

**THE SECULAR PROMISE OF LIBERTY AND EQUALITY:
REVISITING RAWLS ON FREEDOM OF BELIEF**

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Our hope for the future of our society rests on the belief that the social world allows at least a decent political order, so that a reasonably just, though not perfect, democratic regime is possible...What ideals and principles would such a society try to realize given the circumstances of justice in a democratic culture as we know them? These circumstances include the fact of reasonable pluralism. This condition is permanent as it persists indefinitely under free democratic institutions.

John Rawls

Justice as Fairness: A Restatement (Erin Kelly, ed)

(Cambridge, Mass., Belknap Press 2003) 4.

...having the right to freedom of thought, conscience and religion does not mean that its enjoyment need be without cost.

Malcolm Evans, *Religious Liberty and International Law in Europe*

(Cambridge University Press 1997) 300.

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ABSTRACT

In this thesis I consider the universally adopted right for all individuals to have and follow a religion or other life stance based on personal moral values (a 'Belief') of their choosing. This right is contained in Article 18 of the *Universal Declaration of Human Rights* ('UDHR'), adopted by the 190-plus member states of the United Nations.

However, the UDHR provides that practising one's Belief can be limited by the state for the protection of the principles of democracy and the rights of others (Article 29). I argue that this is aimed at ensuring that this right is enjoyed equally by everyone.

I outline current perceptions of the meaning of Freedom of Belief in practice, concentrating on such bodies as the United Nations and the European Court of Human Rights. These perceptions include the view that religion merits privileged status over other Beliefs; individuals are entitled to exemption from the law on the ground of religious belief; and governments can establish, endorse, support or privilege a particular Belief system or organisation over others.

Adopting a theoretical model of democratic pluralist liberal society, specifically that established by John Rawls,¹ I critique these perceptions. I argue they fall short of delivering the ideal of political secularism (that is, state indifference to Beliefs in the exercise of its power) that Rawls advocated as central to his model of political liberalism.

I suggest a different perspective on freedom of Belief that accords with the international human rights treaties, and is consistent with Rawls's political liberalism.

This proposed model involves (1) recognition that all Beliefs, religious or otherwise, are to be equally protected; (2) no person or organisation warrants special treatment (favourable or otherwise) on the sole basis of their Belief, and (3) this requires state-Belief separation, that is, governance based on the principle of political secularism.

¹ Rawls, John, *A Theory of Justice* (Cambridge MA, Harvard University Press expanded ed, 2005); *Justice as Fairness: a Restatement* (Cambridge, Belknap Press 2003); *Political Liberalism* (expanded edition, New York, Columbia University Press 2005); 'Reply to Habermas', *Journal of Philosophy* 92, (March 1995) 132-80, reprinted in *Political Liberalism* (expanded edition); 'The Idea of Public Reason Revisited' *University of Chicago Law Review* 64, Summer 1997) 765-807, reprinted in *Political Liberalism* (expanded edition); *The Law of Peoples* (Harvard, Harvard University Press 1999).

STATEMENT BY CANDIDATE

I hereby declare that this thesis is my own work, and to best of my knowledge it contains no material previously published or written by another person, or material which to a substantial extent has been has been accepted for the award of any other degree or diploma at Macquarie University or any other educational institution, except where due acknowledgement is made in the thesis.

Margaret Quain Wallace

Date: _____

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When I told a friend who had undertaken a PhD and survived of my intention to follow suit, I was told it would be a lonely journey. Indeed, as a project of discovery and conclusion, I was in large part on my own. However, at such a time one experiences the value of those precious relationships that form through the good will of those who come forward to help on the way.

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But I owe the greatest thanks of all to my husband, Dr Max Wallace, who encouraged me to undertake this degree. We have shared much together over many years, and as with my other projects, his support (from cooking to commentary) has been invaluable in my seeing this thesis through to completion.

TABLE 1: THE RIGHT TO FREEDOM OF BELIEF AS SET OUT IN THE RELEVANT ARTICLES OF INTERNATIONAL TREATIES

Article 18 of the *Universal Declaration of Human Rights* (UDHR) states:

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 teaching, practice, worship and observance

Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) states:

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 teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (Belief Declaration) states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever 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 teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ECHR states:

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.

GLOSSARY AND ABBREVIATIONS

Belief Declaration	<i>Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief</i> GA Res. 36/55 of 25 November 1981, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51, 1981 (25 November 1981).
Beliefs (capitalised); Personal Convictions; Life stances	Conceptions of the meaning of life and what is of value in human life in an articulated system of belief that generates a normative prescription for personal living. They are comprehensive in that they apply to all of life, rather than being prescriptions applying specifically to politics, business, professions, etc. Rawls refers to these as <i>comprehensive doctrines</i> .
Burdens of Judgment	Rawls ¹ included the following factors that give rise to the burdens of judgment: <ul style="list-style-type: none">• evidence in relation to a case is often conflicting and complex;• there is disagreement about weight of different relevant considerations;• concepts are often vague, and indeterminate, requiring reliance on judgement and interpretation;• individual experiences are often different, and this affects our assessment of evidence; and• differences in setting priorities and making adjustments.
Cairo Declaration	<i>Cairo Declaration of Human Rights in Islam</i> adopted by the Organization of the Islamic Conference in 1990, reprinted in U.N. Doc. A/Conf. 157/PC/62/Add.18 (1993).
Comprehensive Doctrines (Rawls)	Rawls's term for what I call 'Beliefs', 'personal convictions' or 'life stances'.
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , as amended by Protocol No. 11, opened for signature by the Council of Europe 4 November 1950, ETS No. 5 (entered into force September 3, 1953).
European Bodies	The European Commission and the European Court of Human Rights.
European Commission	European Commission on Human Rights.
European Court	European Court of Human Rights.
ICCPR	<i>International Covenant on Civil and Political Rights</i> , opened for signature 16 December 1966, 999 UNTS 171 (entered into force March 23, 1976).

¹ Rawls, *Political Liberalism*, 56-7.

Public Political Culture	This 'comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary) as well as historic texts and documents that are common knowledge.' ² Religious or other comprehensive doctrines may be introduced into public political culture, <i>subject to the proviso of 'proper political reasons'</i> for their justification in governance (public reason). 'When these doctrines accept the proviso and only then come into political debate, the commitment to constitutional democracy is publicly manifested.' ³ Justice as fairness is based on this political tradition. ⁴
Public Reason	The <i>idea</i> of public reason is reasoning that accords with the democratic interests of free and equal citizens, based on reasonable political conceptions of justice. The <i>ideal</i> of public reason is the exercise of public reason by government officials in making policy and legislation, and by citizens in voting for their representatives.
Overlapping Consensus	'A political conception of justice affirmed by citizens irrespective of the political strength of their comprehensive view.' ⁵
OIC	Organisation of the Islamic Conference.
Philosophical Secularism	A worldview and ethical code based on the present life, rooted in non-belief in the existence of the metaphysical or supernatural, akin to the ideologies of humanism and rationalism.
Political (or structural) Secularism	Indifference to, or the discounting of, religion or religious considerations by the state in the exercise of its power, resulting in the separation from state authority of Belief considerations.
Political Virtues (Rawls)	Ideals of good citizenship in a democratic regime. These include liberty, equality, and fair opportunity for primary goods, health and welfare.
Primary Goods (Rawls)	Goods necessary for the realisation of one's capacity for a sense of justice and for a conception of what is good. They include 'rights and liberties, powers, opportunities and positions of office, income, wealth and the bases of self-respect'. ⁶
Reasonable person (Rawls)	One who is 'willing to propose and honour fair terms of cooperation' and 'govern their conduct by a principle from which they and others can reason in common'. ⁷

² Ibid., 13,14.

³ Rawls, 'The Idea of Public Reason Revisited' 463.

⁴ Rawls, *Political Liberalism*, 14, 8, 175.

⁵ John Rawls, *Justice as Fairness* (Harvard, Belknap Press, 2003), 193.

⁶ Freeman, *Rawls* (London and New York, Routledge 2007) 478.

⁷ Rawls, *Political Liberalism* 49 fn1.

Reciprocity	Rawls uses this term in two relevant ways. At the political level reciprocity requires justification of governance in terms reasonably acceptable to all citizens. It also involves cooperation between citizens for mutual advantage, but on fair terms where any benefits bestowed on those who are already most socially or economically advantaged must simultaneously benefit the least advantaged more than an alternative benefit. ⁸
Reflective Equilibrium (Rawls)	The ‘mutual adjustment and readjustment between our pre-reflective intuitive specific convictions of justice and general, abstract principles of Justice’. ⁹
Relevant Bodies	United Nations Human Rights Committee (‘UNHRC’), the European Commission on Human Rights (‘European Commission’) and the European Court of Human Rights (‘European Court’).
UDHR	<i>Universal Declaration of Human Rights</i> . Adopted and Proclaimed 10 December 1948 by G.A. Res. 217a (iii), U.N. Doc a/810 at 71 (1948).
UNHRC	United Nations Human Rights Committee.

⁸ See, e.g. Freeman, *Rawls*, 374.

⁹ Wojciech Sadurski ‘Rawls and the Limits of Liberalism: Reflections on “*The Law of Peoples*” (2005) 1 *Ius et Lex* 197, 212. See also Rawls, *Political Liberalism*, 8, 28.

TABLE 2: CLASSIFICATION OF WORLD REGIMES AS AT 2004

Source: Siaroff, Alan, *Comparing Political Regimes* (Peterborough, Ontario, Broadview Press 2005), 77-78.

LIBERAL DEMOCRACIES*		ELECTORAL DEMOCRACIES**		SEMI-LIBERAL AUTOCRACIES***	CLOSED AUTOCRACIES****
Andorra	Norway	Albania	Sierra Leone	Afghanistan	Azerbaijan
Australia	Palau	Antigua/ Barbuda	Solomon Is	Algeria	Belarus
Austria	Poland	Argentina	Sri Lanka	Angola	Brunei
Bahamas	Portugal	Bangladesh	Thailand	Armenia	Burma
Barbados	St Kitts & Nevis	Bolivia	Timor-Leste	Bahrain	Burundi
Belgium	Santa Lucia	Brazil	Trinidad/Tobago	Bhutan	China
Belize	St Vincent/Grenadines	Bulgaria	Turkey	Bosnia Herzegovina	Congo
Benin	Samoa	Colombia	Venezuela	Burkina Faso	Cuba
Botswana	San Marino	Croatia		Cambodia	Egypt
Canada	Slovakia	Dominican Republic		Cameroon	Equatorial Guinea
Cape Verde	Slovenia	Ecuador		Central African Rep.	Eritrea
Chile	Sth Africa	El Salvador		Chad	Guinea
Costa Rica	Spain	Georgia		Comoros	Haiti
Cyprus	Suriname	Guatemala		Congo	Kazakhstan
Czech Republic	Sweden	Honduras		Djibouti	Korea, Nth
Denmark	Switzerland	India		Ethiopia	Kyrgyzstan
Dominica	Taiwan	Indonesia		Fiji	Laos
Estonia	Tuvalu	Jamaica		Gabon	Liberia
Finland	United Kingdom	Kenya		Gambia	Libya
France	United States	Lesotho		Guinea-Bissau	Oman
Germany	Uruguay	Liechtenstein		Iran	Rwanda
Ghana	Vanuatu	Macedonia		Iraq	Saudi Arabia
Greece		Madagascar		Ivory Coast	Somalia
Grenada		Malawi		Jordan	Sudan
Guyana		Mali		Kuwait	Swaziland
Hungary		Mexico		Lebanon	Syria
Iceland		Moldova		Malaysia	Tajikistan
Ireland		Mongolia		Maldives	Togo
Israel		Mozambique		Mauritania	Tunisia
Italy		Namibia		Monaco	Turkmenistan
Japan		Nicaragua		Morocco	United Arab Rep.
Kiribati		Niger		Nepal	Uzbekistan
Korea, South		Nigeria		Pakistan	Vietnam
Latvia		Panama		Qatar	Zimbabwe
Lithuania		Papua New Guinea		Russia	
Luxembourg		Paraguay		Singapore	
Malta		Peru		Tanzania	
Marshall Islands		Philippines		Tonga	
Mauritius		Romania		Uganda	
Micronesia		Sao Tome/Principes		Ukraine	
Nauru		Senegal		Yemen	
Netherlands		Serbia/Montenegro		Zambia	
New Zealand		Seychelles			

* **Liberal democracy** = responsible Government; free and fair competition for office; full and equal rights to political participation; full civil liberties; religious pluralism; a well-functioning state.

** **Electoral democracy** = freely and fairly elected government; general political accountability; limited constraints on authority; equal political rights; a degree of tolerance of pluralism but a deficiency in civil liberties.

*** **Semi-liberal autocracy** = limited political, cultural and religious pluralism; national elections neither free nor fair enough to change or determine government; limited political accountability; limits on authority; illusion of legal-rational authority.

**** **Closed autocracy** = intolerance of full political pluralism; limited social, economic, religious tolerance; few or no civil liberties; no political accountability; undefined legal limits on leaders' authority and leadership for life or overthrow.

PREFACE

This thesis is about the universally adopted equal right for all individuals to have and follow a religion or other worldview – a system of belief that gives meaning to the world and provides ethical guidelines for living. Article 18 of the *Universal Declaration of Human Rights* ('UDHR'), adopted by all the member states of the United Nations promises (a) absolute freedom for all citizens to adopt a 'religion or belief of [their] choice', as well as (b) freedom to 'manifest [their] religion or belief in worship, observance, practice and teaching'.

Fundamental to Freedom of Belief is the meaning of the term 'religion or belief'. The European Court of Human Rights defined this freedom as covering 'those ideas based on human knowledge and reasoning concerning the world, life, society, etc., which a person adopts and professes according to the dictates of his or her conscience'.¹¹ These I call interchangeably 'Beliefs' (capitalised) 'personal convictions' or 'life stances'.

My work in developing government policy to further the implementation of international human rights led to an interest in the relationship of equality to human rights, especially in the articulation of the right to freedom to have and act on one's personal convictions. I looked for a theoretical model of democratic pluralist liberal society, and turned to the model of political liberalism developed by John Rawls, the celebrated twentieth-century political theorist.¹² Rawls's later works in particular were devoted to considering how we can ensure full and equal freedom of what he refers to as 'comprehensive doctrines' in pluralist societies. Michael Sandel claims that Rawls's theory of justice 'represents

¹¹ *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48.

¹² There is a voluminous literature by and about Rawls. See, e.g. the Bibliography in Samuel Freeman, *Rawls* (London and New York, Routledge 2007). While he has sparked a lively debate within political and legal academia, his influence is extensive. For example, Freeman states that 'Rawls is the foremost political philosopher of the twentieth century, and is recognised by many as one of the great political thinkers of all time' (ibid, x). Richard Arneson, says 'Rawls's achievements continue to set the contemporary terms of debate on theories of social justice' in 'Justice After Rawls', John Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, (Oxford, Oxford University Press, 2006) 45, 45. Amitrajeet Batabyal, in a Book Review of Rawls's *The Law of Peoples*, claims that '[t]here is no gainsaying the fact that John Rawls is one of the pre-eminent political philosophers of the 20th Century': *Journal of Agricultural and Environmental Ethics*, **13**, 269-71, 2000.

the most compelling case for a more equal society that American political philosophy has yet produced'.¹³

I have chosen Rawls as he aimed to develop a theory of justice from the idea of social contract, one that is compatible with the fundamental principles of democratic society: freedom and equality. He was concerned to develop a feasible model of a just and democratic society in which all agree on a public conception of justice. Recognising that his philosophical conception of justice as fairness which he expounded in *A Theory of Justice* needed further development to provide for stability over time, he went on to write *Political Liberalism*. Here he considered the plurality of moral philosophical and religious beliefs, and conceived the model in which citizens arrive at an 'overlapping consensus' on a *political* conception of justice. This 'overlapping consensus' is freestanding of comprehensive doctrines and framed to provide a basis for public justification among democratic citizens. It is an excellent basis for consideration of the Freedom of Belief, as it lays the groundwork for considering how we can ensure Freedom of Belief in a liberal democratic society.

Rawls considers the case for the neutralist position in relation to ensuring Freedom of Belief in pluralist liberal democratic societies.¹⁴ But I argue that the position he takes is in fact one that implies 'structural secularism' – that is, state governance that is disassociated from (rather than treating equally) 'comprehensive doctrines', neither favouring nor disfavouring them.¹⁵

It is central to Rawls's political model that he acknowledges historical and cultural, as well as religious, aspects of society as legitimate considerations for governance in a 'well-ordered' society. However, stability in such societies dictates that government policy and legislation should comply with a liberal conception of justice, representing basic liberties: one that all within a society can agree to, whatever their Belief. Such societies are distinct from illiberal but 'decent' societies, based on limited human rights.¹⁶

¹³ Michael Sandel, *Justice: What's the Right Thing to Do?* (London, Penguin 2009) 166.

¹⁴ In *Political Liberalism*, 191.

¹⁵ See, e.g., *ibid*, 194.

¹⁶ See *The Law of Peoples*, 78ff.

Rawls's conception of political liberalism, which is the basis of governance in liberal societies, requires that religious and cultural considerations may be considered *with the proviso* that justification of prescriptive governance is based on the liberal conception of justice. I argue in Chapter 9 that it is this proviso that makes Rawls's approach inconsistent with government accommodation of Belief (religious or otherwise), or the imprecise and implausible conception of 'equal aid' to religious or other Beliefs.

This aspect of Rawls's reasoning has not been specifically identified, nor has its implications for state – Belief separation been dealt with, in other writings on his work.

My argument thus focuses on Rawls's analysis of political liberalism, proposing that current interpretations of Freedom of Belief by the international bodies charged with this task fall short of Rawls's model.

'Comprehensive doctrines' for Rawls has a similar meaning to the European Court definition set out above: he defines them as conceptions of 'what is of value in human life' covering 'all recognised values within one rather precisely articulated system', such as religious and philosophical doctrines.¹⁷ Freedom of 'religion or belief' thus involves freedom to adopt and act according to one's personal comprehensive doctrines, which bear a similar meaning to 'Beliefs', 'personal convictions' or 'life stances'. A political conception, by contrast, is 'a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it'.¹⁸

While recognising that not all societies are fully liberal democracies, Rawls concluded that freedom in relation to personal comprehensive doctrines flourishes best in a liberal democratic regime. Writing in the context of American constitutional provisions, Rawls did not specifically apply his ideas to the provisions of the UDHR and other international human rights documents. I have attempted to fill this gap by devising what I believe to be the implications of his views for the interpretation of the internationally accepted right to Freedom of Belief.

¹⁷ John Rawls, *Political Liberalism*, 13.

¹⁸ Ibid, 12.

Rawls's theory is recognised widely as seeking a model of society in which the enjoyment of the right to Freedom of Belief is maximised for all through the principles of liberal democracy (while accepting a lesser level of liberty in 'illiberal but decent societies').¹⁹ Rawls's use of the idea of public reasoning, based on overlapping consensus, is quoted approvingly by Wojciech Sadurski,²⁰ to whom I refer. I use this model as a yardstick for considering the extent to which the interpretation and implementation by those responsible for doing so is in accordance with liberal democracy. I consider to what extent this model is compatible with the interpretation of that right by international adjudicative bodies charged with interpreting the *International Convention on Human Rights* (the U.N. Human Rights Committee) and the *European Convention on Human Rights* (the European Court of Human Rights and the European Commission of Human Rights).

My contribution is novel in that it makes the case that, based on the Rawlsian model of Freedom of Belief, the original conception of Freedom of Belief, and its interpretation by the adjudicative bodies, is inadequate for providing its full and equal enjoyment by all. This is mainly because they do not provide for what I describe as a structurally secular government, one that ensures separation of the state from religious or other life-stance beliefs. In other words, they have failed to deliver what they promise.

Neither Rawls nor Sadurski applies himself directly to the adjudicative bodies' approach. I am not aware of such an approach in the academic literature. Sadurski

¹⁹ Many learned writers have expressed conflicting views on this Rawls's work, and I do not intend to take up that argument. E.g. Samuel Freeman examines objections to various theories in *Rawls*, esp. 72ff, 115ff, 324. Some criticisms are summarised by James Nickel and David Reidy, '2, Philosophy' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris, eds., *International Human Rights Law* (Oxford: Oxford University Press 2010): 39-63, 61. The Chapter is also found at <https://docs.google.com/fileview?id=0B_VH8cWdlkJSYjZiOTE4YTMtODQ3Yi00NjViLTllOWUtMjg1MWU4NmY3Y2Ew&hl=en&pli=1>, accessed 12/3/2010. See also James Nickel, 'Rethinking Rawls's Theory of Liberty and Rights' (1993-4) 69 *Chicago-Kent Law Review* 763.

²⁰ Wojciech Sadurski, 'Perspectives on Equal Protection Part 1: The Concept of Legal Equality and an Underlying Theory of Discrimination' (1998) *Saint Louis-Warsaw Transatlantic Law Journal* 63; "Reasonableness" and Value Pluralism in Law and Politics', European University Institute Working Paper LAW 2008/13' (2008) *American Journal of International Law* <<http://www.eui.eu/>> accessed 14/2/09; *Equality and Legitimacy* (Oxford, OUP 2008); Sadurski, 'Legitimacy, Political Equality, and Majority Rule' (2008) 21(1) *Ratio Juris* 39; *Moral Pluralism and Legal Neutrality* (Dordrecht, Kluwer Academic Publishers 1990); 'Neutrality of law towards religion' (1990) 12 *Sydney Law Review* 450; Wojciech Sadurski, 'On Legal Definitions of 'Religion' (1989) 63 *Australian Law Journal* 834; 'Rawls and the Limits of Liberalism: Reflections on the "Law of Peoples"' (2005) 1 *Ius et Lex* 197; 'Rights and Moral Reasoning: An Unstated Assumption - A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7(1) *I.CON* 24; *Law and Religion* (Aldershot, Dartmouth Publishing Co Ltd 1992).

argues that one can ‘apply the equal–promotion theory of neutrality to the impartiality of the state between different religions (trying to accommodate their demands to an equal degree),’²¹ but one can’t treat equally both religious and non-religious beliefs. I make the case in Chapter 9 that even such equal treatment of religious beliefs is not feasible.

I hold that a structurally secular government is essential for equal enjoyment of Freedom of Belief. Rawls in fact did not specifically make this argument, adopting the view that secularism is a philosophy similar to religion or comprehensive doctrines, and invoking the idea of state neutrality instead. From his approach to government in a politically liberal society, however, I maintain that his work was compatible with *political secularism*: that is, government that is structurally indifferent to religious or other comprehensive doctrines, neither favouring nor disfavours individuals or organisations espousing them, and upholding a strict state-Belief separation. Sadurski also favours this approach in relation to religious and non-religious beliefs.

My thesis is based on the view that ‘neutrality’ is an imprecise concept (as both writers concede) whereas structural secularism is more static and precise, performing better the function of freedom both of and from Belief.

By viewing Rawls’s theories as inferring a need for structural secularism, I conclude that the internationally accepted right to Freedom of Belief does indeed presuppose a liberal democratic, structurally secular society, and consideration of Rawls’s ideas helps to understand how we can provide for equal enjoyment of Freedom of Belief for all in a pluralist, democratic society such as ours.

Accordingly, I refute some major perceptions currently surrounding Freedom of Belief. These centre on the view that the right to Freedom of Belief is compatible with granting privileged status and treatment of some religious or non-religious Beliefs over others. This leads to the perception that individuals are entitled to exemption from the law on the ground of religious belief, and that governments can establish, endorse, privilege, or discriminate against, any religious or non-religious Belief system or organisation.

²¹ Sadurski, ‘Neutrality of State towards Religion’, 453-4.

I offer a different perspective based on my reading of Rawls: one aimed at facilitating enjoyment of Freedom of Belief equally by all – regardless of the nature of that Belief – according to the international human rights treaties, and consistent with Rawls’s model of liberal pluralist democracy.

By adopting this perspective, states that have signed up to the UDHR (which means almost all the countries of the world) would acknowledge that freedom of thought is a stand-alone, absolute and all-embracing freedom which generates Freedom of Belief and its expression in manifestation, speech and assembly. It would ensure that the freedoms apply to all Beliefs, religious or otherwise, rejecting special treatment of religion. This means a clear separation of the state from particular Beliefs, insisting that no Belief or Belief-based organisation (for example a Church or Humanist society) is privileged or disadvantaged by the state.

This perspective, based on a political secularism that involves separation from state authority – the ‘public sphere’ – of religious considerations, would address incoherence, inconsistency and inequity in the interpretation and implementation of the currently established approach to Freedom of Belief, and clarify what is intended by such freedom.

TABLE 3: MEMBERSHIP OF THE UNITED NATIONS

There are 192 members. All except those shaded are Parties to ICCPR: (172 nations).

Sources: <http://www.un.org/en/members/>;

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

Afghanistan	of	India	Morocco	Slovenia
Albania	Congo, Dem.	Indonesia	Mozambique	Solomon Islands
Algeria	Rep. of	Iran	Myanmar	
Andorra	Costa Rica	Iraq	Namibia	Somalia
Angola	Côte d'Ivoire	Ireland	Nauru	South Africa
Antigua/Barbuda	Croatia	Israel	Nepal	Spain
Argentina	Cuba	Italy	Netherlands	Sri Lanka
Armenia	Cyprus	Jamaica	New Zealand	Sudan
Australia	Czech Republic ³	Japan	Nicaragua	Suriname
Austria	Denmark	Jordan	Niger	Swaziland
Azerbaijan	Djibouti	Kazakhstan	Nigeria	Sweden
Bahamas	Dominica	Kenya	Norway	Switzerland ⁴
Bahrain	Dominican Republic	Kiribati	Oman	Syria
Bangladesh	East Timor	Korea, North	Pakistan	Tajikistan
Barbados	Ecuador	Korea, South	Palau	Tanzania
Belarus	Egypt	Kuwait	Panama	Thailand
Belgium	El Salvador	Kyrgyzstan	Papua New Guinea	Togo
Belize	Equatorial Guinea	Laos	Paraguay	Tonga
Benin	Eritrea	Latvia	Peru	Trinidad/Tobago
Bhutan	Estonia	Lebanon	Philippines	Tunisia
Bolivia	Ethiopia	Lesotho	Poland	Turkey
Bosnia and Herzegovina	Fiji	Liberia	Portugal	Turkmenistan
Botswana	Finland	Libya	Qatar	Tuvalu
Brazil	France	Liechtenstein	Romania	Uganda
Brunei	Gabon	Lithuania	Russian Fedn	Ukraine
Bulgaria	Gambia	Luxembourg	Rwanda	United Arab Emirates
Burkina Faso	Georgia	Macedonia	St. Kitts and Nevis	United Kingdom
Burundi	Germany	Madagascar	St. Lucia	United States
Cambodia	Ghana	Malawi	St. Vincent, Grenadines	Uruguay
Cameroon	Greece	Maldives	Samoa	Uzbekistan
Canada	Grenada	Mali	San Marino	Vanuatu
Cape Verde	Guatemala	Malta	São Tomé & Príncipe	Venezuela
Central African Republic	Guinea	Marshall Islands	Saudi Arabia	Vietnam
Chad	Guinea-Bissau	Mauritania	Senegal	Yemen
Chile	Guyana	Mauritius	Serbia ⁶	Zambia
China ²	Haiti	Mexico	Seychelles	Zimbabwe
Colombia	Honduras	Micronesia	Sierra Leone	
Comoros	Hungary	Moldova	Singapore	
Congo, Rep.	Iceland	Monaco	Slovakia	
		Mongolia		
		Montenegro		

PART 1 INTRODUCTION AND THEORETICAL BACKGROUND:
RAWLS AND FREEDOM OF BELIEF

CHAPTER 1

THE RIGHT TO FREEDOM OF BELIEF

1.1 Introduction

Making sense of the universe, the natural world and our relationship with others defines being human. We are impelled to make sense of where we come from, the problems that beset us, and why we are here.¹ Because of the unanswered questions about life, making sense manifests itself as the development of what I will call variously ‘Beliefs’:

‘personal convictions’ or life stances, which become the intellectual mechanism for understanding our existence and forming an ethical code for living. Individuals and groups can become so dependent on their Beliefs that they hold them to be self-evident and incontestable. They then feel threatened by the presence of incompatible or contradictory Beliefs of others. It is thus not surprising that history is full of stories of intolerance between those of different worldviews. The acceptance of Freedom of Belief for all, whether religious or non-religious, has been one of the oldest controversies in the annals of society, and ‘one of the most enduring sources of conflict and inequality’.²

Over time, however, there have been attempts worldwide to allow individuals the right to their own particular Belief system through more tolerant societies. This has led to the twentieth century recognition (in form at least³) of international human rights, by almost every nation in the world. These rights include the right to freedom of what is called ‘religion or belief’,⁴ which will be called throughout this thesis, ‘Freedom of Belief’, to denote inclusion of both religious and non-religious worldviews. The case for using the capitalised term ‘Belief’ for ‘religion or belief’ is made in Chapter 2 (see especially below section 2.2).

¹ See, e.g., Robert van Krieken et al, *Sociology: Themes and Perspectives* (Sydney, Pearson Education, Australia 2000), 481.

² Ibid, 471.

³ Membership of the United Nations involves subscribing to the *Universal Declaration of Human Rights*, (UDHR) adopted and Proclaimed 10 December 1948 by G.A. Res. 217a (iii), U.N. Doc a/810 at 71 (1948), which binds members to, *inter alia*, the application within their jurisdictions of the human rights listed in that document, including the right to Freedom of Belief. A list of membership of the U.N. is at Table 3.

⁴ This is the term used in the formal expression of the right in international human rights treaties to freedom to have and express worldviews or personal convictions. These convictions deal with our relationship to the world and to others within it, and generate a code of ethical behaviour: see below, Ch 6.

Freedom of Belief has been held to be one of the rights designed to:

...enable man to develop his own intellectual and moral personality, to determine his attitude towards natural and supernatural powers, and to shape his relations to his fellow creatures as well as his position in the social and political order.⁵

With diversity of culture and religion, however, comes a diversity of understanding of what constitutes human rights, including the right to Freedom of Belief. Most religions and other Beliefs across the world, from East to West, subscribe to the idea of human rights, but as Johan Van der Vyver states, 'on their own terms'.⁶ While governments and religions are eager to be associated with the idea of human rights, the widespread claim to follow them, based as it is on various religious and cultural backgrounds, 'signifies no more than rhetorical consensus'.⁷ This is demonstrated in the long list of reservations to the ICCPR by States Parties signing and ratifying it.⁸ Eastern religions, Van der Vyver points out, are increasingly questioning Western perceptions of human rights, and there is a 'struggle for supremacy' in the United Nations, particularly between the perceptions of human rights considered 'Western', and those based on Islamic shari'ah.⁹

1.2 Background

Despite the diversity of conceptions of what human rights involve, then, all members of the United Nations have pledged themselves to uphold 'human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.¹⁰ This has become accepted 'almost universally' as imposing moral and political, if not legal,

⁵ K J Partsch, 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, (New York, Columbia University Press, 1981), 209.

⁶ Johan van der Vyver, 'Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts' in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives*, (The Hague, Martinus Nijhoff, 1996), xii.

⁷ Ibid.

⁸ For example, states have insisted on maintaining their own laws on particular matters, or interpreting the ICCPR according to Shari'ah or other religious law. Reservations are set out at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 3/11/2010.

⁹ Johan van der Vyver, 'Introduction', xiiiff.

¹⁰ *United Nations Charter*, 1 U.N.T.S. xvi, Adopted 26 June 1945, entered into force 24 October 1945, as amended by G.A. Res. 1991 (XVIII) 17 December 1963, entered into force 31 Aug. 1965 (557 UNTS 143); 2101 of 20 Dec. 1965, entered into force 12 June 1968 (638 UNTS 308 and 2847 (XXVI) of 20 Dec. 1971, entered into force 24 Sep. 1973 (892 UNTS 119), Article 1(3). States later joining the U.N. since bind themselves to the Charter.

obligations on member states.¹¹ By their membership of the United Nations, over 190 member states have adopted the *Universal Declaration of Human Rights* ('UDHR')¹² which sets out *inter alia* the right to Freedom of Belief. Natan Lerner states that:

The critical role of the Universal Declaration in the development of the legal and political philosophy of the second part of the twentieth century is beyond controversy. It is the most important single legal document of our time, and most of its contents constitute present customary international law.¹³

As shown in Table 3, 172 nations are party to the *International Covenant on Civil and Political Rights* ('ICCPR') the international human rights treaty that gives contractual expression to civil and political rights established by the UDHR, including members of the Organisation of the Islamic Conference ('OIC'),¹⁴ an organisation to promote Islamic solidarity among member states. Article 18 as it appears in the ICCPR is repeated almost word-for-word in Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR') which applies to member States of the European Union.

The right to Freedom of Belief as set out in the above documents provides for absolute freedom to believe what one will, but proclaims that manifestation of that Belief is to be subject to, *inter alia*, the same freedom for others. Equality of freedom is thus not boundless, but is constrained by the responsibility of reciprocity towards others to ensure they enjoy similarly equal freedom. This, I argue, is consistent with the principles of political liberalism based on democracy.

¹¹ Bahiyyih Tahzib, *Freedom of Religion and Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff 1996), 68.

¹² Notably, there were no votes against the UDHR among member states at the time, Saudi Arabia, South Africa and six Eastern European states abstaining. All Muslim states present except Saudi Arabia voted for the UDHR: *ibid*, 76-7.

¹³ Lerner, Natan, 'Religious Human Rights Under the United Nations' in Johan van der Vyver (ed), *Religious Human Rights in Global Perspective*, (Kluwer Law International, 1996) 79, 88.

¹⁴ Most Muslim-dominated countries are also party to the Covenant: Afghanistan, Bahrain, Bangladesh, Cameroon, Chad, Djibouti, Egypt, India, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Somalia, Sudan, Syria, Thailand and Algeria, Tunisia, Turkey, Yemen. Saudi Arabia, Pakistan and UAE are not parties: Ben Clarke, 'Freedom of Speech and Criticism of Religion: What are the Limits?' (2007) 14(2) *Murdoch University Law Journal* 94. Note, however that Egypt declared accession only to the extent that the Covenant provisions do not conflict with Islamic Shari'ah, and the OIC has adopted a Shari'ah-based Declaration of human rights. See discussion at section 1.4 below.

1.3 Objectives and Scope of the Thesis

This thesis makes the case that not only does Rawls develop a theory that presents a strong justification for liberal constitutional democracy as the basis of a fair and just society, he offers a model of structurally secular government comprised of multiple diverse Belief systems, based on the ideal of reasonable agreement among all free and equal citizens.¹⁵ This model seeks compatibility with equal enjoyment by all of fundamental human rights. It is based on what I call political (or structural) secularism. Although Rawls does not use that term, political secularism is inferred in his model. Briefly, it involves

- recognition that Freedom of Belief applies equally to *all* understandings of the world, what is of value, and the meaning of life that generate a normative prescription for personal living, whether they are religious or not ('Beliefs');
- indifference to, or the discounting of, religion or religious considerations by the state in the exercise of its power, with government based on principles from which all citizens, regardless of Belief, can reason in common; and
- the resulting separation from state authority (the 'public sphere') of Belief considerations ('State-Belief separation').

After outlining this model in Part 1, I go on in Part 2 to consider the interpretation and implementation of the relevant Articles with reference to deliberations of the adjudicative bodies. I challenge perceptions about Freedom of Belief that privilege some Beliefs, and/or lead to state-Belief entanglement. This perception is aided in no small way by ambiguity and inconsistency in both the wording of the relevant Articles and their interpretation, as well as their implementation by the adjudicating bodies and others. The result, I conclude, is that current approaches to Freedom of Belief are not always compatible with Rawls's model for equal enjoyment by all of Freedom of Belief.

¹⁵ Rawls's main works are: *A Theory of Justice*; *Political Liberalism*; 'The Idea of Public Reason Revisited', reprinted in Rawls, John *Political Liberalism*; *The Law of Peoples* (Harvard, Harvard University Press 1999), (originally published in *University of Chicago Law Review* 64, Summer 1997, 765-807); *Justice as Fairness: A Restatement* (Cambridge, Belknap Press 2003).

In reaching its conclusion, the thesis refutes the perception that the following are consonant with Freedom of Belief:

- the granting of privileged status of some Belief systems and organisations (mainly religious Beliefs) over others (see especially Chapter 7);
- the entitlement of individuals to automatic exemption from laws that contravene such Beliefs (see especially Chapters 7 and 8); and
- the establishment, endorsement or other forms of engagement between government and Belief systems and organisations that result in their favourable or unfavourable treatment (see especially Chapter 9).

These perceptions prevent the opportunity of all to enjoy Freedom of Belief in a truly equal fashion and lead to significant discrimination and division within society. The conclusion is that a revised perception of Freedom of Belief is warranted, and a means of doing this will be proposed in Chapter 10.

1.4 Liberal democracy as the basis for human rights

This thesis is based on the premise that all members of the U.N., by adopting the UDHR, have committed themselves (membership of the U.N. is listed at Table 3) to liberal democracy, and that this has three broad components:

- *a representative form of democracy*, which has regular elections based on formal political equality (for example each person is entitled to one vote, each vote equalling one value), and equality before the law;
- *political pluralism* and toleration of diverse and conflicting political, social and philosophical Beliefs;
- *neutral procedures in the exercise of governmental power* that recognise the diverse conceptions of the good or ways of life adopted by citizens, but do not discriminate between them or against them.¹⁶

¹⁶ See, e.g., Andrew Heywood, *Political Ideologies* (New York, Palgrave Macmillan 3rd ed, 2003), 43; Ian McLean, 'Democracy' in Ian McLean and Alistair McMillan (eds), *The Concise Oxford*

As to (1), all members have undertaken to provide for this under UDHR Articles 2 (equality) and 21 (political participation).

As to (2) all members have undertaken to provide for this under various sections of the UDHR, including Article 2 (equality), Articles 18, 19 and 20 (Freedom of Belief, speech and assembly), and Articles 21 and 29 (political participation and full development of personality).

As to (3), all members have agreed to neutrality of government implied by the above Articles, especially considering the requirement in Article 29 UDHR that limitations are to be based on the need to protect the rights of others and the 'just requirements of a democratic society'.

Not all nations that have adopted the UDHR as members of the U.N. purport to agree with its terms. For example:

The majority of the constitutions of the Middle East and North Africa promise religious freedom but state that this freedom is subordinate to Islam, local customs, public order or some similar qualification, which effectively allows significant restrictions on religious freedom.¹⁷

The Organisation of the Islamic Conference (about 50 nations) has promulgated an alternative version of human rights, while remaining States Parties to the ICCPR. Under its *Cairo Declaration of Human Rights*,¹⁸ all human rights are to be subject to 'Islamic Shari'ah', thus establishing state-enforced religious practice. Indeed Jonathon Fox has concluded from an intensive study of religion throughout the world that there is a 'clear correlation between democracy and [separation of religion and the state],'¹⁹ while,

Dictionary of Politics, (Oxford, Oxford University Press, 2003) 139. Various interpretations of 'democracy' in general are canvassed in April Carter and Geoffrey Stokes, 'Introduction: Liberal Democracy and its Critics' in April Carter and Geoffrey Stokes (eds), *Liberal Democracy and its Critics*, (Cambridge, Polity Press, 1998) 1.

¹⁷ Jonathon Fox, *A World Survey of Religion and the State* (Cambridge, Cambridge University Press 2008) 248.

¹⁸ *Cairo Declaration of Human Rights in Islam*, adopted by the Organization of the Islamic Conference in 1990, reprinted in U. N. Doc. A/Conf. 157/PC/62/Add.18 (1993), also published by Office of the High Commissioner of Human Rights, 'Cairo Declaration of Human Rights', *A Compilation of International Instruments: Volume II: Regional Instruments*, (Geneva, United Nations, 1997) 477.

¹⁹ Fox, *A World Survey of Religion and the State*, 345ff.

conversely, there has been an overall global increase in government involvement in religion by means of regulation between 1990 and 2002.²⁰

Alan Siaroff describes liberal democracy as having the following features:²¹

- *responsible Government* by an elected legislature, accountable to the electorate, with full civilian control of the military;
- *free and fair competition for office* with officials appointed and removed through fair elections, and political parties free to form and run for office;
- *full and equal rights to political participation* with all eligible adults free to vote and run for office, and only one vote per person, with all votes having equal value;
- *full civil liberties*, including Freedom of Belief, assembly and speech and the right to criticise government; and
- *a well-functioning state* with effective and fair governance through the rule of law and absence of corruption.

A liberal democracy is different from an electoral democracy,²² a semi-liberal autocracy,²³ and a closed autocracy.²⁴ Of 192 nations surveyed, Siaroff estimates there were, in 2004, 65 nations that he considered liberal democracies, 51 electoral democracies, 42 semi-liberal autocracies and 34 closed autocracies. These are listed at Table 2. It seems apparent that Siaroff's categorisation of liberal democracy does not imply complete and equal Freedom of Belief.

²⁰ Ibid, 100.

²¹ Siaroff, *Comparing Political Regimes* (Peterborough, Ontario, Broadview Press 2005), 67.

²² An *electoral democracy* is a freely and fairly elected government, with general political accountability; limited constraints on authority; equal political rights; a degree of tolerance of pluralism; but a deficiency in civil liberties: *ibid*, 74.

²³ A *semi-liberal autocracy* has limited political pluralism with national elections neither free nor fair enough to change or determine government (they confirm the leader however produced); limited social and economic pluralism; accountability and limits on authority; and the illusion of legal-rational authority: *ibid*.

²⁴ In a *closed autocracy* there is intolerance of full political pluralism; limited social, economic and religious tolerance; few or no civil liberties; no political accountability; undefined legal limits on leaders' authority (may be by bureaucracy or military); and leadership for life or overthrow: *ibid*.

A model of liberal democracy that takes into account the growing religious and cultural pluralism throughout the world is required. This is why Rawls's model of political liberalism, one that specifically addresses the pluralism in society and takes into account the equal enjoyment of Freedom of Belief among other human rights, is chosen as a theoretical framework for this thesis. His model of liberal democracy is examined extensively in Chapters 3-5.

1.5 The 'relevant Articles'

There are numerous provisions in international human rights treaties, Declarations, Charters and Agreements – both 'universal' and regional – that either proclaim the right to freedom to have and manifest 'religion or belief', or prohibit discrimination on the ground of 'religion or belief'.²⁵ In considering the right to freedom of 'religion or belief', my thesis will focus mainly on the relevant Articles contained in the international human rights treaties that provide for the 'right to freedom of religion or belief'.

This right was first established by Article 18 of the UDHR.²⁶ It is repeated in Article 18 of the ICCPR²⁷, and Article 1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* ('Belief Declaration').²⁸ Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR')²⁹ is almost identical to Article 18 ICCPR.

Accordingly, the term 'relevant Articles' is used throughout the thesis to refer to

- Article 18 ICCPR;

²⁵ See, e.g., Appendix A, Tore Lindholm, W Cole Durham and Bahia Tahzib-Le (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004), 873ff.

²⁶ *Universal Declaration of Human Rights*, (UDHR) Adopted and Proclaimed 10 December 1948 by G.A. Res. 217a (iii), U.N. Doc a/810 at 71 (1948).

²⁷ *International Covenant on Civil and Political Rights*, (ICCPR) opened for signature 16 December 1966, 999 UNTS 171, (entered into force March 23, 1976).

²⁸ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* GA Res. 36/55 of 25 November 1981, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51, 1981 (25 November 1981).

²⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 11, opened for signature by the Council of Europe 4 November 1950, ETS No. 5 (entered into force September 3, 1953).

- Article I of the Belief Declaration; and
- Article 9 ECHR.

I will now consider these (for reference they are also set out in Table 1, after the Acknowledgments).

1.5.1 The Universal Declaration of Human Rights (UDHR)

Article 18 UDHR states that:

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

Article 2 of the UDHR ensures enjoyment of human rights free from discrimination:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UDHR has become generally accepted as part of international law,³⁰ as well as being a statement of moral, as well as symbolic, significance.

1.5.2 The International Covenant on Civil and Political Rights (ICCPR)

Article 18 of the UDHR was amended and adopted to become Article 18 ICCPR. It states:

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 teaching.

³⁰ See, e.g., Tahzib, *Freedom of Religion and Belief*, 79 n58; John Humphrey, 'The Revolution in the International Law of Human Rights' (1975) 4 *Human Rights* 205, 207.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own personal convictions.

To ensure its universal application, this freedom is explicitly extended to minority religions. Article 27 ICCPR states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 26 ICCPR ensures that rights set out in the Covenant are enjoyed by all individuals free from discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.5.3 The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Belief Declaration)

Several other international instruments have included provisions to ensure Freedom of Belief for such groups as children,³¹ migrant workers and their families³² and ethnic,

³¹ *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Session., Supp. No. 49, art. 32(1), U.N. Doc. A/44/49 (1989) entered into force September 2 1990.

³² *International Convention on the Protection of the Rights of All Migrant Workers and their Families*, A/RES/45/158 69th adopted plenary meeting 18 December 1990, entered into force on July 1st, 2003.

religious or linguistic minorities,³³ but these are similar in form to the Articles described above.

Many attempts were made to institute a Convention on elimination of intolerance based on religion or belief, to elaborate on, and more specifically implement principles set out in the above Articles. However, due to the diversity of views of delegates, these came to a standstill in 1967, and no significant progress has since been made.³⁴ It has been acknowledged that ‘the complexities of devising a universal instrument addressing freedom of conscience or religion appear to be considerably greater than for other, even closely related freedoms’.³⁵ The closest the United Nations has come to agreement on elaboration of the right to freedom of religion or belief is the Belief Declaration.³⁶ This essentially ended the stage of ‘standard setting’ for Freedom of Belief, with the United Nations then focusing on measures for implementation.³⁷

Article 1 of the Belief Declaration provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever 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 teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

³³ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted 15 December 1992, G.A. Res.47/135, reprinted in 32 ILM 911 (1993) 14 HRLJ 54 (1993).

