

9-1-2006

## Church-State Relations in the European Court of Human Rights

Carolyn Evans

Christopher A. Thomas

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Courts Commons](#), [European Law Commons](#), [Human Rights Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Carolyn Evans and Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. Rev. 699 (2006).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2006/iss3/4>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## Church-State Relations in the European Court of Human Rights

*Carolyn Evans\* and Christopher A. Thomas\*\**

### I. INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>1</sup> does not deal directly with the relationship between church and state in European countries. In this respect, the ECHR is like most other international human rights treaties that, to the extent that they deal with religion, emphasize religious freedom and nondiscrimination on the basis of religion.<sup>2</sup> Unlike some domestic constitutions, these treaties do not require a particular degree of separation or attachment between religions and the state and they do not explicitly prohibit establishment.<sup>3</sup> The ECHR does, however, indirectly regulate the permissible forms of relationship between religious institutions and the state by reference to religious freedom. This article explores the ways in which the requirements of religious freedom in the ECHR permit certain types of relationships between Church and State (including some that would be impermissible in countries such as the United States) but also restricts the scope of permissible relations.

---

\* Deputy Director, Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne.

\*\* Research Assistant, Parliaments and Human Rights Project, Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne.

1. Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter ECHR].

2. See African (Banjul) Charter on Human and Peoples' Rights art. 8, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); Final Act of the Conference on Security and Co-operation in Europe § 1(a)(VII), Aug. 1, 1975, 14 I.L.M. 1292; International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; American Convention on Human Rights art. 12, Nov. 22, 1969, O.A.S. 36, 1144 U.N.T.S. 123; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/RES/217A (III) (Dec. 10, 1948) [hereinafter Universal Declaration].

3. For an argument that a combination of articles 9 and 14 of the ECHR requires State neutrality between religions, see Kyriakos N. Kyriazopoulos, *The "Prevailing Religion" in Greece: Its Meaning and Implications*, 43 J. CHURCH & ST. 511 (2001).

The focus of the European Court of Human Rights (“the Court”) with regard to religion is summarized in a passage that it used in the case of *Kokkinakis v. Greece* and has repeated in every major religious freedom case since:

[F]reedom of thought, conscience and religion is one of the foundations of a “democratic society” . . . It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset to atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>4</sup>

These words are at the heart of the European approach to religious freedom cases brought under the ECHR. The passage acknowledges the importance of religious freedom to society but does not deal in any detail with the precise nature of the relationship between church and state except to say that religious freedom, rather than religion itself, is a “foundation” of a democratic society and indissociable from pluralism.<sup>5</sup> The state itself, therefore, must be democratic and pluralistic in order to fit within the requirements of the ECHR,<sup>6</sup> and it must respect religious freedom, but within those boundaries, there is no requirement or prohibition of establishment between church and state.<sup>7</sup>

Under the ECHR, therefore, when a litigant argues that there is an inappropriate relationship between a religion and the state, the Court does not begin by asking whether a particular law or series of laws is indicative of the establishment of a religion—because this does not answer the question of whether there has been a violation of human rights. Instead, there are several provisions of the ECHR that the Court considers in determining whether the particular aspect of connection between church and state is permissible.

This article provides a discussion of the permissible boundaries of church-state relations within the ECHR. Part II commences by considering the key provisions in the ECHR that potentially impact

---

4. 260-A Eur. Ct. H.R. (ser. A) at 13 (1993) (citing ECHR, *supra* note 1, art. 9).

5. *Id.*

6. See discussion *infra* Part III.B.

7. See Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 209, 217 (Tore Lindholm et al. eds., 2004).

church-state relations. Part III is a discussion of the case law of the Court in relation to the type of benefits that the state can grant to an established church and the degree of control that the state can exercise over it. Part IV analyzes the degree of control over internal religious matters—particularly the appointment of clergy—that the state can exercise over non-established religions. Part V is a conclusion that compares the strengths and weaknesses of a purely religious-freedom focused approach to the relationship between church and state, as allowed by the ECHR, to that of the establishment-oriented case law of countries such as the United States.

## II. KEY PROVISIONS OF THE ECHR

The approach of the European Court of Human Rights to church-state relations relies heavily on its interpretation of key provisions of the ECHR. This section gives a brief background on the ECHR and provides a discussion of the provisions that apply specifically to the relationship between government and religion.

### *A. Purpose of the ECHR*

The European Convention on Human Rights was developed under the auspices of the Council of Europe.<sup>8</sup> The ECHR was signed in Rome on November 4, 1950 and entered into force on September 3, 1953.<sup>9</sup> In addition to furthering human rights, the parties to the ECHR affirmed that working toward “further realisation of human rights and fundamental freedoms” was one of the methods to ensure “greater unity” between the members of the Council of Europe.<sup>10</sup> The ECHR built on the work of the United Nations Universal Declaration of Human Rights (“Universal Declaration”)<sup>11</sup> and replicates the wording of the Universal Declaration in several places. However, while the Universal Declaration included both civil/political rights and social/economic

---

8. The Council of Europe is today a far larger and more inclusive organization than the European Union. It currently has forty-six member states. *See* Council of Europe homepage, <http://www.coe.int/default.asp> (last visited Mar. 23, 2006).

9. ECHR, *supra* note 1.

10. *Id.* at pmbl.

11. *See* Universal Declaration, *supra* note 2.

rights, the ECHR's primary focus was on civil and political rights.<sup>12</sup> Over the years, the ECHR has been supplemented by a series of protocols that serve as amendments to the ECHR for members who are signatories to each protocol.<sup>13</sup>

One of the key differences between the earlier United Nations work on human rights and the ECHR was that the ECHR was to be given legal force and some degree of enforcement. In recent years, since Protocol 11 came into effect, all cases are heard by the Court and all states that ratify the ECHR agree to the Court's jurisdiction over human rights cases.<sup>14</sup> Prior to Protocol 11 coming into effect, cases were dealt with by a European Commission on Human Rights ("Commission") before they reached the Court. The Commission acted as a filter for unmeritorious cases and effectively as a court of first instance.<sup>15</sup>

The ECHR places an obligation on all parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the ECHR]."<sup>16</sup> The role of the Court is merely to help "ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention."<sup>17</sup> The jurisprudence of the Court over the last five decades, however, has provided a useful insight into the way in which obligations in the ECHR should be understood and applied. The wording of the obligations, including those on freedom of religion or belief, tends to be wide. The Court can usefully serve the purpose of developing case law that will then be influential in the law and practice of parties.

