves had taken on political significance in Turkey in recent years, imposing limitations on freedom in this sphere was regarded as meeting a pressing social

⁴⁵⁰ Dijk et al., *supra* note 48, p. 760.

⁴⁵¹ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, paras. 107-109 and para. 115; Brems (Ed.), *supra* note 32, p. 204.

⁴⁵² *Ibid*, paras. 35 and 93.

need by seeking to achieve the legitimate aims of the protection of the “rights and freedoms of others” and the “maintenance of public order”. Accordingly, the regulations concerned were viewed as a measure intended to achieve these legitimate aims, taking into account the context involving extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.⁴⁵³ Reference was also made to the Court’s previous finding that “in a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention.”⁴⁵⁴

As summarised by the dissenting Judge Tulkens, it was the threat posed by extremist political movements - seeking to impose on society their religious symbols and conception of a society founded on religious precepts - which, in the Court’s view, served to justify the regulations in issue in the name of ensuring pluralism in universities. Her criticism concerned the association of the mere wearing of the headscarf with fundamentalism and failure of the Court to distinguish between those who wear the headscarf and “extremists” who seek to impose the headscarf as they do other religious symbols. She drew the majority’s attention to the fact that not all women who wear the headscarf are fundamentalists and there was nothing to suggest that the applicant held fundamentalist views. Nor did the judgment provide any concrete example of the type of the pressure concerned. She therefore concluded that the applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol could not be wholly absorbed by the public interest in fighting extremism.⁴⁵⁵ Moreover, the reference to political overtones seems equally hard to be reconciled with the Court’s well-established case law on the duty of neutrality and impartiality: “the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed...”⁴⁵⁶ Moreover, as later noted by the Court in *İzzettin Doğan and Others v. Turkey*, (2016), the fact that there was a debate within the Alevi community regarding the basic precepts

⁴⁵³ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, paras. 108-109; See also *Dogru v. France*, *supra* note 340, para 66.

⁴⁵⁴ E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 111

⁴⁵⁵ *Ibid*, Dissenting Opinion of Judge Tulkens, para. 10.

⁴⁵⁶ *Hasan and Chaush v. Bulgaria*, *supra* note 345, para. 78; *Refah Partisi (the Welfare Party) and Others* [GC], §91, E.g. *Leyla Şahin v. Turkey* [GC], *supra* note 108, para. 107; *Eweida and others v the UK*, *supra* note 133, para, 81.

of the Alevi faith and the demands of the Alevi community in Turkey was of no relevance to alter the fact that it is a religious community with rights protected by Article 9.⁴⁵⁷ Therefore, what ought to concern the Court in relation to Islamic headscarves is that for those who wear these symbols, they are usually understood as religiously required.⁴⁵⁸

The Court adopted the same approach with respect to Christian religious symbols later on, stating that the display of one or more religious symbols cannot be justified either by the wishes of other parents who want to see a religious form of education in conformity with their convictions or by the need for a compromise with political parties of Christian inspiration.⁴⁵⁹ However, in *Şahin*, there was no actual link established between political movements and the applicant and the interference was justified based on the views of the society deriving from the historical context in Turkey. To make matters worse, the impression that *Şahin* is contextually limited is erroneous considering its influence on later case law of the Court which extended beyond the Turkish contexts to secular and egalitarian States with different backgrounds from that of Turkey's.⁴⁶⁰

5. Conclusion

The purpose of the thesis has been to examine the value-neutrality of the European Court of Human Rights. Having regard to the limited scope of the paper, the analysis has been based on two morally and ethically challenging areas – marriage and religious symbols. In each area, the attempt has been made to scrutinise if the criticism regarding the Court's inconsistency has valid grounds and if the ECtHR's argumentation is indeed fuelled with traditional, conservative, biased, etc. views or prejudices. To that end, Chapter 2 was devoted to the review of the two main stages of the Court's usual way of examining whether there has been a violation or not: determination of the scope and assessment of the limitations. Considering that the institution of marriage raises issues primarily in relation to the scope, while religious symbols is mostly a matter of the justifiable limitations for our purposes, the main substantive chapters examined the areas in the same order.