³⁴ Malcolm Evans, ‘The United Nations and Freedom of Religion: The Work of the Human Rights Committee’ in Rex Ahdar (ed), *Law and Religion*, (Aldershot, Ashgate Publishing, 2000) 35, 36.

³⁵ Paul Taylor, ‘The Basis for Departure of European standard under article 9 of the European Convention on Human Rights from Equivalent Universal Standards’ (2001) 5 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2001/issue5/taylor5.html>> accessed 13/6/2001, 2.

³⁶ G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

³⁷ Theo Van Boven, ‘The United Nations Commission on Human Rights and Freedom of Religion or Belief’ in Tor Lindholm, W. Cole Durham and Bahia Tahzib-Le (eds), *Facilitating Freedom of Belief: a Deskbook*, (Leiden, Martinus Nijhoff, 2004) 173,174.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

The similarity of this provision to the ICCPR is because 'it proved impossible to forge a consensus around a more detailed formulation'.³⁸ Indeed none of the international instruments can be properly understood without placing them in their political context. This includes the need to accommodate the many diverse constitutional regimes of the member states who were party to formulating the various international instruments involved. The significance of this critical fact is evident throughout the discussion of implementation of Freedom of Belief in Chapters 6-9.

1.5.4 The European Convention on Human Rights and Freedoms (ECHR)

Article 18 UDHR was the model used to create similar freedoms in the ECHR adopted by the Council of Europe. Article 9 of the ECHR provides that:

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.

Unlike Article 18 ICCPR, Article 9 ECHR retains the freedom to change one's religion or belief, whereas Article 18 ICCPR dropped mention of that right at the request of the Islamic member states that disapprove of conversion from Islam to another religion, apostasy or proselytism.³⁹

³⁸ Malcolm Evans, 'The United Nations and Freedom of Religion: The Work of the Human Rights Committee' in Rex Ahdar (ed), *Law and Religion*, (Aldershot, Ashgate Publishing, 2000) 35, 36.

³⁹ It is argued below that non-specification of the right to change one's Belief does not eliminate that right, as it is inherent in the right to have a Belief. See below section 6.4.1.

The ECHR also prohibits discrimination in relation to the enjoyment of ECHR rights. Article 14 ECHR provides that:

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.

1.5.5 The Three basic rights

The relevant Articles thus set out three main freedoms in relation to Belief in the one paragraph. They are:

- freedom of ‘thought, conscience and religion’
- freedom to either adopt⁴⁰ or change⁴¹ a ‘religion or belief’ of one’s choice; and
- freedom to ‘manifest [one’s] religion or belief in worship, observance, practice and teaching, either individually or in community with others and in public or private’.

1.6 The adjudicative bodies and their role

The bodies that oversee implementation of these human rights treaties are the United Nations (mainly through the Human Rights Committee (‘UNHRC’)),⁴² and the European Council, with individual cases being considered by the European Court of Human Rights (‘European Court’). Before 1998, cases were mostly dealt with by the European Commission on Human Rights (‘European Commission’): see below section 1.6.2. The European Commission and European Court are referred to as the ‘European Bodies’.

These organisations have been chosen for examination, because they both implement human rights treaties with similar wording. Between them, they have developed a body

⁴⁰ Articles 18(1) ICCPR, 1 *Belief Declaration* and 9(1) ECHR.

⁴¹ Articles 18(1) UDHR, Article 9(1) ECHR.

⁴² The Special Rapporteur for freedom of Religion and Belief, and on occasion other Special Rapporteurs on human rights issues, visit countries and report on human rights compliance by states, and also make representations to governments on complaints of non-compliance by citizens. These do not take the form of case law, but are considered on occasion where relevant.

of case law and commentary that sets out the metes and bounds of freedom of thought, conscience and religion. The United Nations is a universal body, embracing many different kinds of regimes, and consequently has a non-coercive approach to human rights. It establishes case law through formal Views on the interpretation of the relevant Articles as expressed by its Human Rights Committee in hearing individual cases under the Optional Protocol to the ICCPR.⁴³ As of March 2008, there were 111 parties to the Optional Protocol.

By contrast, the European Council applies human rights according to a region-specific convention, with similar wording to the ICCPR, but with an added institution for enforcing these in the European Court of Human Rights and the former European Commission on Human Rights ('European Commission'). However, case law and commentary from other jurisdictions, mainly the United Kingdom (which has adopted the ECHR into its *Human Rights Act 1998*) and the United States, can fill gaps where this case law is wanting, and provide some useful examples for comparison.

A review of the interpretation and implementation of Freedom of Belief is all the more pressing in the light of recent developments of concern in the United Nations that involve what many see as a degree of erosion of the right to Freedom of Belief.

One matter of concern is that, despite their ratification of the ICCPR the majority member states of the Organisation of the Islamic Conference ('OIC'), which comprises 56 member states, signed the *Cairo Declaration of Human Rights in Islam* ('Cairo Declaration').⁴⁴

This document declares that all rights are derived from God. The preamble declares:

...no one as a matter of principle has the right to suspend [the nominated rights] in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God....making their observance an act of worship and their neglect or violation an abominable sin....

⁴³ ICCPR Optional Protocol, UNTS vol 999, p. 171, opened for signature 19 December 1966, entered into force 23 March 1976.

⁴⁴ *Cairo Declaration of Human Rights in Islam* ('Cairo Declaration') adopted by the Organization of the Islamic Conference in 1990, reprinted in U. N. Doc. A/Conf. 157/PC/62/Add.18 (1993).

The Declaration is inconsistent with the ICCPR in that all rights and freedom it stipulates are ‘subject to the Islamic Shari’ah’, which is to be the ‘only source of reference for the explanation or clarifications of any of the articles’ (Articles 24, 25). Shari’ah is based on the holy books of the Islamic religion, as well as interpretation of these by imams, or ministers of religion. This makes the Declaration a religious document, despite some liberal language.⁴⁵ It is based on inequality between men and women (Article 6), denies Freedom of Belief (Article 22) and limits free speech (Article 22). The Cairo Declaration was included by the Office of the High Commissioner for Human Rights in the official U.N. document *Human Rights: A Compilation of International Instruments: Volume II: Regional Instruments*,⁴⁶ providing quasi-official recognition by the U.N.

A second cause for concern, I submit, is the adoption by the UNHRC and U.N. General Assembly of resolutions condemning ‘defamation of religion’, which has been urged by the Islamic countries, and is seen by many (especially non-Muslim) countries as a way of restricting freedom of speech. Australia, along with approximately one third of the General Assembly, refused to support the resolution.⁴⁷

Such developments have eroded what is suggested is an already less than ideal recognition of equal Freedom of Belief for all. Currently government involvement in religion ‘remains ubiquitous throughout the world’ and a large majority of the world’s

⁴⁵ A detailed consideration of the provisions of the Cairo Declaration can be found in Audrey Guichon, ‘Some Arguments on the Universality of Human Rights in Islam’ in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, (Leiden, Martinus Nijhoff, 2007) 167, 185ff.

⁴⁶ See, for comment, International Humanist and Ethical Union (IHEU), Association for World Education and Association of World Citizens, ‘The Cairo Declaration and the Universality of Human Rights’ (2008) Webpage of IHEU <<http://www.iheu.org/node/3162>> accessed 21/2/2010, 5.

⁴⁷ ‘[T]he reasons given for this refusal to support the resolution was that it over-referenced Islam and did not adequately address all religions. Further, it confuses issues around defamation and human rights – humans, not religions, have human rights’ and also ‘the terms ‘combating’ and ‘defamation’ lack clarity and the way they are used in the resolution are confusing’. Australian Human Rights and Equal Opportunity Commission, ‘*Combating the Defamation of Religions: Report to the United Nations High Commissioner for Human Rights*’ (2008) <<http://www.humanrights.gov.au/partnerships/religiousdefamation/>> at 30/03/09 55. Recently (2010) the Gay and Lesbian Human Rights Commission was refused “consultative status” at the U.N. Economic and Social Council (ECOSOC) by the Committee on Non-Governmental Organizations although it fulfilled all the requirements for recognition. The refusal was pursuant to a majority vote by such countries as Egypt, Sudan, Qatar, Pakistan and China: Louis Charbonneau, ‘U.N. Committee Moves to Keep Out Gay-Lesbian NGO’, <<http://www.reuters.com/article/idUSTRE6526BQ20100603>>, accessed 3/6/ 2010.

states do not have separation of religion and the state.⁴⁸ In fact, from 1990 to 2002 more states saw an increase in government involvement in religion (that is, regulation of religious practice and discrimination on the ground of religion) than saw a decrease.⁴⁹ This occurred mainly in former Soviet states and Muslim countries. Since the collapse of the Soviet Union, former Soviet states have shown a tendency to re-establish their indigenous cultures and religions.

This has resulted in increased government involvement in religion through limits and bans on minority Beliefs.⁵⁰ Muslim states have also seen an increase in religious regulation of individuals as well as discrimination based on religion since 1990.⁵¹ Some link religion with citizenship, for example, Saudi Arabia, Iran, Kuwait and the UAE.⁵² Orthodox states also have heavy state involvement in religion. Fox argues that no Orthodox states are considered to have separation of religion and state, but few Orthodox states have extreme government involvement in religion. By contrast, Muslim states can be found from one extreme to the other, but are more likely to have government involvement in religion.⁵³

I make the case in Chapters 6-10 that there is a need to revise approaches to growing global pluralism in once relatively homogeneous societies. The conclusion is drawn that the interpretation and implementation of Freedom of Belief, be it religious or non-religious, would be facilitated in the adoption of a perspective that no longer accommodates special consideration (and therefore the dominance) of any particular *kind* of Belief, and recognises the need for state impartiality and separation from church or any other institutionalised ideology.

1.6.1 The United Nations Human Rights Commission ('UNHRC')

The ICCPR established the UNHRC in September 20, 1976.⁵⁴ The Committee members are experts, acting independently of their states, assisting the United Nations Centre for

⁴⁸ Fox, *A World Survey of Religion and the State* 100.

⁴⁹ Ibid.

⁵⁰ Ibid, 178.

⁵¹ Ibid, 326-7.

⁵² Ibid, 355.

⁵³ Ibid, 88-90.

⁵⁴ ICCPR, Articles 23-30.

Human Rights and reporting annually on its activities to the General Assembly.⁵⁵ The Committee is one of six Committees set up to monitor compliance of Member States with the United Nations human rights treaties.⁵⁶ The Committee receives State Party reports on measures they have taken in compliance with the Covenant, which must be submitted every five years. It then conducts an examination of each state's report in public meetings with representatives of that state. Representatives from non-government organisations can also make representations. The Committee then issues concluding observations on its inquiry, expressing views and making recommendations to the State Party concerned. From the questions it asks of the state whose report is being examined, and its concluding observations, one can glean indirectly the views of the UNHRC on the meaning of the relevant Articles.⁵⁷

More importantly, for the purposes of this thesis, the UNHRC also compiles General Comments in relation to the ICCPR that elaborate, interpret and clarify its terms,⁵⁸ as well as receiving 'communications' (also called 'informations') under the First Optional Protocol. The 'communications' are complaints to the Committee by individuals who allege they are the victims of human rights violations by their state government, and who have exhausted all available domestic avenues of appeal. The Committee releases its 'Views' after consideration of the matter.⁵⁹

It is relevant to any consideration of the Committee's views that these are not binding. The State Party involved in a case must recognise the competence of the Committee to determine whether there has been a violation of the ICCPR, and undertake to ensure its citizens are all subject to its jurisdiction. The procedure it undertakes is simple and involves only consideration of paperwork in a closed meeting, without the appearance of the parties concerned. There is no procedure for ensuring compliance, although the

⁵⁵ Tahzib, *Freedom of Religion and Belief*, 250; H Steiner and P Alston (eds), *International Human Rights in Context*, Oxford (2nd edn, OUP, 2000) 707ff.

⁵⁶ The other five Committees are the Committee Against Torture, Committee on Economic, Social and Cultural Rights, Committee on Elimination of Discrimination Against Women, Committee on the Elimination of Racial Discrimination and Committee and the Committee on the Rights of the Child.

⁵⁷ For a discussion of the reasons that the UNHRC cannot effectively perform similarly to adjudication by a court, see Henry Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Phillip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, (Cambridge, Cambridge University Press, 2000) 15.

⁵⁸ These are updated and available at <<http://www2.ohchr.org/english/bodies/treaty/comments.htm>>, or <<http://www1.umn.edu/humanrts/gencomm/hrcomms.htm>>.

⁵⁹ These are updated and available at <<http://www1.umn.edu/humanrts/undocs/undocs.htmwebsite>>.

various means of oversight mentioned above does provide some accountability.⁶⁰ While this may be considered a less than ideal approach to due process, an advantage is the Committee's ability to give effect to the basic principles underlying the human rights instruments as a whole, and to determine a generally applicable interpretation of the Covenant. As will be proposed throughout this thesis, in the case of human rights this is more likely to facilitate the exercise of liberties such as those related to Belief than the clause-based, more literal and party-specific determination generally applied by courts.

The U.N. Human Rights Commission, a body of the United Nations, also provides a means of overview of the status of human rights in member states. It appoints special *rapporteurs* to examine specific human rights issues in member states and receives submissions by non-government organisations. Malcolm Evans argues that the Reports of the Special Rapporteur on Freedom of Belief are of limited guidance in determining the extent of freedom to manifest Belief. This is because there is a tendency to 'relate to the ability of believers to enjoy the practice of their religion in a fairly narrow sense', as well as the need to direct resources to 'more pressing, and basic, needs'.⁶¹ There is a:

...reluctance to move beyond the forms of manifestation either set out in, or directly flowing from, the [Belief] Declaration and address wider and more controversial questions concerning the ability of believers to act in accordance with the dictates of their religious beliefs.⁶²

However, he states that what Reports there are 'provide a depressing catalogue of the infinite variants surrounding the restriction of even the most basic form of manifestation [of Belief]'.⁶³

Additionally, the U.N. develops programs for the promotion of human rights at both the institutional and civil society levels. It works globally towards bridging the gap between Islamic and Western societies by seeking to overcome prejudices, misconceptions and polarisations that potentially threaten world peace.

⁶⁰ See, e.g., Henry Steiner and Phillip Alston (eds), *International Human Rights in Context*, Oxford (2nd edn, OUP, 2000), 738 ff.

⁶¹ Malcolm Evans, *Religious Liberty and International Law*, 253 – 4.

⁶² Ibid, 254; See, e.g., the Rapporteur's report of 1988, E/CN.4/1987/35, §63. Evans discusses the role and work of the Special Rapporteur at *ibid*, 245ff.

⁶³ Ibid, 254.

Because of the extremely diverse societies represented by the member states of the U.N., a more binding, judicially oriented system is probably not feasible, this being more appropriately undertaken by regional complaints systems such as the European, African and American regional human rights systems, which ‘offer several advantages in the areas of logistics, local trust, and homogeneity’.⁶⁴

1.6.2 The European Human Rights Commission and Court of Human Rights

The procedure for consideration of alleged violations of the ECHR has taken place in two main phases.

Until 31 October 1998 there were two adjudicative bodies established by the ECHR. These were the European Court of Human Rights (a part-time court), and the European Commission of Human Rights. These had jurisdiction to hear complaints between states, and between individuals and a concurring State. There was a preliminary examination by the Commission, which would attempt a ‘friendly settlement’. If this was not achieved, the Commission would report its opinion on the merits of the case to the Committee of Ministers, who would determine if there was a violation of the Convention, and any compensation considered appropriate. Within three months of the decision, the Commission or a state concerned (but not the complainant) was entitled to refer the matter to the Court. If this did not happen, the final decision was pronounced by the Committee of Ministers. Thus, the Court was dependent on the Commission’s decisions as to which cases it would hear.⁶⁵

Due to the growth in matters brought under the Convention, Protocol 11 was brought into effect on 1 November 1998,⁶⁶ fusing the Commission and the Court into a full-time and enlarged European Court of Human Rights. The Court assumed the Commission’s task of determining matters of admissibility and merit. The new Court has three tiers, Committees, each consisting of three judges; Chambers, each consisting of seven

⁶⁴ Turkel Opsahl, ‘The Human Rights Committee’ in Philip Alston (ed), *The United Nations and Human Rights: a Critical Appraisal*, (Oxford, Clarendon Press 1992) 421, 421. See also J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester, Manchester University Press 1988) in relation to other nations.

⁶⁵ Steiner and Alston (eds), *International Human Rights in Context* ed, 798.

⁶⁶ ETS No. 55.

judges; and a Grand Chamber of seventeen judges, including the President, Vice-President and Presidents of the Chambers.⁶⁷

The new Court has jurisdiction to hear complaints between States as well as complaints brought by individuals against a State.⁶⁸ An ‘individual application’ can be brought by any person non-governmental organisation or group of individuals claiming to be the victim of a violation of the Convention by one of the ratifying states. A Committee may by unanimous vote declare an application by an individual or group inadmissible or strike it out. This decision is final. If no such decision is taken by the Committee, this matter is decided by a Chamber that hears cases on their merits. A Chamber also considers interstate applications.

Before rendering judgment, the Chamber may relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects. It may do this where the matter before the Chamber raises a serious question about the interpretation of the Convention, or there is an issue of departing from precedent.⁶⁹ In addition, within three months from the date of judgment of the Chamber, any party to the case may, for the same reason, request that the case be referred to the Grand Chamber,⁷⁰ which will render judgment. As a result, each case is heard by at least one convocation of the court.

Judgments of the Grand Chamber are final, those of a Chamber become final when the parties declare they will not request referral to the Grand Chamber, three months have passed since the date of the Chamber judgment with no request for referral, or the Grand Chamber refuses a request to hear the matter.

The ECHR Article 46 provides that:

- 1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
- 2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

⁶⁷ ECHR art 27.

⁶⁸ Ibid, art 34.

⁶⁹ Ibid, art 30.

⁷⁰ Ibid, art 43.

In comparison with the UNHRC, it has been said:

What makes the Strasbourg [ECHR] legal system a more thorough-going international legal system than say, United Nations human rights law, is that Strasbourg displays a much more settled and accepted system of secondary rules and institutions. Moreover, the actors within the system, both governments and individual litigants, as well as their lawyers, recognize the Strasbourg rules and the Strasbourg institutions as legitimate.⁷¹

1.7 Synopsis of following Chapters

Part 1: Introduction and Theoretical Background: Rawls and Freedom of Belief

outlines and sets the scene for the thesis, and considers what Rawls says in relation to pluralist society, and the implications that I argue flow from this for Freedom of Belief in liberal democracy.

Chapter 2, '*Theoretical and Historical Background*' begins by considering the meaning of Freedom of Belief in pluralist societies. The relationship between cultural relativism and human rights is appraised, with reference to 'perfectionist liberalism' and 'neutralist liberalism' paradigms, and special consideration of Rawls and the neutralist paradigm. It is proposed that the idea of the universality of human rights is an underlying principle in Freedom of Belief, as the international human rights treaties have 'revolutionised' the idea of citizenship, endowing all human beings with equal dignity and autonomy. This is considered in the light of cultural diversity.

A premise of my argument is the necessity to recognise the distinction between statements of rights as moral statements (which take into consideration historical, cultural, and social significance of the matters involved) and statements of rights as legally binding documents (which are based on the legal interpretation of these). In addition, considered central is an understanding of the relationship between civil rights and human rights. These distinctions are applied to the democratic principles underlying human rights as adopted in the relevant human rights instruments, such as freedom and equality. As the ICCPR and the ECHR are a form of contract with states parties, they are

⁷¹ Mark Janis, Richard Kay and Anthony Bradley, (eds) *European Human Rights Law* (2nd ed., Oxford, OUP, 2000), 87.

a commitment to the interpretation by the adjudicative bodies of the rights they enumerate.

In Chapter 3, *Rawls and the Nature of Secularism*, it is proposed that Rawls developed a theory of the secular state, in the quest for a society that allows, *inter alia*, Freedom of Belief. The term ‘secularism’ has been given various meanings, and these are canvassed. It is concluded that, while not specifying it as such, Rawls articulated the ideal liberal democracy as one based on *structural secularism*,⁷² that is, a political structure in which religion is immaterial to government coercive decision-making. It precludes accommodation of Belief in legislative or judicial matters that discriminates favourably or unfavourably simply because of Belief. This structure necessarily implies state disassociation from all Beliefs. It is important to note that this structure does not preclude government consideration of culture, religion or ethnicity in matters that do not jeopardise the exercise of public reason in governance: see Chapter 9. Arguments against a more accommodating ‘neutralist’ approach are presented in Chapter 9.

Discussion of the concept of secularism and its relationship to Rawls’s idea of state indifference follows, making the case that political secularism lies at the heart of his model of procedural justice as fairness. Rawls’s model is founded on the ideal of public reason (grounds for public policy that all can accept)⁷³ that expresses an overlapping consensus to be accepted at the basis of all Beliefs.⁷⁴

This approach leads to a fuller understanding of the connection between the idea of a liberal democratic society and structural secularism, with its ability to facilitate most effectively the right to Freedom of Belief.

⁷² As noted above, a distinction is drawn between structural secularism, a form of political structure, and what is often conceived as a philosophical secularism based on non-religious principles.

⁷³ I am using the term ‘ideal of public reason’ according to Rawls’s exposition (‘The Idea of Public Reason Revisited’, 442), which is realized whenever those holding public office act according to the idea of ‘public reason’ (see glossary).

⁷⁴ Rawls uses the term ‘neutrality’ in relation to government. As will be argued in Chapter 9, ‘neutrality’ need not necessarily mean strict indifference to Belief, but has been seen as a position of equal favouring of Beliefs (‘equal aid’). It is argued there that this is not logically feasible and in fact results in unequal treatment of Belief systems. It is proposed there that what is required is Belief-state separation, or ‘no aid’.

Chapter 4, *Secular Liberal Democracy and Human Rights* then sets out to examine what Rawls means by citizens having a ‘right’ in a liberal democratic state. It starts with consideration of the First of his two Principles of Justice.

The First Principle of Justice (‘First Principle’) sets out the benchmark for the interpretation of the scope of the free exercise of religion or belief as set out in the relevant Articles (namely, Articles 18(1) ICCPR, 1 Belief Declaration, and 9(1) ECHR). The First Principle provides for equality: each person having an equal claim to equal basic rights and liberties, in which equal political liberties are to be guaranteed their fair value. Chapter 4 considers what is involved in a claim to basic right and liberties; Chapter 5 considers Rawls’s approach to equality and Freedom of Belief.

Rawls’s distinction between political rights giving effect to ‘*basic human rights*’ and those giving effect to ‘*basic liberties*’ is outlined, and the case is made that basic liberties are politically determined by individual societies, as opposed to the universal nature of basic human rights. Basic liberties give rise to political rights, which are aimed at providing equal status as citizens, with its attendant recognition of the claim for all to engage equally in the political process because of their citizenship. Integral to that freedom is the duty of reciprocity, involving acknowledgement by all of the same enjoyment of Freedom of Belief by others. The corollary of Freedom of Belief, then, is freedom *from* [the influence of] Belief.

Rawls contends that political rights take priority over liberties aimed at equalising possibilities for enhancing social or economic experience – what I call ‘life-chance equality’ – such as equal pay or employment opportunities.

As all members of the United Nations have subscribed to the UDHR, most have subscribed to the ICCPR and many to the ECHR, I propose that these nations can be considered to have undertaken to establish societies based on at least some form of liberal democracy.⁷⁵ Rawls sought to theorise an ideal model of democracy that would allow for equal Freedom of Belief for all in his model of political liberalism.

⁷⁵ Articles 25 and 26 ICCPR provide for participation of all in the conduct of public affairs and voting, and equality before the law; the Preamble of the ECHR is based on the principle of democracy.

In accepting and affirming their pluralist democratic society, citizens recognise the need to cooperate with those with different Beliefs on terms that all can accept. Consequently, public policies and laws must be justifiable on those terms. They include human rights as set out in the international human rights treaties. As a result, it is argued, liberal democracy exhibits a convergence between the public and the private spheres, rather than an irreconcilable conflict between them. This convergence is the foundation of an ‘overlapping consensus.’⁷⁶

Chapter 5, *Equality and Freedom of Belief* concludes the theoretical background by examining the idea of equality as elucidated by Rawls, and elaborated in his Second Principle of Justice. This is then applied to the right to Freedom of Belief according to his model of political liberalism. It is quite clear that equality is central to human rights: it is a central focus of the international human rights treaties. The legal approach to equality is noted, pointing out problems with attempting to treat everyone equally, despite their differences in natural abilities and circumstance. Consequently, the idea of equality of opportunity has been developed, and this is considered in light of Rawls’s work.

It is proposed that democracy involves more than citizens passively voting or accepting a foregone conclusion at the ballot box. They must also be free to exercise individual autonomous authorship of political decisions. This requires maximising the opportunity for all to exercise their human rights, including the right to Freedom of Belief. Rather than considering social, physical or economic characteristics in themselves as the basis for equal treatment, the aim is thus to ensure no one is treated unjustly. Accordingly, the practice of political equality has the goal of ensuring equal enjoyment by all of the equal exercise of their human rights through equal participation in the political process.

The case is made that Rawls by implication drew an important distinction between reallocation of resources for the purpose of equal participation in political process (‘political equality’) and reallocation for the purpose of an equal chance at social and economic benefits (‘life-chance equality’). Strategies for political equality harmonise the elements of both liberty and equality, as the liberty involved contains within itself the requirement of equality. Strategies for life-chance equality, a nebulous entity given

⁷⁶ Rawls, *Justice as Fairness*, 32.

human and social diversity, favours some at the expense of others, resulting in conflict between the ideals of liberty and equality.

Part 2, Interpretation and Implementation of Relevant Articles and Conclusion

considers the deliberations of the adjudicative bodies in their oversight of States' observance of the right to Freedom of Belief, and the extent to which these give effect to the principles of liberal democracy outlined by Rawls. It offers a new perspective for facilitating Freedom of Belief, based on Rawls's model of liberal democracy in a pluralist society.

Chapter 6, *The Scope of the relevant Articles* refers to the fact that three fundamental freedoms – freedom of thought, freedom to have a Belief and freedom to manifest that Belief - are enmeshed in one paragraph in the relevant Articles. This causes ambiguity and confusion, promoting, *inter alia*, unwarranted bias towards freedom of religion. I argue that these freedoms should be expressed separately for clarification.

Despite ambiguity and confusion, it is clear from interpretive statements that the relevant Articles are meant to encompass all ethical worldviews whether they are religious or not. While this approach is congruent with Rawls's model, I propose that the general approach to Freedom of Belief taken by adjudicative bodies and governments is infused with religious preference. A more equitable approach, which gives clear indication that religious conviction is not a special aspect of Freedom of Belief, is required.

While the relevant Articles only use the words 'religion or belief' in relation to the right to manifestation of personal convictions through nominated activities, in Chapter 7, *What is Protected in Having or Adopting a Belief?*, I consider the claim that Freedom of Belief includes the right to act on 'conscience'.

This leads to consideration of the dichotomy that has been drawn by writers between the *forum internum* ('the internal and private realm against which no State interference is justified') and the *forum externum* (the 'right of manifestation').⁷⁷ The argument that the absolute right to 'thought, conscience and religion' can extend to protection from

⁷⁷ Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, Cambridge University Press 2005), 19.

mandatory action that is in conflict with individual conscience is examined and critiqued.

Also assessed is the conception of society as comprising two separate areas of concern when considering Freedom of Belief: a private sphere (the personal world of family and social interaction) and a ‘public sphere’ of governmental policy debate and decision-making respectively. This too is critiqued in the light of Rawls’s rejection of a clear distinction between the two in relation to political rights (including Freedom of Belief), while they may be relevant in other perspectives on society. Rawls argues that they are not separate spheres, but ‘the result of how the principles of justice are applied... If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing.’⁷⁸

This reasoning leads to the conclusion that human rights, such as Freedom of Belief itself (which includes the right to leave or dissent from a religion or association) and personal integrity, apply to all within the family and associations. It overrides the freedom to waive voluntarily some basic liberties such as personal decision-making, freedom of movement, employment, and equal treatment with others. Nevertheless, waiving these liberties does not deprive an individual of their entitlement to claim their human rights if they so desire, and the state may intervene when an individual’s actions adversely affect the rights and liberties of others (which include the public interest). Herein lies the limits of freedom of religion: individuals’ rights as citizens cannot be compromised.

Chapter 8, *What is involved in Manifesting a Belief?*, considers the meaning and application by the adjudicative bodies of the right to ‘manifestation of religion or belief’ and the application of the limitations attached to it in the relevant Articles. A conclusion as to the issues that arise from the need to interpret and apply the concepts of ‘worship’, ‘observance’, ‘practice’ and ‘teaching’ of religion or belief is drawn, urging that the limits of manifestation of Belief, with Rawls’s clear indication that Freedom of Belief is subject to public reason and the strictures of equality in liberal democracy, are considered.

⁷⁸ John Rawls, ‘The Idea of Public Reason Revisited’, 471.

It is noted that the approach to interpretation and implementation of the right to manifest Belief is problematic, with *privilege* of Belief, rather than its *protection*, often the overriding consideration. According to the principles of liberal democracy, I propose, the reverse approach is more likely to provide Freedom of Belief.

Chapter 9, *The Relationship between State and Belief*, considers what is argued to be a serious omission in the expression of Freedom of Belief in the relevant Articles, and the approach of the adjudicative bodies. It deals with the extent to which entanglement of religion or other personal convictions and public life affect Freedom of Belief. It notes the ‘non-establishment’ approach of the United States to religion and compares this with the absence of such a principle in human rights language. The chapter considers different approaches to the notion of ‘state neutrality’, and concludes that the lack of a clear principle of state disengagement from personal convictions is hindering the full exercise of Freedom of Belief. State accommodation of religious or other Beliefs takes the idea of Freedom of Belief beyond freedom from state interference with holding and manifesting Beliefs to an active and mostly selective state promotion or endorsement of them.

The placing of religious Belief in a category of its own and its preferential treatment has resulted in many religious institutions being granted special status, one to which governments, courts and society in general often defer.⁷⁹ This can also lead to marginalisation of, and discrimination against, those who have firm Beliefs that are not considered by the state to be ‘religious’, contrary to the accepted purpose of the right to Freedom of Belief.

I propose that the focus of Freedom of Belief should be, not some inherent value of personal Beliefs in themselves, but the danger of allowing ideas based on these Beliefs to ‘prevail in the political process’⁸⁰ or, on the other hand, to be compromised by political interference. Consequently, the distinction between public reason and background culture as established by the presence of diverse personal convictions is increasingly appropriate to modern democratic and secular society.

⁷⁹ See the discussion of *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A at section 6.3.3 for an example of favourable and unfavourable status given to particular religions.

⁸⁰ William Marshall, ‘The Inequality of Anti-Establishment’ (1993) 63 *Brigham Young University Law Review* 63, 71.

It is accepted that complete separation of state and Belief is problematic given the complex interrelationship of Belief and political activity. However, the Chapter is concluded by proposing that a secular state is best achieved by maximising formal and actual separation from personal convictions, religious or otherwise. This is the most effective way of facilitating Freedom of Belief.

Chapter 10, *Conclusion and Way Forward* brings together the several arguments canvassed throughout the thesis to propose a revised approach to the formulation and interpretation of Freedom of Belief. This approach involves a perspective that divides the one paragraph of the relevant Articles into three distinct freedoms nominated above at section 1.5.5. It includes the removal of ‘religion’ as a special category of protection, the full recognition of need for certain restrictions on the manifestation of Belief, and the need to promote maximisation of state-Belief separation.

1.8 Conclusion

The international human rights treaties considered in this thesis are based on a model of liberal democracy, involving representative government, political pluralism, impartial exercise of government power and equality before the law. They promise freedom to have or adopt a Belief, and to practise its tenets subject to restrictions that preserve the integrity of the (democratic) state and the rights of others.

The U.N. and the European Council, through the case law of their adjudicative bodies and other determinations of their various organisations, provide interpretations and guides to implementation of the relevant Articles. It seems useful to take Rawls’s model of political liberalism, especially as it focuses on the right to Freedom of Belief in pluralist society as a roadmap, to determining the effectiveness of states’ responses to their obligations under the relevant Articles, and the extent to which citizens enjoy Freedom of Belief.

CHAPTER 2 THEORETICAL AND HISTORICAL BACKGROUND

2.1 Introduction

Premodern state legitimacy throughout the world stemmed from hegemonic religious Belief and culture, which was synonymous with political loyalty. Exceptions did occur: for example, there was a degree of tolerance of different Beliefs and cultural practices for the sake of burgeoning trade between peoples or for practical purposes in cementing conquest.¹

The development of nation states and colonial expansion throughout the globe meant that people were no longer homogeneous groups bound together by similar religious and cultural Beliefs, through the principle of *cuius regio, eius religio*, but geographically determined areas of land in which one government (usually a monarch) ruled over many different tribes or ethnic/cultural communities.

It was the monotheistic religions, according to Malcolm Evans, with their challenge to religious pluralism (as expressed, for example, by the First and Second Commandments) that promoted religious intolerance throughout Europe over the centuries², and wherever monotheism spread. Tor Lindholm suggests that Christianity later perversely paved the way for religious freedom, through the ‘interminable’ religious wars (culminating in the 30-years war) that provoked the move for international peace.³ The Treaty of Augsburg (1555) recognised the existence of Lutheranism within the German territories. This sowed the seed of tolerance of different religions within national borders.⁴ The Treaty of Westphalia (1648) ushered in a new secular international order while preserving internal denominational polities. While recognising Freedom of Belief *between* nations, it did not recognise individual Freedom of Belief *within* nations. That depended on the idea of individual rights first seriously espoused in the seventeenth century, with the English Bill of Rights of 1688, and later refined in the French and U.S. Declarations of rights

¹ Tore Lindholm, ‘Philosophical and Religious Justifications of Freedom’, 25; Malcolm Evans, ‘Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict’ in *ibid*, 2, 6.

² Evans, ‘Historical Analysis’, 2.

³ Lindholm, ‘Philosophical and Religious Justifications’, 29.

⁴ Evans, ‘Historical Analysis’, 4.

(see below, section 5.2.1). It was then some centuries before the international human rights treaties to make human rights, including the right to Freedom of Belief, applicable to individuals.

Despite the establishment of an internationally recognised freedom of religion or belief, such freedom is patchy across the world today. At one end of the spectrum there are theocracies such as Iran and the Arab Emirates. Their constitutions provide that the state be subject to Islamic law. At the other end of the spectrum are states that provide for separation of government from religion. These states vary in the degree of separation, the two most prominently separationist being the U.S. and France. Other nations fit into various positions along the spectrum.

2.2 The meaning of ‘religion or belief’

The terms ‘religion’ and ‘belief’, the subject of the relevant Articles (set out in section 1.5 above) bear no settled meaning, as they are contentious.⁵ The meaning of ‘religion or belief’ as conceived by the bodies administering the right to Freedom of Belief is explored in Chapter 6. Many different attempts to determine what is included in the right to freedom of religion have been made. Narrow substantive interpretations require recognition of a supernatural being or entity (e.g. in the Australian courts).⁶ Functional views favour consideration of the role of religion in social identity and cohesion (e.g. in the U.S. courts).⁷ This broader idea of worldview takes ‘religion’ and ‘belief’ to be synonymous. Robert Boccock’s approach is an example of the latter. He defines religion as ‘social and cultural beliefs’: ‘Beliefs, values, symbols, rituals, social roles, organisations and groups which are concerned with the sacred’, sacred being the ‘‘set apart’ from everyday, secular, utilitarian, profane area of social life’.⁸

Ironically, this thesis maintains, the special reference to religious Beliefs and subsequent privileging of them by states tends to *hinder* rather than facilitate the opportunity for many to exercise fully liberties surrounding the adoption and expression of their

⁵ See, e.g., T Jeremy Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’ (2003) 16 *Harvard Human Rights Journal* 189.

⁶ See, e.g., *Church of the New Faith v. Commissioner of Pay-Roll Tax* (Vic) (1983) 154 CLR 120.

⁷ See, e.g., Paul Horwitz, ‘Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion’ (1997) 47 *De Paul L.R.* 85, 129.

⁸ Robert Boccock, ‘Religion in Modern Britain’ in Robert Boccock and Kenneth Thompson (eds), *Religion and Ideology*, (Manchester, Manchester University Press, 1991) 207.

personal convictions, whether they are faith-based or reason-based.⁹ In other words, the opportunity for all individuals to enjoy the liberty to adopt and follow their Beliefs, religious or otherwise, would in fact be enhanced if all personal convictions or Beliefs were treated in the same way, be they religious or otherwise.

Privileging of religion creates a two-tier approach to Belief, distinguishing religious convictions from other Beliefs, with the consequent presumption that religious Belief is somehow morally superior to, or more important than, other Beliefs. What results is a degree of incoherence, inconsistency and inequity in approaches taken by governments and judicial bodies to their understanding of the liberties relating to Belief. The promotion of equal participation of all individuals in the liberty to live by their personal convictions is consequently inhibited.

In relation to *incoherence*, for example, there is often judicial uncertainty towards what should be considered a religion. Should the content of a Belief be considered?¹⁰ If so, is it to include a god, several gods, some other sort of supernatural entity, or should it rather include any Belief that forms the same function as religion? If the latter, what is the function of religion? Is it to provide a system of enquiry, a set of rules, a comforting social support or a proud cultural heritage? Opinions and judicial deliberations differ.¹¹ To be considered manifestation of religion, must protected actions be central to religion (such as church services) or merely motivated by religion (such as good works or modest dress)? These are all questions that are raised by the need to find a definition of 'religion', which is dealt with further in Chapter 6.

If courts or tribunals are to consider whether a Belief is 'religious', they can also be distracted by other questions, such as, is the claimant sincere in her Belief, or is religious Belief being used as an excuse for her actions? Is the wearing of the Islamic *hijab* or veil

⁹ See, e.g., Mark Tushnet, 'Questioning the value of Accommodating Religion' in Stephen Feldman (ed), *Law and Religion: A Critical Anthology*, (New York, New York University Press, 2000) 245; William Marshall, 'The Inequality of Anti-Establishment' (1993) 63 *Brigham Young University Law Review* 71.

¹⁰ See, e.g., discussion of this issue in, e.g., *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978) ; *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A; *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I; *Darby v. Sweden*, 23 October 1990, Series A no. 187.

¹¹ W. Cole Durham, 'Perspectives on Religious Liberty' in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective*, (The Hague, Martinus Nijhoff, 1996); Gunn, 'The Complexity of Religion'.

a deeply religious act, or more one of cultural or political solidarity? Should adjudicators question the validity of religious tenets of a claimant against their religious community as a whole, or can the claimant's differing views from their religious community to which they belong be taken into account? What if the claimant argues that his or her own unique Beliefs are religious? ¹²

Then again, some religious adherents reject attempts to find a 'one-size-fits all' definition of religion as failing to accommodate the myriad of Belief systems their followers would call 'religions'. ¹³

Inconsistency occurs because Governments and courts have differed in the meaning they have given religion from one jurisdiction to another. For example, Raelianism and Scientology consist of belief in extraterrestrial beings that have invaded the earth. The Australian Tax Office has ruled that Raelianism is not a Belief in the supernatural, Scientology is, so only the latter is a 'religion'. ¹⁴

Finally, *inequality* results from the dependence for recognition on government that may favour specific religious groups based on assumptions and accepted social or ethnic views. Even where there is no state established religion, as in Australia and New Zealand, our Governments clearly favour Christianity. ¹⁵ The Queen as our head of state is the Supreme Governor of the Anglican Church. Our Flag bears the crosses of three Christian Saints, St George, St Andrew and St Patrick. Parliamentary sessions start with Christian prayers. The former Australian Prime Minister, John Howard, and Treasurer, Peter Costello, have often told us that Australia is a nation with a Judeo-Christian tradition, and former Prime Minister Kevin Rudd has argued for religious influence in politics. ¹⁶ More than one million Australians, at least, who consider they do not belong

¹² The difficulty of determining just what beliefs should be considered religious or not, and whether individual ideas of right and wrong are included is outlined by Malcolm M. Evans, *Religious Liberty*, 203ff.

¹³ See, e.g., Mark Tushnet, 'Questioning the value of Accommodating Religion' in Stephen Feldman (ed), *Law and Religion: A Critical Anthology*, (New York, New York University Press, 2000) 245.

¹⁴ According to personal discussion with a Raelian representative and perusal of Australian Tax Office reasons for decision. See below section 6.3.1.

¹⁵ E.g., Dennis Altman *51st State?* (Melbourne, Scribe, 2006), Chapter 3; Marion Maddox, *God Under Howard* (Sydney, Allen & Unwin, 2005).

¹⁶ Kevin Rudd, 'Faith in Politics' *The Monthly*, October 2006, 22. See comment, Meg Wallace, 'Parliament is not a Church: Rudd Rawls and the Secular State' (2008) 15(2) *Murdoch University Law Journal* 246.

to a religion, are not officially recognised in these important formal state ceremonial representations. This is in addition to the financial assistance through tax exemptions and grants such as those for the Catholic Church's World Youth Day (see section 9.5.2), and religious chaplains in government schools.

On the grounds of incoherence, inconsistency and inequality, I refute the idea that religion should be a special category of 'belief'. Freedom to follow personal convictions (be they religious or non-religious) are closely related to other freedoms involving speech, assembly, personal integrity and autonomy, essentially derived from the general application of these principles of self-realisation. Religious services, meetings or proselytism have at times been dealt with as a matter of free speech rather than worship in some cases. In this sense, liberties surrounding Belief (religious or otherwise) and associated action should be approached as part of a seamless, comprehensive and inter-related set of principles recognising individual autonomy and self-realisation.

In a liberal, representative democracy the liberty of all individuals to act in any way that promotes the full and meaningful development as human beings is the principle that feeds all liberties such as those involving speech, association and assembly. They are interdependent, and have been declared indivisible.¹⁷ However, these liberties can be restricted in the interests of the liberties of others. It is thus recognised that liberal democracy contains within itself the need to limit the very liberties it promotes. Some liberties, however, are considered to require special protection by the state, thus becoming, to differing extents, what are considered enforceable rights.

This model applies to Freedom of Belief. For example, the right of children to state protection may well outweigh an individual's freedom to refuse medical treatment of

¹⁷ The U.N. has declared all human rights to be indivisible, both those civil and political and social and economic. This principle is supported by the General Assembly and by the Office of the High Commissioner for Human Rights. The 1993 Vienna Declaration declares that 'All human rights are universal, indivisible and interdependent and interrelated': *Vienna Declaration and Programme of Action*, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, § 5, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993). Indivisibility requires that the two categories of rights be mutually indispensable as opposed to the more flexible relationship of interdependence: James Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' *Human Rights Quarterly* 30 2008 984–1001, 991. Nickel argues that 'United Nations statements about indivisibility are broad overstatements of more modest truths': *ibid*, 1001, and that total indivisibility of all rights is not really a practical option, particularly for developing nations. His analysis points to a more realisable focus on supporting relationships of interdependence and interrelationship, based on particular rights and circumstances of realisation.

their child on religious grounds. However, some governments have accepted harmful practices, such as refusal of medical treatment, child sexual abuse, domestic violence and female circumcision, as a consequence of a policy of ‘respect’ for, and even encouragement of, diversity of culture and religion. In the U.S. for example, Marci Hamilton claims that:

A total of 32 states provide a defense for felonious child neglect, manslaughter or murder where the child’s life was sacrificed for religious reasons, as well as a religious defense for misdemeanours arising from physical harm to children resulting from medical neglect.¹⁸

Across the world, human rights are compromised in relation to the right to change one’s Belief, and the role of women and children based on Belief. Government acquiescence, either formally or informally, plays a part in their continuance.¹⁹ Disagreement on these issues helps to explain the failure of U.N. membership to develop the Belief Declaration into a legally binding covenant.²⁰ Lindholm *et al* point out that:

...the 1993 Vienna World Conference on Human Rights did not succeed in crafting a new understanding on the universality or particularity of human rights. It merely acknowledged disagreement through its compromise language, giving continued recognition to the universality of human rights while accepting cultural and religious particularities as well.²¹

¹⁸ Marci A Hamilton, *God vs. the Gavel* (Cambridge, Cambridge University Press 2005), 32. See also *ibid*, Ch 2.

¹⁹ E.g., in Afghanistan, ‘[n]umerous reports demonstrate that authorities systematically fail to investigate and prosecute perpetrators of sexual violence...police and judicial officials are not aware or convinced that rape is a serious criminal offence’: United Nations Assistance Mission in Afghanistan, *Silence is Violence: End the Abuse of Women in Afghanistan* (Geneva, United Nations High Commissioner for Human Rights, 2009), 24-5. ‘In some countries police and judiciary help to preserve and protect harmful traditional practices, for example, in covering up murders dressed up as crimes of honour. Judges may fear interference with custom or culture’: Geneva-Based NGO Committee on Freedom of Religion or Belief and NGO Committee on the Status of Women, ‘Working Paper: Unofficial Summary in English,’ E/CN.4/2002/73/Add.2, 5 April 2002’ (2002), §197.

²⁰ Lindholm *et al*, ‘Facilitating Freedom’, xxviii.

²¹ *Ibid*, xxviii.

2.3 Special treatment for Religion?

My position here is *not* that religion should be removed from special consideration in determining liberties associated with personal convictions because we should not respect the liberty of all individuals to adopt or manifest the religion of their choice. It is rather that the same approach should apply to the adoption and manifestation of *any* life stance, religious or otherwise. The special attention given religious Belief cannot be justified in the twenty-first century, especially given the increasing diversity of Beliefs, and their changing nature due to the influence of social mobility, global governance and the ideology of human rights.