---

12. These civil/political rights include the right to life, ECHR, *supra* note 1, art. 2, freedom from torture, *id.* art. 3, freedom from slavery, *id.* art. 4, the right to privacy, *id.* art. 8, freedom of religion or belief, *id.* art. 9, freedom of expression, *id.* art. 10, and the rights of free association and assembly, *id.* art. 11.

13. The effect of these Protocols has been to expand the scope of rights in the Convention (e.g., the First Protocol) or to change the structure and mechanisms used to enforce rights (e.g., Protocol 11).

14. Protocol 11 of the European Convention on Human Rights and Fundamental Freedoms (ETS No. 155) entered into force November 1, 1998. The effect of Protocol 11 was to abolish the Commission and establish in its place different levels of the Court—which may hear a case in Committee, Chamber, or Grand Chamber. Under Article 28, as amended by Protocol 11, a Committee of the Court (constituted of three judges) may declare a case inadmissible—a role undertaken by the Commission before its abolition.

15. The Commission was established in the original Article 19(1) of the ECHR and its functions outlined in articles 20–37. ECHR, *supra* note 1, arts. 19(1), 20–37.

16. *Id.* art. 1.

17. *Id.* art. 19.

*B. Provisions of the ECHR Dealing with Religion*

There are three key provisions of the ECHR that deal with religion. Article 9 provides the basic framework for freedom of religion, Article 14 ensures that ECHR-acknowledged rights should be free from religious discrimination, and Article 2 of the first Protocol gives parents the right to regulate the religious education of their children.

The first and most central is Article 9, which declares:

1. 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.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>18</sup>

The second is Article 14, which ensures that “[t]he 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.”<sup>19</sup> It is important in the context of nondiscrimination to note that, unlike many other international conventions such as the ICCPR,<sup>20</sup> the ECHR only prohibits discrimination in regards to ECHR-acknowledged rights and does not include a general provision requiring the equality of all people before the law. The absence of a general nondiscrimination provision in the main body of the ECHR has a significant legal effect in church-state cases.<sup>21</sup>

---

18. *Id.* art. 9.

19. *Id.* art. 14.

20. Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Feb. 14, 2006). The ICCPR places an obligation on the large number of parties to it to protect a variety of civil and political rights. *See* ICCPR, *supra* note 2, art. 25. Its enforcement mechanisms, however, are weaker than those of the ECHR.

21. *See infra* Part III.B.

Despite this absence, there has been some movement in the area of nondiscrimination in this context. Article 1 of Protocol 12 to the ECHR requires the enjoyment of legal rights to be “secured without discrimination” on a number of grounds, including religion.<sup>22</sup> Protocol 12 does not limit nondiscrimination protection to the rights set out in the ECHR and thus potentially represents a significant step forward for the equal treatment of religion. At present, however, participation in this Protocol is relatively low and does not include many of the larger and more powerful European states; only eleven of the forty-six Member States have ratified the Protocol.<sup>23</sup>

Finally, Article 2 of the first Protocol to the ECHR, concerning the right to education, stipulates that “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>24</sup> While this provision will not be dealt with in depth here, it is important to recognize its significance in the area of church-state relations. Allowing parents to retain control over the religious teachings to which the children are exposed is a substantial protection from state indoctrination or a requirement of adherence to the state preferred religion in schools. Even if the provision is not always interpreted with as much sensitivity to minority viewpoints as might be appropriate in a human rights convention that is supposed to protect the rights of vulnerable minorities, it does limit the potential for state indoctrination of some of the more vulnerable members of society.<sup>25</sup>

There are a number of other important provisions in the ECHR that are relevant to the church-state relationship. These include

---

22. ECHR, *supra* note 1, Protocol 12, art. 1. See Charlotte McCafferty, *General Prohibition of Discrimination—The New Protocol to the Human Rights Convention*, INT’L FAM. L. 78 (2001); Gay Moon & Robin Allen, *Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and Their Implications*, 6 EUR. HUM. RTS. L. REV. 580, 595–96 (2000).

23. Council of Europe, Legal Affairs, Treaty Office, Reservations and Declarations Made, <http://conventions.coe.int/Treaty/EN/v3MenuDecl.asp> (last visited Mar. 23, 2006). The states that have ratified are Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, the Netherlands, San Marino, Serbia and Montenegro, and the former Yugoslav Republic of Macedonia. *Id.*

24. ECHR, *supra* note 1, Protocol 1, art. 2.

25. See *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 126 (1976) (permitting religious studies taught in schools to focus on the dominant religion with little explanation of how to do this in a manner that is objective and neutral). This issue is discussed further *infra* note 74 and accompanying text.

freedom of expression,<sup>26</sup> privacy,<sup>27</sup> assembly,<sup>28</sup> and marriage.<sup>29</sup> In most religion cases, however, the Court treats the religion-specific provisions outlined above as the *lex specialis*—the law that is most appropriate to the particular legal problem—and tends to focus on those “provisions.” Conversely, it often refuses to discuss the religious freedom issues in cases where it holds that another provision of the ECHR is the most relevant provision, even when the parties also argue that there has been a violation of Article 9.<sup>30</sup>

### III. THE STATE AND THE ESTABLISHED CHURCH

Due to the wide variance in church-state relationships across Europe, there are several models for church-state relations within the region. This section discusses the dimensions of the relationship between established religions and state governments in terms of boundaries on establishment, accepted forms of state support for religion, the test for permissible discrimination laws, and state intervention in the affairs of established churches.

The Council of Europe has forty-six state members<sup>31</sup> and the relationships between church and state differ significantly across the region, from a strict separation and secularity to an official, established church.<sup>32</sup> Some members of the Council of Europe include secularism as one of their fundamental constitutional values. Turkey’s constitution, for example, includes in Article 2 a description of Turkey as a “democratic, secular and social state”<sup>33</sup> and Article 4 makes these basic principles irrevocable.<sup>34</sup> At the other end of the spectrum, the Church of England is the established religion of the

---

26. ECHR, *supra* note 1, art. 10.

27. *Id.* art. 8.