⁴⁵⁷ *İzzettin Doğan and Others v. Turkey*, (App. 62649/10), 26 April 2016 [GC], para. 134.

⁴⁵⁸ Nussbaum, Martha C., 2012. *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*. Cambridge, MA: Harvard University Press, p. 104.

⁴⁵⁹ *Lautsi and other v Italy* [GC], *supra* note 351, para. 56.

⁴⁶⁰ Brems (ed.), *supra* note 32, p. 207.

Chapter 3. Marriage and the ECtHR Marriage illustrated that, in relation to marriage, the Court indeed deviates from its typically progressive and relatively independent approach to the determination of the scope of the Convention provisions. In examining the protective ambit of Article 12, the ECtHR relies on the traditional concept and historical perception of marriage and family in lieu of upholding a more liberal view - marriage is, above all, a juridical construct in which two individuals lay down the terms and conditions under which they wish to arrange their lives and possessions. Even after more than 30 years since the first case concerning the right to divorce, the Court is still of the view that the individuals cannot enjoy such a right under the Convention. Furthermore, marriage has been treated as a relationship of *ipso facto* superior status in comparison with *de facto* family relationships. The Court, *inter alia*, has allowed the concerns regarding maintaining *de jure*, including clearly doomed, marriages to prevail over a genuine *de facto* family. Thus, the institution of marriage seems to be seen by the Strasbourg Court as an outstanding, almost sacred union.

The review of the case law has also suggested that thus far, the ECtHR has not overcome the heteronormativity-based approach to marriage either. To be more precise, regulation of the access to marriage for the non-conforming people, including at the very least transgender people (who wish to marry the partners of the same gender as their acquired one) or pre-operative transsexuals and homosexuals, has been consistently left to the States' discretion. Post-operative transsexuals, however, have succeeded in acquiring the protection of Article 12 since they manage to fit within the gender binary system by "passing" either as a man or a woman. Notably, currently sixteen Council of Europe Member States have granted same-sex couples access to marriage.⁴⁶¹ Considering that authorisation of some form of civil partnership for same-sex couples by eighteen Member States sufficed for the Court to conclude that the same-sex couples shall be afforded the option of entering into a form of civil union or registered partnership, it seems to be only a matter of time before the Court recognises the right to marry for same-sex couples.⁴⁶²

The right of same-sex couples to second-parent or joint adoption has been equally neglected and left to the regulation of national authorities. Nevertheless, there is an ever-increasing number of States and jurisdictions which fully recognise the right of second-parent and joint adopt of children to same-sex couples. With 20 and 18 States recognising the rights

⁴⁶¹ See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 2019. 13th edition of the flagship publication, *State-Sponsored Homophobia*, authored by Lucas Ramón Mendosm pp. 280-282, available at https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf

⁴⁶² See further analysis on the issue and solutions in Hamilton, *supra* note 144.

respectively,⁴⁶³ hope remains that the traditional concept of family will soon be waived by the Court at least with respect to the right to second-parent or joint adoption of same-sex couples. In summary, with regard to Article 12, the only significant development since 1986⁴⁶⁴ is that the right to marry guaranteed by the Article refers to the traditional marriage between persons of both opposite biological and opposite acquired sex.

Criticism regarding the Court's inconsistency holds true also for the second stage of examination of the interference in several ways, even if the ECtHR has never followed strictly established criteria outside the areas in question. First and foremost, the Court accepts mere interests or purely traditional views as legitimate interests and, without proper proportionality assessment, allows them to prevail over real rights, even if such interests have otherwise been rejected for being unsubstantiated. Additionally, it has adopted a relatively strict approach to the criterion of common European ground and regarded emerging and rapid tendencies towards certain issues relating to marriage as insufficient for ruling in the applicants' favour. Furthermore, if concerning other areas the lack of common European ground has been relied on to defer to the national authorities, in relation to marriage the same decision has been made regardless of the clear consensus between the States. Consequently, the sensitive religious, ethical or moral nature of the issue has been determinant for the Court in establishing the width of the margin of appreciation concerning marriage.