This proposal is supported below by other considerations. Firstly, the intention of the international expressions of these liberties has been to include in the liberties a wide conception of the term to include Beliefs of all kinds, as will be seen in considering the approach of the judicial bodies (Chapters 6–9).

Secondly, the liberty to adopt and follow personal convictions overlaps and interrelates with other liberties, such as liberty of speech and association, personal autonomy and liberties expressing the rule of law. This is demonstrated by the fact that where a complaint considered by the European Court alleges breach of a related Article along with Article 9, it is often considered by the adjudicative body under the other Article(s) only, a finding of breach of the other Article(s) removing the need to consider Article 9.²²

Thirdly, as soon as one accepts a broad definition of ‘belief’ to include both religious and non-religious Beliefs, as well as relating to other freedoms, the question arises - *why should there be any special treatment of religious belief?* There is a lack of agreement on how to identify this distinctive nature – is it religion’s belief in the supernatural, its faith-based, rather than rational, basis, or the imperative nature of its dictates, with fear of eternal damnation?²³ Other Beliefs are based on ethical imperatives, albeit for different reasons. They may or may not be based on faith or reason. The issue is that if

²² E.g., Jean-François Renucci, *Article 9 of the European Convention on Human Rights* (Strasbourg, Council of Europe 2005), 36ff.

²³ Richard Dawkins considers that one can sum up the functions attributed to religion as explanation, exhortation (to do right), consolation and inspiration, all of which he says are provided by science: Richard Dawkins, *The God Delusion* (London, Bantam Press 2006), esp p. 347.

we believe in equal liberties for all, we need to consider all Beliefs equally, whatever their basis.

By doing this, it is proposed we would in fact enhance the ability of all individuals to exercise more equitably their liberties to have and manifest their Beliefs. However, we also need to be clear about the underlying aim of the relevant Articles, which, as argued above, is to promote the basic principles of dignity and self-realisation.

The approach suggested would increase equality in relation to the liberty to believe. It would focus on the common factor of liberty in relation to whatever Belief is being considered, by grounding religious liberty in generic liberties of speech, association and expression rather than establishing some special right of its own.

In effect, then, protection of the liberty to hold and express Beliefs would become one element, albeit essential, of liberal democratic society, with its focus on autonomy and equality. In the words of Professor James Nickel ‘The believer, the religion shopper, the founder of a new religion, the syncretistic new age seeker, the theologian, the doubter, and the atheist all find shelter in the broad basic liberties.’²⁴

It thus seems unhelpful to conceive of religion as other than a way of believing,²⁵ as ‘belief’ connotes the acceptance of a proposition.²⁶ B. J. Good notes that the concepts of ‘belief’ and ‘belief systems’ have been used by social scientists to connote ‘a society’s culture, religion, or ideas about the world, but seldom explicitly theorized’.²⁷ He refers to D. E. Tooker, who argues that, anthropologically, ‘belief’ generally has two elements: ‘a mental state or conviction in which a doctrine or proposition concerning one’s world-view is affirmed as true as opposed to false’ and an assumption that such a

²⁴ James W Nickel, ‘Who Needs Freedom of Religion?’ (2005) 76 *University of Colorado Law Review* 941.

²⁵ Carlo Prandi, ‘Belief’ *The Blackwell Encyclopedia of Sociology*, 258.

²⁶ Concise Oxford Dictionary, Oxford, OUP 1985.

²⁷ B. J. Good, ‘Belief, Anthropology of’ (2001) *International Encyclopedia of the Social and Behavioural Sciences* 1137 <<http://www.sciencedirect.com>> at online 5/06/09, 1. Pages noted are those of downloaded printout.

‘prepositional relationship to tradition is an ‘interiorized’ one because of its reference to mental states’.²⁸

Good considers several approaches to similar uses of the term ‘belief’. He cites the structural-functional ‘symbolic statement[s] about the social order’ that is the Boasian paradigm of a cultural worldview, giving a particular people its distinctive sense of place in the world. He also refers to cognitive anthropology with its ‘propositions about the relations among things’. These are propositions ‘to which those who believe have some kind of commitment...for pragmatic or emotional reasons’.²⁹ He then points out that in other areas of scholarship, for example medical anthropology and health studies, the term ‘belief’ (questioning) is opposed to ‘knowledge’ (scientific certainty).³⁰ The difference in this conception of ‘belief’ is that a belief in scientific terms is open to external validation, whereas Belief in religious terms is not.³¹

The mingling of tradition and religious belief is widespread, and the phrase ‘religion or belief’ is considered in this thesis to be appropriately represented by the capitalised term ‘Belief’, which thus includes religious or non-religious worldviews. Following Tooker’s approach, then, it can be argued that a legitimate paradigm of Belief involves a commitment to a worldview or system of ideas, religious or otherwise, that attempts to (1) explain nature, existence, and one’s relationship to the natural, social and political order, and (2) provide a set of values or morals for human behaviour. David Little demonstrates what he argues is a deep interconnection between religion, ethnic and at times nationalist identity.³² In many states, particularly those with a Muslim majority, religion is linked with national identity. For example, ‘in Saudi Arabia all citizens must

²⁸ Ibid, 2, quoting E Tooker, ‘Identity systems of Highland Burma: “belief,” Akha Zan, and a critique of interiorized notions of ethno-religious identity’ (1992) 27 *Man* 299, 808.

²⁹ Good, ‘Belief’ 5, quoting W. H. Goodenough, ‘Evolution of the human capacity for beliefs’ (1990) 92 *American Anthropologist* 597, 597.

³⁰ Good, ‘Belief’, 5.

³¹ Van Krieken et al, *Sociology*, 484; see also Grace Davie, *The Sociology of Religion* (London, Sage Publications 2007), 19-20.

³² David Little, ‘Studying “Religious Human Rights”’: Methodological Foundations’ in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective*, (The Hague, Kluwer Law International, 1996) 45, esp. 68ff. See also Fox, *A World Survey of Religion and the State*, 354.

be Muslims and in Iran, Kuwait and the UAE citizenship is strongly linked to Islam' and most states with official religions can be said to link indirectly religion and citizenship.³³

On this reasoning, the terms 'religion' and 'belief' as they appear in the relevant Articles both refer to a worldview, as 'religion' is another form of 'belief'. Beliefs, religious or otherwise, are fundamental to self-identity and perception of the cosmos for all human beings. Because of the critical role they play in individuals' and communities' perception of the nature and meaning of their lives, Beliefs, whether religious or otherwise, have been the cause of much intolerance through discrimination, persecution and warfare for centuries.³⁴

2.4 Recognition of 'Belief' in a pluralist society

Several paradigms of pluralist society have been developed. These range from cultural relativism on the one hand, to a universalist (or 'cosmopolitan') notion of human rights governing all societies on the other. While I do not purport to examine these paradigms in depth, I will briefly discuss them and relate them to the argument of this thesis.

2.4.1 Cultural relativism and human rights

Cultural relativism is based on the principle of moral relativism, holding that culture is the sole source of validation of morality.³⁵ It eschews the notion of judging the actions of a particular group, and tends toward the toleration of all communities, regardless of the concern with which others might observe their practices.³⁶

Charles Taylor argues that what different groups want is more than toleration; they seek recognition of their dignity not as members of a universal community but as individuals and groups distinct from everyone else.³⁷ Chandran Kukathas envisages an extremely

³³ Fox, *ibid*, 355.

³⁴ See, e.g., Evans, 'Historical Analysis'; David Ranan, *Double Cross: The Code of the Catholic Church* (London, Theo Press 2006) Ch 4; Heywood, Andrew, *Political Ideologies* (New York, Palgrave Macmillan 3rd ed, 2003), Ch10, esp 302ff.

³⁵ Richard Wilson, *Human Rights, Culture & Context* (London, Pluto Press 1997), 2.

³⁶ However, different cultures are not fixed in their practices, nor are they unaffected by transnational political and judicial processes. They are also increasingly turning to human rights principles and law to further their own interests: *Ibid*, 9-10.

³⁷ Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition*, (Princeton, Princeton University Press, 1994) 25. See comments, Chandran Kukathas, 'Moral Universalism and Cultural Difference' in John Dryzek, Bonnie Honig

tolerant political order, advocating acceptance of group practices so long as they ‘do not directly harm the interests of the wider community’.³⁸ The interests of members of the group may suffer because of political or culturally different practices that he acknowledges may visit ‘significant harms’ on the most vulnerable members of a minority community – usually women, children and dissenters.’³⁹ Practices such as executions, female genital mutilation, forced marriages and refusal of medical treatment of children, while denounced by liberals, would be tolerated.⁴⁰ If oppression is of concern, he says,

...there is just as much reason to hold (more) firmly to the principles of toleration – since the threat of oppression is as likely to come from outside the minority community as it is from within.⁴¹

He maintains that Rawls’s conception of justice holds certain moral views unacceptable, at the cost of toleration. Rather, he sees toleration as a principle in itself, superseding what outsiders may abjure: ‘if we preach tolerance, we should go all the way.’

Most writers advocating toleration of others’ cultural values, however, draw the line at some practices found to violate the decency of humanity. Michael Walzer, for example, argues that there are limits to recognition of cultural relativism, doubting the inclination of a liberal society to tolerate a community within it that was at odds with ‘every aspect of liberal culture’.⁴² Even Kukathas sets a limit to practices that harm wider society such as polluting rivers that run through the property of others.⁴³

Cultural relativists argue that the egalitarian, individualist approach to Freedom of Belief is based on certain presumptions arising from Western philosophical traditions such as

and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, (Oxford, Oxford University Press, 2006) 581, 590.

³⁸ Chandran Kukathas, ‘Cultural Toleration’ in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and Group Rights*, (New York, New York University Press, 1997) 69, 70, quoted in Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Oxford, Polity 2001), 141.

³⁹ Kukathas, *ibid*, 88.

⁴⁰ Kukathas, ‘Cultural Toleration’, 70, 88. For a critique of this approach see Barry, *Culture and Equality*, 131ff.

⁴¹ Kukathas, 88

⁴² Walzer Michael, ‘Response to Kukathas’, in Ian Shapiro & Will Kymlicka, *Ethnicity and Group Rights* New York University Press 1997, 105-111; Raymond Wacks, *Jurisprudence* (London, Blackstone Press 1999), 255.

⁴³ Kukathas, ‘Moral Universalism’, 71, 100 n 3.

the Reformation and the Enlightenment. These traditions, they claim, place emphasis on the individual and personal autonomy, and do not countenance other philosophical traditions that give the group priority over the individual, and where salvation depends on public conformity with the decrees of one's religion rather than a personal relationship with one's god.⁴⁴

The relativist stance gives little scope for the expression of intellectual autonomy. To the extent that adoption or manifestation of Belief is involuntary, through, for example, indoctrination, acculturation, coercion or fear, this is an unjustified limitation of freedoms as outlined in the internationally adopted instruments, and integral to democratic regimes.

Despite arguing that human rights are a Western concept, K.M. Pannikar, again drawing some limits to toleration, concludes that they are imperative.⁴⁵ This is because the development of human rights is bound up in 'the slow development of the megamachine of the modern technological world'. How far individuals, groups or nations collaborate with the system of human rights varies, but 'in the contemporary political arena as defined by current socio-economic and ideological trends, the defence of human rights is a 'sacred duty'.⁴⁶ He holds that modern technological society without human rights is inhuman, but introducing human rights as defined in the Western sense would be technological invasion. Room must exist for non-Western traditions 'to develop and formulate their own homeomorphic views corresponding to or opposing Western "rights."'⁴⁷

Richard Wilson argues cultural relativism recognises the intrinsic merit of other cultural perspectives but it is not without its problems. There are both theoretical and practical issues that cultural relativism fails to address. A major theoretical problem is the absolutist claim of relativism that no reasonable person would criticise other cultures. This leads to a certain 'moral rectitude' that allows cruel and inhumane practice in the

⁴⁴ Anthony Langlois, *The Politics of Justice and Human Rights*, Cambridge Asia-Pacific Studies (Cambridge, Cambridge University Press 2001).

⁴⁵ K.M. Pannikar, 'Is the Notion of Human Rights a Western Concept?' in Henry Steiner and Philip Alston (eds), *International Human Rights in Context*, (Oxford, OUP, 1982) 383, 388.

⁴⁶ Ibid.

⁴⁷ Ibid.

name of 'culture' as if *culture* is the single source of moral acceptability.⁴⁸ Further, he argues, relativism reifies culture, as if it is 'internally uniform and hermetically bounded...shared and normative, not as cross-cut by social differences (age, caste, gender etc)' or 'contested, fragmented, contextualised and emergent'. However, he argues, this view 'falls apart in contexts of hybridity, creolisation, intermixture and the overlapping of political traditions'.⁴⁹

Recognition of relativism, Wilson argues, 'has a directly conservative political implication – the maintenance of inegalitarian and repressive political systems'.⁵⁰ While he does not refer to it, the Islamic approach to the alleged ethnocentrism of the West through the adoption by the Organisation of the Islamic Conference (OIC)⁵¹ is an example of cultural relativism. The OIC has contested the *Universal Declaration of Humans Rights* (despite members having ratified it) as not being consistent with Islamic shari'ah. The OIC adopted the *Cairo Declaration of Human Rights in Islam*, which states 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah'⁵² and '[t]he Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration'.⁵³ At the same time, they argue that there is no contradiction between the Cairo Declaration with the U.N. document they had previously signed. The intention seems to be the silencing of criticism of some of their practices by giving what is in effect a theocratic manifesto the appearance of compliance with universalist human rights.⁵⁴

⁴⁸ Richard Wilson, *Human Rights, Culture & Context* (London, Pluto Press 1997), 2.

⁴⁹ Ibid, 9.

⁵⁰ Ibid, 8-9.

⁵¹ The OIC has over 50 member states, from the Middle East, Africa, Central Asia, Caucasus, Balkans, Southeast Asia, South Asia and South America. It is an international organisation with a permanent delegation to the United Nations. According to its charter, one of its aims is to aims to preserve Islamic social and economic values.

⁵² *Declaration of Human Rights in Islam* Adopted by the Organization of the Islamic Conference in 1990, reprinted in U.N. Doc. A/Conf. 157/PC/62/Add.18 (1993), art 24.

⁵³ Ibid, Article 25.

⁵⁴ The independent body, the Cairo Institute for Human Rights Studies (CIHRS) in its Report in 2009 claims the state of human rights in the countries reviewed has worsened since 2008. It accuses the 21-member Arab League of remaining silent about, or collaborating on, grave human rights violations in several Arab states. As well as outlining issues facing individual countries, the Institute blames Arab governments and member states of the Organisation of the Islamic Conference for working in concert within U.N. institutions to undermine international mechanisms and standards for the protection of human rights: Cairo Institute for Human Rights Studies, *Bastion of Impunity, Mirage of Reform*, <<http://www.cihrs.org/Images/ArticleFiles/Original/484.pdf>> accessed 9/11/2009.

Brian Barry points to the fallacies he sees in moral relativism.⁵⁵ He takes the claim that diversity is a good thing, and society is the richer for allowing even illiberal regimes.⁵⁶ However, he points to the harm that some cultural and religious practices cause members of different groups.⁵⁷ This argument, he alleges, requires ‘some universal requirement of value, which is precisely what the premise of the [cultural-relativist] argument denies’. He also maintains that something is only good when people benefit from it, and, as recognised, minority groups (particularly women and children) do not benefit from the values of many cultures and religions.⁵⁸ While agreeing with Taylor’s view that we should recognise in all human beings an equal capacity for culture, Barry adds that ‘we should also attribute to all human beings an equal capacity for cultural adaptation’.⁵⁹

Consequently, where once anthropology drew a distinction between the West and ‘other cultures’, Wilson notes that globalisation has reached into almost every corner of the world to the extent that indigenous people themselves resort to the language of human rights to protect their culture from further unwanted encroachment.⁶⁰ There is now a global inter-connectedness allowing indigenous people to exchange information and promote their interests in a global environment.⁶¹

For the above reasons, it is concluded, diversity does need to be protected, but it is no longer considered a matter of protecting it any price, especially when many indigenous peoples themselves contest former customs and rituals and seek practices that are more humane.

⁵⁵ See generally Barry, *Culture and Equality*, esp. 131ff.

⁵⁶ Ibid, 133-4.

⁵⁷ Ibid, 134. For an examination of the harmful effects of tolerating religious and cultural values on women and girls in Afghanistan, despite in principle human rights values enunciated by the Government, see, e.g., United Nations Assistance Mission in Afghanistan, *Silence is Violence: End the Abuse of Women in Afghanistan* (United Nations High Commissioner for Human Rights, 2009).

⁵⁸ Barry, *Culture and Equality*, 134.

⁵⁹ Ibid, ch 7.

⁶⁰ Richard Wilson notes this has occurred in diverse contexts including Central America, Africa and Canada. Wilson, *Human Rights, Culture and Context*, 9.

⁶¹ See articles in ibid, which are summarised in the ‘Introduction’, 18ff.

2.4.2 The ‘liberal perfectionist’ paradigm

Perfectionism is described by Rawls as a comprehensive doctrine, being both ‘strict’ and ‘moderate’. ‘Strict’ perfectionism is a teleological doctrine that says that governing institutions should be based on right conduct, as it is legitimate for government to use the law to encourage citizens to right conduct – that is, conduct that is intrinsically worthy. Right conduct maximises human perfection as expressed in culture and religion. It is objectively determined, and not founded on individual perception of what is right. What Rawls calls ‘moderate’ perfectionism is the result of the influence of liberalism, which ‘balances the principles of perfection against other, (non-teleological) principles to determine questions of right and justice.’⁶²

Anna Galeotti⁶³ argues that contemporary liberalism has evolved ‘two influential strands which bear on the conception of toleration’: ‘perfectionist liberalism’ propounded by George Sher, Joseph Raz and others, and ‘neutralist or political liberalism’ most notably espoused by Rawls.⁶⁴

George Sher, for example, differs from Rawls in his model of perfectionist liberalism as pluralistic in one sense and monistic in another. It is pluralistic ‘in the sense that it attaches values to a number of irreducibly different activities, traits and types of relationship, but monistic in that it traces the value of each to a single source.’⁶⁵ He advocates the ‘traditional perfectionist view’, that, for example, some activities or traits are objectively intrinsically valuable. Governments and individual political agents often have ample reason to promote such values.⁶⁶

However, he argues that perfectionist values are not the only proper grounds for political decisions, nor should they dominate all others. Other concerns are legitimate reasons for government decision-making, e.g. creating jobs, protecting health insurance. However,

⁶² Freeman, *Rawls* 477.

⁶³ Anna Galeotti, ‘Identity, Difference, Toleration’ in John Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, (Oxford, Oxford University Press, 2006) 564.

⁶⁴ Ibid, 566. See, e.g. George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge, Cambridge University Press 1997); Joseph Raz, ‘Disagreement in Politics’ (1998) 43 *American Journal of Jurisprudence* 25 and *The Morality of Freedom* (Oxford 1986).

⁶⁵ Sher, *ibid*, 199.

⁶⁶ Ibid, 245.

perfectionist values must not play a marginal role. In fact, they are ‘potentially relevant to every aspect of human life.’

Rawls, on the other hand does not require the evaluation of the relative merits of different conceptions of the good held by individuals:

...once it is supposed they are compatible with the principles of justice. Everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands.⁶⁷

Joseph Raz also disagrees with Rawls. He objects to the idea of relying on consensus for political legitimacy, and argues that this allows public reason to be based on false comprehensive doctrines.⁶⁸

He claims that Rawls allows comprehensive doctrines to affect what governments can legitimately do. Instead, he argues that while it is important for legitimacy to get people to agree on moral principles, the correct standard for legitimacy is based on independent standards that are true. Raz’s approach is, says Freeman, a misreading of Rawls.⁶⁹

Rawls’s account of public reason does not allow ‘false’ comprehensive doctrines and values to determine or even influence *standards* of public reason, political justification and political legitimacy. ‘Public reason derives its content from a liberal political conception that is freestanding of all comprehensive doctrines.’⁷⁰ Indeed, it is critical to keep in mind that:

The exercise of political power is legitimate only when it is exercised in fundamental cases in accordance with a constitution, *the essentials of which all reasonable citizens as free and equal might reasonably be expected to endorse.*⁷¹

These may be compatible with different comprehensive doctrines, whether one can consider them ‘true’ or not. What is distinctive about Rawls’s political liberalism is that

⁶⁷ Rawls, *A Theory of Justice*, 81.

⁶⁸ Raz, ‘Disagreement in Politics’ (1998) 43 *American Journal of Jurisprudence* 25, for comment see Freeman *Justice and the Social Contract*, esp.232ff.

⁶⁹ See, e.g. Freeman, *Justice and the Social Contract* esp. 232ff.

⁷⁰ Ibid, 236.

⁷¹ Rawls, ‘Reply to Habermas’, 393 (my emphasis).

it sets out not only the content of its moral values, ‘but also independent standards of justification, objectivity, and validity that apply within the domain of the political.’⁷²

It is not the place to consider neutralist paradigms in depth here.⁷³ Raz’s views and a refutation of them are set out and discussed by Freeman elsewhere.⁷⁴

Neither perfectionist nor neutralist (discussed below) liberalisms exemplify moral relativism. However, as there appears to be a variety of views as to the source of values to be legitimately adopted in ‘perfectionist liberalism’, the paradigm appears (rightly or wrongly) to depend on comprehensive doctrines (Rawls believed so: see section 2.4.4). It is seen to recognise ‘substantive value and principle’ by according special rights to the activities of different groups tempered by some recognition of some universal moral standards in the guise of human rights. This approach has also been called the ‘differentiated rights solution’.⁷⁵ According to this model, it seems that while cultural groups can maintain their particular customs and traditions, maintaining the intrinsic goodness of essential values, all human beings should be able to live autonomously.

Any connection that is made between perfectionist nor neutralist liberalisms, I suggest, tends towards acceptance of different group values, and is potentially arbitrary and discriminatory in the political recognition of these values in government. Further, in the expression of cultural and religious values, it is most likely that leaders of cultural groups become the voice of communities, and minorities within the groups are powerless – rights being communal, rather than belonging to the individuals within them.⁷⁶

⁷² Freeman, *Justice and the Social Contract*, 233.

⁷³ Sher, for example, refers to the fact that perfectionism is ‘involved and arcane’ and presupposes much philosophical background: *Beyond Neutrality*, 245 fn1.

⁷⁴ See, e.g., ‘Raz, Disagreement in Politics’, esp. P32ff; Raz, J, *The Morality of Freedom* (Oxford 1986). Response by Freeman in *Justice and the Social Contract*, Chapter 7; Freeman, Samuel, ‘Public Reason and Political Justifications’ (2004) 72 *Fordham Law Review* 2021, esp. 2041

⁷⁵ Kukathas, ‘Moral Universalism’, 583.

⁷⁶ E.g., Belief systems are usually male-dominated, depriving women of power and voice in the determination of values and practices, affecting their identity and autonomy within the group and in relation to others: Juliet Sheen, ‘Burdens on the Right of Women to Assert their Freedom of Religion or Belief’ in Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004) 513, 515.

2.4.3 The ‘neutralist’ or ‘political liberalism’ paradigm

This approach is also referred to as the ‘cosmopolitan solution’.⁷⁷ Each person, through freedom of speech, association and assembly, lives according to the cultural and other Belief of his or her choice in private life, but the state remains neutral.⁷⁸ Variations on the neutralist paradigm, in their rejection of cultural relativism, are based on the premise that egalitarianism has universal validity, albeit they diverge in the rigor with which they apply their approach.⁷⁹

Jeremy Waldron argues that relativism is a flawed basis for acceptance of others’ values, as acceptance is based solely on the expression of those values by others, rather than on the *worth* of the values themselves.⁸⁰ He gives the example of Iranian clerics who justify banning pornography because it is just not acceptable in their society and claims that this reasoning is not sufficient to establish a general moral value that cannot be criticised. However, if the cleric justifies banning pornography because it is degrading and irredeemably corrupts society, the argument goes to the content of the value espoused. ‘[I]f we cannot answer [this argument], and answer it adequately, we are not entitled to regard our toleration of pornography as valid *even for us*’ let alone inflict it on anyone else.⁸¹ He points out the responsibility of universalists is thus to ‘address whatever reservations, doubts, and objections there are about our positions *out there, in the real world*, no matter what society or culture or religious tradition they come from’.⁸² Thus, it seems, it is the effect of a value on society, not its source, that is the relevant consideration.

One common thread in the egalitarian cosmopolitan paradigm is the rejection of cultural relativism, and recognition of the need to obey the law that is developed through a sense

⁷⁷ See, e.g., Kukathas, ‘Moral Universalism’, 585.

⁷⁸ Despite her accommodationist leanings, Anna Galeotti argues neutrality is ‘the central feature of liberal institutions which ought to be designed independently from any substantive moral outlook, so as to be recognized as legitimate by people who widely disagree about values and morals’. She agrees ‘choice’ is not necessarily autonomous, due to the influence of history, birth, indoctrination and circumstances. However, in principle under universal human rights one has the right to abandon, vary or adopt a life stance of one’s choice: ‘Identity, Difference, Toleration’, 564, 566-7.

⁷⁹ See, e.g., Anna Galeotti, ‘Identity, Difference, Toleration’, 564.

⁸⁰ Jeremy Waldron, ‘How to Argue for a Universal Claim’ (1999) 30 *Columbia Human Rights Law Review* 305.

⁸¹ *Ibid*, 312 (emphasis original).

⁸² *Ibid*, (emphasis original).

of co-operation and equality, expanding to a form of overall consensus for governance among Belief systems in liberal democracies.⁸³

A major theorist espousing what he calls ‘group-differentiated rights’ within the liberal tradition, which seems to straddle both the perfectionist and neutralist liberal positions is Will Kymlicka.⁸⁴ He writes approvingly of Rawls’s model of democracy based on the priority of shared civic purpose and solidarity over personal interest.⁸⁵ On the other hand, he recognises that different religious, cultural language and ethnic groups may nevertheless wish to ‘preserve their existence as a distinct group, always adapting and transforming their culture, of course, but resisting interference and pressure to abandon entirely their group life and assimilate into the larger society’.⁸⁶

Consequently, Kymlicka advocates ‘group-specific’ rights for different religious, cultural language and ethnic groups. Recognition of cultural practices within a nation must be recognised, Kymlicka argues, but in the context of common institutions accepted within the wider society, and in a way that encourages integration.⁸⁷

Kymlicka maintains the desirability of international acceptance of the principles of human rights, while ‘it is difficult to see how minority rights can be codified at the international level’,⁸⁸ and thus we must supplement traditional human rights ‘within each country with the specified minority rights that are appropriate for that country’.⁸⁹ He sees human rights simply as neither inherently ‘individualistic’ nor anathema to group life. All they do is ensure that traditions are voluntarily maintained, and that

⁸³ See, e.g., Jeremy Waldron, ‘Minority Cultures and the Cosmopolitan Alternative’ in Will Kymlicka (ed), *The Rights of Minority Cultures*, (Oxford, OUP, 1995) 93; Will Kymlicka, (ed) *The Rights of Minority Cultures* Oxford, OUP, 1995), 210ff; Brian Barry, *Culture and Equality* 132, 136, 138ff.

⁸⁴ Will Kymlicka, *Politics in the Vernacular* (Oxford, Oxford University Press 2001), 328.

⁸⁵ Kymlicka draws the distinction between virtues adopted because they make someone’s life more worthwhile and fulfilling (personal interest), and virtues adopted because they make a person more likely to fulfil their civic obligations that promote individual agency and social justice: *ibid*, 333.

⁸⁶ *Ibid*, 212.

⁸⁷ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Oxford University Press 1995), 165ff.

⁸⁸ Kymlicka, *Politics in the Vernacular*, 83.

⁸⁹ *Ibid*, 84. Limits are set by the host nation according to its law. Kymlicka gives the example of Australia, and quotes official multicultural policies of the time that required all Australians to accept the basic structures and principles of Australian society, including *inter alia* democracy, the rule of law and ‘reciprocal responsibility to accept the right of others to express their views and values’ at p. 173.

dissent is not forcibly suppressed. Seen in this way human rights protect vulnerable individuals from abuse by their political leaders, and opposition on the basis that they inhibit community life will fade.⁹⁰

This approach appears to grant rights based simply on personal interest, rather than shared civic purpose, sitting somewhere between cultural relativism and neutralism, and raising the spectre of institutionalised discrimination based on Belief.⁹¹

2.4.4 Rawls: Perfectionist, Neutralist or neither?

Rawls considers the perfectionist paradigm a ‘comprehensive doctrine’, and draws a clear distinction between the narrower doctrine of justice as fairness, which is:

...a political conception of justice for the special case of the basic structure of a modern democratic society. In this respect it is much narrower in scope than comprehensive doctrines such as ... perfectionism. It focuses on the political (in the form of the basic structure) which is but a part of the domain of the moral.⁹²

The spectre of cultural relativism hangs over Rawls’s characterisation of perfectionism. He saw communitarianism as a form of perfectionism. For him communitarianism:

...means the good of the community must be presupposed in the in the first instance as the basis for any argument for ethical principles (of justice or otherwise), and not be treated, as Rawls does, as a coincidental consequence of them. ...Rawls himself regarded communitarianism, at its best, as a kind of perfectionism. He rejects it for the same reasons he rejects other perfectionist positions.⁹³

Whereas communitarianism sees sharing in the values of a particular community – political or religious – as necessary to everyone’s good, this according to Rawls, ‘is incompatible with the good of the freedom to determine one’s good from among a wide range of intrinsically valuable activities.’

⁹⁰ Ibid, 82ff., 296ff; see also Kukathas, ‘Moral Universalism’, 585.

⁹¹ Brian Barry, for example, argues that Kymlicka is in effect advocating a form of cultural relativism: Barry, *Culture and Equality*, 140.

⁹² Rawls, *Justice as Fairness*, 14.

⁹³ Freeman, *Rawls* 306 (footnotes deleted). See Rawls *A Theory of Justice*, section 50.

According to Samuel Freeman, Rawls bases his idea of the good on deontology.⁹⁴

Firstly, there is a plurality of intrinsic goods and a plurality of ways of life that are rational for individuals to pursue (“deliberative rationality”).

Secondly, ‘having the freedom to deliberate on, revise, and rationally pursue a conception of the good is a part of each person’s good. It is a precondition of living the good life’.⁹⁵

But thirdly, and crucially,

... a condition of anyone’s realising one’s rational good (at least in a “well-ordered society”) is that his/her ends and pursuits be consistent with institutional requirements of justice. By deciding on and pursuing a rational plan from within the range of admissible plans defined by the priority of right, a person’s good is reasonable and legitimate and so respects the limits of justice, satisfying the precondition of living a good life.⁹⁶

Thus, while Rawls follows the liberalist tradition, his distinction between the comprehensive moral doctrine of perfectionism (in either the strict or the moderate sense) and the political paradigm of justice as fairness is clear.

As regards neutrality, Rawls draws a distinction between *procedural neutrality* or neutrality of intent, and *neutrality of aim*. The former refers to a procedure ‘that can be legitimated or justified without appealing to any moral values at all’, or if that seems impossible, at most to values ‘that regulate fair procedures for adjudicating, or arbitrating, between parties whose aims are in conflict’.⁹⁷ They may also draw on values:

⁹⁴ Freeman, *Justice and the Social Contract*, (Oxford University Press 2007), 68.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Rawls, *Political Liberalism*, 191.

...that underlie the principles of free rational discussion between reasonable persons fully capable of thought and judgment, and concerned to find the truth or to reach reasonable agreement based on the best available information.⁹⁸

Neutrality of aim means that those institutions and policies are neutral in the sense that they can be endorsed by citizens generally as within the scope of a public political conception....Justice as fairness is not procedurally neutral. Principles of justice are substantive and express far more than procedural values and so do its political conceptions of society and person.⁹⁹

This, I reason, means that while procedures for judgement and decision-making based on public reason aim to be neutral in effect respecting Belief, public reason itself is not devoid of values, that themselves will influence comprehensive doctrines.

As noted, liberal perfectionists, such as Raz and Sher raise objections to Rawls's approach, but detailed considerations of these is beyond my brief. These and other objections are answered in depth by Freeman.¹⁰⁰ It is enough for the purposes of this thesis, I contend, to make it clear that Rawls's conception of justice as fairness is distinct from the 'comprehensive doctrine' of perfectionism, and the 'equal aid' approach of neutralism. His approach, as I argue more fully in section 3.3.5, is a political one of structural secularism, that is, that government recognition of social history and culture (including religion) is subject to the proviso that it is compatible with the liberal conception of justice.

What liberal theorists have in common is the existence of a universalist value *system*, however minimal that may be. They draw the line at behaviour they perceive as beyond what is consistent with that system. The defence on religious or cultural grounds of such practices as executions, stoning, genital mutilation, restriction on movement, speech and assembly, breakup of families and discrimination before the law as morally acceptable, is questioned. That is a moral issue.

⁹⁸ Ibid, 191-2.

⁹⁹ Ibid, 192.

¹⁰⁰ See, e.g., Samuel Freeman, 'Public Reason and Political Justifications' (2004) 72 *Fordham Law Review* 2021, esp. 2038ff..

As most nations in the world have formally subscribed to a set of universal moral values as human rights, however, their acceptance becomes a *political* issue.¹⁰¹ They have purportedly undertaken to implement a set of values that all, regardless of their personal convictions, have accepted. Rawls's view of political liberalism advocates such a view.¹⁰² It is important to a consideration of Rawls's notion of basic liberties to note that in fact they do not apply to all nations at all historical times, 'but only when development occurs to the extent that they can be effectively exercised'.¹⁰³ His notion of justice holds that 'social and economic advantages must be arranged to be of greatest benefit to the least advantaged members of society'.¹⁰⁴

Given the above outline of relevant paradigms of social pluralism, the neutralist paradigm offered by Rawls is judged relevant to consideration of how the right to Freedom of Belief is interpreted and administered by the relevant bodies. The details of his theory will be examined in some detail (Chapters 3-5), before considering the interpretation and implementation of the right to Freedom of Belief by the relevant administrative bodies (Chapters 6-9).

2.5 Universality of Freedom of Belief

The notion of universal human rights has been called 'a revolution in international law', as it has both created the universal idea of the individual human being, and held that 'it is no longer necessary to appeal to either a divine or natural law as a basis for human rights, for they now have a positive existence in law'.¹⁰⁵ For the first time a person is defined not through being the subject of a monarch or sovereign state, nor because of his or her legal, physical, mental, social, economic or any other status. Before 1945, international law was based on the right to recognition of the sovereignty (i.e. unfettered

¹⁰¹ The political (as opposed to philosophical approach of Rawls is examined in James Nickel and David Reidy, '[Chapter] 2 Philosophy' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris, eds., *International Human Rights Law* (Oxford: Oxford University Press 2010): 39-63, 61. The Chapter is also found at <https://docs.google.com/fileview?id=0B_VH8cWdlkJSYjZiOTE4YTMtODQ3Yi00NjViLTllOWUtMjg1MWU4NmY3Y2Ew&hl=en&pli=1>, accessed 12/3/2010.

¹⁰² Richard Arneson, 'Justice After Rawls' in John Dryzek, et al, *The Oxford Handbook of Political Theory*, 45, 52.

¹⁰³ Ibid, 47.

¹⁰⁴ Ibid. Thus Rawls advocates toleration of 'decent hierarchical societies' while striving for the establishment of what he calls political liberalism.

¹⁰⁵ Anna Yeatman, 'Who is the Subject of Human Rights?' (2000) 43(9) *American Behavioural Scientist* 1498, 1504.

power) of each nation.¹⁰⁶ The individual is now the subject of human rights simply through his or her status as a human being.¹⁰⁷ The UDHR proclaimed that the ‘inherent dignity and....equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.¹⁰⁸

The placing of the individual as the universal subject of human rights laid the foundation for the principle of equal application of such rights to all individuals equally.¹⁰⁹ This thesis considers the extent to which this principle has been recognised through the interpretation and implementation of the relevant Articles by the responsible agencies. Lindholm issues a challenge to critics of universally applicable human rights to:

...come up with feasible alternative political, legal, and institutional measures that are arguably superior to what we already have as a globally entrenched regime: universally applicable human rights protection (though often inefficient and non-evenhanded) against pressing threats and impending perils to human freedom and dignity in the present-day world.¹¹⁰

2.6 Are the Human Rights Treaties moral or legal statements?

It is proposed that statements of rights in the international human rights treaties described above perform two functions. Firstly, they are general, ideological and often rhetorical normative statements. As such, they set down values that are recognised as applicable to all individuals as part of liberal and democratic society – liberal in the

¹⁰⁶ See Kant’s model of *ius gentium* (sovereign power of the estate). Immanuel Kant, ‘Perpetual Peace: A Philosophical Sketch’ in H Reiss (ed), *Kant: Political writings* (Cambridge, Cambridge University Press, 1795) 93, 131. Any universalistic discourse on human rights deemed them privileges granted by the prince or sovereign power, in which international law had no interest (dealing only with relationships between sovereigns). The only exception was the obligation of states to protect non-resident aliens of another state (under the doctrine of national sovereignty).

¹⁰⁷ Yeatman, ‘Who is the Subject of Human Rights?’ See her comments on globalisation and *ius cosmopoliticum* at p. 1501).

¹⁰⁸ UDHR, Preamble.

¹⁰⁹ Articles 26 ICCPR, and Article 14 of the ECHR proscribe discrimination with regard to the rights and freedoms set out in the Conventions on *inter alia*, ‘religion, political or other opinion’, race or ethnicity. Protocol No. 12 to the ECHR provides that ‘the enjoyment of any right set forth by law shall be secured without discrimination on grounds that include religion and ‘political or other’ opinion. It is not in force yet for whilst twenty-six countries have signed it, only one – Georgia- has ratified it as of 2004: Javier Martínez-Torrón and Rafael Navarro-Valls, ‘The Protection of Religious Freedom in the System of the Council of Europe’ in T. Lindholm, Durham, W., et al. (eds) (ed), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004) 209, 218.

¹¹⁰ Lindholm, ‘Philosophical and Religious Justifications’, 50.

sense of promoting individual autonomy,¹¹¹ and democratic in the sense of requiring equal political participation for all.¹¹² They are legal statements in that they prescribe the means for the realisation of those values, binding on those states that have ratified the treaties. Breaches of human rights may thus lead to the imposition of sanctions by the responsible agency.¹¹³

The dual moral/legal nature of human rights statements has been a feature of concern for commentators from the first such statements of the nineteenth century. The articulation of the idea of universal freedoms inhering in all individuals set out in the French *Declaration of the Rights of Man and the Citizen* is the expression of an ideal, but nevertheless meant to be a statement of principles, binding on governments, and applying to all individuals, regardless of status. As such, it was criticised by leading social and legal theorists of the time such as Jeremy Bentham, who saw it as a ‘hasty generalisation’¹¹⁴ and ‘nonsense upon stilts’.¹¹⁵ The international instruments, he argued, are an *expression of want*, rather than the *provision of the wanted*.¹¹⁶ Similar objections to the expression of human rights as a generalised list of entitlements have

¹¹¹ As provided, e.g., by freedom of thought, Belief, speech, expression and assembly.

¹¹² As provided by Articles 25, 26 and 27 ICCPR.

¹¹³ James Nickel has written a useful account of human rights in the electronic version of the *Stanford Encyclopedia of Philosophy*. He calls human rights ‘political norms dealing mainly with how people should be treated by their governments and institutions’ that are not ordinary norms applying to interpersonal conduct, such as lying and violence. However, he concedes that some rights, such as those against racial and sexual discrimination involve regulation of private behaviour and that one could argue that the latter rights are really addressed indirectly to governments, prohibiting them from discrimination and requiring them to prevent discrimination. They have been more simply described as what we determine as the right or wrong way to act: James Nickel, ‘Human Rights’ (2006) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/rights-human/>> at 11/01/07.

¹¹⁴ Conor Gearty, ‘Reflections on Human Rights and Civil Liberties in Light of the United Kingdom’s Human Rights Act 1998’ (2001) 35(1) *University of Richmond Law Review* 1, 4.

¹¹⁵ Jeremy Bentham, *Anarchical Fallacies*, (1843) extracts reproduced in Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, (London, Methuen, 1987), 46, at 53. See also discussion in Denise Meyerson, *Essential Jurisprudence*, Essential Series (Sydney, Routledge-Cavendish 2006) 119-20; M. Freeman, *Lloyd’s Introduction to Jurisprudence* (London, Sweet & Maxwell 7th ed, 2001) 199 -207, 224ff.

¹¹⁶ Bentham: ‘In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights: - a reason for wishing that a certain right were established is not that right – want is not supply – hunger is not bread’. *Anarchical Fallacies*, extracts reproduced in Jeremy Waldron (ed), *Nonsense upon Stilts*, 46, at 53.

also been articulated more recently by those opposing the adoption of legislative bills of rights in Australia and elsewhere.¹¹⁷

Bentham proposed that rather than adopting abstract values such as liberty, equality and property, specific laws that were more suited to achieve their desired ends, such as the increase in the level of general happiness, should be enacted. These, he argued, would be more practical and could be enforced, and thus more likely to be effective.¹¹⁸

Karl Marx also criticised the statement of human rights, but for different reasons. He argued that the idea of inalienable rights vesting in individuals proposed creating a self-centred individual disconnected from society, concerned with his private interests and whims and unconcerned with the welfare of others. Rights, he considered, should relate to forms of action undertaken by people, not as isolated individuals, regardless of others, but as *citizens*, in common with others.¹¹⁹ He thus recognised, in a way, the need for mutual cooperation in the pursuit of a commonly accepted good.

To be made legally enforceable, it is suggested, rights need to be expressed in operational terms that can be properly subjected to the legal requirements of precision, clarity, practicality and accountability for effectiveness and justice.¹²⁰ It is difficult to express such rights in this way.¹²¹

More recently, Conor Gearty sees the UDHR as ‘just that’: a declaration, not a law – and the other international human rights instruments are little more: they are not meant for ‘instant deployment’,¹²² instead resulting in ‘Committees of experts meet[ing] and

¹¹⁷ See, e.g., Brian Galligan, ‘No Bill of Rights for Australia: Paper originally presented at the third Senate Seminar on Parliamentary Law and Practice at Parliament House on 8 May 1989’ (1989) <<http://www.aph.gov.au/library/intguide/law/civlaw.htm#bill>> at 5/03/2007; Augusto Zimmermann, ‘Eight reasons why Australia should not have a federal charter of rights’ (Summer 2008/09) (79) *National Observer* 34 <www.nationalobserver.net> at 3/04/09 esp. 37.

¹¹⁸ Jeremy Waldron (ed), *Nonsense upon Stilts*, 29ff.

¹¹⁹ Conor Gearty, ‘Reflections on Human Rights’, 5-6.

¹²⁰ See, for discussion of translation of human rights into law, Conor Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press 2006) Ch 3.

¹²¹ See, e.g., Conor Gearty, *Can Human Rights Survive?*, esp. Ch. 3; *Principles of Human Rights Adjudication* (Oxford, OUP 2004), esp. Ch. 2

¹²² Gearty *Principles of Human Rights Adjudication*, 19.

report[ing] to other committees which review national records and perhaps cross-examine local officials'.¹²³ In effect, then, he says:

When the international community has embraced the language of human rights, it has been careful to ensure that in the process it has not thereby agreed to bring forth such rights. Thus, the rod that has been made for its back is rhetorical rather than legal.¹²⁴

Nevertheless, it is argued here that case law alone indicates that human rights instruments *are* intended to 'bring forth' rights by effecting change. As noted, states parties to the ICCPR agree to United Nations scrutiny and accountability and states party to the ECHR are subject to judicial review. This potentially exposes them to recognised legal processes and sanction by those bodies, indicating that both the ICCPR and ECHR are statements of normative principle *and* legal obligation.

It may thus be considered that some or all normative statements of human rights generate legally enforceable directives, and indeed, it has been argued that the UDHR itself has been accepted as part of customary international law and therefore binding on all states.¹²⁵

The ICCPR and the ECHR require the signatories to implement human rights through domestic policies and legislation, and to respond to international scrutiny. As noted above, confining one's approach to a narrow, clause-bound analysis of the human rights provisions alone may limit their potential value. The more flexible approach based on legal principles of liberal democracy proposed above combines a legal framework offering a degree of certainty, clarity and predictability with the parameters of dignity and autonomy established by acknowledged human rights.¹²⁶

¹²³ Gearty, *ibid*, 20.

¹²⁴ Gearty, 'Reflections on Human Rights', 8.

¹²⁵ As early as 1975 John Humphrey argued that the UDHR had been invoked so many times both within and without the U.N. that it has become part of customary law of nations and therefore binding on all nations: Humphrey, 'Revolution in International Law', 207.

¹²⁶ Amartya Sen argues that there are at least three reasons to link human rights with law: the ICCPR and ECHR are based on the idea of rights, which itself is 'old, well-established and widely used'; the language used is 'influenced by legal terminology' and advocates of human rights favour 'fresh legislation in that direction': Amartya Sen, 'Human Rights and the Limits of Law' (2006) 27 *Cardozo Law Review* 2913, 2914.