28. *Id.* art. 11.

29. *Id.* art. 12.

30. *See, e.g.*, Rai v. United Kingdom, 81-A Eur. Comm’n H.R. Dec. & Rep. 146 (1995); Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) ¶¶ 63–64 (1986); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

31. *See* The Council of Europe homepage, <http://www.coe.int/Defaulten.asp> (last visited Feb. 22, 2006).

32. *See generally* STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 2d ed. 2005).

33. TURK. CONST. art. 2 (Law No. 2709).

34. *Id.* art. 4.

United Kingdom, even if its power within government has waned in recent years.<sup>35</sup>

*A. The ECHR and Establishment*

The European Commission has held that establishment is not in itself a breach of the ECHR.<sup>36</sup> Establishment is only prohibited to the extent that it implicates one of the other ECHR rights. There are a number of reasons for this. The first is textual—the text of the ECHR does not mention establishment and takes no explicit position on whether it should be permitted. The ECHR was drafted well after other constitutions that required separation of church and state, and the absence of such a provision cannot therefore be attributed to mere oversight.<sup>37</sup> The second reason is historical. At the time that the ECHR was drafted, a number of member states had established churches, including the United Kingdom, Sweden, and Norway. If the ECHR had prohibited establishment, then it is quite possible that significant states would not have ratified the ECHR or would have included substantial reservations to their acceptance. These states included important supporters of the ECHR, such as the United Kingdom, which maintains its established church to this day and would likely oppose any attempts to include establishment as a rights violation.<sup>38</sup> While the number of states with established churches in Europe is decreasing over time, a number of states still maintain elements of establishment. The fact that establishment existed in many member states at the time of the drafting of the ECHR is good evidence that Article 9 should not be interpreted as an absolute prohibition on establishment.<sup>39</sup>

The final reason for holding that Article 9 does not prohibit establishment is that the Court is not convinced that all forms of

---

35. As the United Kingdom does not have a written constitution, this establishment is set out in a variety of documents including, most importantly the Act of Settlement, 12 & 13 Will. 3, c. 2, arts. 1–3 (1701) (Eng.). For further examples of the relationships between church and state in European nations, see CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 19–21 (2001).

36. *Darby v. Sweden*, Eur. Comm'n H.R. Dec. & Rep. ¶ 47 (1989).

37. Such as the U.S. Constitution of 1789 (First Amendment), the Constitution of the Republic of France of 1946 (article 2), and the Turkish Constitution of 1924 (as amended in 1937; now reflected in articles 2 and 24 of the Constitution of the Republic of Turkey of 1982). See also EVANS, *supra* note 35, at 19–21.

38. See discussion and references *infra* note 81.

39. See EVANS, *supra* note 35.

establishment are necessarily incompatible with the rights set out in the ECHR. A country such as the United Kingdom, it might be argued, has a great deal of religious freedom and religious tolerance—more than many secular countries—despite its established church. While establishment certainly presents some dangers to religious freedom, and many states with an established religion have very poor protection of religious freedom,<sup>40</sup> it does not follow that establishment will necessarily lead to the oppression of religious freedom for those who do not belong to the established church.<sup>41</sup>

The Commission summarized the issue in this manner:

A State Church system cannot in itself be considered to violate Article 9 (Art. 9) of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9 (Art. 9), include specific safeguards for the individual's freedom of religion.<sup>42</sup>

The passage both outlines what is permissible—to have an established church—and also the limits of permissibility—when establishment undermines the safeguards on religious freedom.

### *1. Limitations on establishment*

Given the ECHR's requirement to protect the religious freedom of all members of society, even in a state that has an established religion, it is clear that some forms of establishment would not be

---

40. U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2005), available at <http://www.state.gov/g/drl/rls/irf/2005>. The report demonstrates that many States that pursue an anti-religion policy (such as the People's Republic of China, Burma, and Cuba) may also be very problematic when it comes to religious freedom. However, the report also highlights the abuses in countries such as Iran, Saudi Arabia, and Sudan, where the dominant religion has political and legal authority.

41. The danger of establishment to religious minorities should not be overlooked. There are certainly some who take issue with the claim that there can be an establishment that is not harmful to religious freedom. See, e.g., Myres S. McDougal et al., *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination*, 74 MICH. L. REV. 865, 890 (1976). International experts on religious freedom have tended to defend the notion that an established or dominant church is not necessarily a breach of international law, while warning about the serious potential for harm to religious minorities that often exists in societies with established churches. For a useful summary, see Kyriazopoulos, *supra* note 3, at 514–15.

42. *Darby v. Sweden*, Eur. Comm'n H.R. Dec. & Rep. ¶ 45 (1989).

permitted. A theocratic or confessional state would clearly violate Article 9 in a number of ways. Even short of this extreme, there have been a few cases where an established church intruded too far into the lives of non-believers and the Court struck down the law in question.

One example of such a case involved the refusal of several parliamentarians in San Marino to take an oath on the gospels in order to be able to take up their seats.<sup>43</sup> The parliamentarians' religious beliefs precluded them from taking the oath, and the Court found that the law requiring the oaths was an unjustified interference with the religious freedom of the parliamentarians.<sup>44</sup>

Another case demonstrating the limitations on establishment is *Darby v. Sweden*, which involved a requirement that certain non-believers pay a tax for the support of the religious activities of the established church of Sweden.<sup>45</sup> The Commission found that this mandatory religion tax was impermissible. While the sum involved was relatively small and the number of people affected was also limited,<sup>46</sup> the Commission held that the law placed an impermissible burden on belief by forcing someone who was not a member of the church to support the religious elements of that church.<sup>47</sup>

Similarly, members of established religions must be allowed to freely choose to stay within or leave that religion. In the context of proselytism, although the Court did not deal with the issue directly, the claims by the Greek government about the historical and ongoing importance of Greek Orthodoxy to Greece and the desirability of maintaining protection for that church were not accepted as sufficient reasons for the prosecution of a Jehovah's Witness for proselytism.<sup>48</sup> Despite the Greek submissions on the historical importance of the Orthodox Church, the argument was not even

---

43. *Buscarini v. San Marino*, Eur. Ct. H.R. ¶¶ 34–41 (1999).