Chapter 4. Religious symbols and the ECtHR was concerned with the assessment of the Court's value-neutrality in relation to religious symbols. It has been demonstrated that restrictions on religious symbols in educational institutions, and even more so in other public spaces, have been justified by virtue of an abstract and general approach to secularism. The foundation of the approach has been a subjective test which prioritises potential perceptions and doubts of the users of public services as to the impartiality of the service even in the absence of actual threat thereto. The emphasis on this subjective dimension for the determination of the impartial image of public services diverges from the tendency of the Court to rely on objective criteria in the assessment of legitimate concerns as to the neutrality and impartiality: it is not the standpoint and perceptions of a single individual that is decisive, but whether the doubts can be objectively justified or if an objective observer would have a cause for concern. The negative aspect of freedom of religion – the principle of secularism protects individuals not

⁴⁶³ ILGA, 2019. *Sexual Orientation Laws in the World*, pp. 297-298 and 291-292 respectively. https://ilga.org/downloads/ILGA_Sexual_Orientation_Laws_Map_2019.pdf

⁴⁶⁴ *Christine Goodwin v. the UK* [GC], *supra* note 46.

only against arbitrary interference by the State but also against external pressure – has been used as another useful means of stretching the restrictions as applying to the users of public services, albeit the absence of public official status.

Some religious symbols, namely Islamic headscarves, have been classified by the Court also as a powerful external symbol, having some kind of proselytising effect. It has been done so even without any attempt of proselytism by the individual concerned and irrespective of explicit recognition that it was difficult to assess the general impact of the wearing of a headscarf on very young children. Thus, the Court has created a presumption of indoctrination for the Islamic headscarves when worn by teachers or students, either in schools or universities, even though there was a clear common European ground against the ban in the latter context.

The Court used to utilise higher threshold for determining indoctrination in cases relating to the indoctrination of school pupils by the State. However, the threshold of indoctrination has become very low in recent cases which works clearly against the individual who wants to manifest a religion in a certain way. The Court's well-established case law also clarified that the role of the authorities is not to remove the cause of tension by eliminating pluralism, but to harmonise the principles of secularism, equality and liberty so as to ensure that the competing groups tolerate each other. Nevertheless, in upholding the ban on certain religious symbols due to presumptions, the Court has actually weighed one interest – secularism, against the others – liberty and equality leading to “illiberal secularism” or “wrong-headed” approach “in disordered retreat in the face of political pressure”.⁴⁶⁵

Besides the threats to neutrality of the public service and some proselytising effect, the Court has had recourse to certain peculiarities of religious symbols as a basis for upholding their restriction which, however, are difficult to be linked with the legitimate aims of the relevant Convention provision. Indeed, the Court has always accepted a wide range of interests as legitimate aims as long as they fit into one of the aims expressly mentioned in the Convention. Moreover, in other areas the Court has refused to accept objectives that clearly reflect gender stereotypes, derive purely from tradition, are expressive of discrimination or prejudice or reflect biased assumptions or prevailing social prejudice in a particular country. While behind characterising Islamic headscarves as contrary to gender equality (which was eventually

⁴⁶⁵ As cited in Andreescu, Liviu & Andreescu, Gabriel, 2012. “Passive/Aggressive Symbols in the Public School: Religious Displays in the Council of Europe and the United States, with a Special Focus on Romania” in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, J. Temperman (ed.), pp. 267-300, at. 267, footnote 2.

rejected), a barrier to social interaction or a political tool, dominant factors have been societal assumptions, prejudices and fears even if these fears and feelings of uneasiness were not ascribed to the veil itself, but to the philosophy that is presumed to be linked thereto. Thus, majoritarian morality of how individuals should act in the public space has prevailed in the assessment of justifiable restrictions of Convention rights.