Objections to the expression of rights as absolute non-derogable duties on society and conceived in a social vacuum contain some validity: such an approach is little more than rhetoric without a contextual setting to give them legitimacy in the society to which they apply.¹²⁷ As normative statements, rights can be expressed in more general terms than if they are merely to create legal duties. To be meaningful, however, they must address the relationship between individuals, the state and other individuals. Bentham and Marx were not indifferent to the importance of human dignity, it is contended. Rather, they deplored what they saw as the 'shoddiness of the short cuts taken by the (absolutist) language of rights and the deployment of that language to prevent political debate'.¹²⁸ In more recent times the Rt.Hon. Sir Harry Gibbs stated a positivist view:

It seems to me that it is much more satisfactory to define rights clearly and precisely by detailed legislation rather than to guarantee so-called fundamental rights which are expressed in general terms.¹²⁹

Alternatively, it is argued, to translate human rights statements into a language that will create absolute entitlements and duties for nominated individuals would be to undermine the pluralism essential to universality that is said to be the essence of human rights. Those entitled to a nominated right and the objectives of that right must be clearly identified, and what is allowed or prohibited, together with any sanction involved, nominated with some precision.¹³⁰ A more effective way of implementing rights principles is to adopt human rights statements as legally binding principles, with parameters for determining flexible, context-relevant interpretation and implementation.

¹²⁷ Gearty, *Can Human Rights Survive?*, esp. Chap 3. Gearty is concerned with 'how human rights can be embedded in society as a set of realistic and achievable political goals and not just as a guide to good morals' (p. 61). He says elsewhere, 'the key is to identify the underlying principles of the protection of civil liberties, legality and respect for human dignity as the triad of ideas upon which human rights in its legal incarnation...depends'. Gearty, *Principles of Human Rights Adjudication*, 29.

¹²⁸ Gearty, *Principles of Human Rights Adjudication*, 16.

¹²⁹ Harry Gibbs, 'Does Australia Need a Bill of Rights?' (1992) *Inaugural Conference of The Samuel Griffith Society* < <http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm> > accessed 5/03/2007.

¹³⁰ As argued above, democracy is a fundamental requirement for human rights as set out in the relevant Articles (see e.g. Gearty, *Principles*, Ch 4, esp. 68). They give expression to principles of legality: Gearty, *Principles of Human Rights Adjudication*, 60; Anna-Lena McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, Kluwer Law International 1998), 54 ff.). This is reflected in the fact, for example, that any limitation or interference with a right must have basis in domestic law (see below, Ch 8).

Criticisms such as those of Bentham and Marx are addressed to some extent in the relevant Articles,¹³¹ which separate those claims that are non-derogable from those that are subject to limitation under specified conditions.¹³² The latter claims only exist when, and to the extent that, they outweigh the right of the state or others to limit them, subject to a democratic society.¹³³ Further, the implementation of the international human rights treaties is subject to the circumstances obtaining in the particular nation in which they are in question.

Thus human rights are considered neither as specific as legislation generally understood, nor buttressed by effective enforcement mechanisms. This severely limits their effectiveness.¹³⁴ It is concluded that for human rights to reflect the general principles established by the human rights treaties, they must draw on the wording of the instruments and their expressed intention (through for example, *travaux préparatoires*), while ensuring that these adequately provide for the exercise of principles of liberal democracy such as those set out by Rawls.

As will be discussed more fully in Chapters 6-9, although the UNHRC case law is somewhat more indefinite in its language than that of the European Commission and Court, the principle of legality provides that any restrictions on the exercise of human rights must be subject to established laws of general application that are facially neutral in respect of Belief. They must further be adequately accessible and understandable to

¹³¹ See, e.g., Gearty, *Principles of Human Rights Adjudication*, 19ff.

¹³² See, e.g., Gearty, 'Reflections on Human Rights', 9ff. James Nickel describes the human rights set out in the international instruments as setting 'minimal standards', leaving 'most legal and policy matters open to democratic decision-making at the national and local levels' allowing scope for recognition of regional institutional and cultural practices: Nickel, James, 'Human Rights' (2006) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/rights-human/>> accessed 11/01/07.

¹³³ For example, the following requirements are placed on limitations established by the ICCPR:

- Limitation on freedom to manifest one's religion or belief: prescription by law and necessity for protection of public safety, order, health, or morals or the fundamental rights and freedoms of others (Art 18);
- Limitation on freedom of expression: prescription by law and necessity for respecting the rights or reputations of others; national security; public order; or public health or morals. (art 19)
- Limitation of the right to peaceful assembly: prescribed by law and necessary in a democratic society in the interests of national security or public safety; public order; the protection of public health or morals; or the protection of the rights and freedoms of others. (art 21).
- Limitation of the right to freedom of association prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order; protection of public health or morals or the protection of the rights and freedoms of others (art 22).

¹³⁴ See, e.g., Humphrey, 'Revolution in International Law'.

the public, provide adequate protection against arbitrary use of discretion, and be applicable at all times, regardless of public emergency.¹³⁵

The United Nations Human Rights Commission and Special Rapporteurs, as well as the Council of Europe, have provided interpretative statements on the various human rights documents. These statements set out the scope of specific rights, when they should apply and when exceptions are appropriate. Whilst these measures are intended to ensure that human rights are not applied in an arbitrary or unqualified manner, the dangers of the politicisation of their application have been noted.¹³⁶

In the application of human rights in the domestic sphere of states party to the human rights treaties, the intention of the human rights treaties is that they are to be implemented, preferably with constitutional status, taking precedence over non-constitutional legislation. The objections of Bentham have also been met to some extent in the domestic sphere where states have adopted the grand, imprecise expressions of the original declarations in their constitutions, but applied a different, more restrictive, or even, at times, broader, meaning, to give a degree of precision to the words expressed in their other legislation or in judicial interpretations.¹³⁷

Despite the fact that a nation may have no constitutionally established civil or human rights, its courts can invoke them as principles underlying common law to discount legislative provisions they consider impede those rights. Examples from the common law of the United Kingdom before the *Human Rights Act 1998* came into force are *Beatty v. Gillbanks*¹³⁸ and *DPP v. Jones*.¹³⁹ Both these cases involved public assemblies that breached orders prohibiting them. The Court of Appeal heard the first case and the House of Lords the second (the latter decision being reached by a margin of 3-2). In

¹³⁵ See e.g., Anna-Lena McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, Kluwer Law International 1998), 54 ff.), 93.

¹³⁶ See, e.g. Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press 2006) ch 3.

¹³⁷ A restrictive approach can be seen in the limitations placed on the first amendment to the U.S. Constitution, which declares that ‘Congress shall make no law...abridging the freedom of speech’, but it is accepted that a person cannot incite to murder, or falsely shout ‘fire!’ in a crowded cinema. An example of courts adopting a *broad* meaning to a constitutional provisions than apparently originally intended is *Roe v. Wade* 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965) where the U.S. Supreme Court held that prohibition of first and second trimester abortion and contraception breaches the Constitutional right to privacy.

¹³⁸ [1882] 9 Q.B.D. 308

¹³⁹ [1999] 2 AC 240 (H.L.).

both cases the courts recognised the legal validity of civil liberties and ruled in accordance with the view that:

...the health of Britain's representative democracy depends both on the forbearance of Parliament in not legislating to erode civil liberties and on the vigilance of the judges in deploying their powers of adjudication and interpretation to protect civil liberties from legislative and executive attack.¹⁴⁰

Opinions differ on the question of which body, the legislature or the judiciary, is most appropriate for determining whether law and policy provide the rights accepted within a jurisdiction, whether they are technically 'human' or 'civil' rights. One view favours the legislature as a representative body (or at least argues that judges are no better at moral decisions than are legislators).

This approach points to the legislature potentially addressing the views of all citizens. It allows consideration of a broader range of issues than those permitted a court in a specific matter. It also promotes deliberation and action according to the democratic process of debate, and appropriate rights for the society in question.¹⁴¹

The other view holds that whereas the legislative process can be captured by vested interests and political expediency, it is not a pure process of democracy. Rather, this view holds, it is the judiciary who can best do so in a specialist, nominally impartial environment of reflective deliberation, delivering an authoritative ruling on the meaning of the rights in question.¹⁴² Both views present the best examples of their favoured body's working and the worst of that of their opponent.

Recognising the generality of human rights language, English-speaking jurisdictions among others, including New Zealand¹⁴³ the United Kingdom¹⁴⁴ the Australian Capital

¹⁴⁰ Gearty, 'Reflections on Human Rights', 15.

¹⁴¹ See, for a discussion of the arguments regarding preference for legislative or judicial determination of rights, Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *I.CON* 2; Wojciech Sadurski, 'Rights and Moral Reasoning: An Unstated Assumption - A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7(1) *I.CON* 24.

¹⁴² Lawrence Sager, 'Constitutional Justice' (2002) 6(11) *New York University Journal of Legislation and Public Policy*, 11.

¹⁴³ *Bill of Rights Act 1990* (N.Z.).

¹⁴⁴ *Human Rights Act 1998* (U.K.) – ('HRA').

Territory (ACT)¹⁴⁵ and Victoria, Australia¹⁴⁶ seek to mitigate against the disadvantages of both the above approaches. They have passed what amount to a bill of rights, variously named, requiring the government to act according to human rights principles. All legislation and government policy must be compatible with the bill of rights. Alleged incompatibility is subject to judicial review, and the court may issue a Declaration of Incompatibility where this is found to be the case. The court does not strike down the legislation.¹⁴⁷

In the U.K., once the court has issued a declaration of incompatibility and an appropriate Minister of the Crown considers that there are compelling reasons for action, he or she may, by a 'remedial order', make such amendments to the legislation considered necessary to remove the incompatibility. Remedial orders are at the government's discretion, and a failure to act on a declaration of incompatibility cannot itself be challenged under the Human Rights Act.¹⁴⁸ Rather it is a political matter, to be debated through democratic procedures.

In the ACT, a declaration of incompatibility must be tabled in the Legislative Assembly, requiring a response by the Assembly within a set period. The Assembly may decide to amend the legislation or defend its retention in terms of the grounds for limiting the rights set out in the Act.

The approaches of these jurisdictions is to leave the ultimate decision in the hands of the legislature rather than the courts, but one made with the benefit of impartial and expert consideration of the courts.

Consideration of human rights as the end result of human deliberation and reasoning leads to the conclusion that human rights are a very human creation. It is suggested that if we view human rights as stemming from human nature rather than an external,

¹⁴⁵ *Human Rights Act 1994 (ACT)*.

¹⁴⁶ *Victorian Charter of Human Rights and Responsibilities*.

¹⁴⁷ This generally only applies to 'primary legislation'. While the various Acts are silent on delegated legislation, a declaration that subordinate legislation is incompatible with the U.K. *Human Rights Act* (where primary legislation is compatible) would impliedly be invalid to the extent the primary and secondary legislation is incompatible, the secondary legislation being *ultra vires* the parent Act. Philip Plowden and Kevin Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (London, Cavendish 2002), 198 ff. Acts of public authorities that are incompatible with the HRA may be the subject of an action for compensation.

¹⁴⁸ *Human Rights Act 1998 (U.K.)*, s. 6(6)(b).

supernatural force, human rights are necessarily based on a secular understanding of governance. Conversely, personal conviction, both religious and non-religious, can lead to breaches of human rights, through, for example, discrimination towards women, ‘sinners’, non-believers and apostates. To avoid this happening, as will be argued, the right to Freedom of Belief is subject to limitations that accord with liberal democratic society.

2.7 Human rights and civil liberties

The ‘human’ source of human rights is not always accepted. As currently used, ‘human rights’ are attributed variously to one of three possible sources. One source exists outside human nature (be it through religious faith or some other external source), such as a god or other supernatural entity from which right and wrong are revealed.¹⁴⁹ A second source is nature itself, held to hold the essence of humanity from which truth and direction (‘natural law’) arises. This truth and direction is said to be universal, superior to human law and discoverable by ‘natural’ rather than ‘artificial’ (common law) reason.¹⁵⁰

A third possible source can, however, be explained as the inevitable development of those liberties essential to a liberal representative democracy – ‘civil liberties’ – being the liberties that underscore liberal representative democracy. These liberties result from the acquisition by humans of the capacity to *know* (therefore understand), to *empathise* (therefore to feel, and appreciate another’s point of view or suffering) and to *reason* (therefore to judge and evaluate courses of action, including the principle of reciprocity).¹⁵¹ These human capacities lead to the development of principles for governance and result in recognition of the interests of each individual in equal

¹⁴⁹ E.g., the *Cairo Declaration*, that sources all rights in Allah, and requires interpretation of the Declaration to accord with Islamic Shari’ah law.

¹⁵⁰ See e.g., Margaret Davies, *Asking the Law Question* (Sydney, Law Book Company Limited 1994), Chapter 3.

¹⁵¹ I use this term to denote the principle that one should not do to others what one would not want done to oneself (which, incidentally, is a fundamental principle formally underlying most established religions): see Tahzib, *Freedom of Religion and Belief*, 15-16.

citizenship and equality before the law: each person having an equal voice in the governance of their society – that is, democracy.¹⁵²

Central to democracy is the civil right of each citizen to vote. The power to vote implies the equality of all citizens, along with the secondary liberties of speech, assembly and association. It also implies legality, that is, that no citizen can be subjected to invasion of personal autonomy through arbitrary execution, assault, torture¹⁵³ or unlawful detention or punishment. It is so essential to democracy, that if a democracy is to exist, the claim of all citizens to the liberty to vote cannot be denied. It is an ‘entitlement without which no country can properly describe itself as democratic’.¹⁵⁴

The right to cast a vote is not enough, however. There must be genuine choice in the vote one casts. This involves the positive freedom to seek information, express both Beliefs and opinions, associate with others, assemble and enjoy equality before the law. It also requires a degree of personal security, privacy and the rule of law. Nevertheless, within all these freedoms are contained the seeds of their own limitation, as it follows that each person must also respect the same liberties for others.

Civil liberties exist only as the consequence of legislation or case law accepted by the government of a particular nation. As such, they may be ‘qualified, removed, restored, truncated or expanded’.¹⁵⁵ They are contingent on the political and legal processes in place at any given time. They are also technically only applicable to citizens of the society that creates them. Human rights, on the other hand are recognised as due to all individuals by virtue of their human nature alone, regardless of national identity. They circumscribe the power of the state to change or modify them.

Human rights have thus the ‘revolutionary’ effect of placing the source of personal power derived simply from the status of humanity, rather than in the beneficence or otherwise of the state. What were civil rights, granted by the state now apply to all

¹⁵² See, e.g., Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press 2006), 66-8. These capacities could be considered the basis for Rawls’s idea of moral personhood: Rawls, *Political Liberalism*, 81.

¹⁵³ Under human rights instruments freedom from torture, along with freedom of thought, conscience and religion, have been designated absolute rights. Under civil liberties, strictly speaking, the democratic process can limit such liberties.

¹⁵⁴ Gearty, ‘Reflections on Human Rights and Civil Liberties’, 12.

¹⁵⁵ *Ibid*, 12.

human beings, regardless of nationality, citizenship or location.¹⁵⁶ All individuals create within themselves, by their simple existence, the obligation of states to grant equal liberties, regardless of any counterclaims of the society in which they reside. They supplant policy and legislation of governments that do not recognise these liberties. Thus while civil liberties law sets the parameters of behaviour in specific detail, human rights law draws on a set of principles, leaving the details to be determined according to circumstances.¹⁵⁷

Human rights instruments, then, expand the principles underlying the civil liberties that help define liberal democracy, establishing 'bottom line' guidelines for ensuring the self-realisation of all individuals as compared with the more specific civil rights. Human rights documents, drawn up in a world where governments had lost sight of civil liberties, thus assume and amend civil liberties in a form that is universally accepted.¹⁵⁸ They specify each freedom and nominate:

- whether it can never be limited (for example, freedom from slavery or torture);
or
- whether and when it can be subject to limitations, restrictions, conditions, or derogation (for example, freedom of speech, assembly, association or privacy).¹⁵⁹

¹⁵⁶ Humphrey, 'Revolution in International Law', 209. Rex Martin and Nickel, 'Recent Work on the Concept of Rights' (1980) 17(3) *American Philosophical Quarterly* 165. See also Anna Galleoti, 'Globality, State and Society' (Paper presented at the Globalism Project Conference, Mexico City, Feb. 19-22, 2002), available at <<http://polanyi.concordia.ca/conf/pdf/Yeatman.pdf>>, 6.

¹⁵⁷ Gearty, 'Reflections on Human Rights'. Gearty points out that civil liberties transcend the endless debates on when particular speech or assembly should be restricted, and argues that human rights law has no coherent way of answering these questions without drawing on some deeper set of principles (presumably, in the case of internationally accepted human rights those principles on which they may be limited). 'Civil liberties law, in contrast, has the benchmark of democratic necessity readily to hand': *Principles of Human Rights Adjudication*. By this he appears to mean that rights are adequately determined (and protected) by the legislature (see his argument in *Can Human Rights Survive?*, esp 91ff).

¹⁵⁸ Indeed, Humphrey considered the fact of universal acceptance as further 'revolutionary' aspect of the UDHR: Humphrey, 'Revolution in International Law', 209.

¹⁵⁹ The ICCPR Article 4(2) sets out non-derogable rights as being those contained in Article 6 (life), 7 (torture, cruelty), 8(1) (slavery), 8(2) (servitude), 11 (imprisonment for debt), 15 (fair trial), 16, (equality before the law) and 18 (Freedom of Belief). Articles 6 and 18 are subject to limitations contained within the articles themselves.

2.8 The goal of Human Rights

As noted above, the conception of human rights as a coherent interrelationship of principles demands that their goals are reasonably specifically identified. It is proposed that the principles can be identified as follows:¹⁶⁰

- *personal integrity and dignity* (e.g., Freedom of Belief, from arbitrary deprivation of life or liberty; freedom from slavery, torture; inhuman or degrading treatment or punishment; right to a fair trial and rule of law);
- *personal development* (e.g., Freedom of Belief, thought and inquiry; communication and expression; association; peaceful Assembly);
- *privacy and autonomy in personal life* (e.g. Freedom of Belief, from arbitrary interference in private and family life, home and correspondence; marriage, sexuality and reproduction). This principle can be expanded to include freedom to follow an ethic, plan of life, lifestyle or traditional way of living.¹⁶¹
- *non-discrimination* (e.g, on the ground of, race, sex, ethnicity, and Belief) in the application of these principles.

Seen in this way, and taking ‘belief’ to include all kinds of personal convictions, Freedom of Belief can be interpreted in broad, rather than black and white, absolutist manner. This reasoning points to the conclusion that we should interpret human rights according to the basic principles underlying the liberties recognised by a liberal democratic society in preference to adopting clause-bound, narrowly interpreted criteria. The issue arises as to how to approach interpretation of the Freedom of Belief in a way that gives effect to the principles on which it is founded.

¹⁶⁰ This is based on James Nickel’s ‘basic liberties’: ‘Who Needs Freedom of Religion?’, 943.

¹⁶¹ Ibid, 943. As mentioned above, the terms ‘rights’ and ‘freedoms’ are used in the international instruments to cover both absolute and potentially limited freedoms. This has contributed to various perceptions of these terms. The freedom to hold personal convictions and the freedom to express them have often both been held to involve absolute rights. Consequently, claims are made, and consequent provision for preferential treatment of personal convictions, most particularly those considered religious convictions.

2.9 Democracy and Freedom of Belief

This thesis makes the case that a society that best gives effect to these principles is one that accepts democratic standards of liberty and equality applying to all individuals.¹⁶² While the UDHR appears to espouse a ‘democratic society’ by implication from its terms, this has not been defined as such by the UNHRC,¹⁶³ the ‘notion of a democratic society is firmly embedded in the Statute of the Council for Europe’.¹⁶⁴ At least almost all nations espouse democracy in form, if not in practice. In relation to the right to Freedom of Belief, the European Court has stated:

As enshrined in Article 9 [ECHR] (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. 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 for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.¹⁶⁵

These principles express the lofty but elusive ideal of freedom to investigate and develop a frame of reference for establishing individuals’ identity and relationship to the world around them. While some may argue they are unattainable, they at least provide a ‘roadmap’ for maximum realisation of personal fulfilment through Freedom of Belief.

¹⁶² Article 29(2) UDHR, on which the ICCPR and the *Belief Declaration* are based, provides that
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 25 ICCPR provides for equal participation of all in public affairs and universal suffrage, Article 26 provides for equality before the law for all. The preamble of the ECHR that human rights are ‘best maintained...by an effective political democracy’, and notes specifically that the rights to a fair trial, (Art. 6); privacy (Art. 8), manifestation of belief (Art. 9), expression (Art. 10); and assembly and association (Art. 11) are dependent on what is necessary for a democratic society. See Anna-Lena McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, Kluwer Law International 1998), ch 3.

¹⁶³ Ibid, 109; Henry Steiner, ‘Do Human Rights require a Particular Form of Democracy?’ in Steiner et al, *International Human Rights in Context*, 1315.

¹⁶⁴ Ibid, 120.

¹⁶⁵ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A §31.

Based on human autonomy, dignity and equality, the freedom to hold and manifest worldviews is entrenched in such fundamental rights as liberty of the person, freedom of speech, assembly and association, as well as the right to family privacy. If this is so, then it follows that freedom to deliberate and debate, to adopt opinions and personal convictions and express them (whether by word or action) are all equally deserving of protection by the law. On this reasoning, the extent of protection of manifestation of beliefs, is dependent, not on whether the Belief in question is religious or not, but the effect of its manifestation on other individuals or society in general.

2.10 Conclusion

This chapter considered firstly, the terms ‘religion and belief’ – and the difficulties surrounding determining what they mean. The complexity of attempts to define either ‘religion’ or ‘belief’ were canvassed, and it was argued that such attempts are counterproductive, as they distract from the aim of ensuring equal exercise of Freedom of Belief. It was also suggested that the two words should be taken together to apply to social and cultural understandings of our relationship to the world and what is of value in life. It was thus concluded that giving a special meaning to ‘religion’ would be divisive, creating a ‘two-tiered’ approach to what is protected in the right to Freedom of Belief, and indeed potentially hindering such the exercise of such a right. This lies at the basis for the argument that will be developed for substitution of the term ‘religion and belief’ with the term ‘Belief’.

Several paradigms for pluralist society in relation to the recognition of diverse cultures and Beliefs have been considered. These include cultural relativism and ‘perfectionist liberalism’ (with their various degrees of toleration of diverse cultures) and political liberalism (with its neutralist approach). It was concluded that the most appropriate paradigm, in the light of the relevant Articles, is the political liberalism model, in line with Rawls and his approach to pluralism. This leads to the conclusion that Freedom of Belief, as with other human rights, expresses a universal value, which is tied in with the principles of democracy. These principles transform civil liberties (freedoms and obligations applying to individuals as a feature of their citizenship of a particular nation) into human rights (freedoms and obligations applying to all individuals because of their membership of the human race).

From the above discussion, it was concluded that freedom to adopt personal convictions and to express them is inherent in the freedom and equality to which all individuals are entitled.

The question was asked: are human rights statements moral or legal statements? The implications of the possible answers to this question were set out, and the conclusion reached that human rights statements are in fact both moral *and* legal statements. As moral statements, they establish principles for promoting the dignity and self-realisation of all individuals. As legal statements, they must be considered differently, setting the parameters of acceptable behaviour required for the realisation of liberal democratic society. Given the different ethnic and cultural nature of the various nations of the world, as well as the diversity of Beliefs and cultures within each nation, it is not feasible to set detailed and rigid parameters on the rights they adopt. Consequently, one must consider the nature and goals of human rights, and determine the principles underlying them, including the origin and nature of civil liberties, and the relationship of human rights with democracy.

Civil liberties arose to allow individuals to exercise their capacities of self-determination through equality before the law. They are expanded to provide for the freedoms contained in the human rights treaties. It was thus reasoned that human rights, including the right to Freedom of Belief, are universal, in that they are not subject to the principles of sovereignty, but apply to all individuals because of their membership of the human race. At the very least, they apply to all individuals residing in those nations that have ratified the international treaties on human rights.

It is concluded that a statement of human rights should read less like a clause-bound, literal charter and more like a road map of general directions, but specific enough to guide interpretation for effective realisation of human rights. These directions are based on personal integrity through physical security from arbitrary government interference and equality before the law, personal development through Freedom of Belief, thought, inquiry, communication expression, association and assembly, and privacy in family and lifestyle. In short, human rights should be read in light of the principles that underlie a liberal democratic society.

The criteria set out in the human rights treaties require the application of principles consistent with those of liberal democracy. Rawls's theory on political liberalism is an attempt to identify those principles and apply them to Freedom of Belief. It is outlined in the next three chapters.

CHAPTER 3

RAWLS AND THE NATURE OF SECULARISM

3.1 Introduction

This Chapter outlines the secular nature of Rawls's model of a liberal, democratic and pluralist society in which he sought to provide for long-term stability in ensuring the enjoyment of those rights through equal justice and fairness for all citizens. It will be argued that Rawls's liberal democracy is based on a form of political secularism.

Rawls argued that pluralism of Beliefs is a 'natural outcome of the activities of human reason under enduring free institutions'.¹ Consequently, he reasoned, the only way diverse and sometimes incompatible Beliefs can co-exist in a liberal democracy is for the recognition by everyone of an 'overlapping consensus' of values and principles as part of their Beliefs.

An overlapping consensus is a set of values and procedures for state governance that all can accept. The case is made here that this ideal approach to liberal pluralist democracy provides a theoretical structure for any society. It aspires to full recognition of human rights, and the right to Freedom of Belief in particular. For this reason, I argue that such an approach provides an appropriate and useful standard for assessing the extent to which relevant Articles of the human rights treaties adequately articulate the right to Freedom of Belief.

Essential to this proposal is the claim that, fundamentally, Rawls envisaged the liberal state as a secular state, despite his denials,² which were based on his particular use of the concept of secularism. He describes secularism as 'reasoning in terms of comprehensive non-religious doctrines'.³ Consequently '...a central feature of political liberalism is that it views all [secular arguments] as philosophical in the same way it views religious ones,

¹ John Rawls, *Political Liberalism*, 36-7; '*Political Liberalism* never denies or questions these doctrines in any way, so long as they are politically reasonable'. John Rawls, 'Reply to Habermas', 372, 378.

² When asked in an Interview with Bernard Prusak, Rawls emphatically denied that he was making a veiled argument for secularism. However, he goes on to state that he saw secularism, like religion, as a 'comprehensive doctrine'. Bernard Prusak, 'Politics, Religion and the Public Good: and Interview with Philosopher John Rawls' (1998) *Commonweal*, Sept 25 1998
<http://findarticles.com/p/articles/mi_mi1252/is_n16_v125/ai_21197512/print> accessed 28/7/08.

³ John Rawls, 'The Idea of Public Reason Revisited', 452.

and therefore these secular philosophical doctrines do not provide public reasons [for justifying public policy and legislation]'.⁴ It will be demonstrated that this conception of secularism as a set of moral values similar to religious doctrines is only one interpretation among many that have been given to the idea of 'secularism'.

Despite his rejection of 'secularism' in the nominated sense, it will be proposed that Rawls espoused a state based on political values and reasoning only, being neutral in respect of, and separate from, moral values that form individual worldviews. This, it is proposed below, accords with both an accepted use of the concept 'secularism' and Rawls's model of political liberalism. It will be contended that this understanding of secularism, establishing a political structure in which the state is both neutral and separate regarding non-political values, is the one that most appropriately expresses its unique features. Consequently, Rawls's approach can be usefully compared with the position on secularism adopted by the French Government – *laïcité* – that gives precedence to the neutrality and separateness from Belief of public reason. As a result, it is suggested, both the relevance of Rawls's work concerning (a) secularism as a structural foundation of democratic and pluralist societies and (b) its usefulness in understanding the right to Freedom of Belief, may not have been fully appreciated.

To support this point, I argue that justice as fairness in Rawls's terms (e.g. the provision of an 'acceptable philosophical and moral basis for democratic institutions')⁵ is separate from his conception of political liberalism, the latter being the *means* the realisation of justice as fairness. This thesis focuses on the means for ensuring *equal* and *full* enjoyment of freedom of Belief by everyone through the principles of political liberalism, which in turn, it is held, is realised through structural secularism.

Rawls considered separation of the state from individual personal worldviews ('state-Belief separation') to be essential for the equal enjoyment by all of Freedom of Belief. He maintained that as all are entitled to equal access to a just society, assured by an impartial and neutral state, this should result in equal Freedom of Belief. Thus, citizens can pursue moral, philosophical or religious interests unrestricted by arbitrary

⁴ Ibid, 458.

⁵ Rawls, *Justice as Fairness*, 5.

compulsion to participate, or not participate, in religious or other practices.⁶ Rawls's non-partisan secular state, set apart from the vested interests of any particular non-political ideology, is critical to the equal and free pursuit of such ideologies in line with the principles of public reason. Entanglement of the state with Belief organisations, on the other hand, can result in the state favouring or disadvantaging those who are not recognised as having an eligible Belief. Rawls considered secularism similar to other philosophies and doctrines. However, in effect his approach represented secularism as a *political structure*, the structural means of ensuring separation of the state from the influence of such Beliefs.

It follows that the meaning of the concept 'secular', both generally and as used in this thesis, requires initial clarification.

3.2 Secularism and the State

The terms 'secular' and 'secularism' have been given various meanings and connotations that are significantly different in their implications.⁷ Generally speaking, they have been used in one or more of the following three senses:

- (a) temporal or worldly considerations and activities undertaken by religious bodies or personnel, such as charitable works and the administration of church financial affairs;

⁶ This is an extrapolation from John Rawls, *A Theory of Justice*, 310-35.

⁷ See, e.g., Abdullahi Ahmed An-Na'im, 'The Interdependence of Religion, Secularism and Human Rights' (2005) 11(1) *Common Knowledge* 56, 60ff, esp. 62-3, who canvasses the different meanings and applications of the concept of 'secular' and 'secularism'. See also, Reid Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (1995), University of Queensland, T.C. Beirne Department of Law 478 <<http://espace.library.uq.edu.au/eserv/UQ:184004/the10180.pdf>> accessed 14/12/2010, 33ff; Maurice Barbier, 'Towards a Definition of French Secularism' (2005) *Revue des Revues de l'adpf, Sélection de Septembre 2005*, <<http://www.diplomatie.gouv.fr/en/IMG/pdf/0205-Barbier-GB-2.pdf>> accessed 29/01/08; Catriona McKinnon, 'Democracy, Equality and Toleration' (2007) 11 *Journal of Ethics* 125; Elizabeth Hurd, *The Politics of Secularism in International Relations* (Princeton, Princeton University Press 2008); Julian Baggini, 'The Rise, Fall and Rise again of Secularism' (2006) December 2005-February 2006 *Public Policy Research* 204 15; Anders Berg-Sørensen, 'Politicizing Secularism' (2007) Fall/Winter *Journal of International Affairs* 253; Paul Weller, 'Human Rights', 'Religion' and the 'Secular': Variant Configurations of Religion(s), State(s) and Society(s)' (2006) 1 *Religion and Human Rights* 17; Tore Lindholm, 'Philosophical and Religious Justifications', 36ff, Muriel Fraser, 'Secularism' (2008) *Concordat Watch* <<http://www.concordatwatch.eu>> accessed 1/9/08; András Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6(3-4) *International Journal of Constitutional Law* 605; John Wilkins, 'The Role of Secularism in Protecting Religion' in Warren Bonett, ed., *The Australian Book of Atheism*, Carlton North Australia, Scribe 2010).

- (b) a worldview and ethical code based on the present life, akin to the ideologies of humanism and rationalism, rooted in non-belief in the existence of the metaphysical or supernatural; or
- (c) indifference to, or the discounting of, religion or religious considerations by the state in the exercise of its power.

Many authors have reviewed these three broad approaches in a variety of ways.

Elizabeth Hurd identifies two general uses of the term ‘secularism’ in modern democratic society. One (similar to (c)) she calls ‘laïcism’, which she argues is associated with attempts to remove religion from state governance.⁸ She claims that rationalists, humanists and others who hold non-religious views and seek a separation of the state from religious Beliefs have advocated this form of secularism.⁹ It requires the separation from state authority of religious considerations. Secularism in this sense is thus a structural notion.

The second form of secularism, (b), Hurd calls ‘Judeo-Christian secularism’. This form of secularism seeks to ‘claim and reinforce the “secular” as a unique Western achievement that both distils and expresses the essence of Euro-American history’.¹⁰ By adding a (Western, Christian) normative element to the nominal neutrality of the state, it gives that neutrality a specifically theological content. This is a more qualified approach to state neutrality, where secularism serves to thwart sectarianism by nominally creating a level playing field between all religions, while formally identifying with their Judeo-Christian heritage.

The noted theologian Lloyd Geering also considers secularism from a religious point of view, identifying a ‘tipping point’ in the secularising of religion in the doctrine of the Incarnation. That doctrine, he says, ‘states not only that the transcendent God is to be found within the physical world rather than outside of it, but that the divine has become

⁸ Hurd, *Politics of Secularism*, 23ff.

⁹ Ibid, 13. Hurd points out that the term secularism was officially coined by George Holyoake, a rationalist leader, in 1851, who described secularism as a ‘code of duty pertaining to this life for those who find theology indefinite or inadequate, unreliable or unbelievable’: Bill Cooke, *Dictionary of Atheism, Skepticism, and Humanism* (New York, Prometheus Books 2006), 474. Holyoake saw secularism as a belief, rather than a political structure.

¹⁰ Hurd, *Politics of Secularism*, 23ff.

manifest in the human condition'.¹¹ However, the humanist Paul Kurtz sees 'secular humanism' as involving religious scepticism, reason as the dominant form of public discourse, and separation of church and state.¹² He points to elements of 'secular humanism' in Confucian China, the Charvaka materialist movement in ancient India, Greek writers such as Protagoras, the Sophists, Socrates, Plato, Aristotle, and Roman philosophy such as Epicureanism, stoicism and scepticism.¹³ It is not clear what *non*-secular humanism would look like.¹⁴

With the eclipse of the Dark Ages, the evolution of international protection of Freedom of Belief can be seen in terms of three successively realized, but partially overlapping, models. These are the *cuius regio, eius religio* model involving peace treaties separating people of different religious persuasions; the *minority protection* model where international treaties provided for protection of religious minorities within states with a hegemonic ethnic or religious majority; and finally the *human rights model* ensuring Freedom of Belief for all.¹⁵ While the first two models of government can exist in states that provide official privileged status to a particular religion, the last model requires the presence of a structurally secular government.

¹¹ Lloyd Geering, *In Praise of the Secular* (Wellington, St Andrew's Trust for the Study of Religion and Society 2007), 21.

¹² Paul Kurtz, *What is Secular Humanism?* (Amhurst, NY, Prometheus Books 2007). See also Cooke, *Dictionary*, 471ff. Cooke cites the systemist theses of Mario Bunge. These include the following principles: (1) *Cosmological*: whatever exists is either natural or man-made; (2) *Anthropological*: common features of humanity are more significant than the differences; (3) *Axiological*: basic values such as well-being, honesty, loyalty, peace and knowledge are worth striving for; (4) *Epistemological*: we can discover the nature of reality through reason, imagination and criticism; (5) *Moral*: we should seek to justify our lives through work and thought; (6) *Social*: liberty, equality and solidarity with others; (7) *Political*: freedom of thought and the secular state. Cooke, *Dictionary of Atheism, Skepticism, and Humanism*, 260.

¹³ Kurtz, *ibid*, 9ff.

¹⁴ *Ibid*, 17-18. Kurtz comments there that

the Catholic philosopher Maritain 'referred to "Christian humanism" as concern with ameliorating the human condition on earth ... Religious humanists introduced a distinction between a "religion" and the supposed "religious" qualities of experience, and chose to emphasize the latter. They considered "God" not as an independently existing entity but as a human expression of the highest ideals (Dewey) ... or of our "ultimate concern" (Paul Tilich). Such attempts at redefinition are generally nontheistic.

¹⁵ See, e.g., Lindholm, '*Philosophical and Religious Justifications*', 27-30; Malcolm Evans, '*Historical Analysis*', 11ff. Evans gives a comprehensive historical view of the development of the right to Belief: *Religious Liberty and International Law*, Chaps 2-9.

Coincidentally, humanism re-emerged during the Renaissance with the rise of independent scholarship and autonomous natural science. It established an alternative foundation of knowledge and reasoning to revelation from a supernatural source, and spawned the growth of structural secularism to allow for the flourishing of all Beliefs, religious or otherwise.¹⁶ This led to the third stage in the development of the secular state through legitimization of state force that is indifferent to Belief.

The ‘emancipation of positive law’, ‘rupture of religious hegemony’ and finally public schooling indifferent to religion, rendered religion free to blossom and specialise and differentiate in its own independent realm.¹⁷ This freeing of religion from state intervention meant that ‘in a mature secular society no particular religion, life stance, or ideology is encumbered with the status, roles and liabilities of premodern hegemonic and more or less coercively implemented religion’.¹⁸ The international human rights treaties invoke a secular political structure and humanitarian, rather than religious, values, albeit they are compatible with some religions, as such values were agreed upon by the many nations ratifying them. These factors form the criteria for assessment as to their effectiveness.

3.2.1 Weller’s four forms of secularism

Paul Weller has pointed to what he sees as four main ways in which these approaches to secularism appear in practice in different nations.¹⁹

3.2.1.1 ‘Separation of Religion and State (with religiosity)’

The first form of secularism identified by Weller is what he calls ‘*Separation of Religion and State (with religiosity)*’, which he identifies as the form which secularism takes in the United States. It could be argued that a reason for the call in the early years of the newly forming American nation for separation of religion and state arose from problems associated with establishing a particular religion, reinforced, presumably, by the experience of establishment of religion in England. The Constitution formally

¹⁶ Kurtz, *What is Secular Humanism?*, 11ff.

¹⁷ Lindholm, ‘Philosophical and Religious Justifications’, 36ff.

¹⁸ Ibid, 38. This depends on the presence of other differentiated autonomous institutions such as positive law and democratic system of government.

¹⁹ Paul Weller, ‘Human Rights’, ‘Religion’ and the ‘Secular’, 32.

recognised separation of Church and State and diversity of Belief is based not simply on political expedience, but a genuine right to Freedom of Belief for all.

However, there is a strong, albeit diverse religious tradition in the U.S., with Christianity seen by many as deserving a privileged place in a society. While a secular state can acknowledge the presence of God (government is ordained by God), there is a strong movement for political parties to ‘embrace a large range of social issues from a religious perspective by endorsing faith-based, rather than governmental, solutions’.²⁰ A strong religious tradition means that separation of religion from the state has come to be seen as protection of religion from intervention by the state. This form of secularism, which gives religion a privileged status, is nevertheless skewed toward Judeo-Christian values, based on the form of Judeo-Christian model of secularism outlined by Hurd and described above.

3.2.1.2 ‘Pillarisation’

A second form taken by secularism is ‘pillarisation’ (*‘Verzuiling’*)²¹, which has been most evident in the Netherlands. ‘Pillarisation’ is a social structure that allows an individual to live his or her life wholly within a particular religious or secular social bloc, or ‘pillar’. One can be educated, marry, find employment, subscribe to print and electronic media and participate in sport and leisure activities solely within institutions established within one’s religious bloc. This approach can be socially divisive, with ‘ghettoisation’ and concentration on allegiance to the individual community rather than the nation as a whole. Weller argues that certain notorious murders and persecutions perpetrated by members of religious groups have shown some disadvantages of this model.²² Pillarisation is no longer considered a current practice in the Netherlands, as Dutch society changed from being ‘vertically and hierarchically organised and pillarized’ to being more horizontal and democratic from the 1960s.²³

²⁰ Deal Hudson, *Onward, Christian Soldiers: The Growing Political Power of Catholics and Evangelicals in the United States* (New York, Threshold Editions 2008) see, e.g., pp. 81, 91, 310.

²¹ Weller, ‘Human Rights’, ‘Religion’ and the ‘Secular’, 29; see also Jan Rath et al, ‘The Politics of Recognizing Religious Diversity in Europe’ (1999) *Netherlands Journal of Social Sciences*, 53.

²² See e.g., Weller, ‘Human Rights’, ‘Religion’ and the ‘Secular’, 29ff.

²³ J.G.A. van Mierlo, ‘Public Entrepreneurship As Innovative Management Strategy in The Public Sector: A Public Choice-Approach’ (1996) Paper Originally Presented at the 65th Annual Conference of the Southern Economic Association, November 18-20, 1995 <

3.2.1.3 'Communalism'

A third form of secularism noted by Weller is communalism, adopted in India by the Congress Party, in the face of violent sectarian uprisings. This involves the self-government of communal political units that arose from the hostile polarisation of politics between Hindus and Muslims.²⁴ Communal politics based on religious groups is the politics of religious identity, but communalism is not necessarily based on religion. It can just as easily be based on caste or region.²⁵ Religious communalism in India, according to Achin Vanaik, is divisive:

...a process involving competitive de-secularization (a competitive striving to extend the reach and power of religions), which – along with non-religious factors – helps to harden the divisions between different religious communities and increase tensions between them.²⁶

The Government adopted a 'defensive' approach to the notion of secularism, seeing the secular state as a defence against the threats posed to the nascent republic by religious communalism.²⁷ The Indian state is meant to be a bulwark against communalism, but it is interventionist and insufficiently discriminating: 'it has all too often lapsed readily into a posture of actively balancing communalisms'.²⁸ It appears to vacillate between contradictory policies of promoting no religion and promoting them all equally, though not always effectively.²⁹

Ursula King also points to the combination of nationalism and communalism in India, which is predominantly supported by the right. Given the politicisation of Hinduism in the name of nationalism, especially given the conflict between Hindu traditional

<http://arno.unimaas.nl/show.cgi?fid=585> accessed 20/3/08. Maarten Vink also refutes the idea that pillarisation lasted past the 1970s. Maarten Vink, 'Dutch Multiculturalism : beyond the Pillarisation Myth' (2007) 5(3) *Political Studies Review* 337, 2.

²⁴ Ian McLean and Alistair McMillan, *The Concise Oxford Dictionary of Politics* (Oxford, Oxford University Press 2003), 96.

²⁵ Achin Vanaik, 'Reflections on communalism and nationalism in India' (1992) 196 *New Left Review* 43, 48.

²⁶ Ibid, 50.

²⁷ Weller, 'Human Rights', 'Religion' and the 'Secular', 32.

²⁸ Vanaik, 'Reflections on communalism', 61.

²⁹ Weller, 'Human Rights', 'Religion' and the 'Secular', 33.

patriarchy and human rights for women, she is sceptical of the development of a genuinely secular society in India.³⁰

3.2.1.4 ‘Secularist Secular Tradition’

While they are based on constitutional provisions for secularism, in practice the Dutch and Indian models of secularism are less well delineated than that of the United States, with its constitutional provision for non-establishment of religion. However, Weller’s fourth model is less ambiguous, and one that can be compared and contrasted directly with that of the United States. Weller differentiates his model of ‘separation of religion and state (with religiosity)’, which he argues is the model prevalent in the United States, from what he calls the ‘*secularist secular tradition*’. This tradition, he argues, is found in the French revolutionary republican tradition that has given rise to the current use by that Government of the separationist principle of *laïcité*.

In contrast to the United States where ‘separation is combined with a high degree of religiosity in public life’³¹ in France separation is associated with an ethos that is strongly opposed to ‘contamination’ of the public sphere by religion.³² It is necessary to discuss this French approach of *laïcité* more fully, to locate Rawls’s view of the relationship between religion and the State.

In Europe in the 18th Century, particularly in France, the momentum for secularism came from movements against the state-established power of the Church³³ (specifically, in France, the Catholic Church).³⁴ Secularism has there been invoked to mean independence of political authority from religious and other ideologies or worldviews. In the United States and the Northern European countries (which inherited a Protestant culture), the emergence of modernity was associated with religion. Conversely, in

³⁰ Ursula King, ‘Hinduism and Women: Uses and Abuses of Religious Freedom’ in Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004) 523, 541. Hindu law was incorporated into the codified law by the nineteenth century British colonial administration, ‘freezing Hindu law in its nineteenth-century form, carrying a strong anti-woman bias’. This was complemented by current British values (Ibid, at 532-3). The result was often the perpetration of violence against women justified by religion, and then exacerbated by caste (at 533ff.).

³¹ Weller, ‘Human Rights’, ‘Religion’ and the ‘Secular’, 26.

³² Ibid, 27.

³³ Lindholm, ‘Philosophical and Religious Justifications’ 19, 26ff.

³⁴ See, e.g., Henri Pena-Ruiz, *Histoire de la Laïcité: Genèse d’un idéal* (Paris, Gallimand 2005) esp ch. 2, 3.

France modernity was pitted *against* religion, particularly the Catholic Church. Consequently, the Enlightenment proved more radical in France than in surrounding countries.³⁵ Most importantly, this has led to the more robust view of secularism as separation of religion and state (*laïcité*) in France than in other countries, including the United States with its Constitutional provision for non-establishment.

3.2.2 Secularism as Political Structure

Maurice Barbier explains the distinctive French approach.³⁶ The idea of secularism as *laïcité*, he says, ‘boils down to two precise components, which are *negative* (the ‘negative content’ model): the absence of recognition of forms of worship and the absence of their public funding in the form of salaries or subventions’.³⁷ Secularism, according to this ‘negative’ model, describes *a social and political process for ensuring Freedom of Belief*, not a Belief itself. It is thus political and structural in nature.

Barbier decries the tendency of writers and governments to theorise the idea of secularism beyond this structural conception by including notions of freedom of conscience, tolerance and the duty to live together in reciprocal harmony (what he sees as the ‘positive content’ model of secularism). This positive content turns secularism into an ethical doctrine similar to religion or other personal philosophies, endowing it with a similar social function. It is suggested that this ‘functional perception’ of secularism is more reasonably described as humanism or other non-religious Belief – a system of moral values that question the existence of the supernatural, founding human dignity and responsibility for determining good and bad on the moral capacity of human beings themselves.

The result of the functional perception of what is ‘secular’, Barbier argues, is that there is a consequent confusion of the idea of a separate, neutral mechanism of governance with these independent notions of tolerance and harmony. Not only do these notions then begin to encroach on the simple principle of state impartiality, he maintains, but

³⁵ Jean Baubérot, ‘The Place of Religion in Public Life: The Lay Approach’ in Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004) 441, 441-2.