44. *Id.*

45. *Darby*, Eur. Comm'n H.R. Dec. & Rep. ¶ 45.

46. *Id.* The law applied only to those who were working in Sweden but not residents there. *Id.*

47. *Id.* ¶¶ 50–60; see also P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 547 (3d ed. 1998); T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 316–18 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

48. See *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) ¶¶ 46–50 (1993).

considered by the Court in its reasoning.<sup>49</sup> In a similar fashion, the Court held that other Greek laws that made it difficult for minority religions to establish places of worship without the agreement of the local Metropolitan were in breach of the ECHR.<sup>50</sup> Established religions or religions with a close relationship with the state cannot therefore rely on state laws to maintain followers.

## 2. *Church-state relations in practice: The Refah Partisi case*

Most of the cases that the Court has dealt with have raised relatively minor intrusions by the established church. The case that has forced the Court to deal with issues of the appropriate relationship between churches and states in the most detail is *Refah Partisi (The Welfare Party) v. Turkey*.<sup>51</sup> This case arose out of the dissolution of the Turkish Welfare Party on the basis that it was a center of “activities contrary to the principles of secularism.”<sup>52</sup> While the dissolution was agreed by all parties to be an interference with the right to free association,<sup>53</sup> the Court upheld the dissolution as necessary in a democratic society to protect the rights and freedoms of others.<sup>54</sup> Two of the key rights that the dissolution was said to protect were those of freedom of religion and belief, and nondiscrimination on the basis of religion.

The Court divided the arguments concerning the problematic activities of *Refah* into three categories. These were

- (1) the arguments that *Refah* intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs;
- (2) the arguments that *Refah* intended to apply sharia [or Islamic law] to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and
- (3) the arguments based on the references made by *Refah* members to the possibility of recourse to force as a political method.<sup>55</sup>

---

49. *Id.*

50. *See Manoussakis v. Greece*, 17 Eur. Ct. H.R. (ser. A) ¶ 36 (1996).

51. 35 Eur. H.R. Rep. 3 (2002).

52. *Id.* ¶ 12.

53. *Id.* ¶ 50.

54. *Id.* ¶ 135.

55. *Id.* ¶ 116.

For the purposes of this article, the first two grounds are the most relevant, as violence to achieve a political outcome is clearly problematic whether the motive for such violence is religious or not. The reasoning of the Court as applied to the claims that the Welfare Party would impose sharia<sup>56</sup> and that it would create a plurality of legal systems, however, is relevant to understanding the limits of the permissible relationship between religion and the state.

The Court held that a plurality of legal systems was inimical to the values of the ECHR for two reasons. First, it did “away with the State’s role as guarantor of individual rights and freedoms” since it would require individuals to obey the laws of the religious group rather than the laws of the state.<sup>57</sup> Second, it would “undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedom.”<sup>58</sup> This decision was based on the assumption that the different legal systems would govern “individuals in all fields of public and private law according to their religion.”<sup>59</sup>

While the Court held that plurality of legal systems would lead to this outcome, it is worth noting that the Court did not provide much evidence to support this proposition. This is particularly problematic in light of the Welfare Party’s argument that the religious legal system would not cover all aspects of law.

In many countries where there are plural legal systems or some role for religious courts, individuals still have to obey the central legal authority of the government and the government maintains its role as guarantor of rights.<sup>60</sup> In these cases, religious law primarily operates in the private sphere of marriage and divorce and some contractual law and often adapts to incorporate parts of the indigenous cultural practices.<sup>61</sup> There are undoubtedly problems

---

56. Sharia is defined as the “code of law based on the Koran.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1600 (4th ed. 2000).

57. *Refah Partisi*, 35 Eur. H.R. Rep. ¶ 119.

58. *Id.*

59. *Id.*

60. Section 211 of the Constitution of South Africa of 1996, for example, allows for the repeal or amendment of traditional customary law by legislation. Some countries with plural legal systems, such as South Africa, have a strong legal commitment to the protection of human rights. S. AFR. CONST. 1996 § 211.

61. See SHAHEEN SARDAR ALI, GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? 92–172 (2000); Kathryn Robinson, *Muslim Women’s Political Struggle for Marriage Law Reform*, in MIXED

with such systems. Issues of possible discrimination arise when people have to be assigned to a particular religious group, although, again, most states that operate with plural legal systems do maintain a secular system for disputes between people from different religions or for people with no religious affiliation. This type of system is often also problematic for women's rights.<sup>62</sup> Even if the Court were correct that ultimately such systems do raise too many problems for equal treatment before the law, the Court could have at least demonstrated greater awareness of the operation of such systems in practice, and particularly the way in which such systems try to allow for the very plurality that the Court said is at the heart of a democratic society.

Nonetheless, this aspect of the decision illuminates one characteristic of the permissible relationship between religion and the state. The adoption of a state religion does not necessarily lead to discrimination between members of the dominant religion and those of other religions, but it will be subject to particular scrutiny. Different legal systems for different religious groups will be deeply suspect, and perhaps even impermissible, under the ECHR, and the state is limited in its capacity to arrange the legal system to introduce elements of religious law.

The Court also had a second reason based on religious law for upholding the dissolution of the Welfare Party: that the party would introduce sharia if put in power. The Court held that sharia "faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it."<sup>63</sup> The introduction of sharia thus cannot be reconciled with "the fundamental principles of democracy, as conceived in the Convention taken as a whole."<sup>64</sup> The Court held that sharia also offends the rights in the ECHR with respect to criminal law and procedure, the status of women, and the way that sharia intervenes in "all spheres of private and public life."<sup>65</sup> No evidence or authority was given for these propositions other than the rulings from the

---

BLESSINGS: LAW, RELIGIONS AND WOMEN'S RIGHTS IN THE ASIA-PACIFIC REGION (Amanda Whiting & Carolyn Evans eds., 2006).

62. Some of these problems can be mitigated by legislation. *See, e.g.*, The Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986 (India).

63. *Refah Partisi*, 35 Eur. H.R. Rep. ¶ 123.