Perhaps most regrettably, the analysis has disclosed that the Court has, whether deliberately or inadvertently, accorded more favourable treatment to Christian symbols than non-Christian manifestations. The display of Christian crucifixes in a public school has been viewed by the Court as an essentially passive religious manifestation based on the objective criterion which requires applicants to show either the development of proselytising tendencies in the school or evidence of their general proselytising effect. By contrast, the subjective criterion, which has been used to decide on the non-Christian symbols, does not require the translation of general principles into more concrete considerations or real encroachment on the interests of others. Therefore, abstract principles, assumptions or ideals have been sufficient for the Court to attach a relatively proselytising effect to non-Christian symbols even without any attempt of proselytism and irrespective of the inability to make a general assessment as to the impact that these symbols might have on the freedom of conscience and religion of others. By the same token, if the display of Christian religious symbols were not justified due to a real connection with a political party of Christian inspiration, the restriction on Islamic headscarves was justified without an actual link between political movements and the applicant, based on the historical considerations.

Hence, the obscurity around the Court's value-neutrality can be answered in the affirmative: with respect to the institution of marriage and religious symbols, the ECtHR deviates from its traditional ways of case examination. In this regard, instead of adopting a typically progressive interpretation of the scope of marriage, the Court has been relatively appreciative of the States' primary responsibility to regulate the areas in question. In a similar vein, permissible limitations have been examined relatively superficially, resting on more abstract and theoretical principles, presumptions, attitudes or prejudices in lieu of real, valid claims.

It might be argued that unlike the ECHR, the HRC has been able to adopt a more progressive approach on account of the fact that its decisions are not actually enforceable and it is, thus, not necessarily wary of how its decisions will be received by the States.⁴⁶⁶ By contrast, if the

⁴⁶⁶ Keller & Stone Sweet, *supra* note 2, pp. 13-14.

Strasbourg Court were to force their views on all 47 countries, this could lead to a political backlash and could mean some governments threatened to leave the Council of Europe, especially considering the debates regarding the Court's subsidiary role.⁴⁶⁷ Be that as it may, the issue in question has not been to argue for or against the Court's margin of appreciation doctrine, historical considerations, the analysis of European consensus, more expanded role, etc.⁴⁶⁸ These are the topics of another discussion. It is also true that the Court cannot avoid that for some commentators the case law of the Court may seem too conservative and for others too liberal. However, the bottom line is that the European Court of Human Rights must remain faithful to the Convention standards.⁴⁶⁹ To that end, value-neutrality, and even more so consistent reliance thereon, is strictly necessary to avoid further contribution to a largely conservative climate and exacerbation of the pervasive conservative, biased or prejudicial societal views towards certain acts or practices. It is equally necessary for maintaining the Court's authoritative image that has thus far been gained since the lack of clarity and inconsistency hinders the implementation of the Convention standards by other Member States; only sufficiently clear and transparent reasoning is likely to be adopted by domestic decision-making authorities.⁴⁷⁰

⁴⁶⁷ Wintemute, Robert: "Consensus is the right approach for the European court of human rights." *The Guardian*, 12 August 2010, available at <https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus>. For a comparative discussion of the levels and nature of reception of the Strasbourg General on Court's jurisprudence and authority.

⁴⁶⁸ See, e.g., Henrard, Kristin, 2012. "A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision", *The Yearbook of Polar Law Online*, volume 4, issue 1, pp. 365-413.

⁴⁶⁹ Laffranque, Julia, 2017. "A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom", *Juridica International*, pp. 34-46, at 36

⁴⁷⁰ Janneke Gerards, 2013. "How to improve the necessity test of the European Court of Human Rights", *International Journal of Constitutional Law*, volume 11, issue 2, pp. 466-490, at 468.

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