³⁶ Barbier, ‘Towards a Definition of French Secularism’.

³⁷ *Ibid*, 7 (emphasis added).

also state impartiality is ruled out by sleight of hand – and becomes even non-existent – in the cause of tolerance and harmony.³⁸

Because of this broader approach, Barbier claims, secularism is seen as consistent with, and even supportive of, the *relaxation* of boundaries between state and religion. This leads, for example, to state subsidisation of religious activities, increasing involvement of religious groups in state-funded social and welfare services, education and other state activities, and even special laws for different religious groups. Recently, the Archbishop of Canterbury, Rowan Williams, has gone so far as to call for the institution of shari'ah for Muslims in Britain to help resolve marital and financial disputes, as an alternative to the current legal system.³⁹ This sort of development, according to Barbier, helps '...attenuate separation between state and religions, which readily confuse their social visibility with their entry into the public sphere'.⁴⁰ He says that inroads into separation of religion from the public sphere are an *ad hoc*, stop-gap measure to ensure harmony within diversity. However, he argues, sustainable harmony will only occur when it is based on an egalitarian, reciprocal recognition of secularism as separation of religion and other personal ideologies from state authority.⁴¹

Secularism, then, according to Barbier, is devoid of normative content, being a mechanism, rather than a philosophy. It is thus devoid of values such as freedom of religion and conscience, pluralism and tolerance, which, as pragmatic (and arbitrary) measures for attaining peaceful coexistence, can operate to some extent without it. These values nevertheless follow naturally from secularism and are necessary (and more stable) consequences of it.⁴² Barbier concludes that, for the sake of a clear and general

³⁸ Ibid, 4.

³⁹ Also, Yaser Soliman, a member of the Victorian Multicultural Commission, has called for shari'ah courts: 'Australia Rejects Call for Islamic Courts' (2008) *Sydney Morning Herald* Feb 9-10, 9. For an account of exemptions from the general law in the U.S. see Hamilton, *God vs. the Gavel*. She discusses, for example, exemption from reporting child abuse, even out of the confessional (p.9, 12ff.); exemptions under homicide laws for causing death through neglect for religious reasons (p.34ff); exemptions under discrimination legislation by religious bodies (173ff).

⁴⁰ Barbier, 'Towards a Definition of French Secularism', 20.

⁴¹ It has been argued that the toleration of religious motivation of moderate ideas in the political arena helps to legitimate religious motivation for action by more extremist non-state actors. See e.g., Timothy Challans, 'Rawls versus Habermas on Religion, Politics, and War' (2007) *School of Advanced Military Studies International Symposium on Military Ethics* <http://www.usafa.af.mil/jscope/ISME2007/Papers/Challans_Rawls_v._Habermas.doc> accessed 28/2/2007, 9; Sam Harris, *The End of Faith* (London, Free Press 2004), 45.

⁴² Barbier, 'Towards a Definition of French Secularism' 7, 14.

understanding, the term secularism should retain its negative character, being ‘nothing in itself’: a political structure in which religion is irrelevant. In this view, while it necessarily implies state neutrality in relation to all Beliefs, such neutrality is a *consequence* of secularism, ‘not the same thing as it’.⁴³ In other words, ‘*Laïcité* is not an opinion; it is the freedom to have one’.⁴⁴ This is its one simple principle.

Two main consequences arise when secularism is operative as this one principle. Firstly, individuals as citizens have the right to express their Beliefs, whatever they may be, through worship, observance, practice and teaching. Secondly, that right is matched by a duty to maintain the secular structure of the state, by (a) recognising the same right for others, restricting their own actions to provide for this, and (b) ensuring neutrality on the part of public policy.

Michel Troper explains the idea of civic duty in describing the French concept of *libertés publiques*. In France, ‘[f]reedom is the result of one’s exclusive submission to the law’ as that submission makes it possible to know the exact consequences of one’s actions.⁴⁵ Thus, one’s very existence as a citizen with freedom is determined by the state: the degree of freedom is in accordance with the freedom allowed by law. Citizenship is in fact created by the state (the nature of which citizens determine) and so the citizen ‘does not have an identity independent from the state’. The state:

...has the right and the duty to create and reinforce social cohesion, thus contributing to the forging of citizenship...The state’s secular duty is an obligation to which a subjective right does not correspond. It is, therefore, to be treated not as a civil right, but as a public freedom.⁴⁶

Despite its apparent simplicity, the idea of *laïcité* has differed in its intensity in some French policy-making. For some, a narrow laicist ideology is tempered in practice with a

⁴³ Ibid, 14.

⁴⁴ ‘*La laïcité n’est pas une opinion, c’est la liberté d’en avoir une.*’ (Jean-Marie Matisson, ‘Audition du Comité Laïcité République Devant la Commission Stasi: Commission de Reflexion sur L’application Du Principe De Laïcité Dans La Republique’ (2003). Intervention De Jean-Marie Matisson, Président du Comité Laïcité République Mardi 18 Novembre 2003. <http://www.communautarisme.net/commissionstasi/Audition-de-M-Jean-Marie-Matisson,-President-du-Comite-Laique-et-Republicain-et-M-Patrick-Kessel-huit-clos-_a41.html> at 11/03/08) 3.

⁴⁵ Michel Troper, ‘French Secularism, or *Laïcité*’ (2000) 21 *Cardozo Law Review* 1267.

⁴⁶ Ibid, 1268.

more moderate ‘judicial laicism’, which countenances some government favouring of religious belief where this is considered to provide a fair equality of opportunity to manifest religious or other Belief.⁴⁷

On the above reasoning, I conclude that the U.S. ‘separation of religion and State (with Religiosity)’ is aimed at ‘protect[ing] religion from state intervention and encouraging faith-based social networking to consolidate civil society.’⁴⁸ This is the ‘judicial laicism’ or liberal approach. In contrast, the stricter approach of *laïcité*, favoured in countries like France, protects the state (the people as a whole) from religious intervention and encourages social networking based more emphatically on citizenship principles of liberty, equality and fraternity.⁴⁹ This is the narrower interpretation of separation.

I will argue that the understanding of secularism as a political structure – not a philosophy in itself but a means for freedom to adopt any philosophy – is to be preferred in the consideration of Freedom of Belief. András Sajó describes secularism in these terms:

Secularism is a form of ordered political coexistence that does not admit of according preference to, or allowing domination by, religious, social, or political groups. This requires that citizens be somewhat loyal to the state or, at least, not stand actively against it.⁵⁰

This approach paves the way for full recognition by the state of the right of individuals to provide their own moral agenda through the adoption of what Rawls calls ‘comprehensive doctrines’ (most religious and philosophical doctrines), with the proviso that they are in accordance with the obligations of citizenship.

It is proposed below that Rawls in effect assumes a similar, though perhaps not identical, position on the relationship between the citizen and the state as that held by the French.

⁴⁷ Baubérot, ‘The Place of Religion in Public Life’, 451.

⁴⁸ Weller, ‘Human Rights’, ‘Religion’ and the ‘Secular’, 29.

⁴⁹ In contrast to the U.S. , where ‘religion has been integral to the emergence of modernity’, in France ‘modernity erected itself against religion’: Baubérot, ‘The Place of Religion in Public Life’, 441, or in other words, in the U.S. religion is protected from the state, in France the state is protected from religion: Joan Scott, ‘Secularism: Forced to be Free’ (2008) 90 *Australian Humanist* 4, 2.

⁵⁰ Sajó, ‘Preliminaries to a Concept’, 619.

According to Rawls, there is a proviso to the use of religious or other comprehensive doctrines to justify the use of coercive force:

Reasonable comprehensive doctrines, religious or non-religious, may be introduced in public political discussion at any time, provided that in due course proper political reasons...are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.⁵¹

The proviso does not support the use of religious and other comprehensive doctrines in the political forum to support measures not supportable by public reason.⁵² This is the foundation of the citizen's 'duty of civility', the moral duty of citizens and political officials to make their case for the policies and laws they advocate in accordance with public reason (see section 3.3.4.).

Further, I propose that using the idea of secularism in its structural sense clarifies its distinctive nature, which is to ensure the integrity of the diverse comprehensive doctrines (the 'background culture' of a society). Structural secularism, then, is not one of the many diverse and sometimes conflicting comprehensive doctrines, but the right to *have* one of those comprehensive doctrines.

The term 'secular' and 'secularism' will refer to structural secularism as described above in this thesis, unless otherwise indicated. Meanwhile, it is appropriate at this point to consider Rawls's application of the notion of secularism in its structural sense.

3.3 Secularism and Justice

It is proposed here that secularism in the structural sense described above is the basis of justice as fairness for Rawls. Justice as fairness is a conception of justice that can be 'shared by citizens as a basis of reasoned, informed, and willing political agreement'. It expresses their 'shared and public political reason', and is 'independent of opposing

⁵¹ Rawls, 'The Idea of Public Reason Revisited', 462ff. People who argue and vote for their views only on the basis of their religious and other comprehensive doctrines without regard to the requirements of public reason are being unreasonable and violating a moral/political duty. Freeman, *Rawls* 412.

⁵² 'Citizens must vote for the ordering of political values they sincerely think the most reasonable. Otherwise they fail to exercise the political power in ways that satisfy the criterion of reciprocity': Rawls, 'The Idea of Public Reason Revisited', 479.

philosophical and religious doctrines'.⁵³ In developing his theory, however, Rawls rejects what he calls 'Enlightenment Liberalism', which 'historically *attacked* orthodox Christianity'.⁵⁴ He argues that details of how justice and fairness would be determined in a society are best developed from what he calls the 'original position'. The original position is society in the abstract, a social and political blank sheet where members are stripped of social, economic and political differences such as culture, wealth and Belief. Rawls then proposes we consider a hypothetical group of 'rationally autonomous' representatives who place themselves in this position – behind a 'veil of ignorance' of personal attributes and circumstances – and then ask themselves, 'what sort of society would provide justice and fairness for all?'.⁵⁵ Their aim is to construct the ideal society – one they believe is the best for all individuals, irrespective of the social or economic circumstances of its members. Firstly, they will develop the basic principles under which the society will operate (such as equality and liberty, mutual respect and reciprocity), and then determine how to put these into practice (such as the machinery of government and the articulation of rights and duties).

Under the above circumstances the representatives will, Rawls reasons, choose a society impartial in relation to worldviews, that does not discriminate on such matters as sex, race or Belief, and which upholds equal enjoyment of basic liberties with the reciprocal recognition of the rights of others.⁵⁶ The principles selected as the basis for a just society would also be general, universal, publicly known and able to order competing claims, as well as being final (there being no higher standard to which an appeal may be made).⁵⁷

⁵³ Rawls, *Political Liberalism*, 9.

⁵⁴ Rawls, 'The Idea of Public Reason Revisited', 486 (emphasis added).

⁵⁵ This is an extrapolation from Rawls, *A Theory of Justice*, 11, 17 and, §24. Samuel Freeman, *Rawls* (London and New York, Routledge 2007) argues that the 'veil of ignorance is a 'thought experiment' and it is recognized that it is impractical to expect people to be able in fact to psychologically place themselves in that position. This, however, is inconsequential to the purpose of the exercise, which is intended to theoretically remove from considerations of justice and fairness irrelevant circumstances such as race, gender, ethnicity and religion (at p. 160).

⁵⁶ Rawls, *Political Liberalism*, 311: '...the veil of ignorance implies that the parties do not know whether the Beliefs espoused by the persons they represent is a majority or a minority view. They cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion and will therefore have an even greater liberty. For it may also happen that these persons belong to a minority faith and may suffer accordingly. If the parties were to gamble this in this way, they would show that they did not take the religious, philosophical, or moral convictions of persons seriously...' See also John Rawls, *A Theory of Justice* sect. 26; Freeman, *Rawls*, 167ff.

⁵⁷ Rawls, *A Theory of Justice*, 113ff.

One can paraphrase Rawls's intentions as follows: through this method of determining a just and fair society, representatives would generate policies appealing to enlightened self-interest, speaking to the desire of each individual to maximise his or her primary social goods and opportunities, but in a way that advances justice and fairness for all. Thus, there is a balance between individual liberties and the common good.⁵⁸ This is an attempt to reconcile different approaches that 'are taken by those identifying themselves as liberals; as opposed to communitarians; or in John Rawls' terms, as civic humanists.'⁵⁹

Representatives do not know particular circumstances, including Beliefs, of any of the hypothetical citizens for whom they are determining a just society. It follows, Rawls claims, that there will be a natural tendency for each representative to act not just *rationally* (to promote the rights and interests of the particular individual) but also *fairly* (to best promote the rights and interests of all). In this sense, representative decision-making will be 'disinterested' and reasonable in respect of such matters as personal moral Beliefs emanating from comprehensive doctrines, which are not a basis for the just society.

Rawls sums the above merging of the just and the good in a phrase: 'the just draws the limit, the good shows the point'.⁶⁰

3.3.1 Justice as Fairness: the four stages of procedural justice

For Rawls, justice as fairness in liberal democracy is established in a four-part sequence to provide a procedure for ensuring political institutions, such as the legislature, executive and judiciary, are in accordance with his notion of a just and fair society based on political liberalism. This political process can be thought of as a 'machine which

⁵⁸ Rawls sets out the ideas of the good in *Justice and Fairness* §43.2

⁵⁹ Ivana Bacik, 'Is Ireland Really a Republic?' (2009) *Philip Monahan Lecture, UCC* <<http://www.ucc.ie/en/government/Bacik-Lecture.doc>> accessed 21/12/2010, 2. See Rawls, *Justice as Fairness*, §43, esp p.142ff. Rawls defines 'civic humanism' as holding that 'we are social, even political, beings whose essential nature is most fully achieved in a democratic society in which there is widespread and active participation in political life': *ibid*, 142.

⁶⁰ Rawls, *Justice as Fairness*, 142.

makes social decisions when the views of representatives and their constituents are fed into it'.⁶¹

In the first stage, those in the 'original position' aim at securing the interests of individuals in exercising their ability to rationally develop and pursue their notion of the good based on the First and Second Principles. The First Principle includes equal political liberties for all (such as rights to vote, hold office, form and join political parties, express views and enjoy fair opportunity to take part in political life). The Second Principle includes the right to fair equality of opportunity and the requirement that social institutions are arranged to maximize the opportunities of the least advantaged in society to participate as full and equal citizens. 'Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equality liberty shared by all'.⁶² These Principles are discussed more fully in Chapters 4 and 5.

In the second stage, the parties meet in constitutional convention and formulate a constitution based on the First and Second Principles. At this stage, the veil of ignorance has lifted to the extent that they now know 'the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advancement and political culture, and so on'.⁶³ The first task is to design a just procedure that includes the liberties of equal citizenship including liberty of conscience, freedom of thought liberty of the person and equal political rights.⁶⁴

In the third stage the legislature is established, and legislation forming the social structure of society. This is where the 'difference principle' (Rawls's Second Principle) comes into play. This principle requires that social and economic policies are instituted that target the 'long-term expectations of the least advantaged' and seek to maximise them through fair equality of opportunity and equal liberties. The full range of general

⁶¹ Rawls, *A Theory of Justice*, 2005), 171ff. For discussion see also Marius Van Wyk, *Equal Opportunity and Liberal Equality* (Doctoral Thesis, Rand Afrikaans University, 2001) <<http://152.106.6.200:8080/dspace/browse-title?top=10210%2F2978>> accessed 21/2/2010, Ch 3, 80; Kymlicka, *Politics in the Vernacular*, 328 ff.

⁶² Rawls, *A Theory of Justice*, 179.

⁶³ Ibid, 172-3.

⁶⁴ Ibid, 173.

economic and social facts is now taken into account.⁶⁵ Rawls acknowledges that ‘Often the best that we can say of a law or policy is that at least it is not clearly unjust’.⁶⁶

...laws and policies are just provided that they lie within the allowed range, and the legislature in ways authorized by a just constitution, has in fact enacted them.

[I]ndeterminacy in the theory of justice is not in itself a defect. It is what we would expect. Justice as fairness will prove a worthwhile theory if it defines the range of justice more in accordance with our considered judgments than do existing theories, and it singles out with greater sharpness the graver wrongs a society should avoid.⁶⁷

In the fourth stage, judicial and other officials apply these rules. Personal circumstances may be considered, but again only according to the principles of fair equality of opportunity and equal liberties. The exercise of justice involves what Rawls calls ‘reflective equilibrium’. Reflective equilibrium requires objective consideration of ‘alternative conceptions of justice and the force of various arguments for them.’⁶⁸ Considered judgements become those ‘in which we have the greatest confidence’ (e.g., eliminating religious intolerance and racial discrimination).⁶⁹ In a particular situation, the aim is to find the conception of justice that best fits with accepted values, these values being the ‘fixed points which we presume any conception of justice must fit’.⁷⁰ Best fit is not intuitive, but based on the original position.⁷¹ As Wojciech Sadurski pithily explains it, reflective equilibrium is the ‘mutual adjustment and readjustment between our pre-reflective intuitive specific convictions of justice and general, abstract principles of Justice’.⁷²

⁶⁵ Ibid, 175.

⁶⁶ Ibid, 174.

⁶⁷ Ibid, 176.

⁶⁸ Rawls *Justice as Fairness*, 31.

⁶⁹ Rawls *A Theory of Justice*, 17.

⁷⁰ Ibid, 18. I draw here on Freeman’s rather wide-ranging analysis of Rawls’s thinking in *Rawls*, 29ff.

⁷¹ Rawls, *Justice as Fairness*, 30.

⁷² Wojciech Sadurski ‘Rawls and the Limits of Liberalism: Reflections on “*The Law of Peoples*”’ (2005) 1 *Ius et Lex* 197, 212. In relation to slavery, for example ‘We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these into a coherent political conception of justice’ Rawls, *Political Liberalism*, 8. Sadurski gives a detailed discussion of reflective equilibrium in his ‘Rights and Moral Reasoning’ (2009) 7(1) *I.CON* 24.

As the veil of ignorance becomes progressively thinner with each stage, the contingencies of a particular society will dictate the most appropriate and important institutional distributive rules for that society.⁷³

According to Rawls then, procedural justice does not necessarily guarantee what is morally right in every individual social or legal transaction. We do not have self-determining standards for ascertaining whether a particular individual social arrangement is fair.⁷⁴ The complexity of human life is such that we can at best establish fair *procedures* (which involves majority decision making based on public reason) for arriving at such arrangements by social and political institutions (the task of those in the ‘original position’), but the procedure may not guarantee fairness for individuals involved in every case. Given that a *procedure* is considered fair (‘pure procedural justice’), we are obliged to accept the outcome as necessarily fair, whatever it may be:

A just constitution must rely to some extent on citizens and legislators adopting a wider view and exercising good judgment in applying the principles of justice. There seems to be no way of allowing them to take a narrow or group-interested standpoint and then regulating the process so that it leads to a just outcome.⁷⁵

Justice as fairness then, provides a notion of substantive justice as inferred by a *process* of fairness at the constitutional level, where these basic principles are established. It must provide for substantive justice in at least enough cases to establish its legitimacy, but given the complexity of human society, the process cannot guarantee perfect individual satisfaction in every case.

Rawls cites as an example of *perfect procedural justice* the cutting of a cake in precisely equal portions for those wanting to eat it, as in such cases the criteria for justice is

⁷³ Van Wyk, *Equal Opportunity and Liberal Equality*, Ch 3 p82.

⁷⁴ Procedural justice deals with this fact in several ways. Firstly, it dispenses with the impossible task of tracking the innumerable individual social and legal circumstances and transactions that take place and developing principles to deal with the many diverse changing situations in which people find themselves. For one thing, consistency would be non-existent, and the rule of law compromised. Rawls points out that ‘[o]ne avoids the problem of defining principles to cope with the enormous complexities which would arise if such details were relevant’. Secondly, one cannot expect to require every change in circumstance, viewed in isolation, to be just: Thirdly, whether something is just cannot be judged in isolation from historical and social context -- ‘from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations’: *A Theory of Justice*, 76. Finally it avoids the potentially inequitable effects of utilitarianism: *ibid*, 165.

⁷⁵ *Ibid*, 317.

predetermined and easily ascertainable – portions of cake that can be measured to determine their equal size. An example of *imperfect procedural justice* is criminal legal procedure – a procedure designed to provide justice but occasionally failing to do so because of the vagaries of accompanying circumstances, such as the composition of the jury, availability of evidence and expertise of counsel.⁷⁶ The result may be questioned by those involved, but the resolution lies with ensuring the fairness of the procedure, not its outcome.

Pure procedural justice is the process aimed at in liberal democracies, Rawls claims. This provides for the advance establishment of constitutional and governmental processes for legislative and judicial decision-making that are considered fair and just by the standards of the society in which they are established. Through logical necessity, the result of such procedures must be considered fair and just, although in fact, the procedure may result in some individuals suffering discrimination, thus being denied ‘substantive’ justice.⁷⁷ In such cases, the procedures may require reconsideration, as the aim is to maximise substantive justice through egalitarian just procedures. The kinds of procedural justice set out by Rawls can be represented as follows:

⁷⁶ Rawls, ‘Reply to Habermas’, 422.

⁷⁷ Ibid. See discussion of procedural justice and its implications for fairness in Wojciech Sadurski *Equality and Legitimacy* (Oxford, OUP 2008), 22ff.

TABLE 4: RAWLS'S MODEL OF PROCEDURAL JUSTICE

	Independent criteria of justice pre-determined	Procedure is fair, therefore deemed just	Criteria for legitimacy
Pure procedural justice	No Variability of individual circumstances means result may not be fair for everyone. Fairness is defined by the procedure itself.	Yes If procedure is fair, outcome is accepted as fair.	Perceived fairness of procedure is critical for legitimacy.

Pure procedural justice may take the form of:

Perfect procedural justice	Yes (e.g., equal size of entity portions, such as division of cake, to verify equal division).	Yes (e.g., identical portion of cake for each person).	Legitimacy of process assured as both criteria and procedure can be verified.
Imperfect procedural justice	Varies according to culture and conditions of society. May be possible in some cases (e.g., factual guilt or innocence of accused in criminal procedure) but not in others (e.g. the degree of scope for exercise of Freedom of Belief may be too complex to precisely establish independent criteria).	Yes However, perceived individual justice may not result for all (e.g., due to quality of evidentiary or procedural rules in criminal procedure, or the need for protection of public safety or health in banning particular headgear).	Legitimacy of process depends on degree of perceived success of procedure in dispensing individual fairness (e.g., the accuracy of convictions/acquittals, number of people free to manifest Belief). Acceptability of procedure, despite outcome, through democratic process.

Given the complexity of pluralist society, 'the best we can do is to uphold democracy as a device similar to imperfect procedural justice: a system that maximises the achievement of democracy'.⁷⁸ The independent criteria are expressed in terms of the exercise of human rights. A fair procedure is one that seeks to provide this equally to all individuals. Its legitimacy is based on the extent to which the procedure permits minority groups to exercise their human rights.⁷⁹

⁷⁸ Sadurski, *Equality and Legitimacy*, 24.

⁷⁹ Rawls, *Political Liberalism*, §9, 281ff.

This underscores Rawls's concept of 'civic duty': reasonable citizens in a liberal democracy accept the need for, and outcome of, pure procedural justice, even where it may result in a denial of substantive justice in individual cases. Indeed, in liberal democracy, procedural justice *is*, by definition, justice. Both procedural and substantive justice are linked, however, and procedures can be thrown into question if substantive justice is not achieved. Where procedures do not provide significant substantive justice, the legitimacy of the system is jeopardised. In other words, a procedure such as that of a criminal trial would not be considered legitimate (just) unless it results in justice at least 'much of the time'.⁸⁰

On this reasoning, rather than setting rigid criteria for perceived justice to cover all situations, or adopting an *ad hoc*, case-by-case approach to provide perceived substantive, individual justice, it would seem that Rawls would require the outcome to be based on procedural justice as fairness (that is, his First and Second Principles). This involves consideration of such issues as whether, for example, those affected by the legislation were afforded the same consideration and given the same opportunity to exercise their Freedom of Belief as others.

3.3.2 Secularism as the basis of liberty and equality

As mentioned, Rawls refers to secularism as a comprehensive doctrine.⁸¹ Despite this, he also argues that indifference to comprehensive doctrines by the state is fundamental to the principles underlying a just society. Accordingly, separation of church and state are integral to the protection of 'religion from the state and the state from religion; it protects citizens from their churches and citizens from one another'.⁸² On this reasoning, it is contended, secularism as state indifference to comprehensive doctrines, as well as its separation from them, can be considered a fundamental basis for Rawls's just society.

Although Rawls does not specifically invoke the terminology of political (structural) secularism, I argue that in effect political secularism also frames Rawls's view that people are free and equal:

⁸⁰ Rawls, 'Reply to Habermas', 422.

⁸¹ Rawls, *Political Liberalism*, 457ff; McKinnon, 'Democracy, Equality and Toleration', 142.

⁸² See, e.g., Rawls, 'The Idea of Public Reason Revisited', 476.

The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully operating members of society makes persons equal.⁸³

Liberty and equality are discussed further in Chapter 6.

3.3.3 Public reason, public political culture and procedural justice

Rawls's conception of procedural justice is related to his idea of public reason, which follows on from the exercise by citizens of their two moral powers, and further characterises his secular approach to government. Public reason is based on the view that reasonable people in a democratic society are willing to govern their activities by principles from which all citizens can reason in common. '[T]hey are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so' (i.e., the principle of reciprocity).⁸⁴

Public reason is based on the public political culture. Public political culture differs from social (or 'background') culture (such as comprehensive doctrines) in that it 'comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary) as well as historic texts and documents that are common knowledge.'⁸⁵ This is Rawls's 'wide view' of public political culture.⁸⁶ For these interpretations we 'look not only to courts, political parties and statesmen, but also to writers on constitutional law and jurisprudence, and to the more enduring writings of all kinds that bear on a society's political philosophy.'⁸⁷ Fundamental ideas

⁸³ Rawls, *Political Liberalism* 19. See also his *A Theory of Justice*, 62, 504-12. For a brief but illuminating outline of the concept of public reason see Kymlicka, *Politics in the Vernacular*, 296ff.

⁸⁴ Rawls, *Political Liberalism*, 49. These terms are those everyone consider reasonable to adopt. Rawls draws a distinction between the 'reasonable' and the 'rational'. Rationality is more simply a value-free process for determining the best way to achieve particular ends whatever they may be. Rationality is thus not bound by impartiality and consideration of the good of others, as is reasonableness, but a means for determining how to achieve given ends: *ibid*, 48. See also Freeman, *Rawls*, 480.

⁸⁵ Rawls, *Political Liberalism*, 13, 14.

⁸⁶ *Ibid*, 462.

⁸⁷ Rawls, *Justice as Fairness*, 19-20.

familiar from, or implicit in, the public political culture of a democratic society formulate a political conception of justice in a democratic society.

There may be a variety of public political cultures, as Rawls acknowledges.⁸⁸ Religious or other comprehensive doctrines may be introduced into public political culture, *subject to the proviso of 'proper political reasons'* (public reason) for their justification in governance. 'When these doctrines accept the proviso and only then come into political debate, the commitment to constitutional democracy is publicly manifested.'⁸⁹ Justice as fairness is based on this political tradition.⁹⁰

The ideal of public reason is aimed at allowing individuals to operate as free and equal citizens. Rawls concedes that his model of public reason is an ideal, and:

As an ideal conception of citizenship for a constitutional democratic regime, it presents how things might be ...It describes what is possible and can be, yet may never be, though no less fundamental for that.⁹¹

3.3.4 Basic Liberties and public reason

To operate as free and equal citizens, Rawls proposes that those in a society grounded in justice will require access to the political values of public reason, which include the *basic liberties*. Basic liberties are listed by Rawls as:⁹²

- freedom of thought and liberty of conscience;
- political liberties;
- freedom of association;
- freedoms specified by the liberty and integrity of the person;
- rights and liberties covered by the rule of law.

⁸⁸ Ibid, 25.

⁸⁹ Rawls, 'The Idea of Public Reason Revisited' 463.

⁹⁰ Rawls, *Political Liberalism*, 14, 8, 175.

⁹¹ Ibid, 213.

⁹² Ibid, 291.

Rawls does not provide a checklist of ‘political liberties’. It is suggested that these can be gleaned from Freeman’s explanation of ‘political values of public reason’:

Among political values Rawls lists liberty and equality of citizens, fair opportunities and other primary goods;⁹³ justice and the general welfare; the common defense; public health and other public goods; the security of person and their property; fair distribution of income, wealth and taxation; effectiveness and economic efficiency; respect for human life; the role of the family in achieving the reproduction of a just society over time, etc.⁹⁴

Rawls contrasts these values with non-political and comprehensive values arising from religious and philosophical doctrines. For Rawls, public reason is a moral doctrine, but one confined to a political conception of justice,⁹⁵ not a comprehensive, moral doctrine that covers all facets of life.⁹⁶ Public reason is public in that it concerns public matters of fundamental justice, and it is open to public scrutiny, debate, and accountability.⁹⁷ It is reason in that it is a means for a political society of ‘formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly’.⁹⁸

Thus, public reason is confined to such matters as forms of governance (such as the constitutional make-up of that society) and the basic liberties of its members. It is therefore indifferent and universal concerning comprehensive doctrines.⁹⁹ As indicated, values arising from comprehensive doctrines (for example, that abortion, euthanasia or

⁹³ Primary goods include the equal political liberties, such as freedom of speech, and assembly; equal civil liberties, such as liberty of conscience, association and choice of occupation; and income and wealth required for realising the two moral powers (capacity for a sense of justice and conception of the good, including government services such as health care, public health and basic education): Rawls, *Justice as Fairness*, 168ff.

⁹⁴ Freeman, *Rawls*, 478.

⁹⁵ See, e.g., Rawls, ‘Reply to Habermas’, 373.

⁹⁶ Rawls, *Political Liberalism*, 13.

⁹⁷ Ibid, 213.

⁹⁸ Ibid, 212.

⁹⁹ The state is independent from religion ‘because it does not presuppose religious views. Rawls certainly does not claim that public reason is neutral in the sense of abstaining from moral or political judgment. The ideal of public government acting only on the basis of public reasons is therefore not an ideal of governmental abstention from value choice’: Denise Meyerson, ‘Why Religion Belongs in the Private Sphere, Not the Public Square’ in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge, Cambridge University Press, 2008) 44, 58. It is this value choice, fundamental to liberal democracy, that gives rise to its structural secularism.

some forms of sexuality are wrong) may inform and inspire public debate, but legislation regulating these activities must ultimately be justified in terms of public reason for acceptance in the public forum.¹⁰⁰

Rawls stakes his claim for pluralism on the ideal of public reason, which requires reciprocity between reasonable people (subscribers to the principles of justice). He also places a high value on citizens' commitment to democracy.¹⁰¹ His 'duty of civility' — the obligation to justify the principles and policies adopted by government in terms of public reason — while it is a moral rather than a legal duty, is similar to that of *laïcité*-as-civic-duty. While he does not specifically use the term 'secular' in Barbier's negative sense - 'secular-as-separation', it can be seen that Rawls agrees with separation of church and state, to *protect* religion from the state and the state from religion.¹⁰² The centrality of separation is considered more fully in Chapter 9.

Accordingly, Rawls argues, public reason extends to the private sphere inasmuch as it applies to individual citizens exercising their right to vote.¹⁰³ Rather than acting as a private citizen in line with his or her own personal values, when voting, a citizen is subject to the requirements of public reason. Jeremy Waldron expresses this duty in the following way:

...if an argument can be made in favour of *officials* not exercising their political power on the basis of their religious convictions, consistency requires that the same arrangement be applied to voters', thus voters can be thought of as a 'huge jury'.¹⁰⁴

¹⁰⁰ Rawls, *Political Liberalism*, 215.

¹⁰¹ However, Rawls did not approve of simple majoritarianism: see, e.g., Freeman, *Rawls*, 217ff for an elaboration of his particular approach to democracy as justice as fairness.

¹⁰² Rawls, 'The Idea of Public Reason Revisited', 476; see also John Wilkins, 'The Role of Secularism in Protecting Religion', 313.

¹⁰³ Public reason:

sees the office of citizen with its duty of civility as analogous to that of judgeship with its duty of deciding cases. Just as judges are to decide them by legal ground of precedent and recognised canons of statutory interpretation and other relevant grounds, so citizens are to reason by public reason and to be guided by the criterion of reciprocity, whenever constitutional essentials and matters of basic justice are at stake'. Rawls, *Political Liberalism*, liii. See also *ibid*, 217; 'The Idea of Public Reason Revisited', 444ff.

See also Kymlicka, *Politics in the Vernacular*, 298.

¹⁰⁴ Jeremy Waldron, 'Religious Contributions in Public Deliberation' (1993) 30 *San Diego Law Review* 817, 828 (emphasis added).

As a voter, a person must cast aside his or her personal religious and other personal convictions, and:

... is, for the time being a public official, exercising the power of the whole people, and impartiality is a responsibility that is required of him in that “office” which may not be required of him in ordinary life... Given such a doctrine, the voter has no right to engage in his specific religious convictions in the polling booth... he is exercising the power of a responsible office, and he must take care that he does so in a way that is impartial and responsive to the *public* character of his decision.¹⁰⁵

This is indeed an ideal model!

3.3.5 Rawls’s ‘structural secularism’ and *laïcité*

As noted above, Rawls describes secularism in philosophical terms. He saw secular reasoning as ‘reasoning in terms of comprehensive nonreligious doctrines.’ Such doctrines and values ‘are much too broad to serve the purposes of public reason.’¹⁰⁶

That, I argue, is a fair description of what I call *philosophical secularism*. Alessandro Ferrara describes what he calls three ‘narratives’ that describe secularism.¹⁰⁷ I suggest this is a useful way of conceiving secularism in practice, while I disagree with Ferrara’s argument that a ‘post-secular’ society requires a closer relationship between Belief and state.

Ferrara describes what I call ‘philosophical secularism’ as the ‘phenomenological transformation of the experience of believing’.¹⁰⁸ Another aspect of secularism he calls *social secularism*:¹⁰⁹ the term with which he refers to the general turning away of society from religiosity, and its decreasing influence on political decision-making.

¹⁰⁵ Ibid, 829.

¹⁰⁶ Rawls, ‘The Idea of Public Reason Revisited’, 452

¹⁰⁷ Alessandro Ferrara, ‘The Separation of Religion and Politics in a post-secular society’ (2009) 35 *Philosophy and Social Criticism* 77.

¹⁰⁸ Alessandro Ferrara, ‘The Separation of Religion and Politics in a post-secular society’ (2009) 35 *Philosophy and Social Criticism* 77, 78. Ferrara argues for a re-thinking of ‘post-secular’ relationships.

¹⁰⁹ Ibid, 78.

What is relevant to my thesis is what Ferrara calls *political secularism*.¹¹⁰ This Ferraro defines as ‘the fact that all citizens can freely express their religious freedom and worship one God, another God or no God at all, and the fact that the churches and the state are neatly separated.’ People must ‘never invoke support from the state’s coercive power, never pretend to turn sin into crime and always allow their believers to turn to another religion or no religion.’¹¹¹ This is similar to what Rawls calls public political culture (see above section 3.3.3), without which equal enjoyment of freedom of Belief cannot be ensured. I call this ‘structural secularism’.

Ferrara claims that the distinction between political and social secularism is useful because the former allows us to identify where erstwhile secular governance is influenced by local historical contexts.¹¹² We perceive our blindness to the presence of such religious influence in a state considered to be secular, such as the use of religious symbols in public places, or rituals such as prayers at local council proceedings, that may be upheld by courts or legislatures. By holding that government recognition of social history and culture (including religion) is subject to the proviso that these comply with the liberal conception of justice, and his advocacy of state-church separation, Rawls attests to his agreement with this approach (see above section 3.3.3, 3.3.4).

However, most critically, Rawls’s approach is a more precise and realisable form of secularism than envisaged by what I argue in Chapter 9 are the imprecise and implausible conceptions of state neutrality or accommodationism. Rather than ‘equal-aid’ for religious and other beliefs, rejected in Chapter 9, structural secularism is more akin to the French notion of *laïcité*: a starting point of complete state disengagement from religious or other Beliefs (‘no-aid’), with special consideration of Belief only to remedy unfair discrimination.

While discounting the idea of a state that is ‘secular’ in the meaning he gives that term, Rawls’s model of political liberalism offers in effect a structure that is not based on any comprehensive doctrine itself (religious or otherwise) but provides the right to adopt a doctrine of one’s choice. Using secularism in Ferrara’s sense of including non-religious

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid ,79.

belief, (and noting Rawls's inclusive notion of comprehensive doctrines) I propose Rawls's implied structural secularism includes not treating religious belief as somehow distinctive (see section 9.2.3).

Rawls has not specifically considered the French approach of *laïcité*-as-civic-duty, or the expression of the citizen as a state construct as posed by Troper (see above section 3.2.2). Nevertheless, his approach can be hypothesized by considering two lines of reasoning Troper adopts.

Firstly, Rawls holds that individuals have a 'duty of civility' as citizens in the liberal democratic state. This duty concerns matters of constitutional importance or basic social justice. In those cases public officials and citizens have a duty to justify the laws and policies they advocate (and the way they vote) in terms of the political values of justice and fairness. This means that the principles of procedural justice take precedence over the promotion of personal interests or those of a particular group.¹¹³ Critically, Rawls sees the duty of civility as a *moral duty* – one that applies the principles to the circumstances of the situation. The French civic duty appears to have been considered more as a *legal duty*: one that is absolute, resulting in a formal rather than moral perception of equality.¹¹⁴

Secondly, while Rawls was concerned with *process* rather than substantive justice, the purpose of process was to maximise equality of substantive justice through, *inter alia*, 'separation of church and state'.¹¹⁵ That being the case, it is proposed that Rawls's moral duty of civility has the flexibility of reflective equilibrium: adjustment of the intuitive sense of substantive justice with general, abstract principles of justice that can apply to everyone equally. Equality for Rawls means equality of *justice* (in terms of an equal claim to a fully adequate scheme of equal basic human rights and liberties).¹¹⁶ However, reflective equilibrium would moderate the libertarianism claimed by many who adopt the 'secularism as pluralism' stance. Thus, as Samuel Freeman points out, Rawls rejects a libertarianism in which individuals are 'absolute owners of themselves and their

¹¹³ Rawls, 'The Idea of Public Reason Revisited', 444-445. The political values of justice and fairness are expressed in public reason, described below in section 3.3.1.

¹¹⁴ See, e.g., Troper, Michel, 'French Secularism, or *Laïcité*' (2000) 21 *Cardozo Law Review* 1267.

¹¹⁵ Rawls, *Political Liberalism*, 476-8.

¹¹⁶ This refers to the first principle of justice set out in Rawls, *Political Liberalism*, 5.

external assets', whose 'cooperative interactions are based in private contracts'. Rather, 'free and equal citizens' cooperate 'on on a basis of reciprocity'.¹¹⁷

While Rawls has not specifically considered the French notion of *laïcité*, his approach to secularism is considered by Catriona McKinnon who compares the notion of secularism prevalent in United States political and legal opinion with that prevailing in France. McKinnon labels the U.S. view of secularism as the 'liberal-pluralist model' where limitations on comprehensive doctrines are based only on a compelling state interest.¹¹⁸ She calls the French view of secularism '*laïcité*-as-civic-duty', invoking the duty owed to the state, described above.¹¹⁹

McKinnon sees these respectively as 'positive content' and 'negative content' approaches to *laïcité*,¹²⁰ much as does Barbier (discussed at 3.2.2). Contrary to Barbier, she agrees with the positive approach (similar to the 'positive content' model Barbier outlines). This model, in her view, involves importing into the meaning of 'secularism' a set of personal values that constitute a worldview, and '[p]ublic policy must accommodate religious practice in the form of legal permissions and exemptions from legal prohibitions if necessary'.¹²¹ The negative interpretation of *laïcité* in McKinnon's view (similar to the 'negative content model' outlined by Barbier) involves a strict separation of religion and state, emphasising *inter alia*, the duty of citizens of appropriate restraint and abstention from the expression of personal convictions in the public sphere to allow others the same freedom ('*laïcité*-as-civic-duty').

¹¹⁷ Samuel Freeman, *The Cambridge Companion to Rawls* (Cambridge, Cambridge University Press 2003), 43. See also Rawls, *The Law of Peoples* 49; Freeman, *Rawls* 403.

¹¹⁸ This principle is the subject of legislation. The Federal *U.S. Religious Freedom Restoration Act*, 1993, for example, provides:

(a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(i) is in furtherance of a compelling governmental interest; and

(ii) is the least restrictive means of furthering that compelling governmental interest.

Christopher Eisgruber and Lawrence Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 *University of Chicago Law Review* 1245 point out the problems with this approach: see esp. 1259ff.

¹¹⁹ McKinnon, 'Democracy, Equality and Toleration' 138ff.

¹²⁰ *Ibid.*,

¹²¹ *Ibid.*, 126.

3.3.5.1 *Laïcité* in action: wearing of religious symbols

McKinnon refers to the contentious matter of prohibiting the wearing of conspicuous religious symbols (such as a veil, or other head or face covering) in France.

‘*Laïcité*-as-civic-duty’, for France, involves specification that the Republic does not recognise any religion.¹²² McKinnon cites President Jacques Chirac’s justification of legislation prohibiting the wearing of conspicuous religious symbols in public schools by stating that the state ‘cannot allow [secularism] to be weakened’.¹²³

In this way, McKinnon claims, the French President discounted any consideration of exceptions in individual cases. McKinnon concludes that this *laïcité*-as-civic-duty is indeed logically ‘the most promising value for a democratic society of equals’.¹²⁴ However, she argues, it imposes uniformity ‘in the name of democratic equality’.¹²⁵

McKinnon inclines towards libertarianism, allowing freedom of religious practice restricted only on grounds of compelling state interest: what she calls a commitment to ‘permanent pluralism’.¹²⁶ She considers that uniformity of treatment sits ill with the individual freedom she sees in pluralism. In other words, McKinnon rejects prohibition of religious symbols in the name of a broad reading of the right to religious expression.

Like Rawls, McKinnon treats the idea of secularism as a comprehensive doctrine - one among many others. Her ‘positive’ approach to the concept of secularism would, for instance, be more sympathetic to the importance to those involved of the wearing of the veil in public schools than holding a strict line against incursions against *laïcité*. She argues that:

So long as [the commitment to pluralism] does not undermine the commitment to democracy of those who exhibit it – and, following Rawls, there is no *a priori*

¹²² *Loi du Décembre 1905 Concernant la Séparation des Églises et de L’État*, (Journal Officiel du 11 décembre 1905). Article 2 abolishes all state spending on religious activity: Pena-Ruiz, *Histoire de la Laïcité* 114. Article 1 nevertheless ensures Freedom of Belief.

¹²³ McKinnon, ‘Democracy, Equality and Toleration’ 134.

¹²⁴ Ibid, 143.

¹²⁵ Ibid, 140.

¹²⁶ Ibid, 141.

reason to think that it must – [the commitment to pluralism] is consistent with good democratic citizenship.¹²⁷

As a consequence of her reasoning, McKinnon *departs* from a strict logical approach to Freedom of Belief, opting for a freedom that is tempered only by compelling state interest. While Rawls does hold that pluralism can be consistent with ‘good democratic citizenship’, he insists on ‘separation of church and state’¹²⁸ and appeals to ‘reasonableness (public reason) rather than compelling state interest as justification for limiting manifestation of belief, with public reason’s emphasis on democratic equality.’¹²⁹ A just outcome would, as indicated, be determined by the principles of procedural justice as applied through the process of reflective equilibrium based on public reason.

Further comment on Rawls’s approach is provided by Wojciech Sadurski, who identifies what he calls the ‘U.S.-style absolutist approach’ (because there is no limitation clause in the U.S. Constitution, Rights are expressed as absolute).¹³⁰ However, the meaning of certain constitutional rights must be narrower than a literal application of the language (e.g. freedom of speech, assembly and belief must be exercised with due appreciation of the rights of others). Judges must therefore narrow the true meaning of a particular right by identifying what are its ‘external constraints’.¹³¹

Sadurski distinguishes the absolutist approach from ‘proportionality analysis’. The latter is adopted by those adjudicators considering Freedom of Belief under treaties that provide for limitation of rights (including the U.N. and European bodies).

¹²⁷ Ibid, 143 (footnote deleted).

¹²⁸ Rawls, *Political Liberalism*, 476-8.

¹²⁹ The principles of equal liberty takes precedence over other principles of justice: John Rawls, *A Theory of Justice*, 214. Principles of equal liberty ‘can be denied only when it is necessary to change the quality of civilization so that in due course everyone can enjoy these freedoms’. Ibid, 475; Freeman, *Rawls* 64ff.

¹³⁰ Sadurski, Wojciech “‘Reasonableness’ and Value Pluralism in Law and Politics’, European University Institute Working Paper LAW 2008/13’ (2008) <<http://www.eui.eu/>> accessed 14/2/09.

¹³¹ Ibid, 8.

The proportionality approach analyses the ‘proportionality of means to ends, where the “means” consist in restrictions of constitutional rights, and the “ends” are about constitutionally permissible aims pursued by the legislator’.¹³²

Sadurski argues that the proportionality analysis is adopted by Rawls as part of his political philosophy, and argues that it is also the preferred approach to adjudicating human rights.¹³³

Tor Lindholm, whose ‘approach to human rights norms is informed by a brand of political liberalism *broadly* in the sense pioneered by Rawls’¹³⁴ endorses Rawls’s overlapping consensus, which he uses to express an overlapping *justification* for state action.¹³⁵ He opposes the European Court’s decision in *Leyla Şahin v. Turkey*,¹³⁶ which upheld the prohibition by a University of the wearing of the Islamic veil by students.