64. *Id.*

65. *Id.*

Constitutional Court of Turkey. Again, no attempt was made by the European Court to consider the wide range of writing about the compatibility of Islam and human rights, for example with respect to the rights of women.<sup>66</sup>

The Court did not consider the varied operation of sharia in the different Muslim countries where it can apply in ways that adapt the law to the local customs and sometimes to contemporary notions of justice. Additionally, the Court ignored the notion of *ijihad* (Islamic legal reasoning) that many more progressive Muslims see as a way of injecting a dynamic element into sharia.<sup>67</sup>

Despite these weaknesses in the judgment, this passage also sheds light on the scope of permissible church-state relationships. Under the *Refah* ruling, laws that are incompatible with human rights are not protected from invalidity under the ECHR simply because they are based on religious teaching. Given that the teachings of many religions include doctrines that are incompatible with human rights, such as teachings regarding the equality of women or freedom of religion, this requirement makes it difficult to transform a legal system so that it is fully compliant with religious teachings. It excludes a theocratic state where religious law is adopted and precludes any legal system where divine mandate means that some or all laws are considered beyond challenge. While the Court gives some protection for the milder forms of establishment that existed in Europe at the time that the Convention came into force, a more thoroughly theocratic regime—whereby all laws have to comply with religious doctrine, including doctrine that is inconsistent with human rights—would clearly be invalid according to the *Refah* judgment.

---

66. For a variety of views that demonstrate the complexity of this area, see generally SARDAR ALI, *supra* note 61; Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIGION 105 (1995–96); Bahia Tahzib-Lie, *Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief*, 2000 BYU L. REV. 967.

67. *Ijihad* is “independent reasoning and judgment in legal matters.” Nazila Ghanea, *Apostasy and Freedom to Change Religion or Belief*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK, *supra* note 7, at 669, 685. The leading proponent of this school of thought, and one of the most progressive scholars to suggest *ijitihad* to bring human rights law and sharia closer together, is Abdullahi Ahmed An-Na'im. See generally ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION, CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990); Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13 (1990).

This case therefore demonstrates that establishment of a religion must not have a profound effect on the political and legal system of a country. Parties to the ECHR must remain democratic and respectful of pluralism, and freedom of religion must be respected.

*B. Permissible Scope of State Support for Religion*

Given the requirement that the relationship between a particular religion and the state must be such that it does not breach the religious freedom of others, what then can a state do to promote or protect a particular religion or religions without breaching the ECHR? This section discusses two permissible ways in which the state may lend its support to religions: finance and education.

*1. State-sponsored financial assistance for religions*

The first, and arguably most important, area in which the state can lend its assistance to a particular religion is that of financing. Funding one or more religions does not directly interfere with the religious freedom of other believers and has been permitted by the Court even where this means that a particular religion receives significantly more funding from the state than some or all other religions.<sup>68</sup> An established religion may even be vested with certain secular functions—such as maintaining birth and death registers or responsibility for burial sites—and be recompensed by the state for doing so. All members of the community and not just those of the state religion may be directly taxed to support these secular state functions,<sup>69</sup> even though the Commission held in the same decision that non-believers could not be taxed for the religious functions of a church. Both the money raised by the religious group from these activities and the prestige that such secular activities bestow upon the established religion may play an important part in underpinning the central social role played by the established religious group. Further, such differentiation between that religion and other groups may play a subtle role in increasing the attractiveness of the dominant religion at the expense of other religious groups.

---

68. *Iglesia Bautista “El Salvador” v. Spain*, 72 Eur. Comm’n H.R. Dec. & Rep. 256 (1992).

69. *See generally* *Lundberg v. Sweden* (Admissibility), Eur. Ct. H.R. (2001); *Darby v. Sweden*, Eur. Comm’n H.R. Dec. & Rep. (1989).

The state may also assist one or more churches by allowing them to collect financial support from their members through a compulsory taxation system.<sup>70</sup> In such a system, believers who are registered members of a particular religious group will pay additional taxation through the general taxation system and this additional taxation goes to the religious group of which they are a member. This can give considerable financial advantages to religions that benefit from the scheme. Unlike most voluntary organizations, religions that employ a compulsory tax are able to require their members to register their affiliation with the government—an intrusion into privacy that the Court views with surprising equanimity—and thereafter benefit from the dues of the members until they formally leave the church and inform the government of their change of religion.<sup>71</sup>

## 2. *State-sponsored educational assistance for religions*

Another area in which support may be given by the state to a particular religion or chosen religions is education. The state is not obliged to fund any religious schools, but may choose to do so. Further, the state is not required to distribute the funding equally to schools representing different religions or beliefs. Most states in Europe not only fund schools from a particular denomination, but some religions receive greater funding from the state than others,<sup>72</sup> and certain types of beliefs are excluded from funding altogether in some states.<sup>73</sup>

Further, religious education may be taught within non-denomination state schools. The Court has put restrictions on such teaching:

The second sentence of Article 2 (P1-2) implies . . . that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination

---

70. *Darby*, Eur. Comm'n H.R. Dec. & Rep. ¶ 38; *E. & G.R. v. Austria*, 37 Eur. Comm'n H.R. Dec. & Rep. 42 (1984).

71. *See* EVANS, *supra* note 35, at 81–82.

72. *Id.* at 83.

73. *See, e.g.*, *X & Y v. United Kingdom*, 31 Eur. Comm'n H.R. Dec. & Rep. 210 (1982); *X v. United Kingdom*, 14 Eur. Comm'n H.R. Dec. & Rep. 179, 180 (1978).

that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.<sup>74</sup>

However, the Court has accepted that religious education may predominantly, if not exclusively, focus on Christianity<sup>75</sup> and has only given the vaguest warning about the possibility of such classes slipping into proselytizing. The Court has placed great faith in students being excused from religion classes that offend the religious beliefs of the parents or children without considering the pressures that such exclusion can place on children.<sup>76</sup> The Court also refused relief in a case where a Polish student claimed that she faced employment and social discrimination because her school record showed that she had refused to participate in a Catholic education class.<sup>77</sup> Thus, the state has relatively wide discretion when it comes to what religions are to be taught in schools; this has the potential to be used to shore up the dominant religion.<sup>78</sup>

### *C. The Role of Discrimination Laws*

One of the reasons the Court has permitted the state to provide support to religions in areas such as finance and education, even though not all religions benefit equally from such arrangements, is because of the limited scope of the discrimination provision in the ECHR. As referred to earlier, discrimination on the basis of religion is prohibited only with respect to ECHR rights. So if members of one religion were allowed to assemble for religious parades while members of another religion were not permitted to do so, then the state would need to show that there were objective and reasonable grounds for this discrimination, such as the fact that one group was involved previously in violence during parades. This is because the right to freedom of assembly is a protected right under the ECHR.<sup>79</sup> However, as no group is entitled *as of right* to funding of particular

---

74. Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) 126, ¶ 53 (1976).