That decision, Lindholm says, enforced an overly strict adherence to the principle of ‘secularism’ as set down by the Turkish State.¹³⁷ He proposes that in relation to toleration of the wearing of the Islamic veil, the emphasis should be on ‘not just toleration, but *mutual respect* between adherents’. The Court, he says ‘failed to hold the government of Turkey to its obligation to pay due respect to the inherent dignity and freedom of Leyla Şahin’.¹³⁸ Unfortunately, the word ‘respect’ has many meanings. Roget’s Thesaurus gives a list ranging from ‘regard’ to ‘obeisance’ to ‘adoration’. The meaning depends on the context, but the context here is ambiguous.

What Lindholm does not mention is the need, according to Rawls, for ‘reflective equilibrium’. This would weigh the intuitive arguments for the individual’s right to

¹³² Ibid, 17.

¹³³ The proportionality approach, Sadurski concedes, is intuitively more suitable for legislative process, involving the complex consideration of ‘empirically verifiable effects in the realm of social processes’ and the ‘weighing and balancing of competing values, interests and preferences’. Sadurski, Ibid, 10.

¹³⁴ Tore Lindholm, ‘The Strasbourg Court Dealing with Turkey and the Human Rights to *Freedom of Religion and Belief*: A Critical Assessment in the Light of Recent Case Law (*Leyla Şahin v. Turkey*, 29 June 2004)’ (2005) <tore-lindholm@nchr.uio.no> accessed 28/5/09, 6.

¹³⁵ Lindholm, ‘Philosophical and Religious Justifications’, 51.

¹³⁶ *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004. This case was later referred to the Grand Chamber which upheld the decision: *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI. (Application No. 44774/98, Judgment of 29 June 2004).

¹³⁷ *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004, §116.

¹³⁸ Lindholm, ‘Strasbourg Court and Freedom of Religion or Belief’, 14.

freedom to manifest Belief, invoked by those who criticise the court, with the need to reconcile that right with general principles of justice that can apply to all.¹³⁹ The Court invoked arguments supporting such general principles, and applied these to the right to manifest religious belief. Emphasis on both aspects of the issue is the basis of the debate, and there will always be disagreement as to whether the Court got it right.¹⁴⁰

In spite of this, I suggest, Rawls would not have come down squarely on one side or the other, and would have more likely advocated a middle ground. While treating Ms Şahin with due consideration (e.g., allowance of, involvement with, advertence to and recognition of, her views), he would do so in a way that was principled (i.e. one that could be applied to everyone). He would thus consider alternatives discussed below.

In relation to criticism of its policy on secularism, the French Government does not preside over strict implementation of *laïcité*. Barbier points out that the French Government did seek to mitigate the perceived conflict that arises between religion and state in prohibiting the veil in public schools. By a vote in March 2004, their Parliament has allowed students to manifest a religious affiliation, but not in a ‘conspicuous fashion’¹⁴¹ (for example, permitting the wearing of small Christian crosses). Jean Baubérot¹⁴² points out that despite the 1905 legislation in France, which established separation of religion from the state,¹⁴³ the state maintains church property, provides for full internal autonomy of religious organisations, allows free speech in houses of worship, public assemblies and processions and other public expressions of religious practice (subject to the requirements of liberal democracy). Thus, as Baubérot says:

¹³⁹ See, e.g., Sadurski, ‘Rawls and the Limits of Liberalism’, 212.

¹⁴⁰ Critics of the case include also Malcolm Evans, ‘Freedom of Religion and the European Convention on Human Rights Approaches, Trends and Tensions’ in Peter Cane, et al, *Law and Religion in Theoretical and Historical Context* (Cambridge, Cambridge University Press, 2008) 291, 306ff; see also Carolyn Evans, ‘The “Islamic Scarf” in the European Court of Human Rights’ (2006) 7 *Melbourne Journal of International Law*, 52.

¹⁴¹ Barbier, ‘Towards a Definition of French Secularism’, 18.

¹⁴² Baubérot, ‘The Place of Religion in Public Life’, 445.

¹⁴³ *Loi du Décembre 1905 Concernant la Séparation des Églises et de L’État*, (Journal Officiel du 11 décembre 1905). Article 2 abolishes all state spending on religious activity.

...an ideological laicism exists alongside a more liberal judicial laicism, concerned with respecting freedom of conscience. To be sure, this ideological laicism would also claim neutrality toward religion but would give it a narrower interpretation.¹⁴⁴

However, the problem of the Muslim '*foulard*' – the veil – remains. Alternative attempts to find an outcome to the desire to wear the veil at school that is seen by all to be just, have included permitting the veil in the colours of the school uniform, ensign or design, where a uniform is required. This reinforces the student's identity as a member of the school society and their allegiance to it. Another approach has been to allow the administration of each school to rule according the circumstances prevailing in each local community, ensuring equal regard for all Beliefs through commonly accepted dress.

Concentration on wearing apparel alone may distract from other features of display of religious Belief in school, such as the requirement for separate provisions for members of a religion (such as separate facilities for boys and girls; religious instruction that excludes those with other Beliefs) or withdrawal of students from particular classes or activities based on religious Belief.

Joan Scott¹⁴⁵ argues that the 'headscarf affair' was the imposition of an ideological vision of a 'one and indivisible' France - 'republican secularism in the face of an opposite reality'.¹⁴⁶ She espouses what she calls the 'democratic' version of secularism ('open to negotiating difference') as opposed to the 'republican' version ('insisting on a single, intractable definition').¹⁴⁷ The democratic vision involves the mediation of difference, critical revisiting of practices and flourishing of debate, where efforts are made to 'contain religion within its limits without denying its immense cultural

¹⁴⁴ Baubérot, 'The Place of Religion in Public Life', 451. See also Scott, 'Secularism', 5, who states that France's secularism [perhaps more so than the secularism of the U.S.] is inconsistent and variable, the result of a process of accommodation between the majority religion and democratic practice. She contends that in France there is substantial state subsidisation of private schools and celebration of Christian holidays.

¹⁴⁵ Scott, 'Secularism'.

¹⁴⁶ 'Contradictions like those represented by the 'veil affair' should not cloud the fact that 'each week millions of "believers" practice their religion without disruption and are free to express themselves publicly' Baubérot, 'The Place of Religion in Public Life', (453).

¹⁴⁷ Scott, 'Secularism', 5.

significance'.¹⁴⁸ While it appears that Rawls leans towards what Scott calls the 'democratic vision', he makes it clear that some principles are not negotiable in a liberal democratic society, as the First and Second Principles create concrete limits within which manifestation of Belief must be contained. These limits are set by justification of public policy and legislation through public reason.

3.3.6 Secular public reason as a liberal, democratic conception of justice

In his paper 'The Idea of Public reason Revisited', Rawls restricted his idea of public reason to apply mainly to notions of constitutional essentials and matters of basic justice.¹⁴⁹ *Constitutional essentials* consist of constitutional powers and procedures of government (powers of legislature, executive and judiciary, scope of majority rule), and equal basic human rights and liberties of citizenship (for example, freedom of conscience, thought and association, and the rule of law).¹⁵⁰ *Basic justice* relates to economic and social justice and other matters not covered by a constitution.¹⁵¹ These are the essentials of a political conception of justice. Public reason, Rawls argues, asks of us that we act towards others in accordance with values we sincerely believe they will accept.¹⁵² This is consistent with the duty of civility.¹⁵³

It follows from his development of a concept of justice as fairness that Rawls bases his secular model of a liberal, democratic society on the contractarian principle whereby government derives its legitimacy from the willing acceptance of its citizens. The liberal philosophers (from the Enlightenment on) who adopted a contractarian model of society premised it on the agreement of all to one basic comprehensive doctrine generated from the inherent nature of human beings. In contrast, Rawls's social contract is the hypothetical political construct of a form of society that an individual (divested of personal characteristics such as gender, race and Belief) would condone because of its fairness and equality.

¹⁴⁸ Ibid.

¹⁴⁹ Rawls, 'The Idea of Public Reason Revisited' 442-3, 453.

¹⁵⁰ Rawls, *Political Liberalism*, 227.

¹⁵¹ Rawls, 'The Idea of Public Reason Revisited' 442 n7. Freeman states that these include equal opportunities, economic justice setting the social minimum (Freeman, *Rawls*, 394) and other 'all-purpose means for effectively exercising basic liberties and fair opportunities' (at 466).

¹⁵² Or at least that those who oppose our view can nevertheless understand how reasonable persons could affirm it. Rawls, *Political Liberalism* 253

¹⁵³ Ibid 253.

In this way, Rawls acknowledges diverse Beliefs by adopting the approach of a free, equal and reasonable person as a political construct,¹⁵⁴ a '*political ideal of democratic citizens*'.¹⁵⁵ He holds that the 'reasonable' person is 'willing to propose and abide by fair terms of social cooperation among equals and their recognition of and willingness to accept the consequences of the burdens of judgment' (in effect, the fact of reasonable pluralism).¹⁵⁶ The individual, in his or her capacity as a moral being, may be influenced by the values and strictures of his or her comprehensive doctrine, but as a *political* being, informed by, and acting according to, public reason.¹⁵⁷

Accordingly, while reasonable citizens may disagree with each other on philosophical, moral or religious matters, 'they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so'.¹⁵⁸ They have a sense of justice, and want to cooperate with each other on mutually acceptable terms in ways that are fair and just (even to their own disadvantage) exercising appropriate toleration.¹⁵⁹ This then gives the government a legitimacy they are prepared to follow, and an acceptance of the duty of civility.¹⁶⁰

3.3.7 Secular public reason as an 'overlapping consensus'

By the use of secular public reason, then, societies generate what Rawls calls an 'overlapping consensus'.¹⁶¹ By 'overlapping consensus' he argues that in a well-ordered democratic society reasonable and rational citizens endorse a conception of justice that

¹⁵⁴ Ibid, 94.

¹⁵⁵ Freeman, *Rawls*, 331 (emphasis original).

¹⁵⁶ Rawls, *Political Liberalism*, 94. See also his *Justice as Fairness*, 36-7; Freeman, *Rawls*, 465. Wojciech Sadurski *Equality and Legitimacy* (Oxford, OUP 2008), 86. Rawls (ibid, 56-7) included the following factors that give rise to the burdens of judgment:

- evidence in relation to a case is often conflicting and complex;
- there is disagreement about weight of different relevant considerations;
- concepts are often vague, and indeterminate, requiring reliance on judgement and interpretation;
- individual experiences are often different, and this affects our assessment of evidence; and
- differences in setting priorities and making adjustments.

¹⁵⁷ Rawls, *The Law of Peoples* 15: 'The idea of a free citizen is determined by a liberal political conception and not by any comprehensive doctrine, which always extends beyond the category of the political'.

¹⁵⁸ Rawls, *Political Liberalism*, 49.

¹⁵⁹ Ibid, Lecture II§1; Rawls, 'The Idea of Public Reason Revisited', 488.

¹⁶⁰ Rawls, *Political Liberalism*, 216ff.

¹⁶¹ Rawls, Ibid, Lecture IV, outlined in his *Justice as Fairness*, 32ff; Freeman, *Rawls* 476.

governs society. In a liberal democracy, all reasonable comprehensive doctrines accept and endorse an egalitarian liberal political conception of justice in an overlapping consensus. They contain a similar political conception of justice as a logical foundation of their own particular comprehensive doctrines.¹⁶²

In a liberal democracy for Rawls, then, all reasonable comprehensive doctrines, both religious and non-religious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals and standards satisfy the criterion of reciprocity.¹⁶³ It stands to reason that an overlapping consensus must be secular in Barbier's negative sense, as its purpose is not to promote particular Belief values, but to provide the machinery for the exercise of all Beliefs that recognise it. The overlapping consensus is based not on personal or group vested interests, but a genuine acceptance of the principles of public reason. Acceptance means that comprehensive doctrines thus recognise equal basic human rights and liberties (including Freedom of Belief) for everyone. Otherwise, they are not reasonable, and any stability within society will not last. Tore Lindholm prefers the term 'overlapping justification' to make clear that the principles are justified in the terms of the comprehensive doctrine in question, not just agreed to for the sake of social harmony.¹⁶⁴

The use of the term 'overlapping justification' also highlights another important issue arising from Rawls's insistence on public reason as the basis for state policy and legislation. Critics have argued that Rawls banishes consideration of personal convictions from the public sphere, referring to the public marketplace of ideas, such as public discussion and debate, silencing public discourse based on personal morality.¹⁶⁵ This is not the case, it is argued, as Rawls valued argument from comprehensive doctrines in the 'public square'. Rather, he saw such discussion preceding the

¹⁶² See, e.g., *Justice as Fairness*, 33.

¹⁶³ Rawls, 'The Idea of Public Reason Revisited', 483.

¹⁶⁴ Lindholm, 'Philosophical and Religious Justifications', 44ff. Lindholm states that at the very minimum, Freedom of Belief requires that adherents of each comprehensive doctrine must 'reasonably hold this universally applicable human right to be well grounded in their own doctrine' and trust that adherents to other comprehensive doctrines will reciprocate: at 51.

¹⁶⁵ Writers expressing reservations regarding exclusion of Belief from political discourse include, e.g., Marci A Hamilton, 'What does "Religion" mean in the Public Square?' Review Essay: *Democracy and Tradition* by Jeffrey Stout, *Princeton University Press* 2004 (2004-2005) 89 *Minnesota Law Review* 1153, 1153ff.; Austin Dacey, *The Secular Conscience* (New York, Prometheus Books 2008), 47; Lindholm, 'Strasbourg Court and Freedom of Religion or Belief', 7.

justification of coercive policy and action by the state through the legislature, executive and judiciary. Without compromising the ideal of public reason as the sole arbiter of just governance, Rawls recognised that considerations such as religious principles, for example, may be invoked as a force for change,¹⁶⁶ and cites the abolitionists and civil rights movements, many of whose members, including Martin Luther King, invoked religious principles for their actions.¹⁶⁷ Religious views underlay their appeals for justice, yet these were not incompatible with public reason:

...it may happen that for a well-ordered society to come about in which public discussion consists mainly in the appeal to political values, prior historical conditions may require that comprehensive doctrines be invoked to strengthen those values....The idea of public reason with its duty of civility has not yet been expressed in the public culture and remains unknown.¹⁶⁸

My contention is that Rawls has identified a point where the private and public spheres merge and inter-relate. In contrast, most commentators on the idea of a secular state see the private and the public spheres it creates as being in potential opposition to each other, in terms of private and public reason. Consequently, the values of one threaten to be incompatible with the other. Rawls states that there is no such thing as strictly ‘private reason’.¹⁶⁹ Instead, he identifies two aspects of reasoning other than public reasoning. One is ‘social reasoning’ (that of groups making up the background culture of daily life, of its many associations, churches, universities, scientific societies, clubs and teams etc.).¹⁷⁰ The other is domestic reasoning (reasoning within families).¹⁷¹ These two aspects of reasoning are based on personally held comprehensive doctrines.

¹⁶⁶ Rawls, ‘The Idea of Public Reason Revisited’, 453.

¹⁶⁷ Rawls *Political Liberalism*, 251. A similar approach is also taken in respect of Islamic culture by Abdullahi Ahmed An-Na’im, ‘The Interdependence of Religion, Secularism and Human Rights’ (2005) 11(1) *Common Knowledge* 56, esp 70. There he says ‘[w]hile the material conditions of coexistence may force a level of religious tolerance and diversity, this situation is likely to be seen as merely expedient and temporary by religious adherents unless they are also able to find tolerance and diversity consistent with (or preferably implied or stipulated by) their religious doctrine’.

¹⁶⁸ Rawls *Political Liberalism*, 251, fn 41.

¹⁶⁹ Ibid, 220 fn 7.

¹⁷⁰ Ibid, 14.

¹⁷¹ Ibid, 220 fn 7.

It is thus proposed that Rawls's 'overlapping consensus', far from placing a 'private' sphere for personal expression of one's worldview in opposition to a completely separate, incompatible 'public sphere' for public policy, presents a much more useful way of conceiving recognition of public reason. The acceptance of an overlapping consensus, as its name implies, indicates that for those who accept a liberal democracy, the principles of public reason are a natural consequence of reasonable comprehensive doctrines (those based on reciprocity and Freedom of Belief).¹⁷² One may not agree with the results of a particular decision made in accordance with public reason because of one's personal conscientious Beliefs, but one can, as a reasonable citizen, agree with the principles of public reason itself as a function of Freedom of Belief in general.¹⁷³ Leslie Griffin describes public reason pithily as 'an independent "module" that can be plugged into numerous reasonable but competing comprehensive doctrines'.¹⁷⁴ The so-called public and private spheres, then, are based on mutually compatible, interrelating facets of a political structure that provides a space for the existence of dissension. In this sense the personal becomes political – a consideration that will be pursued in Chapter 5, where the notion of equality is applied to the individual expression of Belief.

3.4 Conclusion

I have argued that it is counterproductive to consider Rawls's use of secularism as he defined it – a set of Beliefs that form a worldview and in that sense a comprehensive doctrine. Better sense is made of his work if the structural model of secularism is adopted in considering his vision of liberal democracy, as he argues for a society that is based on such a structure. Thus the state, in his view, should be indifferent towards religious or other comprehensive doctrines, and treat all individuals the same, neither favouring nor disfavouring any particular religious or non-religious comprehensive doctrine.

¹⁷² See, e.g., *ibid*, 482-3.

¹⁷³ I would suggest that this is similar to the recognition that adherents to a particular faith accept 'public' modes of worship in a church, synagogue or mosque in contrast to personal modes of practising their faith. The behaviour may be different, but the Beliefs remain (at least substantially) the same.

¹⁷⁴ Leslie Griffin, 'Good Catholics Should be Rawlsian Liberals' (1977) 35 *Southern California Interdisciplinary Law Journal* 297, 303. 'It is the derivation of the political conception of justice from the comprehensive doctrines of citizens that occurs in the overlapping consensus': *Ibid*, 304-5.

This is characteristic of Rawls's view of procedural justice, which, in the face of diverse Beliefs and other social circumstances, is rarely, if ever, perfect procedural justice, where the independent criteria of justice are precisely pre-determined and political procedures for achieving this are assured. Rather, what Rawls calls the model of pure procedural justice is a feasible model for modern society. That is, recognising the variability of individual circumstances means such procedures may not result in satisfaction of the vested interests of everyone, a political structure is established that is accepted by all as being just in expressing the two principles of liberty and equality. It is based on the principle that if a procedure is fair (the values espoused being considered fair by consensus) the outcome is accepted as fair, even where particular personal interests are not satisfied.¹⁷⁵ This is aimed at satisfying the desire of each individual to maximise his or her primary social goods and opportunities, but in a way that advances justice and fairness for all.

This structure, it has been argued, requires the adoption of an overlapping consensus or recognition of an overlapping justification, which logically must be based on an accepted public reasoning as the basis of public policy. An overlapping consensus in a liberal democracy is based on the basic freedoms of liberty and integrity of the person, freedom of thought, conscience and association, political liberties and those covered by the rule of law. It reaches beyond the public arena to the individual. While entitled to believe as he or she will, and to manifest that Belief accordingly, to be an active and co-operative citizen in a liberal democrac, the individual accepts public reason (which is based on liberal democratic principles for its development) as a potential limit on manifestation of that Belief. In this way, he or she recognises the political in personal life.

¹⁷⁵ According to James Sterba, 'Reconciling Public Reason and Religious Values' (1999) 25(1) *Social Theory and Practice* 1, 4:

[I]f fairness is to be secured, particularly with respect to matters of constitutional essentials and questions of basic justice, there must be substantive reasons as well as procedural reasons that are accessible to the minority for accepting the will of the majority. And while these substantive reasons need not, by themselves, be sufficient to require abiding by the will of the majority, they must, when joined together with the procedural reasons that are also accessible to the minority, provide a sufficient justification to require abiding by the will of the majority'.

To provide equal liberty for all Beliefs, public reason must be devoid of reasoning from comprehensive doctrines, and therefore the state that exercises public reason is necessarily secular, in that it is indifferent to the religious or other Beliefs of its citizens.

Having considered Rawls's approach to justice as fairness, one can now turn to the notions of rights and liberties, and consider these in the light of Rawls's secular state.

CHAPTER 4

SECULAR LIBERAL DEMOCRACY AND HUMAN RIGHTS

4.1 Introduction

This Chapter pursues the argument that Freedom of Belief imposes the general duty of state abstention from favourable or unfavourable treatment of religious or other Belief. Consideration will also be given to Rawls's conception of Freedom of Belief in terms of 'basic liberties', upon which liberal democracy is founded, and which are inherent in the liberties outlined in the relevant human rights treaties. My point here is that what Rawls calls 'basic liberties' are politically determined. Crucially, however, these 'basic liberties' are enshrined in the international human rights treaties, in a way that gives them the status of rights, thus placing duties on states and others not to prevent rights-bearers exercising them.

Rawls also draws an important difference between a liberty itself, and the *worth* of that liberty to particular individuals, that is, the degree to which liberties and rights can be exercised by that individual in the realisation of their human capabilities.¹ This distinction is considered, and its implications for the equal exercise of human rights by all are explored, pointing to the importance of the notion of equality in the enjoyment of human rights. Equality is so important to Rawls that he emphasises its central role in any understanding of political liberalism, thus maintaining that it is integral to Freedom of Belief.

The case has been made that a reasonable understanding of Rawls leads to recognition that liberties concerning Belief (part of the ideal of political liberalism) are necessarily structurally secular, based on an overlapping consensus of public reason.² Where those basic liberties are given the status of human rights, as in the international human rights

¹ Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 315, 330ff, uses the concept of realising 'capabilities' to describe a similar notion of the worth of human rights. While he differs in his approach, he does not see it as a 'foundational departure' from Rawls's: Amartya Sen, *The Idea of Justice* (London, Penguin 2009), 66.

See also Martha Nussbaum, *Women and Human Development* (Cambridge, Cambridge University Press 2000), 11.

² See, for a brief description of John Rawls's democracy, Jonathon Wolff, 'John Rawls: Liberal Democracy Restated' in April Carter and Geoffrey Stokes (eds), *Liberal Democracy and its Critics*, (Cambridge, Polity Press, 1998)119ff; Sioroff, *Comparing Political Regimes*, 61ff.

treaties, it follows that states parties are required to be structurally secular.

Consequently, it is proposed, the rights treaties either specify or imply a structurally secular, liberal democratic society.

Such societies are part of the spectrum of governments throughout the world. Rawls divides societies into three main groups in relation to freedoms and liberties:

- ***Unjust societies*** where human rights are absent, which are therefore tyrannies and dictatorships (examples, it is suggested, are the present governments of Zimbabwe and Burma).
- ***'Decent hierarchical societies'*** which are based on a conception of the common good and a hierarchical structure supporting what Rawls terms 'basic human rights'. In these societies, government is carried on through consultation with the different hierarchical groups, resulting in degrees of inequality and favouritism of particular religious or other Beliefs. Countries appear along a continuum of such regimes (examples would come from the 'semi-liberal' and 'closed' autocracies set out in Table 2). These societies adopt what Rawls calls 'basic human rights' (discussed in more detail in section 4.5). Basic human rights include the right to physical integrity; a 'sufficient' (albeit not extensive or equal) liberty of conscience and expression; respect for the rights of women in 'just consultation' (albeit not equality with men) and formal equality before the law, although there may be inequality among members of the society. While not endorsing such societies, Rawls recognises that they exist, and that attempts may be made to bring about more liberal rights for members, but that there is no justification in forceful intervention in their government.³
- ***Liberal democracies***, based on his conception of justice as fairness described in Chapter 3. Liberal democracies are founded on what Rawls calls 'basic liberties' (discussed more fully below in section 4.6). These are similar to the universal human rights set out in the international human rights treaties. They include liberty and integrity of the person; freedom of thought, conscience, speech,

³ Rawls, *The Law of Peoples*, esp 78ff. For an instructive elucidation of Rawls's approach to 'decent hierarchical societies', see Wojciech Sadurski, 'Rawls and the Limits of Liberalism: Reflections on the "Law of Peoples"' (2005) 1 *Ius et Lex* 197.

association and assembly; political liberties (e.g., democratic participation in government) and the rule of law.⁴

As discussed in Chapter 9 (especially section 9.2.2.1), however, separation of religion and the state is patchy across the globe.

4.2 Rawls's Principles of Justice and the Two Moral Powers

Liberal democracies are based on what Rawls calls the two principles of justice as fairness, the foundation stones of political liberalism.⁵ The First Principle of Justice ('First Principle') provides for equal basic political liberties. The Second Principle of Justice ('Second Principle'), sets down guidelines for maximising the opportunity for all to enjoy the equal *worth* of such liberties, despite a variety of abilities and means. Freedom of Belief as established by the First Principle will be considered in this Chapter. The relationship of equality to Belief through the interaction of both principles of justice (in relation to Freedom of Belief) will be considered in Chapter 5.

While it is recognised that the ideal society based on the Principles of justice is hardly attainable, I propose that using this model as a yardstick for assessing and promoting the implementation of the right to Freedom of Belief is a means of improving the ability of all to enjoy the liberties incorporated in the right to Freedom of Belief.

In *A Theory of Justice* Rawls argued that a particular social or political order is stable if (a) it will be regularly and willingly complied with and (b) that stabilising forces are available to control any deviations or infractions that threaten this stability.⁶ Rawls stated that people normally have a sense of justice, including a desire to justify their actions to others on terms mutual respect others can reasonably accept.⁷ However,

[t]here will be individuals in the well-ordered society of justice and fairness who endorse the public conception of justice and the institutions it supports, but who, because of the toleration and the free use of reason... form religious, philosophical

⁴ Rawls, *Political Liberalism*, 291.

⁵ These Principles are first described in John Rawls, *A Theory of Justice*, 52. They are revised in Rawls, *Political Liberalism*, 5.

⁶ Rawls, *A Theory of Justice*, 5-6. See also Freeman *Justice and the Social Contract*, 176ff, esp.178.

⁷ Freeman, *Justice and the Social Contract*, 179; Rawls, *A Theory of Justice*, 414-19.

and moral views that conflict with the beliefs and final ends citizens need entertain and accept for justice and fairness to be stable.⁸

Even assuming people have a sense of justice and a desire to be just, the problem remains of consistently engaging their will, a just constitution must promote or affirm their good to maintain social and political stability over time. This requires an argument that shows an activity – in this case justice – is compatible with the common good (see below) to the extent that it is rational to ‘incorporate this activity as a primary feature of one’s conception of the good.’⁹ In *Political Liberalism* Rawls addresses the nature of just institutions, as well as the question of how people can acquire the will to do justice and the desire to support just institutions.

Consequently, Rawls saw the need, in *Political Liberalism* to develop political concepts of overlapping consensus and public reason. He set out to ‘reformulate justice as fairness as a freestanding political conception that is not tied to any comprehensive doctrine or general moral conception’.¹⁰

Rawls’s approach to the political concept of justice and fairness is based on the notion of the ‘common good’. The common good consists of ‘certain general conditions that are *in an appropriate sense* equally to everyone’s advantage’.¹¹ The common good is determined by taking into account the good of all the members of a society, as well as the good of that society as a whole.¹² ‘An appropriate sense’ in accordance with political liberalism involves free and equal citizens cooperating on a basis of reciprocity and mutual respect, with the duty of the state being to ensure the appropriate environment for its realisation.¹³ This means the equal regard for all individuals, founded on the two Principles of Justice.

The First Principle of Justice states that:

⁸ Freeman, *Justice and the Social Contract*, 185.

⁹ Ibid, 181.

¹⁰ Ibid, 186. See Rawls, *Political Liberalism*, 10-12.

¹¹ Rawls, *A Theory of Justice*, 217, emphasis added.

¹² Rawls *Political Liberalism*, 109.

¹³ Samuel Freeman, *Rawls* (London and New York, Routledge 2007), 217.

Each person should have an equal right to a fully adequate scheme of equal basic liberties that is compatible with a similar system of liberty for all.¹⁴

‘Basic Liberties’ have been described above. The need to ensure equal participation in a scheme of equal rights for all means that Freedom of Belief is not absolute. Political liberalism does not allow space for those comprehensive doctrines (religious or other Beliefs) that are inconsistent with a society promulgating ‘equal basic liberties and mutual toleration’.¹⁵ Accordingly, protection of religious or other Belief comes with the ‘proviso’ mentioned above: religious Beliefs and injunctions must be consistent with the principles of liberal democracy.¹⁶

[T]he basic liberties of liberty of conscience and freedom of association are properly protected by explicit constitutional restrictions. These restrictions publicly express on the constitution’s face, as it were, the conception of social cooperation held by equal citizens in a well ordered society.¹⁷

The Second Principle of Justice states that:

Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.¹⁸

The Second Principle is aimed at maximising the opportunities for the least privileged in society to participate in the scheme of equal basic liberties. This is to be achieved through enabling access to social goods, such as access to public office, adequate income, appropriate education, and, in the case of Freedom of Belief, protection from coercion and unfair influence. The Second Principle stipulates that offices and positions

¹⁴ First enunciated as requiring a ‘most extensive scheme of equal basic liberties’: Rawls, *A Theory of Justice*, 52 ff: revised in his *Political Liberalism*, 5, 291.

¹⁵ Rawls, *Political Liberalism*, 198. Rawls concedes that this does not mean that such doctrines are viable under other historical conditions, or ‘whether their passing is to be regretted’.

¹⁶ Rawls, ‘The Idea of Public Reason Revisited’, 486.

¹⁷ Rawls, *Political Liberalism*, 338.

¹⁸ Ibid, 6, also discussed at 291.

must be open to all and subject to equal opportunity, and any reallocation of resources is to be to the greatest benefit of the least advantaged members of society.¹⁹

Where these two Principles conflict, the First Principle ‘trumps’ the Second Principle, having ‘lexical priority’ of political liberty, by which Rawls means that the ‘equal right to fully adequate scheme of equal basic liberties’ must not be sacrificed for other economic or social advantages, even to achieve social or economic equality.²⁰ Thus, for example, less prosperous social groups cannot be denied equal political liberties (such as the right to vote) in exchange for greater economic prosperity.²¹ By implication, Rawls denies socialism in favour of incremental improvements for the socially disadvantaged through the increasing realisation of political liberties.

This approach sets out a fundamental characteristic of democracy, based on Rawls’s idea of pure procedural justice (discussed more fully at 3.3.1) – that is, processes for legislative and judicial decision-making considered fair and just by the standards of the society that creates them, because of the potential involvement of all citizens. The result is maximised justice and fairness, despite individual views on particular matters. This view of democracy is expressed more simply by Robert Post,²² who argues that the self-determination fundamental to democracy means more than the *making* of decisions. He refers to the example of North Korea, where the apparent freedom to vote is undermined by limited choice elections. Self-determination, according to Post, means rather the autonomous *authorship* of decisions.²³ Rawls would agree with Post, it is argued, when he says that, in a democracy, citizens must perceive the process by which decisions are made:

...as responsive to their own values and ideas...[I]f citizens are free to participate in the formation of public opinion, and if the decisions of the state are made

¹⁹ John Rawls, *A Theory of Justice*, 52 ff; *Political Liberalism*, 6, 291.

²⁰ Rawls, *Political Liberalism*, 294 ff.

²¹ Freeman, *Rawls*, 66; Rawls, *Political Liberalism* 295.

²² Robert Post, ‘Democracy and Equality’ (2006) 603 *The Annals of the American Academy of Political and Social Science*, 24.

²³ *Ibid*, 25.

responsive to public opinion, citizens will be able to experience their government as their own, even if they hold diverse views and otherwise disagree.²⁴

This approach of requiring a meaningful individual participation in the process of governance through international and regional human rights ideology is also adopted by such writers as Henry Steiner²⁵ and Thomas Franck.²⁶ Sadurski also defines equal political opportunity in the process of decision-making as:

...an equality of opportunity to reach one's desired audience, and to get one's message across, to be heard. This is more than an opportunity to speak, and less than an opportunity to convince; it is an opportunity to convey one's message to the audience which the speaker wants to reach.²⁷

Equality at the actual decision-making procedure (i.e. majority rule) is dependent upon an egalitarian deliberative procedure.²⁸

4.2.1 Two Moral Powers

Rawls argued that individuals have two moral powers.²⁹ These powers 'form the primary capacities for practical reasoning'. They are *rational* in that they have the capacity to 'form, revise and pursue a conception of the good'. They are *reasonable* in that they 'have the capacity for a sense of justice', and can 'understand, apply and

²⁴ Ibid, 27.

²⁵ Henry Steiner argues that the minimum right of political participation expressed by Article 25 ICCPR and government by the 'will of the people' in Article 21 UDHR 'should never require less than provision of meaningful exercise of choice by citizens in some form of electoral process permitting active debate on a broad if not unlimited range of issues. But it could require more': Henry Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Yearbook of International Law* 77, excerpted in Steiner, H and Alston, P (eds) *International Human Rights in Context*, Oxford (2nd ed, OUP, 2000) 890, 899.

²⁶ See, e.g., Thomas Franck, who points to the international and regional human rights documents to argue that there is 'a large normative canon for the "democratic entitlement" of peoples'. This, he says, creates the opportunity through processes of self-determination, freedom of expression and electoral rights, 'for all persons to assume responsibility for shaping the kind of civil society in which they live and work': Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) *The American Journal of International Law* 46 excerpted in Steiner, Henry and Alston, Philip, (eds) *International Human Rights in Context*, (Oxford OUP 2000) pp. 900-904, 901.

²⁷ Sadurski, Wojciech, 'Legitimacy, Political Equality, and Majority Rule' (2008) 21(1) *Ratio Juris* 39, 61.

²⁸ Ibid, 63.

²⁹ Rawls, *Political Liberalism*, 19.

follow requirements of principles of justice'³⁰ through cooperation with others. The idea of rights and their attendant duties has arisen from the development of these moral powers. Citizens can exercise their moral powers to the extent that:

- they feel free to develop and revise their conception of the good,
- they see themselves as 'free to make claims on social and political institutions in the name of their fundamental aims and interests' thus being 'self-originating sources of claims'. Thus their claims are seen as independent of the state or other coercive authority; and
- they assume responsibility for their ends, which are not wholly imposed on them by nature or the state.³¹

4.3 Rawls on Freedom

Citizens are thus free to exercise their two moral powers. Rawls adopts the view that freedom as a statement relating to the actions of agents is always the one triadic formula.³² This formula nominates 'the agents who are free, the restrictions or limitations which they are free from, and what it is that they are free to do or not to do'.³³

This triadic formula applies regardless of whether a freedom has been characterised as a 'positive freedom' (freedom to do a specified action) or a 'negative freedom' (freedom from the specified action of another), which are simply a different way of expressing the formula.³⁴ Glanville Williams points out that '[n]o-one ever has a right to do something; he only has a right that someone else shall do (or refrain from doing) something'.³⁵ On this basis, one can follow his rule of thumb: to determine whether something is a right

³⁰ Freeman, *Rawls*, 294.

³¹ Ibid, 294-5.

³² This is in line with the views of such writers as, for example, Glanville Williams, 'The Concept of Legal Liberty' in Robert Summers (ed), *Essays in Legal Philosophy*, (Oxford, Basil Blackwell, 1968) 121; Gerald McCallum, 'Negative and Positive Freedom' (1967) 76(3) *The Philosophical Review* 312, 314; Jeremy Waldron, 'Introduction' in Jeremy Waldron (ed), *Theories of Rights*, (Oxford, Oxford University Press, 1984) 1, 8.

³³ Rawls, *A Theory of Justice*, 177.

³⁴ McCallum, 'Negative and Positive Freedom', 314.

³⁵ Williams, 'The Concept of Legal Liberty', 139.

one asks ‘whether it has a legal duty correlative to it’. The same triadic formula is used when stating the duty of third parties to the rights-holder created by a particular right.³⁶

Under the relevant human rights instruments, duties created by human rights are generally aimed at promoting human dignity, autonomy and self-realisation by either (a) preserving personal safety or integrity;³⁷ or (b) facilitating fair and equal participation in civil and political life through the provision of adequate resources.³⁸ Each of the rights set out in the international human rights instruments establishes either or both kinds of duties.³⁹

Duties of preservation involve ensuring individuals are not disturbed in the exercise of personal autonomy or integrity as equal citizens (‘negative duties’). Negative duties require third parties to refrain from interference in the rights-holder’s exercise of their freedom. These rights in themselves may require provision of facilities that are indirectly relevant for exercising a right, such as minimum degrees of health, wealth and education. Rather than focussing on conferring a benefit, they are intended to preserve the inherent autonomy and dignity that is recognised in all human beings. Negative duties are attached to, e.g., the right to life, personal safety and privacy, as well as thought and Belief.

Duties of facilitation (or ‘positive duties’) require third parties to take active measures to ensure the rights-holder can exercise prescribed freedoms. While the duties apply to those other than the rights-holder, the aim here is to confer special benefits on the rights-holder for the promotion of equal participation with others in the political process, such

³⁶ Ibid, 139. The relationship between human rights and correlative and non-correlative duties is discussed in Liora Lazarus, et al, ‘The Relationship between Rights and Responsibilities’ (2009) (U.K.) Ministry of Justice Research Series 18/09 <www.justice.gov.uk/publications/research.htm> at 18/2/2010, esp 26ff. See also James Nickel, “How Human Rights Generate Duties to Protect and Provide”, (1993)15 *Human Rights Quarterly* 77, 80 (1993).

³⁷ E.g., right to life, freedom from arbitrary arrest, cruel and unusual punishment, Belief, speech and assembly.

³⁸ E.g. fair trial, participation in government and education:

A right is fully implemented or has high quality implementation when all of the major threats to the right have been adequately blocked or neutralized through actions such as gaining recognition and compliance with the right’s associated moral and legal duties, providing protections and other services, and providing legal and other remedies for noncompliance with the right (Nickel, ‘Rethinking Indivisibility’ 992).

³⁹ Positive and negative *duties* are to be distinguished by the notions of positive and negative *rights*. The terms positive and negative rights apply to rights to certain benefits and rights from harm.

as facilities for voting, access to public office, equal treatment before the law and a fair trial.

Rawls points out that freedom generates a legal or constitutional structure of institutions when people are free from certain constraints either to do or not to do something ‘and when their doing it or not doing it is protected from interference by other persons’.⁴⁰ It follows that liberty of conscience as defined by law, means that

...individuals are free to pursue their moral, philosophical or religious interests without legal restrictions requiring them to engage or not to engage in any particular form of religious or other practice, and when other men have a legal duty not to interfere.⁴¹

Rawls here refers to ‘interests’ involved in the right to Freedom of Belief, similar to Waldron⁴², who cites the formula:

...P can be said to have a right (in a moral theory or a legal system) whenever the protection or advancement of some interest of his is recognized (by the theory or the system) as a reason for imposing duties or obligations on others (whether duties and obligations are actually imposed or not).

This reference to interests is most suitable, Waldron points out, for three reasons. Firstly, it does not require identification of who exactly is under the duty. Secondly, it concentrates on the interest involved, as some rights (e.g., freedom of speech or Belief) involve a variety of (often conflicting) privileges, claims and duties. Finally, there is no requirement to spell out what privileges, powers, immunities or obligations are involved in the exercise of the duty. The resultant flexibility minimises injustice caused by restrictive, clause-bound literalism.

⁴⁰ Rawls, *A Theory of Justice* 177. This accords with Glanville Williams’s idea of a ‘right’, as opposed to a ‘liberty’: in that a liberty is an abrogation by the state of any duty *on the part of a person* to do the opposite: a legal right is a duty *on the part of third parties* not to prevent that person from doing it: Williams, ‘The Concept of Legal Liberty’ 132ff. In other words, ‘every right in the strict sense relates to the conduct of another, while a liberty and a power relate to the conduct of the holder of the liberty or power’, at 139.

⁴¹ Rawls, *A Theory of Justice*, 177.

⁴² Waldron, ‘Introduction: Theories of Rights’, 10.

As noted above, the international human rights treaties define freedoms associated with Belief as ‘rights’, with relevant correlative duties. This means that the ‘right’ to Freedom of Belief is in effect addressed to third parties – those, including the state, other than the person who holds the right. It requires third parties to refrain from action that will prevent or restrict the exercise of Freedom of Belief by the rights holder. The obvious problem is discerning the metes and bounds of that duty, noting that it involves the need to ensure that particular Beliefs are neither enforced nor privileged.

It is proposed here that Rawls’s statement that there should be separation of church and state leads to the inference that the right to Freedom of Belief negates any duty of the state to facilitate manifestation of Belief (except for requiring measures to ensure state neutrality itself) as this would compromise the requirement of state impartiality. Thus, there is no duty on the part of the state or anyone else to actively promote, assist or favour the adoption or manifestation of any particular Belief.

4.4 The transition from A Theory of Justice through Political Liberalism to The Law of Peoples

Rawls’s conception of freedom of Belief as a human right is best understood by considering the transition of his ideas from *A Theory of Justice* to *The Law of Peoples*. In *A Theory of Justice* Rawls set out a social contractarian model of society that presented a moral and philosophical account of social and political justice. This account may be philosophically justifiable, but it can invoke controversy on religious, moral and philosophical issues, giving rise to ‘burdens of judgment’. Burdens of judgment result from the fact that people are confronted by conflicting and complex evidence about matters, diverse understandings of issues and different individual experience and values (see section 3.3.6).

The problem arises of maintaining a well-ordered society of justice as fairness when members do not themselves reasonably agree upon the philosophical justification of the principles of justice that they all endorse.⁴³ Rawls addresses this problem within democratic and liberal theory in *Political Liberalism*, according to Freeman:

⁴³ Freeman, *Rawls* 326.

...rather than being tied specifically to justice as fairness, the question now asks how enduring agreement on *any* reasonably just liberal and democratic conception of justice is realistically possible, *given* the fact that reasonable people in liberal societies will inevitably hold different “reasonable comprehensive doctrines.”⁴⁴

Political Liberalism introduces the idea of public political culture, which is central to the liberal and democratic conception of justice. This is the way in which tradition, religion and culture may be recognised in the political conception of liberal society. As noted in section 3.3.3, public political culture consists of the political institutions of a society, as developed through publicly accepted judicial and other scholarly jurisprudential interpretations and philosophical writings, as well as historic texts and documents that are common knowledge.⁴⁵ These go to make up the political conception of justice.

Rawls elaborated on public political culture in his essay ‘The Idea of Public Reason Revisited’.⁴⁶ There he articulated the ‘wide view’ of public political culture. He allowed that comprehensive doctrines (which can involve tradition, religion and culture) might be recognised in the political conception of justice:

... reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided the in due course proper political reasons [i.e. those based on the political conception of justice] – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrine introduced are said to support.⁴⁷

This is the all-important *proviso* that characterises Rawls’s conception of political liberalism, and opens the way for conceiving his approach as one of structural secularism.

⁴⁴ Ibid (original emphasis).

⁴⁵ Rawls, *Political Liberalism*, 13,14.

⁴⁶ Rawls ‘The idea of Public Reason Revisited’, 463ff.

⁴⁷ Ibid, 462.

Thus, Rawls established three main conditions for a liberal democratic ‘well-ordered’⁴⁸ society: (1) a conception of justice freestanding from comprehensive doctrines (2) an overlapping consensus endorsed by all reasonable comprehensive doctrines, and (3) the generation of public reasoning about constitutional essentials and basic justice.⁴⁹ This is the model of society with which I am concerned in this thesis.

However, in *The Law of Peoples*, Rawls went on to extend this conception of the liberal conception of justice. In *Political Liberalism* he had dealt with the recognition of different views of life in a stable and enduring liberal and democratic society at the domestic level. *The Law of Peoples* addresses the fact that not all societies are liberal and democratic. Here Rawls considers the foreign policy of liberal societies. *The Law of Peoples* ‘allows us to examine in a reasonably realistic way what should be the aim of the foreign policy of a liberal democratic people’.⁵⁰ He asks, ‘How are liberal peoples to relate to non-liberal peoples, and in particular to non-liberal peoples who are “decent”, even if not just by the standards of a well-ordered constitutional democracy?’⁵¹

While Rawls endorsed the eventual development of a universal conception of ‘basic liberties’ with preference for political liberalism, he recognised the reality of diversity of pluralist societies, and the consequent moral and political practicality of toleration of illiberal but ‘decent’ peoples who subscribe to his concept of ‘basic human rights’.⁵²

The Law of Peoples locates Rawls’s political liberalism in a global context, and situates his theory in relation to moral relativism and cosmopolitanism (global observance of universal human rights). Rawls recognised the sovereignty of peoples, as he defined them, but did not endorse moral relativism. Instead, he endorsed the eventual development of a universal conception of human rights with preference for political liberalism, while recognising the reality of the diversity of pluralist societies. *The Law of Peoples* explores the consequent moral and political propriety of toleration of illiberal but ‘decent’ peoples who subscribe to his concept of ‘basic human rights’.

⁴⁸ In a ‘well-ordered society’ ‘the public conception of justice provides a mutually recognized point of view from which citizens can adjudicate their claims of political rights on their political institutions or against one another’: Rawls, *Justice as Fairness*, 9.

⁴⁹ Freeman, *Rawls* 329.

⁵⁰ Rawls, *The Law of Peoples*, 83.

⁵¹ Freeman, *Rawls*, 426.

⁵² Ibid, 476.

The Law of Peoples, then, is an integral part of the consideration of human rights and liberties. Rawls provides an account of human rights, coupled with the claim that the basic needs of all individuals in the world are to be met, partly as a matter of their human rights'.⁵³ For him *human rights* are a 'special class of rights':⁵⁴ the minimal freedoms, powers and protections needed for the development and exercise of the moral powers that enable citizens to engage in social cooperation. They are observed in 'decent societies'. In this way they are distinguished from *basic liberties*: the broader range of freedoms enjoyed by citizens in liberal democratic societies.

While in-depth consideration of *The Law of Peoples* is not relevant to the argument of this thesis, it is considered central to an understanding of Rawls's approach to freedom of Belief to consider this distinction.

4.5 Rawls's understanding of 'human rights'

It is essential in applying Rawls's model of political liberalism to human rights to keep in mind the distinction he made between *human rights* and *basic liberties*. Human rights as conceived by Rawls have been described as 'the *minimal* freedoms, powers and protections that any person needs for the most basic development and exercise of the moral powers that enable him or her to engage in social cooperation in any society'.⁵⁵

In *The Law of Peoples*⁵⁶ human rights are listed by Rawls as including:⁵⁷

- the right to life (the means of subsistence and security);
- liberty (freedom from slavery, serfdom, forced occupation);
- a 'sufficient measure' of liberty of conscience to ensure freedom of religion and thought, though 'not as extensive or equal for all members of society' (for

⁵³ Ibid, 264.

⁵⁴ Ibid, 435.

⁵⁵ Ibid, 436 (emphasis original).

⁵⁶ Rawls, John, *The Law of Peoples* (Harvard, Harvard University Press 1999).

⁵⁷ As set out in *ibid*, 65ff.

example a particular religion may be predominant or officially adopted, by a state);⁵⁸

- the holding of personal property; freedom of thought, conscience and expression;
- respect for the rights of women in ‘just consultation’ (while not necessarily resulting in equality with men); and
- formal equality as expressed by the rule of law, that is, similar cases treated similarly, although there may be inequality among members of the society.⁵⁹

Burleigh Wilkins argues that Rawls’s human rights ‘express a special class of urgent rights’ such as ‘freedom from slavery and genocide, liberty (though not equal liberty) of conscience, and security from mass murder and genocide’. ⁶⁰ Thus ‘human rights’ for Rawls includes only the basic human rights required for a ‘decent hierarchical society’ described above – that is, a society that may be non-liberal and lack a secular government, but is not a tyranny or dictatorship.

Decent hierarchical societies are described by Rawls as having two main criteria. Firstly, in their external relationships they are not aggressive towards other peoples. Secondly, internally, they provide for basic human rights and an uncoerced acceptance by members of obligations ‘fitting with their common good idea of justice’. ⁶¹ This idea of justice must be adopted and defended by judges and officials. ⁶²

Decent hierarchical societies have a conception of the common good (rather than despotism), consultation with representatives of the various groups within the society (whilst these groups may not have equal representation) and although religious equality may not exist, there is no religious persecution. ⁶³ Accordingly, while not fully

⁵⁸ Rawls calls this ‘liberty of conscience, though not an equal liberty,’ Ibid, 65 fn 2. Although, e.g., there may be a state established religion, preventing those of other Beliefs holding certain positions, ‘other religions are tolerated, and may be practiced without fear or loss of most civic rights’ Rawls, *The Law of Peoples*, 75-76.

⁵⁹ Rawls, *The Law of Peoples*, 70.

⁶⁰ Burleigh Wilkins, ‘Rawls on Human Rights: A Review Essay’ (2007) *The Journal of Ethics* <feedraider.com/item/245698/Springerlink-Journal> at 11/10/2008, 5.

⁶¹ Rawls, *The Law of Peoples*, 66.

⁶² Ibid, 64-67.

⁶³ Wilkins, ‘Rawls on Human Rights’, 5.

democratic they are considered by the international community to be sufficiently just to warrant recognition of their sovereignty.⁶⁴

In 'decent' nonliberal societies liberty of conscience need not be as extensive as it is in a liberal society and is thus 'not an equal liberty,'⁶⁵ however such societies are sufficiently just to be tolerated as members of the international community of states. Rawls claims that 'self determination, duly constrained by appropriate conditions, is an important good for people... Decent societies should have the opportunity to decide their future for themselves'.⁶⁶ As human rights belong to all human beings, 'outlaw' states – those less than 'decent' (e.g., tyrannies and dictatorships such as Zimbabwe or Burma) are to be condemned, and may warrant intervention on behalf of their citizens.⁶⁷

For Rawls, the presence or absence of respect for these basic human rights determines how countries should deal with problems and injustices they perceive in the internal practices of other countries. These rights are not 'peculiarly liberal or special to the Western tradition,'⁶⁸ but are the necessary conditions for any system of social cooperation,⁶⁹ and for acceptance into the society of peoples.⁷⁰ Regimes that respect basic human rights only are thus called 'decent' *but* 'nonliberal' societies. Rawls concedes that to argue that full democratic and liberal rights are necessary to prevent violation of basic human rights, as he states them, may be valid. He is here attempting to draw the boundary between what can be tolerated in allowing a government internal autonomy: 'no government can claim sovereignty as a defence against its violation of the basic human rights...of those subject to its authority'.⁷¹

According to James Nickel, Rawls viewed basic human rights as international and universal norms of high priority primarily addressed to governments but applying to all

⁶⁴ Rawls, *The Law of Peoples*, 122.

⁶⁵ Ibid, 65 n 2.

⁶⁶ Ibid, 85.

⁶⁷ Ibid, 81.

⁶⁸ Ibid, 65.

⁶⁹ Ibid, 68.

⁷⁰ Ibid, 62ff., esp.63.

⁷¹ Freeman, *Cambridge Companion to Rawls*, 47. See Rawls, *The Law of Peoples*, 80ff, esp 81.

individuals despite their government's non-adherence to them.⁷² They provide minimal protection against the most severe injustices. Rawls's conception of human rights is 'nonstandard' in that he gives them a political role – the '*minimal* freedoms, powers and protections' necessary for '*any* system of social cooperation, whether liberal or non-liberal,'⁷³ indicating when concern with the internal activities of another country is permissible. It follows that they include fewer rights than those set out in the international treaties, which apply to liberal democratic regimes.⁷⁴

Some writers have rejected Rawls's version of human rights, as 'severely diluted'⁷⁵ arguing for a more expansive approach to human rights (as per his 'basic liberties' discussed in the next section).⁷⁶ This criticism is considered irrelevant to this thesis, as what is under discussion is the broader list of human rights to which the majority of the world's nations have subscribed, all nations thus in effect declaring themselves liberal democracies.

4.6 Rawls's understanding of 'Basic Liberties'

Basic liberties expand on basic human rights, and constitute what then become 'freedoms, powers and protections...necessary for the full development and adequate exercise of the moral powers in a liberal and democratic society'.⁷⁷

Many liberties characterised as rights in the international human rights treaties thus go beyond what Rawls calls human rights, creating rights from what he conceives as basic liberties.

⁷² James Nickel, 'Rawls's Theory of Human Rights in Light of Contemporary Human Rights Law and Practice' (2003) <<http://homepages.law.asu.edu/~jnickel/rawlsessay.pdf>> at 01/11/07, 2-3.

⁷³ Freeman, *Rawls*, 436 (emphasis original); Rawls, *The Law of Peoples* 68.

⁷⁴ Nickel, 'Rawls's Theory', 6. 'To exclude decent but nonliberal peoples from the community of peoples [and thus acceptance by liberal states] would unjustifiably go against their fundamental interest in self-respect'. Such interest in their self-respect rests on their common experience, their history and their culture: Rawls, *The Law of Peoples*, 34.

⁷⁵ See, e.g., Lindholm, 'Strasbourg Court and Freedom of Religion or Belief', 6; Nickel, 'Rawls's Theory'.

⁷⁶ See Sadurski 'Rawls and the Limits of Liberalism' for a critique of Rawls's approach of allowing, through toleration, decent peoples to 'find their own way' to honour the ideals of liberalism (Rawls, *The Law of Peoples* 122). James Nickel claims Rawls's 'two-tiered' approach to rights discounts practical international relations, and doubts 'that respect for decent peoples or the avoidance of cultural imperialism requires us to cut so many liberty rights, democratic rights, and equality rights': 'Are Human Rights Mainly Implemented by Intervention?' in Rex Martin and David Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?*, (Oxford, Blackwell Publishing, 2006) 263.

⁷⁷ Freeman, *Rawls*, 436. See also Rawls, *Political Liberalism*, 293.

Rawls placed basic liberties at the centre of the political conception of justice in liberal democratic societies, as an essential element of the public reason that flows from it. They define a person's status as a free and equal person in a liberal society. This means that 'basic liberties can be limited only for the sake of maintaining other basic liberties' and cannot be given up or traded away,⁷⁸ being as they are a prerequisite for a liberal society based on justice as fairness.⁷⁹ Basic liberties are expressed in very general terms, and are similar to the rights set out in the human rights treaties.

Basic liberties as understood by Rawls include freedom of thought and liberty of conscience; political liberties; Freedom of Belief, assembly and association; freedoms specified by the liberty and integrity of the person and the rights and liberties covered by the rule of law.⁸⁰ Essentially, they are based on the principle that all citizens enjoy them equally. In that sense, societies exhibiting basic liberties are non-hierarchical. Equality is a cornerstone of basic liberties.

In addition to the above liberties, other liberties that can be inferred from Rawls's list are named as rights in the ICCPR.⁸¹ They include:

- the right to privacy: (Art 17);
- the right to marry, family privacy and protection of children: (Arts 23, 24);
- the right to participate in public affairs, vote, and access to public service: (Art. 25);
- the right to equal protection of the law, non-discrimination: (Art 26);
- the right to enjoyment of culture, language etc.: (Art 27).

The difference between Rawls's human rights and basic liberties are set out in the following table:

⁷⁸ Freeman, *Cambridge Companion to Rawls*, 5-6.

⁷⁹ See, e.g., Rawls, *Political Liberalism*, 291. Freeman, *Rawls*, 511 n 17. Freeman calls these 'liberal rights': Ibid, at 436.

⁸⁰ Rawls, *ibid*, 291.

⁸¹ Rawls saw basic liberties as designed to further 'fair value of the equal political liberties': *ibid* 327.

TABLE 5: RAWLS'S DIFFERENCE BETWEEN 'HUMAN RIGHTS' AND 'BASIC LIBERTIES'

Basic Human Rights⁸²	Basic Liberties⁸⁴
<p><i>The Minimum to qualify as a 'decent society',⁸³</i></p> <p>(Not all human rights apply equally to all citizens: these are the minimum rights tolerable by other societies, before they are entitled to coercive intervention.)</p> <ul style="list-style-type: none"> • The right to life (the means of subsistence and security); • Personal freedom (freedom from slavery, serfdom, forced occupation); • Freedom of thought, and expression; • A 'sufficient measure' of liberty of conscience though not an equal liberty; • Respect for the rights of women in 'just consultation' (while not necessarily resulting in equality with men); and • Formal equality as expressed by the rule of law, that is, similar cases treated similarly, although there may be inequality among members of the society.⁸⁵ • 	<p>(All basic liberties apply equally to all citizens)</p> <p align="center">Rights Listed by Rawls:</p> <ul style="list-style-type: none"> • Freedom of thought and liberty of conscience; • Political liberties; (such as rights to vote, hold office, form and join political parties, express views and enjoy fair opportunity to take part in political life); • Freedom of association; • Freedoms specified by the liberty and integrity of the person; • Right to hold personal property; • Rights and liberties covered by the rule of law. <p align="center">Rights that may be inferred from above list also set out in the ICCPR:</p> <ul style="list-style-type: none"> • The right to privacy: (Art 17); • The right to marry, family privacy and protection of children: (Arts 23, 24); • The right to participate in public affairs, vote, and access to public service: (Art. 25); • The right to equal protection of the law. non-discrimination: (Art 26); • The right to enjoyment of culture, language etc.: (Art 27).

Basic liberties are therefore similar to the rights accepted by those nations that have ratified the human rights treaties. This, it is argued, indicates that these nations, at least nominally, aspire to the criteria Rawls establishes for liberal democratic societies. For Rawls, a statement of basic liberties is not a legally binding statement, but a political

⁸² As set out in Rawls, *The Law of Peoples*, 65. See also, §10.

⁸³ Rawls does not consider 'decent societies' as just and beyond criticism. However they do not merit coercive intervention, and governments of liberal societies have a duty to 'cooperate with and not seek to undermine' them: Freeman, *Rawls*, 432. Relationships should involve encouraging the increase in basic liberties.

⁸⁴ Rawls, *Political Liberalism*, 291; Freeman, *Rawls*, 464.

⁸⁵ Rawls, *The Law of Peoples*, 70.

one. Where states are party to the human rights treaties, however, one can argue that what Rawls treats as basic liberties become legally recognised *rights*, with legally recognised duties not to impede the exercise of those liberties attached.

A basic liberty is essential, says Rawls, when it is an 'essential social condition for the adequate development and full exercise of the two powers of moral personality over a complete life'.⁸⁶ As stated above these powers mean individuals can rationally pursue a coherent set of values and cooperate with others on fair terms to pursue these.⁸⁷

Consequently, in a society that undertakes to provide for the realisation of the two powers of moral personality, what may otherwise be a 'liberty' becomes a 'right' in the sense that it places an obligation on third parties, but only for that purpose.

As noted, Rawls is flexible as to precisely how liberties are to be specifically defined in each liberal democratic society, allowing in individual cases for consideration of circumstance, history and culture, provided individuals affirm the same conception of themselves as free and equal citizens, enjoying the 'same basic rights, liberties and opportunities'.⁸⁸ He sees the basic liberties as a whole, 'as one system', with the worth of one liberty dependent on the specification of the other liberties, so long as the essential objective of each liberty is preserved.⁸⁹

Consequently, Rawls does not provide a list of basic liberties in order of merit, relying on the two Principles of justice to determine priorities when liberties are in conflict in particular cases. Conflict may raise questions such as, for example, how do we decide when freedom of expression should give way to the right to public order and personal security? This lack of specificity may not be a serious disadvantage, however. By avoiding particularity at the stage of constitutionally defining rights and responsibilities,⁹⁰ there is room for a particular society to determine in more detail how to regulate and adjust basic liberties to maintain an adequate scheme of equal basic

⁸⁶ Rawls, *Political Liberalism*, 293.

⁸⁷ Freeman, *Rawls*, 54. See discussion above sections 3.3.2, 4.4.

⁸⁸ Rawls, *Political Liberalism*, 180, 185.

⁸⁹ Rawls, *A Theory of Justice*, 178.

⁹⁰ Rawls's four-stage process of establishing procedural justice are discussed above at section 3.3.1. The stages are (1) determination of the good based on the First and Second Principles; (2) formulation of a constitution based on these Principles; (3) establishment of the legislature and rules forming the social structure of society; (4) Implementation of legislation by judicial and other officials.

rights and liberties for all. This is to occur at the stage where the legislature sets out in more detail rules and policies to take account of historical, cultural, technological and economic circumstances (so long as this is done with ‘sufficient exactness to sustain [the] conception of justice’).⁹¹

The absence of prioritising liberties may thus be appropriate, given the abstraction at which Rawls is working, as the resulting generality allows for the establishment of a particular society’s individual set of values, priorities, and understanding of the ‘good’. In a liberal democracy, however, this flexibility is necessarily constrained within the secular structure of political liberalism described above (section 3.3.4).

4.6.1 Liberty and the ‘worth of liberty’

It is critical to Rawls’s theory to draw the distinction between the *ideal* of liberty: the ‘complete system of the liberties of equal citizenship’ and the *worth* of liberty to individuals, which depends on ‘their capacity to advance their ends within the framework the [liberal] system defines’. Thus:

Taking the two principles together, the basic structure is to be arranged to ‘maximise the worth to the least advantaged of the complete scheme of equal liberty shared by all’.⁹²

The distinction between liberty and the ‘worth’ of liberty is based on the fact that while all may be entitled to equal political rights and freedoms, inequalities in social, physical and economic resources means that not everyone can equally enjoy or exercise these rights and freedoms. It is the distinction between formal recognition of the status of equality (‘nominal equality’) and the means for ensuring the realisation of equality (‘substantive equality’). Basic political rights are nominally the same for everyone, while the worth of these rights is dependent on means and the resulting ability or otherwise to generate or influence ideas and policies.

Martha Nussbaum discusses Rawls’s idea of the worth of human liberty, and uses the term ‘central human capabilities’ to develop a similar approach to the application of

⁹¹ Rawls, *A Theory of Justice*, 54. See also Van Wyk, *Equal Opportunity and Liberal Equality*, Chap 4, p.80.

⁹² Rawls, *Ibid*, 179.

human rights. She discusses their relevance to women and gives the example of women being legally entitled to education, but denied the opportunity because of lack of resources and government interest: 'We ask not about the person's *satisfaction* with what she does, but *what* she does, and what she is in a position to do (what her opportunities and liberties are)'.⁹³

Rawls's Principles of justice provide for a system of political rights based on the equal participation of all in the political process. They provide for a means of ensuring these liberties are experienced in fact 'by governments taking measures to equalize individuals' political standing and influence, and by not allowing concentrations of wealth and power to distort the democratic process'.⁹⁴ These measures are designed to ensure, where necessary, access to 'primary goods', to 'maximise the worth to the least advantaged of the complete scheme of equal liberty shared by all'.⁹⁵

Primary goods include basic rights and freedoms; freedom of movement and choice of occupation; powers and prerogatives of office and participation in the political and economic institutions; income and wealth; and 'the social bases of self-respect'.⁹⁶ While Rawls's language is general and abstract, it is my view that ensuring equal political liberty may involve reallocation of resources to provide the means to access the required 'primary goods' for equal participation in the political process, meeting the claim of all to equal enjoyment of basic liberties.⁹⁷

To promote the worth of liberty for all, ensuring equal political liberty may also involve measures to ensure equal opportunity in education, the regulation of inequalities in income and wealth and restoration of those to whom the worth of political liberty is diminished through illness or accident.⁹⁸ Those who are naturally advantaged by being

⁹³ Martha Nussbaum, *Women and Human Development*, esp p. 71ff (emphasis added).

⁹⁴ Freeman, *Rawls*, 469.

⁹⁵ See Rawls, *A Theory of Justice*, 179:

[s]ince the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied... Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equality liberty shared by all.

⁹⁶ Rawls, *Political Liberalism*, 181.

⁹⁷ *Ibid*, 185.

⁹⁸ See, e.g., *Ibid*, 185.

endowed with superior mental or physical attributes are only to be favoured where this will improve the lot of the disadvantaged. Thus, for example, those who are intellectually advantaged may be benefited with educational opportunities that allow them to develop scientific breakthroughs to improve the conditions of the less advantaged, but not simply for their own personal or economic gain.⁹⁹ Those who are intellectually or physically *disadvantaged* are assisted through reallocation of resources to ‘maximise’ their opportunity to exercise their political rights.¹⁰⁰

In this way, it is argued, we are led to the view that the distinct but complementary functions of the two Principles of justice reconcile the apparent contradictions of liberty and equality, through the inherence of equality within the notion of freedom itself. In this way, the very freedom each of us has is bounded by the equal claim to freedom by others: we cannot go beyond what allows them, also, to act. By differentiating liberty and the worth of liberty, I argue, Rawls’s approach indicates that liberty itself is not compromised by the appropriate reallocation of resources:

...liberty is represented by the complete system of the liberties of equal citizenship, while the *worth* of liberty to persons and groups depends on their capacity to advance their ends within the framework the system defines.

In this sense, he continues, ‘[f]reedom and equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise’.¹⁰¹ There is no question that all citizens enjoy the *status* of being free, however measures may be required to ensure they enjoy the *worth* of being free.

It is stressed that the First Principle, aims at *political* freedom and equality for all, and no more. Rawls emphasised that measures to promote the worth of freedom to those less able to enjoy it should thus focus on justice as fairness rather than social or economic convenience.¹⁰² Full freedom of political life, Rawls argues is ‘realized by citizens when they act from principles of justice that specify the fair terms of cooperation they would

⁹⁹ Rawls, *A Theory of Justice*, 88.

¹⁰⁰ This can be, for example, through health care for those who are incapacitated, so that they can become fully cooperating members of society. Special provision of educational facilities may also promote participation in the political process. See a fuller discussion below in section 5.3.

¹⁰¹ Rawls, *A Theory of Justice*, 179.

¹⁰² See, e.g., Rawls, *Justice as Fairness*, 47.

give to themselves when fairly represented as free and equal persons'.¹⁰³ In his model of justice as fairness, this 'political autonomy' is distinguished from 'ethical autonomy' – individual ethical values of comprehensive doctrines. Justice as fairness 'affirms political freedom for all but leaves the weight of ethical freedom to be decided by citizens severally in light of their comprehensive doctrines'.¹⁰⁴ However, the strength with which one holds a particular Belief, while making it personally right, does not make it *politically* right.¹⁰⁵ Both political and ethical freedom may be compatible in a liberal democracy, but where they are not, the principles of political freedom take precedence.

Notwithstanding this, all citizens should have a fair opportunity to hold public office and to influence the outcome of political decisions, whatever the person's socio-economic position. This is the promise of the First Principle, a guarantee that is necessary for the establishment of just legislation and an effective process for democracy.¹⁰⁶ Accordingly, Rawls sees Freedom of Belief as primarily a political freedom, established by the First Principle, the 'lexical' antecedent of the Second Principle, which gives it practical effect.

It is critical to note that citizens exercising Rawls's basic liberties are subject to the obligation of reciprocity that arises from their equal status as participants in a fully adequate scheme of equal basic rights and liberties. Rawls emphasises that it is crucial that such measures are subject to the limitations inherent in his model of political liberalism (such as public reason), the 'constraints to which any practicable political conception (as opposed to a comprehensive moral doctrine) is subject'.¹⁰⁷ Citizens are thus obliged to restrict activity that may impede the freedom of others. In this sense, *the statement of their freedom to participate is as much a statement of the limits of their actions as it is one of their freedoms*. Thus, I conclude, any consideration of the basic

¹⁰³ Rawls, *Political Liberalism* 77.

¹⁰⁴ Ibid, 78.

¹⁰⁵ See Rawls *A Theory of Justice*, §6 §4. Wojciech Sadurski, *Equality and Legitimacy* (Oxford, Oxford University Press 2008), agrees with this view. 'The force with which we hold a particular value is not indicative of its worth. The intensity of judgment is not a symptom of its quality' (at 52). He states that to favour one value over another based on strength of feeling would favour irrelevant considerations. But overall social implications *are* a relevant consideration (e.g., the social effects of legislating for some form of voluntary euthanasia). Consequently, 'all that counts for the political process which attempts to reflect individual judgments of members of the group is the fact that each of us espouses a particular judgment and not how strongly we espouse our respective values' (ibid).

¹⁰⁶ See, e.g., Rawls, *Justice as Fairness*, 12,13, esp 45-47.

¹⁰⁷ Rawls, *Political Liberalism*, 182 (footnote deleted).

liberties of democratic societies must, in addition to establishing the freedoms involved, give adequate attention to the limits they impose. The implications of the requirement of equality, and its relation to Freedom of Belief, follows in Chapter 5.

4.6.2 Basic Liberties are politically determined

As basic liberties in Rawls's ideal society are inherent in his conception of justice as fairness, they are a political construct of the ideal liberal democratic society. These additional liberties depend on an 'ideal of persons and of citizens as free, self-reflective and self-governing agents with a good of their own that they have freely accepted'.¹⁰⁸ This political conception is based on the idea of public reason and not a conception of the person as conceived by any comprehensive doctrine. Rawls here seems to be developing the idea of the citizen as a construct of the state 'an *ideal* implicit in democratic political culture',¹⁰⁹ having rights and responsibilities in relation to the state. It is important to a consideration of Rawls's recognition of basic liberties to note that they do not apply at all historical times, or to all peoples, but only when development occurs to the extent that they can be effectively exercised.¹¹⁰

The individual as a political being functions according to values of autonomy, equality and liberty, whereas the rights and responsibilities of the individual as a private being are based on worldviews that apply to the world of family and associations.¹¹¹ Rawls draws the distinction between political autonomy and ethical autonomy:

...full autonomy is achieved by citizens: it is a political and not an ethical value. By that I mean that it is realized in public life by affirming the political principles of justice and enjoying the protection of the basic rights and liberties; it is also realised by participating in society's public affairs and sharing in the collective self-determination over time. This full autonomy of political life must be distinguished

¹⁰⁸ Freeman, *Rawls*, 436.

¹⁰⁹ Rawls, *The Law of Peoples*, 15; Freeman, *Rawls* 211-12, Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 *Chicago-Kent Law Review* 619, 664-5. (This article is reproduced in Samuel Freeman, *Justice and the Social Contract*. Costas Douzinas makes the argument that rights create the person, not vice-versa: Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, Hart Publishing 2000), Ch 9.

¹¹⁰ Rawls, *The Law of Peoples*, sp., §1, 78. See generally Sadurski, 'Rawls and the Limits of Liberalism'.

¹¹¹ Rawls, *ibid*, 15.

from the ethical values of autonomy and individuality, which may apply to the whole of life, both social and individual, as expressed by the comprehensive liberalisms of Kant and Mill. Justice as fairness emphasizes this contrast: it affirms political autonomy for all but leaves the weight of ethical autonomy to be decided by citizens severally in light of their comprehensive doctrines.¹¹²

Rawls's priority of equal political rights challenges the view that the full exercise of democracy allows the state to give priority to the favourable treatment of religious or other Beliefs over its commitment to impartiality, as espoused by McKinnon and discussed above at section 3.3.5. People may be prevented from wearing apparel¹¹³ or consuming drugs¹¹⁴ as prescribed by their religion, or required to breach their religious obligations by taking out third party motor vehicle insurance¹¹⁵ or immunising their cattle in the cause of public reason.¹¹⁶ Rawls recognised this, and acknowledged that a hardline, unforgiving approach to separation of Beliefs from public reason may erode personal freedom. This is where he relies on the reasonableness of liberal democracy: citizens are 'willing to govern their conduct by a principle from which they and others can reason in common' for the general benefit of society.¹¹⁷

Rawls also recognised that basic liberties 'are bound to conflict with one another', and so they are to be defined in a way that fits into a 'coherent scheme of liberties'.¹¹⁸ They can only be restricted and regulated (but not abandoned) for the sake of one or more other basic liberties, and not for social or economic expediency. In the case that they are regulated, this must be within what Rawls calls the 'central range of application' of the basic liberties,¹¹⁹ so that one remains within the coherent scheme of the overall political concept of justice as fairness. Rawls does not define the term 'central range of application' but explains it by referring to freedom of speech. Rules of order are

¹¹² Rawls, *Political Liberalism*, 77-8.

¹¹³ E.g., *Karnel Singh Bhinder v. Canada* Communication No. 208/1986 CCPR/C/37/D/208/1986.

¹¹⁴ E.g., *M.A.B., W.A.T. and J.A.Y.T. v. Canada* No. 570/1993, U.N. Doc. CCPR/C/50/D/570/1993 (1994).

¹¹⁵ E.g., *X. v. the Netherlands*, App. No. 2988/66 10 Yearbook (1967) 472.

¹¹⁶ E.g. *X. v. the Netherlands*, App. No. 1068/61, 5 Yearbook (1962) 278.

¹¹⁷ Rawls, *Political Liberalism*, 49 n 1. They thus act according to reflective equilibrium, described above at section 3.3.1.

¹¹⁸ *Ibid*, 295.

¹¹⁹ *Ibid*, 295-6.

required for regulating free discussion (e.g. rules of debate and procedures of enquiry). This does not include the *content* of speech (such as ‘prohibitions against arguing for certain religious, philosophical or political doctrines’), as the priority of liberty requires regulation, so far as possible, to preserve the central range of application of each basic liberty.¹²⁰

In relation to Freedom of Belief, the ‘central range of application’ can plausibly be explained by referring to the statement of the UNHRC that ‘although a state might defend its culture and national religion, in doing so, it could not deviate from the fundamental common values elaborated in the Covenant’.¹²¹

In the case of both ‘liberal’ and ‘decent, non-liberal’ societies, then, Rawls has developed a theory of political culture that pragmatically recognises the diverse practices and mores of different societies. By his acceptance of ‘decent hierarchical’ societies Rawls is not *advocating* a society with limited rights. He is attempting to formulate a pragmatic model of government, taking into account human nature in all its varieties. Increased understanding and implementation of the full range of human rights as adopted by the world’s nations can be encouraged through example, diplomatic pressure and influence within international relations based on pursuit of the ‘ideal theory’ of justice as fairness.¹²²

Despite this, Rawls has been criticised for being biased towards liberal democracy, and being ethnocentric¹²³ and exclusive of ‘non-Western values’ in his favouring of liberal democracy as the most effective system for ensuring basic liberties (as opposed to what he considers basic human rights).¹²⁴ However, his approach as outlined in *The Law of Peoples* is designed specifically to avoid ethnocentricity,¹²⁵ and offers ‘a modest

¹²⁰ Ibid, 296.

¹²¹ U.N. Human Rights Committee, ‘Report of the Human Rights Committee Concluding Observations, Sudan’ (U.N. Doc. CCPR/A/46/40, 1991), 517.

¹²² Rawls, *The Law of Peoples*, 89ff. Seen also Sadurski, ‘Rawls and the Limits of Liberalism’.

¹²³ See, e.g., Perez-Estervez, ‘Intercultural Dialogue and Human Rights: A Latinamerican Reading of Rawls *The Law of Peoples*’ (Paper presented at the Twentieth World Congress of Philosophy, Boston Mass. August 10-15 1998).

¹²⁴ E.g., see Wolff, ‘John Rawls’, 1 passim.

¹²⁵ Rawls, *The Law of Peoples* 65ff.

doctrine of international justice grounded in the outlooks and practices of liberal and decent peoples'.¹²⁶ In any case, secularism can now be seen as a global phenomenon:

Though initially a European and western social transformation, the basic structures of a secular society have made inroads into social life in almost all corners of the world through colonialism, imperialism, and globalization, as well as through the sheer and noncoercive persuasiveness of democratic human rights ideals.¹²⁷

It is not intended to consider the charge of Rawls's ethnocentricity further here, as this thesis is concerned with those nations that have signed the relevant human rights treaties. These nations have thus formally agreed to adopt liberal democratic rights, with their consequent requirement of a secular state, despite the failure of some to honour their agreement. Indeed, members of the Organisation of the Islamic Conference have expressed their dissatisfaction with the human rights treaties by also subscribing to an alternative declaration of rights based on the Islamic religion and its shari'ah. See above section 1.2.¹²⁸

According to the reasoning above, it is proposed that the ICCPR and ECHR are in effect political agreements relevant to liberal democracies albeit they are also seen as philosophical statements or moral guidelines. To the extent they are binding, they are also legal statements that are contractual in nature.¹²⁹ Further, it is concluded that states parties to these treaties pledge neutrality in respect of religion or other worldviews ('comprehensive doctrines'), and are consequently secular in nature. Otherwise, they are being either theocratic or dictatorial.

¹²⁶ Nickel, 'Rawls's Theory', 6.

¹²⁷ Lindholm, 'Philosophical and Religious Justifications', 24.

¹²⁸ *Cairo Declaration of Human Rights in Islam*, signed by member states of the Organisation of the Islamic Conference, (OIC). The *Cairo Declaration* bases rights in the Islamic religion and *shari'a* (Islamic) law, (see Office of the High Commissioner of Human Rights, 'Cairo Declaration of Human Rights'). The International Humanist and Ethical Union has argued before the U.N. Human Rights Commission that the Cairo Declaration is not 'complementary' to the UDHR (as claimed by the OIC) but rather, given the wording of the Cairo Declaration, it establishes *shari'a* law as its 'only source of reference' and is thus an *alternative*. See, e.g., International Humanist and Ethical Union, 'Universality of Human Rights under attack at the UN' (2008) <<http://www.iheu.org/node/2874>> at 08/03/2008.

¹²⁹ E.g., see Douzinas, *The End of Human Rights*, Ch 9.

4.7 Conclusion

What understanding of the right to Freedom of Belief can be drawn from the above discussion? It has been argued that Rawls draws a distinction between ‘liberties’ (absence of a prohibition from acting in a certain way), and ‘rights’ (duties on the part of third parties not to prevent a person from acting in a certain way) which is similar to that established by Glanville Williams.¹³⁰ Rawls’s distinction between human rights and basic liberties is outlined, and the case is made that what he terms basic liberties are politically determined by individual societies, as opposed to some universal nature of basic human rights.

In this way Rawls provides a distinction between two forms of society. ‘Decent but nonliberal societies’ implement basic human rights – founded on minimal acceptable standards of human dignity and autonomy. Societies implementing ‘basic liberties’ strive for a more equitable and liberal society for all, one based on principles of liberal society. A ‘liberty’ becomes a ‘right’ when it places an obligation on a third party towards the rights-holder. What Rawls considers to be basic liberties become rights by virtue of the fact that they are recognised as such by the state, based on the principles of political liberalism.

It is proposed that Freedom of Belief can thus be seen as a political right, characterised as such by the subscription by a state to the relevant Articles, and part of justice as fairness in a liberal democracy. Rawls’s First Principle of justice as fairness provides equal political status to everyone solely because of his or her citizenship. This takes priority over other claims based on efficiency or economic development. As such, the right to Freedom of Belief provides that third parties, including the state, have an obligation to refrain from action that impedes the enjoyment of the right to Freedom of Belief. There is no obligation to favour Belief for its own sake in any way.

Most importantly, the right to freedom of Belief also sets the *limits* of that freedom, by recognition of the duty of reciprocity: the ‘duty of civility’, which demands equal recognition by all of the same enjoyment of Freedom of Belief by others. This paves the

¹³⁰ Williams, ‘The Concept of Legal Liberty’, 132ff.

way for recognition that the right to Freedom of Belief entails within itself the equally important (and, as will be argued in Part 2, often neglected) freedom *from* Belief.

It is suggested that for Rawls the citizen of his just and fair society is a construct of that society itself, with its liberties and the associated duties of reciprocity. However, basic human rights are fundamental to any decent society and cannot be compromised.

The duty on the part of the liberal state, according to Rawls's Second Principle of Justice, is to maximise the worth of liberty for all in relation to human rights, such as the right to Freedom of Belief. By subscribing to the international human rights treaties, however, states undertake a legal duty to protect those rights. If the practice of a Belief is incompatible with basic liberties and mutual toleration, Rawls argues, there is no way it can prevail in a democratic society that boasts 'a fair system of cooperation among citizens viewed as free and equal'.¹³¹ Without due weight on the need to ensure the 'central range of application' – the core objective – of basic rights, one can indeed lessen the full exercise of democracy.

While the 'basic liberties' set out by Rawls in political liberalism extend beyond the 'bottom line' of what he sees as human rights, it is proposed that these liberties become basic human rights anyway, as they are set out in the international human rights treaties as such for all states parties to them. These nations can thus be considered to have undertaken to establish societies based on the principles of political liberalism elucidated by Rawls. They are accountable, then, for non-compliance.

It is for the purpose of exercising these rights in pluralist societies that Rawls provides his model of institutional structures and procedures based on justification of public policy and legislation acceptable to all reasonable comprehensive doctrines. It can be said that States parties to the relevant international rights documents, by ratifying them, have acceded to a form of overlapping consensus that involves what Rawls identifies as basic liberties: those consistent with a liberal, secular and democratic society.¹³² If they haven't so committed themselves, one is entitled to ask just what their ratification means.

¹³¹ Rawls, *Political Liberalism*, 198.

¹³² *Ibid*, 58ff.

In accepting and affirming their pluralist democratic society, citizens recognise the need to cooperate with those of different Beliefs on ‘mutually acceptable terms’. These terms include politically determined basic liberties, which are necessarily secular in nature. They justify all policies and laws. As a result, it can be argued that there are commonly agreed principles, rather than an irreconcilable conflict between them.¹³³

Given the reliance in Rawls’s model of political liberalism on acceptance of such a perception of justice, it is necessarily an ideal model, albeit one to which all liberal states should aspire. In practice, nations party to the human rights treaties have shown that they do not all accept this perception, as will be seen in later Chapters.

¹³³ As stated above, individuals may bring into the public sphere values and reasoning for public policies based on comprehensive doctrines. It is up to them to argue that such policies are reasonably acceptable within a secular democratic regime for proper political reasons, informed by a political conception of justice. E.g., Rawls, ‘The Idea of Public Reason Revisited’, 462.

CHAPTER 5

EQUALITY AND FREEDOM TO EXERCISE BELIEF

5.1 Introduction

Chapter 4 considered Rawls's First Principle of Justice (that each person has an equal claim to a fully adequate scheme of equal basic rights and liberties). This Chapter considers his conception of equality and its promotion through the Second Principle of Justice (which addresses maximising the means of individuals to meet this claim). The interrelationship of both Principles is noted, and the concept of equality is applied to the right to Freedom of Belief.

The international human rights treaties are based on the Charter of the United Nations – the foundational document on which they are based. Its *Preamble* affirms 'faith in fundamental human rights' and 'the dignity and worth of the human person in the equal rights of men and women...'

The principles of equality and non-discrimination 'constitute the dominant single theme of the ICCPR'.¹ Sir Hersch Lauterpacht has proclaimed that '[t]he claim to equality is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. Equality of respect is the starting point of all other liberties'.² Conor Gearty argues that the phrase 'human rights' hinges on equality of respect and this is the idea which is in turn the 'lynchpin of democracy'.³

The ICCPR specifically applies the principle of equality in five general provisions:

- The inherent dignity and equal and inalienable rights of all members of the 'human family'. (Preamble)
- Equal enjoyment of rights for all without distinction of any kind (Article 2(1)).

¹ B. G. Ramcharan, 'Equality and Nondiscrimination' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, (New York, Columbia University Press 1981) 246, 246.

² Hersch Lauterpacht: *An International Bill of Rights of Man* (London, Columbia University Press 1945), 15 cited by *ibid*, 247.

³ Gearty, *Can Human Rights Survive?*, 55; See also, in relation to democracy and the European Court, Conor Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal' (2000) 51(3) *Northern Ireland Legal Quarterly* 381, 381-2.

- Equality of enjoyment of rights for both men and women. (Article 3(1)).
- Prohibition of discrimination on such grounds as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (e.g., Articles 4(1), 20(2));
- Equality before law and the court and equal protection of the law (e.g., Article 26).

A state party to the ICCPR can therefore be held to be bound by the principles of equality and non-discrimination as set out in the Covenant.⁴ As a result, not only is equality at the basis of democratic societies, it is at the basis of all human rights through the principle of the equal dignity and value of every individual. Consequently, it follows, the notion of equality is fundamental to human rights in any society, whether it is democratic or not.

Article 1 of the ECHR states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in...this Convention'. The ECHR relies on each right being applied to everyone, or by stating that no-one shall be deprived of a right. Article 14 then states 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'.

I propose that these statements are the equivalent of Rawls's First Principle of Justice, providing as they do a statement of claim by all to a 'scheme of equal basic rights and liberties...compatible with the same scheme for all'. The question of whether their interpretation and implementation lead to fair value for all is pursued in Chapters 6-9.

In view of the interrelationship he draws between liberty and equality, the case is made that Rawls's particular conception of political equality is most appropriate for considering human rights, and, in particular, the right to Freedom of Belief. This

⁴ Kevin Kitching points out that the provisions of international human rights instruments and the case law of their supervisory bodies clearly indicate that the principles of equality and non-discrimination are fundamental to the protection of human rights: Kevin Kitching (ed), *International Discrimination Law: A Handbook for Practitioners* ed, London, Interights 2005), 15.

conception addresses the questions, how, and to what extent, do we approach equality in relation to Freedom of Belief? Should the State ensure that every individual proclaiming a Belief has the resources to act in accordance with their Belief? Should the State make special laws, or exception to general laws, so that every individual can worship, practice or teach according to his or her Belief? ⁵

A brief consideration of the often problematic legal concept of equality both generally and in relation to human rights sets the theoretical background to an understanding of Rawls's perception of equality as it applies to Freedom of Belief.

How we view the concept of equality indicates how we define and apply the idea of equality to human rights, and in particular to freedoms associated with Belief. In considering the relationship between equality and the right to Freedom of Belief, it will be argued that a distinction can be drawn between *political equality* (the equal worth of political rights for all) and what will be called *life-chance equality* (equality in the enjoyment of life-enhancing opportunities – see below section 5.3.1). Political equality takes priority over life-chance equality. ⁶ However, Rawls stipulates that political equality presumes 'that basic needs are met, at least insofar as their being met is a necessary condition for citizens to understand and to be able faithfully to exercise the basic rights and liberties'. ⁷

The implications of this distinction are critical to understanding Rawls's approach to Freedom of Belief, in my view. Also critical are the implications of his provision for reallocating resources to equalise the *worth* of political freedom, including Freedom of Belief, where this is required. This reallocation may be in the form of such benefits as redistribution of income and special education or other facilities so that those who lack these are assured equal participation in the democratic process.

⁵ These practices are called 'unimpaired flourishing' by Christopher Eisgruber and Lawrence Sager, 'Unthinking Religious Freedom' (1996) 74 *Texas Law Review* 577, 599. One major proponent of 'unimpaired flourishing' is Michael McConnell, 'Free Exercise Revisionism and the *Smith* Decision' (1990) 57 *Chicago Law Review* 1109; 'Religious Freedom at the Crossroads' (1992) 59 *University of Chicago Law Review* 115, esp. 169ff., and 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 *Harvard Law Review* 1409. In the last-cited article he says 'Even the almighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience', (at 1516). Another proponent is Douglas Laycock, 'The Remnants of Free Exercise' (1990) *Supreme Court Review* 1.

⁶ See, e.g., Rawls, *Justice as Fairness*, 46.: *ibid*, 44.

⁷ *Ibid*, 44.

The case will be made that considering the worth of political freedoms means perceiving rights in terms of their objectives, and the role of equality in achieving these objectives is important in ensuring Freedom of Belief. These objectives, it is proposed, involve the promotion of human dignity and autonomy.

This chapter will draw on literature discussed to frame a consistent and coherent application of the principle of equality. Using Rawls's conception of equality to the right to Freedom of Belief in these terms, the aim is to determine in later chapters the extent to which the interpretation and implementation of the freedom to hold and express a Belief by those responsible comply with the requirements for political liberalism set down by Rawls. Based on the premise that these requirements are also basic to what is considered the liberal democratic principles established by the international human rights treaties, one can gauge the effectiveness of the right to Freedom of Belief in a liberal democratic society.

5.2 The meaning of Equality

The term 'equality' describes the relationship between two or more entities. Unless we specify its context (for example, by explaining in *what way*, a person or thing is equal or unequal with another person or thing), saying something is equal or unequal is meaningless.⁸ Consequently, the notion of equality always requires specification of that context. Paradoxically, the need to achieve equality in one context is often used as justification for tolerating inequality in another.

For example, inequality in the possession of private property may be justified by the need to provide equality before the law (providing an equal right to acquire or dispense with property regardless of wealth). Inequality of position and wealth is justified by the need to provide equality of opportunity (allowing an equal chance to gain what one can, regardless of circumstances). 'Those who are made equal in one respect are often thereby made unequal in another'.⁹

⁸ 'Equality is a term that, in a vacuum, means nothing'. Claire L'Heureux-Dube, 'Conversations on Equality' (1999) 26 *Manitoba Law Journal* 273, 74.

⁹ Jeremy Waldron, 'The Substance of Equality' (1991) 99 *Michigan Law Review* 1350, 1351.

5.2.1 The Legal Approach to equality and rights

Under our legal system the *Magna Carta* of 1215 gave form (albeit to a limited degree) to the principle of the rule of law in relation to a fair trial for all, and the Bill of Rights of 1688 extended this to establish the supremacy of parliament over the king. However, it was not until 1776 and the American Declaration of Independence, and 1789, the year of the French *Declaration of the Rights of Man and of the Citizen* that the idea of general equality for all citizens was formally recognised at least in terms of dignity and specified rights.

This development gave expression to the Enlightenment rejection of social status, birth and kinship as the determinants of rights, replacing those criteria with citizenship. Thus, the mere status of ‘citizen’ endows a person with those rights. Equality in its terms was linked to the right to pursue fulfilment in life, albeit initially racist, sexist and exclusive of slavery in Northern America.

The idea of equality did not propose equal social or economic outcomes within society, as it is impossible to develop one form of fulfilment that would equally suit every individual. There should rather be an equal freedom to pursue individual aims, with unequal results based on physical ability, talents and resourcefulness. Otherwise, it was believed, this would lead to a ‘collectively imposed definition of happiness’.¹⁰ However, the Enlightenment gave birth to the principle that the status of citizen in itself is one granting strict equality of political freedoms and responsibilities, including freedom from persecution based on Belief.

5.2.2 Equality and democracy

It has been proposed that human rights as set out in the international human rights treaties are based on the principle of democracy. At its minimum, representative democracy refers to each citizen having an equal vote in determining who forms government. However, democracy has come to mean more than that. As Anne Phillips points out, democracy ‘is never just a system for organizing the election of governments.

¹⁰ Maimon Schwarzschild, ‘Constitutional law and equality’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Malden, Mass., Blackwell Publishers, 2000) 156, 158.

It also brings with it a strong conviction about the citizens being of intrinsically equal worth',¹¹ thus having 'authorship' of their political decisions.¹²

What is meant here is that sometimes reallocation of social and economic resources will be desirable (for example, provision of special facilities to enable those with disabilities to participate in the democratic process). In such circumstances 'equality' represents equality of *consideration* of people's needs and circumstances in the exercise of their political rights, rather than treating all people equally without such consideration. The law does not treat all situations in exactly the same way, and 'involves selections and classifications based on criteria deemed to be relevant' (for example, classification of citizenship and age to determine eligibility to vote, and of nationality to determine residency entitlements in the country).¹³ It also takes into account those who require special conditions for participation in elections for example, through incapacity or absence. The goal, according to Rawls, is the enjoyment of the equal worth of political freedom by all, that is, to ensure the 'fair value' of equal political rights for everybody.¹⁴

Like Rawls, Anne Phillips expresses the view that democracy envisages equal individual participation in the political process, and that this requires the provision of favourable circumstances where necessary. Like Rawls, she claims that democracy requires 'sustained conditions for dialogue, deliberation and talk'.¹⁵ This implies the goal of some degree of consensus. The growing recognition of this added element of democracy has led to an enhanced appreciation of formerly unrecognised political domination through oppression or undue influence – 'the viciousness of domestic violence and racial assaults, the demonization of Islam; the crippling self-hatred that can be imposed on people whose cultural values are socially despised'.¹⁶ Phillips argues that:

¹¹ Anne Phillips, *Which equalities matter?* (Malden, Mass, Polity Press 1999), 2. See also discussion of 'democracy' by Post, 'Democracy and Equality' (discussed at section 4.2 above); Francisco Gonzalez and Ian McLean in *Oxford Concise Dictionary of Politics*, 139ff, esp discussion of democratization, p144.