75. Angeleni v. Sweden, 51 Eur. Comm'n H.R. Dec. & Rep. 41, 49 (1986).

76. See EVANS, *supra* note 35, at 94-95.

77. CJ, JJ & EJ v. Poland, 84-A Eur. Comm'n H.R. Dec. & Rep. 46 (1996); see also EVANS, *supra* note 35, at 95-96.

78. For a discussion on Article 2 of the First Protocol in the religious freedom context, see MALCOLM EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 342-62 (1997).

79. ECHR, *supra* note 1, art. 11.

types, the discrimination requirement does not extend to the provision of funding or some other elements of state churches—presumably including the presence of a disproportionate number of Church of England bishops in the House of Lords or the requirement that the monarch of a country be of a particular religion.<sup>80</sup> No one has an ECHR right to be king.

If there is discrimination on the basis of an ECHR right, the discriminatory law may be permissible if there is an objective and reasonable basis for the distinction.<sup>81</sup> Thus, even where Article 14 could arguably extend to find discrimination on the basis of religion that interfered with the right to freedom of religion, the Court has often taken a deferential view to state claims that distinctions between religions are justified. In Spain, for example, the state gave the Catholic Church tax exemptions on property used for worship but refused similar relief to Protestant Churches.<sup>82</sup> The Commission held that this was not a breach of Article 14 because there is no ECHR entitlement to tax-free status.<sup>83</sup> Furthermore, even if it were discrimination for ECHR purposes, there were “objective and reasonable grounds” for the distinction.<sup>84</sup> Spain had entered into a concordant with the Catholic Church that placed some obligations on the Church, such as the maintenance of certain historical places and objects, in return for privileges. According to the Court, this agreement—which was not extended to other religions—was sufficient to justify the discrimination between the Catholic Church and other religions.<sup>85</sup>

---

80. See, e.g., Act of Settlement, 12 & 13 Will. 3, c. 2 (1701) (Eng.) (providing that those who “hold communion with the see or Church of Rome, . . . profess the popish religion, or marry a papist” should be excluded from the succession to, possession of, and enjoyment of the English Crown and government of the realm). See generally Michael Igrave, *Fidei Defensor Revisited: Church and State in a Religiously Plural Society*, in *THE CHALLENGE OF RELIGIOUS DISCRIMINATION AT THE DAWN OF THE NEW MILLENNIUM* 207, 215 (Nazila Ghanea ed., 2003) (stating that English monarchs are prohibited from becoming or marrying Roman Catholics).

81. See Stephen Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, 1997 EUR. HUM. RTS. L. REV. 25, 25–34; Marek Antoni Nowicki, *The European Convention of Human Rights: Prohibition of Discrimination*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 17, 19.

82. *Iglesia Bautista “El Salvador” v. Spain*, 72 Eur. Comm’n H.R. Dec. & Rep. 256 (1992).

83. *Id.* at 261.

84. *Id.*

85. *Id.* at 260.

The legal positions of states that are parties to Protocol 12<sup>86</sup> might well diverge from that of other states when it comes to arrangements that give preference to an established or dominant church. A more general right of equality before the law creates a greater scope within which to argue the impermissibility of differential treatment, for example, in the funding of schools or the holding of traditional roles. There is potential for the development of a two-track approach to the permissible assistance that a state may give to a religion depending upon whether the state in question is a party to Protocol 12. It is likely, however, that too great a divergence in standards will be avoided because of the generous approach that the Court has taken to state claims of an objective and reasonable basis for making a distinction between religions.

#### *D. State Control over Established Churches*

While the discussion above demonstrates that a close relationship with the state provides a range of benefits to a religion, such a relationship raises certain problems for the established religion because establishment generally brings with it a greater degree of state control. What is more, the Court seems prepared to accept that such control is legitimate when an established religion is in question despite the fact that the same degree of control over a non-established religion would be considered a breach of Article 9.

This issue has arisen particularly in relation to state control over religious leaders. In a number of European states the clergy of established religions are subject to a far higher degree of control by the government than are the religious leaders of groups not associated so closely with the state.<sup>87</sup> Thus, clergy whose understanding of the requirements of their office differed from that of the secular hierarchy have found themselves disciplined or dismissed from their offices. Examples of such cases include a minister who wished to require couples to attend a certain number of religious lessons before baptizing their children,<sup>88</sup> a minister who

---

86. *See supra* text accompanying notes 22–23.

87. *See* EVANS, *supra* note 35, at 84–87.

88. *X v. Denmark*, 5 Eur. Comm'n H.R. Dec. & Rep. 157, 158 (1976).

was publicly critical of the state abortion laws,<sup>89</sup> and a minister who was opposed to the ordination of women.<sup>90</sup>

To a certain extent, this simply reflects the general limitations on a religious leader who is part of an organized religion that has certain rules and procedures. Even where churches are not established, there has been considerable debate and division over the issue of the ordination of women, and various members of the clergy have resigned or been forced out because their position is different than the official church line. There is a difference with established religions, however.

In the case of official religions, the rules and positions of the church may be directly subjected to some level of state control or oversight, and the secular authorities may use their religious control to further secular rather than religious goals.<sup>91</sup> For example, the minister who was dismissed for his protest against the liberal abortion law of Norway made the highly plausible claim that his position was entirely consistent with the views of his parish and bishop.<sup>92</sup> It was only the government that found his views unacceptable, and it was most unlikely that he would have been dismissed for his comments if the church was independent of state control. Religious leaders from non-established religions could not be silenced in this fashion without the Court finding a breach of religious freedom, while clergy in state religions are said to have accepted a degree of state control when they took on their office.<sup>93</sup> The Court recognized the minister's right to leave the church but, while within it, "a clergyman has . . . not only religious duties, but has also accepted certain obligations toward the State."<sup>94</sup>

---

89. *Knudsen v. Norway*, 42 Eur. Comm'n H.R. Dec. & Rep. 247 (1985).

90. *Karlsson v. Sweden*, 57 Eur. Comm'n H.R. Dec. & Rep. 172, 172-73 (1988).

91. In some states this extends beyond the established church. *See, e.g.*, *Al-Nashif v. Bulgaria*, 36 Eur. H.R. Rep. 37, ¶ 79 (2002) (discussing the Bulgarian laws that require the statute and by-laws of all religious denominations to be submitted to the Council of Ministers for approval). *Al-Nashif* also demonstrates the extent to which politics may influence the types of control that the State exercises over religious groups and their internal ordering. *Id.* ¶ 80.

92. *Knudsen*, 42 Eur. Comm'n H.R. Dec. & Rep. at 247.

93. *Denmark*, 5 Eur. Comm'n H.R. Dec. & Rep. at 158.

94. *Knudsen*, 42 Eur. Comm'n H.R. Dec. & Rep. at 257. *See also* VAN DIJK & VAN HOOF, *supra* note 47, at 547 (describing this as "a sound balancing of rights and interests").

---

#### IV. CONTROL OF THE INTERNAL AFFAIRS OF NON-ESTABLISHED RELIGIONS

The fact that the Court has found that the clergy of an established religion are subject to a reasonable degree of state control does not, however, mean that control extends to religious groups more generally. While renegade ministers may be forced out of the established church, it would be a breach of their religious freedom if they were not permitted to exercise religious leadership either independently or within a religion where their views are more acceptable. As a general rule, states are prohibited from interfering in the internal organization of non-established religions.<sup>95</sup> This section considers the relationship between the state and the non-established church. In the European context, this issue has arisen most often in regard to the appointment of religious leaders, particularly where there is a dispute about who is the official religious leader of a particular community.<sup>96</sup>

While those committed to religious freedom might instinctively recoil at the notion that religious freedom is compatible with the state determining religious leadership or internal structure of a religion, the issue is more complex than it may appear at first. There may be disputes over property ownership—for example, where there has been a schism or breach in religious leadership—and such disputes may well require some state intervention. Such intervention may necessarily pay attention to the internal rules and structure of the religion. Religions may have to structure themselves in particular ways to take advantage of a domestic law right to legal personality or taxation relief, and the state may have to assess the religion's compliance with such domestic rules.<sup>97</sup> Similarly, the state may be prepared to recognize marriages celebrated by certain religious leaders or to give permission for such religious leaders to officiate at funerals when such roles would otherwise require state registration. Again, in such cases the state may have to distinguish between

---

95. See Roland Minnerath, *The Right to Autonomy in Religious Affairs*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK, *supra* note 7, at 291, 311–14.

96. See, e.g., *Serif v. Greece*, Eur. Ct. H.R. (1999) (unreported) (holding that the government cannot interfere with the election of local leaders), <http://www.echr.coe.int>.

97. See generally W. Cole Durham, Jr., *Facilitating Freedom of Religion or Belief Through Religious Association Laws*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK, *supra* note 7, at 321.

certain religions and types of leadership. The Court has not dealt in great detail with these subtle and complex issues but it has set out certain useful principles in cases dealing with more blatant and less acceptable reasons for interference with religious leadership or internal structures.

The first principle is that, under certain circumstances, a state may reasonably accept a particular religious leader or group of leaders as official leaders for particular purposes. These will generally be purposes of the secular law, such as the legal recognition of marriages performed by such religious leaders. But it is not the role of the state to prevent people from exercising unofficial religious leadership or to ensure that any particular religious group is united.

These principles were developed first in the *Serif* case, in which the Greek government prosecuted a man for claiming to be the Mufti of a Muslim community when there was another, officially recognized Mufti.<sup>98</sup> The Court held that it was not for the government to unify, by force of law, a religious community that was divided or to determine conclusively which religious leader people should follow.<sup>99</sup> These laws interfere with the religious freedom of the person exercising leadership and also with the freedom of those who follow. The government argued that such unified leadership was necessary, because otherwise there would be public unrest and tension as a result of two people claiming the same leadership.<sup>100</sup> The Court responded to this argument with much less deference than is typical of cases dealing with potential religious unrest. Tension, it said, is an “unavoidable consequence of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”<sup>101</sup>

In cases where the state can marshal compelling evidence that serious unrest would result and the unrest could not be resolved by less coercive measures, the Court might permit such interference. But the cases the Court has dealt with in this area have not reached that point, and, in fact, a number of similar attempts to exclude people from exercising religious leadership have failed because the

---

98. *Serif*, Eur. Ct. H.R. (unreported), <http://www.echr.coe.int>.

99. *Id.* ¶ 52.

100. *Id.* ¶ 53.

101. *Id.*

Court has required clear evidence of the necessity of restrictive measures. For example, in a case where a dispute arose over religious leadership of the Muslim community of Xanthi, the Greek government alleged that a divided leadership could lead not only to tensions in the Muslim community, but also to tensions between Muslims and Christians, and between Turkey and Greece.<sup>102</sup> The Court, however, dismissed these claims, noting that the government did not allude to any disturbances among the Muslims in Xanthi that the existence of two religious leaders had actually or could have caused.<sup>103</sup> Moreover, the Court considered that no explanation was adduced to warrant qualifying the risk of tension between the Muslims and Christians or between Greece and Turkey as anything more than a very remote possibility.<sup>104</sup>

Thus, a state that argues that restrictions on religious leaders are necessary in a particular circumstance will have to do more than merely assert that tension might arise or demonstrate that some remote risk of harm may exist. Instead, the Court will require concrete evidence, probably including evidence of past problems, such as inter-communal violence, that the authorities could not check by simply taking a firm position that religious groups learn to tolerate one another.

#### V. A COMPARISON WITH ANTI-ESTABLISHMENT APPROACHES

The approach of the Court in dealing with cases where parties claim an inappropriate relationship between church and state is to focus on the extent to which that relationship is a breach of Articles 9 or 14 or, in certain cases, other relevant rights such as the freedom of association. The focus of the Court is very much on religious freedom with a minor role played by nondiscrimination.

There are, of course, other approaches to determining the legality of a particular relationship between church and state. This part will briefly contrast the religious freedom approach of the ECHR with the non-establishment approach taken by the United States Supreme Court. This conclusion will not attempt to restate the vast and sophisticated literature<sup>105</sup> and jurisprudence<sup>106</sup> on the

---

102. *Agga v. Greece* (No. 2), Eur. Ct. H.R. ¶ 47 (2003).

103. *Id.* ¶ 60.

104. *Id.*

105. *See generally* DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES:

United States Establishment Clause, which is, of course, only one example of a constitutional prohibition of establishment<sup>107</sup> but will instead assume familiarity with the basic tenets of United States Supreme Court jurisprudence.

In contrasting the religious freedom and the non-establishment approaches to setting appropriate limits for the relationship between religions and the state, a number of observations may be made. The first is that many of the more extreme forms of government intervention, or forcible establishment of a religion, would be prohibited whether the legal analysis taken is one of religious freedom or establishment. Indeed, the type of government envisaged by the Welfare Party in *Refah* would not have stood scrutiny under the First Amendment any more than it did under the ECHR.

There are still, however, important differences between a religious freedom and an establishment approach. On the positive side, the religious freedom approach can allow greater flexibility for a range of relationships between religions and the state. Some interpretations of establishment clauses may be unduly rigid or constraining and may fail to sufficiently account for the wide range of circumstances existing in various countries. While state funding of religious schools does raise certain problems, particularly when that funding is disproportionately directed to particular religious groups, the prohibition on such funding also creates concerns of discrimination against students attending religious schools and of state hostility toward religion. In European states, where provision of

---

MAKING SENSE OF THE ESTABLISHMENT CLAUSE (1991); FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1994); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Michael W. McConnell, *Law's Perspective of Religion and Its View of the State: Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992).

106. See generally *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

107. See Attorney-General *ex rel.* *Black v. Commonwealth* (1981) 146 C.L.R. 559 ¶ 2 (Austl.). A very similar provision can be found in Section 116 of the Constitution of the Commonwealth of Australia, but courts have interpreted this section in a far more limited fashion.

education by religious groups is a widespread phenomenon and an accepted part of the political culture, a judgment by the Court that questioned the permissibility of such funding might have significant financial and social implications.

In this context, it is important to recall that the Court is an international court that needs to allow states to maintain some flexibility and accept that there are plural ways to address this complex issue. The Court does not have the same authority or connection with the constitution of a particular state as does the United States Supreme Court. The European Court has recognized this in the development of the “margin of appreciation,” which requires the Court to defer to some extent to the judgment of states in relation to whether a restriction on rights is necessary. However, the deference is limited and is said by the Court to go “hand in hand with European supervision.”<sup>108</sup> The Court has justified the need for a margin of appreciation:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [i.e., the requirement to restrict a right] as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.<sup>109</sup>

While the margin can lead to undue deference to states and the status quo, it can also provide a useful framework that allows for diversity in areas as complex and important as religion.<sup>110</sup>

On the negative side, the approach to religious freedom taken by the Court tends to focus in on particular cases and the implications of state actions for the specific applicants involved. An establishment lens encourages consideration of structural issues and recognition that an individual action that may seem relatively harmless in

---

108. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) 23, ¶ 49 (1976).

109. *Id.* at 22, ¶ 48.

110. For a general discussion of the margin appreciation, including criticisms of its role, see HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMIC OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1995). See also J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 151–75 (1993); Timothy H. Jones, *The Devaluation of Human Rights Under the European Convention*, 1995 PUB. L. 430; Thomas O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982).

isolation may have implications for the broader state of religious freedom within a country. The fragmented approach adopted by the Court means that a series of measures may be individually deemed not to interfere with religious freedom, but if taken cumulatively, their implications might be very serious indeed. The solution to this problem is not to impose a U.S. style of establishment restrictions upon countries where such restrictions would be poorly adapted, but for the European judges to be more willing to engage with the systemic problems that close relations between particular religions and the state can cause.

A greater preparedness to invalidate laws that are discriminatory or are routinely used in a discriminatory manner—rather than a condemnation of the particular application of the law—would be a good step in the right direction. An example of such an approach is that taken by Judge Martens in his concurring opinion in *Manoussakis v. Greece*.<sup>111</sup> The case called into question the whole system of authorizations for building of places of worship in Greece and the role of the Orthodox Church in the process of granting permits to other religions.<sup>112</sup> The majority judgment focused on the particular facts in the case and found a breach of Article 9.<sup>113</sup> Judge Martens, however, took a far broader approach. He noted that

the very essence of the applicants' complaints is not one of individual, but one of general injustice: what they complain of is not so much the harassment they have been subjected to, but, basically, the obstruction to setting up a Jehovah's Witnesses chapel in general. The "prescribed by law" requirement is therefore more suitable to do justice to what—also in the Government's opinion—is the essential thesis of the applicants, viz. that the Law of Necessity no. 1363/1938 is incompatible with Article 9 (art. 9), either per se or in any event as consistently applied by the competent authorities.<sup>114</sup>

Judge Martens specifically noted the context of the close relationship between the Orthodox Church and the Greek state and considered this a relevant issue to the determination of whether the

---

111. 17 Eur. Ct. H.R. (ser. A) (1996) (Martens, J., concurring).

112. *Id.*

113. *Id.*

114. *Id.* ¶ 2 (Martens, J., concurring).

law in question was permissible under the ECHR.<sup>115</sup> This more robust approach, which takes seriously the problems that can be caused by too close a relationship between church and state without prohibiting that relationship altogether, could provide a fruitful basis for developing European jurisprudence on church-state relationships.

#### VI. CONCLUSION

The issue of the appropriate relationship between church and state is a complex one. Religious freedom places certain constraints on the nature of permissible relations, but it will never provide a complete answer to this difficult question. That answer involves consideration of legal, political, cultural, religious, economic, and historical factors in particular countries. There may be no single answer. But religious freedom, democracy, and pluralism are a frame that provides the outer limits for state diversity in the European system. Within that frame, states can and do paint remarkably different pictures of the relationship between religion and the state. The European Court has put into place some useful parts of the framework, but further work is needed to ensure that states do not develop so close a relationship with dominant religions that it poses a threat to religious freedom and equality.

---

115. *Id.* ¶¶ 6–7 (Martens, J., concurring).