¹² Robert Post, 'Democracy and Equality', 26.

¹³ Ramcharan, 'Equality and Nondiscrimination', 252-3.

¹⁴ Rawls, *Political Liberalism* VIII, §12, Freeman, *Rawls*, 470.

¹⁵ Phillips, *Which equalities matter?* 5.

¹⁶ *Ibid*, 14

...in practice, discussions of civic republicanism or cultural pluralism or equal citizenship for men and women often proceed as if these had nothing to do with economic arrangements or the distribution of income and wealth. In the context of an unequal world, this has to be regarded as an implausible assumption.¹⁷

Consequently, Phillips, like Rawls, advocates a notion of political equality that includes reallocation where necessary of resources such as income, health and education.¹⁸ She cites the traditional distinction between political and economic equality, along the lines of the different equality claims of the ICCPR and the *International Convention on Economic, Social and Cultural Rights*. For her, political equality is more than the right to participate in politics but a 'deeper notion of equal intrinsic worth'. On the other hand, economic equality is understood as 'equality in income, wealth, and life-chances' including access to socially provided resources such as education or health'.¹⁹ It will be claimed below that while it can be argued that Rawls recognised the desirability of fair and equitable distribution of resources to promote opportunities for enhanced realisation of life goals, he gave priority to the need to ensure the worth of political freedom. This involves maximising the ability of those who lack the material resources for equal participation in the democratic process by reallocation (though not necessarily equality) of those resources.

5.2.3 'Formal' equality

Most legislation, including that aimed at prohibiting discrimination, is based on the principle of treating everyone the same, that is, 'formal equality'. As Greschner notes:

To assess whether a law conforms to this version of equality, we look only at the words of the statute to see if everyone is covered, or conversely, if everyone is excluded. If the words do not draw any distinction at all, the law satisfies the dictates of equality.²⁰

¹⁷ Ibid, 15.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Donna Greschner, 'Does Law Advance the Cause of Equality' (2001) 27 *Queen's Law Journal* 299, 302.

An example of the application of formal equality is legislation considered in Australian High Court case of *Henry v. Boehm*.²¹ The plaintiff, resident in Victoria, was admitted to practise as a barrister and solicitor in that State. He did not intend to move residence to South Australia but wished to practice there and applied for admission to practice. This was refused, as legislation required residence in South Australia for at least three months continuously and immediately preceding the application for admission to practice as a barrister or solicitor there.

The plaintiff appealed this decision, arguing that the legislative requirement breached section 117 of the Australian Constitution, which prohibits the imposition by a State of any 'disability or discrimination based on the fact that the person subject to it is a resident of another State and to which a resident of the legislating State is not equally subject'.²² This requirement discriminated against him, he argued, as only those who were residents of South Australia could apply for admission.

The High Court rejected this argument, claiming that the term 'resident' did not mean *permanent* resident and so the law did not require the applicant to become a resident of South Australia or to abandon Victoria as his State of residence, just three months residence in South Australia.²³ It therefore applied to all equally.

Despite the fact that the plaintiff would need to live in South Australia for a period of time, with the cost and other disadvantages this would require, it was held that residence was not the 'basis of any disability or discrimination to which a person resident in South Australia is not equally subject'.²⁴ In other words, the law applies to all equally, despite their circumstances. Stephen J. disagreed with the majority on this point, stating that it is:

...incorrect to say of a disadvantage that because it is the consequence of a requirement of universal application that disadvantage is equally applicable to all; if

²¹ *Henry v. Boehm* (1973) 128 CLR 482.

²² *Ibid*, per Barwick CJ, 489, §9.

²³ See, e.g., judgement of Menzies J: 'In short, a person could reside continuously in South Australia for the purposes of the rules while still remaining a resident of Victoria. It is this continuous residence that the rules require whether the person applying by virtue of a previous admission is resident in South Australia or in another State: (*ibid*, 493 Par 9).

²⁴ *Ibid*. per Barwick CJ, 490 par 17.

the discriminating factor relates to the personal attributes of individuals some only of whom possess those attributes then, while the requirement may be said to apply equally to all, the disadvantage will apply unequally for it will apply only to those who do not possess those attributes.²⁵

5.2.4 Difficulties with the concept of formal equality

It can be seen that this ‘formal equality’ approach, with its emphasis on procedure under which ‘likes’ and ‘unlikes’ are in fact treated the same, does not prevent, and indeed may promote, disadvantage and hardship. Its potentially unforgiving nature provoked the famous disdainful comment from Anatole France, that it demonstrates ‘... the majestic equality of the law that forbids the rich as well as the poor to sleep under bridges, to beg in the streets and steal bread’.²⁶

The strictly ‘formal equality’ approach of *Henry v. Boehm* was later rejected by the High Court in *Street v. Queensland Bar Association*.²⁷ Mr Street sought admission to practice in Queensland while a resident in NSW, and was refused, again because of the implicit requirement in the law that he abandon interstate residence and move to Queensland.

The Court here adopted a similar interpretation of section 117 to that of Stephen J. in *Henry v Boehm*. Justice Gaudron, in particular, relied on the fact that indirect discrimination can result from the ‘formal’ notion of equality – ‘the notion that a neutral rule of practice that is not designed to disadvantage any particular group, can in its operation have a disparate impact on it’.²⁸ The aim is not simply to eliminate inequality per se, but to eliminate *unfair or unjust* inequality.²⁹ Gaudron J. concluded that anti-

²⁵ Ibid, per Stephen J, 503 par 15.

²⁶ Anatole France in Edwards and Révauger Anatole France, ‘Le Lys Rouge’ in Marie-Claire Bancquart (ed), *Anatole France: Oeuvres, Vol. 2* Gallimard, 1987, 1894) 329, 399: *Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain*: 1984 Ch 7 (my translation).

²⁷ *Street v. Queensland Bar Association* (1989) 168 CLR 461. See Jenny Morgan, ‘Equality and discrimination: Understanding context’ (2004) 15 *PLR* 314, 315, for a discussion of the problems arising from the ‘formal equality’ approach and the response of the High Court, in particular that of Justice Mary Gaudron.

²⁸ Morgan, *ibid*, 315.

²⁹ Morgan argues that whilst the view taken by Gaudron J in *Street v. Queensland Bar Association* is an important advance, it is still immured in the idea of difference. She maintains that identifying discrimination in relation to gender should not rely on determining whether men and women are similar, in the relevant sense, and thus should be treated similarly, or whether they are different, and

discrimination legislation and policy should target ‘discrimination *against* someone’ in the sense that disadvantage results, rather than a mere difference of treatment.³⁰

In this way debates about equal treatment become debates about fairness and justice,³¹ or ‘substantive equality’. Similarly, Rawls approaches fairness and justice in terms of what he calls ‘fair equality of opportunity’.

5.2.5 Equality and Opportunity

Equal opportunity as a general concept (in terms of competition for the limited benefits offered in any particular society) seeks to achieve substantive equality through rendering more equitable the prospects of attaining the means of self-fulfilment for all, regardless of circumstances. Attaining the means of self-fulfilment has been likened to a winning a ‘prize’ or race: achieving a goal despite adverse circumstances or competition.³² Equal opportunity provides a ‘level playing field’ to allow all to participate in seeking the benefits of society. Everyone owns what they gain, and if they are successful all very well. If they fail, it will not be because the way was *unfairly* obstructed.

The move for equal opportunity recognises the interrelationship between political and socio-economic freedoms, and attempts to remove social and economic barriers to the achievement by all of their social or political goals. For this reason it was strongly argued by proponents of a single universal Covenant covering both political and economic rights that political freedoms without socio-economic freedoms would make human existence ‘hollow and the prescribed rights no more than nominal,’ as free speech marches ‘hand in hand with some basic economic dignity’.³³

thus should be treated differently. Rather, she claims, one should determine whether a ‘particular legal practice subordinated or disadvantaged women’: *ibid*, 316.

³⁰ That is, the legislation prohibits *unfavourable* treatment on the specified grounds, but not favourable treatment (*ibid*, 316). Presumably, favourable treatment of someone becomes discrimination in these terms, in that it indirectly disfavours a third party, who become the person discriminated against.

³¹ Jeremy Waldron cites the example of prevention of a group of people from peacefully demonstrating because of their race, which, while decried as discrimination, is more appropriately seen as a restriction on their freedom of speech: those complaining would not be satisfied if all were treated equally by the banning of all from demonstrating: Waldron, ‘Substance of Equality’, 1355-6.

³² See, e.g., Margaret Wallace, ‘The Legal Approach to Discrimination and Harassment’ (1985) 57(1-2) *The Australian Quarterly* 57.

³³ Paul Kennedy, *The Parliament of Man: The United Nations and the Quest for World Government*, Penguin 2006), 183.

Equal opportunity instead aims at a fairer share of society's benefits for those otherwise disadvantaged. This can involve the re-allocation of social and economic benefits and processes or by the legislative prohibition of direct discrimination (that is, treating someone unfavourably on prohibited grounds, such as race, Belief or sex). It has also led to the prohibition of *indirect discrimination*, that is, facially neutral legislation or practice which has an unnecessary adverse impact on individuals belonging to particular groups such as those affected by legislation considered in *Henry v. Boehm*. General requirements for an occupation, such as education or physical attributes (such as height and ability) that are not necessary for the satisfactory performance of that occupation, are further examples, as they unfairly disadvantage those who fail to meet the requirements.

5.3 Rawls and equal opportunity

Rather than considering equal opportunity for both political participation (political equality) and social and financial enhancement (life-chance equality) together, Rawls focuses on equal political liberty. Equal political liberty involves the generation of 'fair value for all of the equal political liberties'.³⁴ The former term applies to the formal establishment of a claim by all to equal participation in a fully adequate scheme of equal political liberties (the First Principle of Justice – discussed in Chapter 4). The latter term refers to steps taken by reallocation of resources to 'enhance the value of equal rights of participation for all members of society'.³⁵ It corrects for social disadvantage and social class differences.³⁶

Rawls's model of fair equal opportunity reflects the liberalism of the day, notwithstanding its appeal to the notion of egalitarianism. He recognises the inevitable structural inequality that results from toleration by the legal system of disparities in the distribution of property and wealth.³⁷ To overcome this inequality in relation to political liberties he proposes the measures outlined in the Second Principle. This allows for some reallocation of resources such as income, wealth and position to maximise the opportunities for socially and economically disadvantaged citizens to exercise their

³⁴ Rawls, *A Theory of Justice*, 198, (discussed generally at §36).

³⁵ Ibid, 197.

³⁶ See, e.g., Ibid, 63.

³⁷ Rawls *Justice as Fairness*, 50ff; *A Theory of Justice*, 53.

political freedoms. Concern for life-chance equality is a worthwhile pursuit, but is secondary to political equality concerns.

In short, the First Principle establishes the status of political equality for all. The Second Principle sets out the means for attaining this. A suggested outline of the two Principles and their inter-relationship is set out in Table 6:

TABLE 6: INTERRELATIONSHIP OF RAWLS'S FIRST AND SECOND PRINCIPLES OF JUSTICE.

This Table is an adaptation of the explanation of the First and Second Principles in Freeman, *Rawls* 467, 469-70.

Principle	Applies to...	Objective	How Realised
First Principle 'Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value'.*	Everyone, regardless of socially recognised differences (such as class, status, race, gender, culture and Belief), or reduced capacity.	An adequate system of equal basic rights and liberties for all.	As it applies equally to everyone, it relies on the Second Principle for realisation.

To facilitate the equal participation of all in a fully adequate scheme of equal political liberties the following, second-order Principle applies:

Principle	Applies to...	Objective	How Realised
Second Principle Social and economic inequalities are to <i>first</i> , be attached to positions and offices open to all under conditions of fair equality of opportunity; <i>second</i> , they are to be to the greatest benefit of the least advantaged members of society.**	Those with similar natural talents and motivation, but differing prospects for developing and using them. Those affected in their ability to access primary goods, *** either favourably or unfavourably, by natural ability or by chance (such as good or bad fortune).	Equal opportunity to compete for powers, and positions of office. Maximum participation of the least advantaged members of society in the scheme of equal political liberties.	Anti-discrimination legislation, equal educational opportunities, access to basic health care and government limitation of concentrations of wealth that undermines fair equal opportunities. Access to primary goods through favourable treatment (such as special education, financial assistance and health care). Applied only where it improves the lot of those most disadvantaged.

* Rawls, *A Theory of Justice*, 6

** Ibid (emphasis added).

*** Primary goods are basic rights and liberties; freedom of movement and choice of occupation; access to powers and positions of responsibility political and economic institutions; income, wealth and the social bases of self-respect: Rawls, *Political Liberalism*, 181.

The measures set out in the Second Principle do not ensure absolute substantive social and economic equality. As proposed above, this would not be desirable in any case, as such individual needs, abilities and desires vary to the extent that individual characteristics vary.³⁸ Rawls recognised that basic political liberties are not guaranteed by simple expressions of formal equality, as argued above. Nevertheless, reallocation of resources according to the Second Principle can promote equal access to various ‘social primary goods’ (such as rights, liberties, powers, opportunities, income, wealth and, especially, self-respect).³⁹

Rawls’s theory of justice sets out a potentially radical approach to equality.⁴⁰ My view is that the First Principle of Justice is as much about equality as it is about liberty, for equality describes the liberty it promotes. The interrelationship between the two Principles thus makes it impossible to give preference to ‘liberty’ (which is also a term that depends for its meaning on its context) over ‘equality’ in relation to political freedoms when both principles depend, in Rawls’ formulation, on each other.

It is thus proposed that, through his two Principles of Justice, Rawls has recognised the fact of social and economic inequality as inherent in human society. He has put inequality in context so far as it applies to political liberalism, and has established a way of elucidating and explaining equality in relation to political rights. In his view, strict political equality is a primary aim, with social and economic equality following from this.

It is critical to Rawls’s model of political liberalism, however, that in this process those who are advantaged from the distribution of social and economic benefits ‘are not to be better off at any point to the detriment of the less well off’.⁴¹ ‘No one deserves his greater natural capacity or merits a more favourable starting point in society’.⁴² It follows that to ensure the worth of political freedom requires that market arrangements

³⁸ See, e.g., Van Wyk, *Equal Opportunity and Liberal Equality*, <<http://152.106.6.200:8080/dspace/browse-title?top=10210%2F2978> Ch 6, 156>, accessed 24/2/2010, ch 6, 156.

³⁹ Rawls considers that self-respect results from full co-operation as members of society, ‘equal basic rights and liberties, the fair value of the political liberties and fair equality of opportunity’ Rawls, *Political Liberalism*, 81-2. See also Ibid, at 318ff.

⁴⁰ Alex Callinicos, *Equality* (Cambridge, Polity Press 2000), esp. 17.

⁴¹ Rawls, *Justice as Fairness*, 124; *A Theory of Justice*, 86ff., esp 87.

⁴² Rawls, *A Theory of Justice*, *ibid.*

are regulated to maximise the worth of political equality for all.⁴³ Rawls did not generally envisage preferential treatment, such as affirmative action, however he did indicate in lectures that this may be acceptable as a temporary means of remedying past discriminatory treatment.⁴⁴

5.3.1 Political equality and life-chance equality distinguished

By specifying that his Principles of Justice are *political* principles, my contention is that, without expressly doing so, Rawls drew the distinction between

- unequal allocation of resources to promote *political equality* (equating the worth of political liberty for all); and
- unequal allocation of resources to promote what I will call '*life-chance equality*' (equating the material benefits of society for all to match lifestyle and prosperity for all).⁴⁵

I agree with Wojciech Sadurski, who claims that equal political opportunity involves more than the right to speak. It includes the right to be heard. Sadurski claims that maximizing equal opportunity to influence an audience involves, *inter alia*:

- Neutral procedure (impartial forum);
- Input into agenda-setting;
- Information on the decision-making process and forms of deliberation (including mass media);
- Freedom to change views without detriment.⁴⁶

⁴³ Ibid, 63.

⁴⁴ Freeman, *Rawls*, 90-91.

⁴⁵ This is similar to the approach of Robert Post, 'Democracy and Equality', whose description of democracy clarifies this distinction between participation in the democratic process and life chances. (Post calls these 'democratic equality' and 'distributive equality' respectively). Post, like Rawls, sees democracy as ensuring that every citizen is entitled to be treated 'equally in regard to the forms of conduct that constitutes autonomous democratic participation' (at 29). Political equality requires 'only those forms of equal citizenship that are necessary for the project of collective self-determination to succeed' (at. 32). It does not require rectification of other, albeit unfair, inequalities, through equal allocation of social or economic resources for its own sake – what Post calls 'distributive equality' (at. 24).

Sadurski goes on to discuss the fact that '[n]one of these requirements is straightforward or uncontroversial'.⁴⁷

Allocation of resources for equating the worth of political liberty may include, for example, ensuring adequate income, education and facilities for participation in the democratic process through ability to consider and debate government policy and vote.⁴⁸ Depending on circumstances, it may require provision of means of communication, and even housing and health facilities. One can see that the allocation of resources for political equality is based, not on everyone having the same material goods or benefits, but on their *equal opportunity to participate in the democratic process*. Equality is an essential determinant of whether there is appropriate liberty to participate, thus the two concepts of liberty and equality are complementary.

Life-chance equality on the other hand, while a legitimate aim of society, is based on different considerations. Its focus is on the unequal allocation of resources to equalise the chances of a lifestyle to which individuals aspire. While highly desirable, such equality is concerned with benefits beyond those required for the exercise of equal political rights, with material benefits of society themselves being the major consideration. It involves such practices as affirmative action, quotas for position in employment or education, or even reverse discrimination, limiting the freedom of some simply to make life better for others.

Tension is caused between those whose life-chances are enhanced from the re-allocation of benefits, and those whose life-chances are consequently narrowed. Allocation of resources to some individuals (for example, affirmative action in employment for women regardless of qualifications) invariably leads to removal of those resources from others (for example, less jobs for worthy males). Also important is the fact that what constitutes a desirable lifestyle varies between individuals, being relative and often self-contradictory, thus preventing agreement on the benefits of re-allocation for this purpose in the first place. For this reason, life-chance equality must be considered with caution.⁴⁹

⁴⁶ Sadurski, Wojciech, *Equality and Legitimacy*, 86-7.

⁴⁷ Ibid, 87ff.

⁴⁸ Rawls, *Political Liberalism* lvi-lvii.

⁴⁹ Sadurski, *Equality and Legitimacy*, 90 makes a similar point:

It is argued here that by separating the idea of equality into political and life-chance equality, the tension between liberty and equality is confined to considerations of equality of social resources *other than* those relating to the exercise of democracy. This separation provides guidelines for when limits can be placed on freedoms in the name of equality. Rawls cites the example of granting state resources for a pilgrimage to a holy place, or for building grand places of worship, where these are claimed to be central to manifestation of a particular Belief. Granting such resources creates an inequity in the 'worth' of Freedom of Belief between citizens, negating equal participation of all in the exercise of their political liberties. This favouring of one Belief over others would be considered unjust and divisive, as 'some receive more than others depending on the determinate final ends and loyalties belonging to their [sectarian] conceptions of the good'.⁵⁰

5.3.2 Equality in the 'private' sphere

Rawls's elaboration of political equality has ramifications for the relationship between democracy and Freedom of Belief. If we see democracy as based simply on the right of everyone to vote, without recognising the inequalities that can arise within the private world of social organisations such as the family and the church, we legitimate potential constraints on the fully autonomous participation by everyone in the democratic process – that is, the enjoyment of the *worth* of political freedom and equality.

This inequity can lead, for example, to discrimination against women because of their allocated position within the domestic sphere, or the dictates of religion. At a broader social level, it can conceal the influence and power that may be wielded over minority groups by those with majority acceptance, government recognition and approval:

It is not the case that political equality is more or less egalitarian than a substantive principle of equal concern but rather that, in a pluralistic community, we would not agree on the common criteria determining which are substantively equal...while we may more likely agree on standards of equality within the process. The detachment of political equality from substantively equal concern as displayed in laws and political decisions renders it possible for us to establish that the very adoption of a democratic procedure reveals a prior acceptance of a strongly egalitarian premise; a premise weighty enough to prevail over the arguments (whatever they may be) for a non-democratic system of government.

See also Wojciech Sadurski, 'Legitimacy, Political Equality, and Majority Rule' (2008) 21(1) *Ratio Juris* 39.

⁵⁰ Rawls, *Political Liberalism* 330.

The domestic division of labour has direct consequences for the nature and degree of political involvement and because of this should be regarded as a political and not just social concern...the point of universal suffrage is that it treats each person as of equal weight to the next: if so, that point is far from being reached.⁵¹

Feminism has resulted in the appreciation of the values of democracy extending beyond the area of formal equality, to beyond gender equality alone, to more a wide-ranging interest in how people relate to each other.⁵² The sexual division of labour therefore has political consequences and is central to the question of political equality.

In response to criticism from feminists and others that his theory only provided for equality in the public sphere of government, and therefore did not cover individuals as members of associations and families, Rawls explained how his theory provides for principles of justice to extend into associations and families in *The Idea of Public Reason Revisited*.⁵³

Rawls acknowledges that Belief communities may subscribe to doctrines that are incompatible with basic liberties. They may practise inequality, patriarchy, refusal of medical treatment of children and exclusion of those who break the rules. However, he holds that basic human rights should still apply to all. In a liberal democracy, members of groups, religions and associations are all equal citizens. They always retain the right to demand the enjoyment of fundamental human rights such as equality before the law, and personal autonomy.⁵⁴

This means that members should be at liberty to reject or question the religious (or other) group to which they belong without retaliation,⁵⁵ as well as to enjoy other

⁵¹ Anne Phillips, 'Engendering Democracy' in Phillip Green (ed), *Democracy*, (New York, Humanity Books, 1999), excerpted from *Engendering Democracy* (London Polity Press 1991 pp. 156-68) 192, 193.

⁵² Ibid, 194.

⁵³ Rawls, 'The Idea of Public Reason Revisited', 466ff.

⁵⁴ Ibid, 469ff.

⁵⁵ The exercise of this freedom is suppressed in some religious groups, for example, Muslims (see, e.g., David Jordan, 'The Dark Ages of Islam, Ijtihad, Apostasy and Human Rights in Contemporary Islamic Jurisprudence' (2002) 9(55) *Washington and Lee Race and Ethnic Anc. Law Journal* and Exclusive Brethren: see e.g., Michael Bachelard, *Behind the Exclusive Brethren* (Melbourne, Scribe 2008), esp. Chapter 10.

political rights, described above, that apply to all citizens.⁵⁶ Rawls argues elsewhere that ‘because churches and universities are associations within the basic structure, they must adjust to the requirements that this structure imposes in order to establish background justice’.⁵⁷ As a result:

As citizens we have reason to impose the constraints specified by the political principles of justice on associations; while as members of associations we have reason for limiting those restraints so that they leave room for a free and flourishing internal life appropriate to the association in question.⁵⁸

In this sense, for Rawls, reference to public and private spheres of life can be misleading. A domain or sphere of life is not a ‘kind of space’ but rather ‘a difference in how the principles of justice are applied, directly to the basic structure and indirectly to the associations within it.’⁵⁹

Whilst his approach seems somewhat imprecise at times, it is proposed that, keen to provide flexibility and width in his treatment of Belief, Rawls is stating that (unspecified) political as well as non-political liberties apply to members of churches and associations. Basic political principles of justice apply throughout society in all its parts, but apply to churches and associations only to the extent that they fit into a democratic process by e.g., the recognition of personal autonomy and dignity, voluntary membership, mutual tolerance and recognition of the law. Subject to this, however, the association may apply its own notions of justice in any given instance (such as the treatment of women and children, forms of worship and ethical doctrines).

It is suggested that Rawls thus makes an important point that has been undervalued by many commentators: the political and non-political spheres are:

...not...two separate, disconnected spaces, each governed solely by its own distinct principles. Even if the basic structure alone is the primary subject of justice, the

⁵⁶ The principles of political justice are to apply directly to the *arrangements* of society’s main institutions, including religious organisations and the family, but not directly to their internal life: Rawls, ‘The Idea of Public Reason Revisited’ 468-9.

⁵⁷ Rawls, *Political Liberalism*, 261.

⁵⁸ Rawls, ‘The Idea of Public Reason Revisited’, 469.

⁵⁹ Ibid, 471 .

principles of justice still put essential restrictions on the family and all other associations. *The adult members of families and other associations are equal citizens first; that is their basic position. No institution or association in which they are involved can violate their rights as citizens.*⁶⁰

Thus, the individual as citizen, with all the attendant rights and freedoms resulting from the principles of justice, carries those rights and freedoms into the family and associations to which he or she belongs. Liberal versions of justice may allow for repudiation of freedoms within those associations. On this reasoning, some principles of political justice need not apply to the internal life of churches, ‘nor is it desirable, nor consistent with liberty of conscience or freedom of association, that they should’.⁶¹ This approach is based on the essential condition that the individual is a voluntary member of an association,⁶² so that members are protected from sanctions against alleged apostasy or heresy, or against questioning tenets of the organisation or disassociating themselves from it.

Among the political values that filter through to associations (including the family) Rawls also includes:

...the freedom and equality of women, the equality of children as future citizens, the freedom of religion and finally, the value of the family in securing the orderly production and reproduction of society and its culture from one generation to the next. These values provide public reasons for all citizens...not only for justice as fairness but for any reasonable political conception.⁶³

It is suggested that ‘equality’ here must be read down to mean ‘equality before the law’. If it were to be read more broadly, all religious Beliefs that treat women in unequal terms (which would include the mainstream religions), would be rejected.

⁶⁰ Ibid, 170-1 (emphasis added).

⁶¹ Rawls, ‘The Idea of Public Reason Revisited’, 468.

⁶² Ibid, 471-2. Rawls proposes that ‘[an action] is voluntary in the sense that it is rational: doing the rational thing in the circumstances even when these involve unfair conditions; or ...in the sense of reasonable: doing the rational thing when all the surrounding conditions are also fair’ (at 472 n 68). He uses the term in the latter sense.

⁶³ Ibid, 474.

In this way, it is argued, Rawls makes it quite clear: those who want to belong to a liberal democracy – recognising the principles of justice as fairness inherent in such societies – must make a commitment. They must be prepared to give priority to those principles over the demands of their religion or belief when these demands clash with the principles of liberal democracy.⁶⁴

5.3.3 Fair equality of opportunity as ‘equal regard’

The concept of ‘fair equality of opportunity’ appears to be a contradiction in terms: things are either equal or they are not. By his use of generalised language such as ‘*fair* equality of opportunity’, it is contended that Rawls is referring to a process of *equal consideration*, or regard, of each individual’s claim to the fair value of a fully adequate scheme of equal political basic rights and liberties. He states that:

Departures from equal treatment are in each case to be defended and judged impartially by the same system of principles that hold for all; the essential equality is thought to be equality of consideration.⁶⁵

Noting that as a simple procedural rule equal consideration is nothing more than treating similar cases similarly, Rawls adds that it must be applied with the goal of justice in mind, as the ‘real assurance of equality lies in the content of the principles of justice’.⁶⁶

Lawrence Sager, in noting the importance of equality in relation to Freedom of Belief, points out that ‘very near, or at the core of religious freedom must be the notion that persons should not suffer on account of their beliefs about matters of spiritual substance – inter alia, questions of divinity’.⁶⁷ Liberty and equality, he argues, are simply two ways of expressing this principle:

...first, government should not devalue the deep commitments and concerns of any of its citizens on account of the spiritual infrastructure of those commitments and concerns. Second, government should extend to all its citizens a robust suite of familiar liberties [pertaining to] free expression, to free association, and to domains

⁶⁴ See Rawls, *Political Liberalism*, 198.

⁶⁵ Rawls, *A Theory of Justice*, 444.

⁶⁶ Ibid, 444.

⁶⁷ Lawrence Sager, ‘The Moral Economy of Religious Freedom’ in Peter Cane et al, *Law and Religion in Theoretical and Historical Context*, 16, 18.

of private choice...So we have an *equality* principle and a *general liberty* principle. Together these compose a view of religious liberty we can call *Equal Liberty*.⁶⁸

In relation to Freedom of Belief, I argue that Rawls's approach to freedom of conscience is similar to the notion of equality of consideration espoused, for example by Lawrence Sager, jointly with Christopher Eisgruber.⁶⁹ A brief consideration of their exposition of 'equal regard' and Freedom of Belief aids an understanding of this approach.

Eisgruber and Sager consider two opposing views as to the meaning of practising one's Belief. One view advocates what they call 'unimpaired flourishing' of the practice of Beliefs: that is, that people should be granted uninhibited freedom to conduct themselves according to their Beliefs. This, they point out, would lead to 'many deeply objectionable forms of behaviour', such as racial and gender discrimination, the exploitation of women and children and withholding medical treatment from the ill, as well as government financial support of religious activities.⁷⁰ Such an approach, they argue, would be unsupportable. It seems it would also offend Rawls's principles of justice as fairness.

Eisgruber and Sager then consider the view taken by those criticising unimpaired flourishing that there is no unifying principle underlying Freedom of Belief, and the best we can do is take an ad hoc, case-by-case approach. This theory they also reject, arguing that 'political theory will be an indispensable element in any satisfactory jurisprudence of religious freedom'.⁷¹ Based on the premise that '[t]here is no normative justification for treating the religious commitments of the devout differently than the deep secular commitments held by many persons in our political community,'⁷² they maintain that a theory of 'equal regard' does provide the necessary underlying and unifying principle of Freedom of Belief. Three facets of equal regard, as they see it, express a similar

⁶⁸ Ibid, 16-17; Sager argues that 'privileging claims on behalf of religion are (sic) morally indefensible and self-defeating', and that due respect of religious practices, along with non-privileging of religion is 'sufficient to generate and sustain a normatively attractive view of religious freedom'. It will be argued below in Chapter 7 that such privileging should in any case be avoided by crafting legislation that is of general application while taking into account legitimate activities.

⁶⁹ Eisgruber and Sager, 'Unthinking Religious Freedom', 577, 601ff.

⁷⁰ Eisgruber and Sager, *ibid*, 599-600. They point to writers who support 'unimpaired flourishing, such as McConnell, 'Religious Freedom at the Crossroads', 168.

⁷¹ Eisgruber and Sager, 'Unthinking Religious Freedom', 578.

⁷² *Ibid*, 599.

approach to that of Rawls. They are (1) treatment of members of minority Belief groups with the same regard as others; (2) government policy justified by public reason, acceptable to any person 'committed to living in a pluralist society governed by the precepts of equal regard'; and (3) a neutral government that neither encourages nor denigrates citizens on the ground of their Belief.

Eisgruber and Sager point out that whereas the state may be entitled to restrict those wishing to express their extreme Beliefs according to the provisions of the relevant Articles, this would not be a contradiction of the principles of equal regard, as the principles do not and cannot 'insist that our governmental arrangements be consistent with their theological demands'.

The principle of equal regard is consistent with Rawls's idea of equality in relation to Freedom of Belief. Equal regard does provide that the interests of those with different religious or non-religious Beliefs and concerns are neither ignored nor devalued, and ensures that they are protected from divisive governmental policies.⁷³ It has a similar effect to Rawls's public reason, attaching limits as well as liberties to the expression of Belief.

Equal regard is essential for self-respect, which Rawls considers a fundamental requirement of a just society. Self-respect is not measured by income, but the 'publicly affirmed' equal distribution of fundamental rights and liberties, which 'gives everyone a secure status when they meet to conduct the common affairs of the wider society'.⁷⁴ It is 'rooted in our self-confidence as a fully cooperating member of society capable of pursuing a worthwhile conception of the good over a complete life'.⁷⁵ A minimum level of self-respect can be established, but the need for a particular good may vary according to the specific society in question, as it is an individual asset. The precise requirements for self-respect are thus largely relative.

⁷³ Ibid, 601.

⁷⁴ Rawls, *A Theory of Justice*, 477. See also Freeman, *Rawls*, 76.

⁷⁵ Rawls, *Political Liberalism*, 318.

5.4 Moral capacity and equality

According to Rawls, moral capacity is twofold. Firstly, it involves the capacity for *reasonableness*, enabling one to cooperate with others on terms that are fair. Secondly, it involves the capacity to be *rational*, that is, to have a ‘rational conception of the good - the power to form, revise, and to rationally pursue a coherent conception of values, as based in a view of what gives life and its pursuits its meaning’.⁷⁶ This twofold capacity or the potential for it is the hallmark of the autonomous citizen, who ‘warrants being treated as an equal’ in a just society.⁷⁷ Rawls contends that having moral capacity *to a minimum degree* is sufficient to warrant respect as a person and equal justice.⁷⁸ This lack of capacity he describes as the ‘lack of potentiality either from birth or accident’, occurring in only ‘scattered individuals’.⁷⁹

Incapacity, according to Rawls, is dealt with by legislation:

...when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure. The aim is to restore people by health care so that once again they are fully cooperating members of society’.⁸⁰

Rawls notes that this means regard of the disadvantaged on humanitarian grounds (‘humanitarian justice’) is a different process to their equal regard in relation to political rights. Humanitarian justice applies to human beings in general, regardless of their ‘moral capacity’, and is part of any ‘decent’ society. On the other hand, a liberal and just society is based on social cooperation among people who are capable of exercising their moral capacity in Rawls’s twofold sense, and who agree to exercise it. Social cooperation involves having the necessary moral (and political) power to do so. It would seem that ‘humanitarian justice’ is potentially compatible with Rawls’s political liberalism, but may conflict with it. Thus ‘misplaced altruism’ which, while adopted to afford relief of a need, can result in stifling the recipient’s opportunity for the exercise of

⁷⁶ Freeman, *Rawls*, 54.

⁷⁷ Ibid, 54: see Rawls, *A Theory of Justice*, 441ff.

⁷⁸ Rawls, *A Theory of Justice*, 442.

⁷⁹ Ibid, 443.

⁸⁰ Rawls, *Political Liberalism*, 184.

their moral and political powers.⁸¹ An example could be the holding of refugees under restricted conditions, while determining their future political status.

5.5 State religion and equality

It is noted that Rawls does not comment specifically on the establishment of state religions, such as that of the United Kingdom or Denmark, nor of those nations that consider themselves based on specific, though not established religion, such as Germany, where the state exacts taxes on behalf of recognized religious institutions from their members.

Considering non-liberal but decent societies that do not grant their members the same equality of rights as liberal democracies, Rawls describes them vaguely as enforcing a state religion ‘as long as it provides an appropriate degree of freedom to practice dissenting religions’⁸² and respect the rights of women [however unequally] representing their interests ‘in its just consultation hierarchy’.⁸³

When he considers basic liberties, however, the situation changes, and Rawls demands separation of church and state, and rejects favourable (or unfavourable) treatment of religious organisations by the state. Whether, and if so to what extent, he would countenance the establishment of state religion in a liberal democracy as part of such separation, is open to debate. This is an important omission in Rawls’s theory that will be discussed in Chapter 9.

5.6 Conclusion

To understand human rights, it has been argued, it is essential to consider their intended effect on individuals’ autonomy and human dignity (the status of equal moral worth and the duty that this be respected by others).⁸⁴ This Chapter considered the critical

⁸¹ See, e.g., Freeman, *Rawls* 243ff, esp. 249. See also pp 287-8: ‘

Principles of humanitarian justice, [as part of basic human rights] extend to human beings generally, without regard to whether one stands in cooperative relations with them. They set forth the minimum (Rawls does not say sufficient) degree of respect that we owe to members of the human species as such. There are other duties of justice and duties of benevolence or charity we owe to them as well.

⁸² Ibid, 430.

⁸³ Ibid.

⁸⁴ Paolo G. Carozza ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ *The European Journal of International Law* Vol. 19 no. 5 2008 931-944, esp 935.

contribution of equality to democratic society, canvassing the nature and effects of formal equality (the requirement of uniform treatment of everyone regardless of circumstance) and substantive equality (the provision of equal circumstances for everyone). Problems arise from a strict application of either of these approaches to equality.

What, then, is the meaning of equality of freedom in relation to Belief? The response to the need to ensure enjoyment of the equal worth of Freedom of Belief for all, according to Rawls, lies in recognising the sources of inequality in society that prevent this. What results may well be *unequal* treatment of individuals by reallocation of material resources to ensure they have the means to experience the *equal* worth of liberties. This reallocation he addresses in his Second Principle of Justice, rejecting the idea of strict 'formal equality'.

So that the First Principle is not confined to establishing a strict formal equality approach to participating in a scheme of basic rights and liberties, Rawls's Second Principle invokes the standard of equal opportunity to give full effect to this equality. Accordingly, the practice of equality is subject to the goal of maximising equal access by all to participation in the political process.

Accordingly, it is argued, Rawls distinguishes by implication between two aspects of equality in society. This important distinction provides a means of identifying in a democracy the reallocation of material benefits that can be claimed in the name of human rights. Political equality for the purposes of participation of all in the democratic process, involves, for example, reallocation of particular resources necessary to ensure *equal participation* in democratic liberties. Life-chance equality rather seeks to equalise social and economic *outcomes* – in practice aimed at altering unequal circumstances to improve the quality of life of those considered materially disadvantaged.

In light of this distinction, one can address the question of how, and to what extent, we approach equality in relation to Freedom of Belief. The answer, it is argued, lies in distinguishing those actions by the state that are aimed at ensuring the equal right to have, adopt, change and manifest one's Beliefs (political equality) from actions that are aimed at providing more favourable conditions for exercising those Beliefs than are provided for others ('life-chance' equality).

It follows that the making of special laws, or exceptions to laws of general application, that are not supportable by public reason – so that every individual can worship, practice or teach according to his or her Belief – is not compatible with the equal exercise of Freedom of Belief. This approach points to the strategy of ‘equal regard’ in relation to Belief elaborated by Eisgruber and Sager, who reject freedom of religion as either ‘unimpaired flourishing’ of the practice of Beliefs or some *ad hoc*, unspecified policy to be adopted by the state. Rawls’s First and Second Principles of Justice provide for equal regard of all in relation to political freedom, and thus their equal freedom to adopt and manifest the Belief of their choice according to the principle of public reason.

This approach also sets the limit to which individuals proclaiming a Belief can claim the resources, such as money and facilities, as well as special dispensation from general laws, to act in accordance with their Belief. It can be reasoned that equality in relation to Freedom of Belief imposes the obligation of impartiality on the government, and reciprocity on the part of individuals. Consequently, Rawls rules out government policy that specifically favours religious or other non-political worldviews, excluding exemptions from laws of general application, as well as government grants and provision of resources for the purpose of the advancement of their religious or other practices. As argued in Chapter 9, impartiality on the part of the State does not mean all Beliefs should receive special treatment by the state, but rather *no* Belief should receive such treatment.

By formulating his two Principles of Justice, Rawls has ‘de-demonised’ inequality *per se*, and provided a means of harmonising liberty and equality in relation to political rights. Political liberalism seeks to determine measures to ensure the maximum degree of enjoyment of the equal worth of these rights, which maximises both freedom and equality.

I will in the following Chapters, turn to the relevant treaties and international case law to consider the extent to which the principles laid down by Rawls have been applied to the right to Freedom of Belief.

**PART 2: INTERPRETATION AND IMPLEMENTATION OF THE RIGHT TO
FREEDOM OF BELIEF AND A PROPOSED NEW PERSPECTIVE**

CHAPTER 6: THE SCOPE OF THE RELEVANT ARTICLES

6.1 Introduction

Part 2 examines the range of matters dealt with by the right to Freedom of Belief. In this Chapter I consider the relevant Articles establishing Freedom of Belief and the determinations of the relevant bodies as to what the words ‘religion or belief’ involve. I conclude that they hold the relevant Articles to apply to all worldviews, religious or otherwise, where these provide a meaning for life and ethical guidelines for living it. Consequently, I question the emphasis given ‘religion’ in states’ interpretation of the relevant Articles.

In line with this view, Rawls advocates the freedom to maintain diverse personal life stances (‘comprehensive doctrines’) whether they are religious or non-religious. This is not always the case in practice, encouraged to an extent by the terminology of the relevant Articles, which is evocative of religion.

This Chapter considers the wording of the first paragraph of each of the relevant Articles (i.e. Article 18 ICCPR, Article 1 of the Belief Declaration and Article 9 ECHR) and what it means, confronting the issues that arise from the terminology used. There are three main rights set out there:

- the right to thought, conscience and religion;
- the right to have, adopt (and change¹) one’s *religion or belief*;
- the right to manifest one’s *religion or belief* alone or with others.

Difficulties in relation to the meaning of the italicised words, as well as their application to the specific rights, are addressed, considering both the *travaux préparatoires* and interpretation by the adjudicative bodies (United Nations Human Rights Committee and European Court of Human Rights) and others.

¹ In Articles 18 UDHR and 9 ECHR only.

Following a critique of the ambiguous and confusing use of key terms, the case will be made that the relevant Articles are meant to encompass all life stances or worldviews whether they are religious or not (‘Beliefs’). It follows from this premise that behaviour inspired by religious convictions is thus to be considered no more worthy of privilege than behaviour expressing non-religious convictions. While the intention of the relevant Articles is broadly compatible with Rawls’s theory, I contend that their terms infuse the right to Freedom of Belief with religious bias. This can lead to the misconception that religious convictions are to receive singular deference and exceptional treatment, making religious convictions a specially protected right.

6.2 Interpretation of the relevant Articles

To understand what is involved in the relevant Articles, it is useful to place the three liberties noted above in perspective.

Firstly, the fundamental freedom to think as one will, and form values and ideas, is established: ‘[e]veryone shall have the right to freedom of thought, conscience and religion’. This freedom is absolute.²

This freedom is then said to include the two freedoms relating to ‘religion or belief’:

- the freedom to have, adopt and in some cases change one’s religion or belief, which is also absolute;³ and
- the freedom to manifest one’s religion or belief in worship, observance, practice and teaching’, which is not absolute, but subject to nominated restrictions based on law that is necessary for public safety and welfare, or for the protection of the rights and freedoms of others.

The ICCPR, the Belief Declaration and the ECHR all provide that the freedom to manifest one’s religious or non-religious convictions is ‘subject only to such limitations

² Article 4 ICCPR provides that there is to be no derogation from Article 18, even in times of emergency. The ECHR does not exempt Article 9 ECHR from derogation, but derogation from the right to thought would seem to be unjustifiable in any circumstances: M. Evans, *Religious Liberty and International Law*, 317.

³ Article 18(2) ICCPR; Evans, *ibid.*

as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁴

6.2.1 Terminology

The use of the undefined terms 'thought', 'religion', 'conscience' and 'belief', and the reluctance of the adjudicative bodies to define them leads to the hypothesis that (a) a definition of each of these words must be critical for those seeking to understand the relevant Articles, and (b) their operation must be complex, governed by detailed analysis of the terms. If this is so, confusion arises from the fact that

- the first freedom allows the adoption of 'thought' with 'conscience' and 'religion', implying reference to three distinct kinds of mental processes, with the terms 'conscience' and 'religion' invoking religious connotations; and
- the other two nominated freedoms identify 'religion' as separate from 'belief', and do not refer to 'thought' or 'conscience' at all; raising questions as to whether (a) freedom to act on 'thought' or 'conscience' is excluded, and (b) 'belief' is to be distinguished from 'religion'.

On their face, these three expressions of freedom in the relevant Articles are ambiguous. In the absence of specific legal definition, the word 'thought' takes on its ordinary meaning,⁵ and so can be considered to include all mental processes. For the purposes of the first freedom, this would entail 'thought' covering the other terms set out there, so reference to 'conscience' and 'religion' are redundant and potentially confusing.

If the words used in an Article are critical to the understanding its intent, the exclusion in the nominated second and third freedoms of the terms 'thought' and 'conscience', and the inclusion of the term 'belief' suggests that the freedom to have and manifest 'religion or belief' relate to something other than 'thought' and 'conscience'. Several issues arise:

⁴ Articles 18(3) ICCPR, 9(2) ECHR and 1(3) of the *Belief Declaration*.

⁵ E.g., 'the process or power of thinking' or 'an idea, conception or chain of reasoning': *Concise Oxford Dictionary*, Oxford, Clarendon Press, 1982.

Firstly, both conscience and religion are arguably the product of thought. Their listing along with ‘thought’ in the relevant Articles suggests an alternative understanding is intended, and their religious connotations promote a tendency to perceive the relevant Articles are to apply exclusively to religion.

Secondly, if ‘thought’ includes Belief, freedom of thought would surely include freedom to have a new thought or Belief, or to revise a thought or Belief. The question arises as to whether the stipulation that one can have, adopt or change a ‘religion or belief’ is relevant. Some Islamic states have taken the view that it is.⁶ Debate over the inclusion of the right to ‘change’ religion or belief arose in preliminary discussions of Article 18 ICCPR, as the Islamic religion forbids apostasy.⁷ As a result, the right to change one’s religion or belief was omitted from both Article 18 ICCPR and Article 1 of the Belief Declaration (although it is generally held that this view is contrary to the appropriate interpretation of the rights to Freedom of Belief – see below section 6.4.1)⁸.

Finally, freedom to manifest a ‘religion or belief’ purports, incongruously, to allow one the right to act on a ‘religion’ or ‘belief’, but not on a ‘thought’ or on ‘conscience’. It also gives the impression that, *inter alia*, religion is somehow distinct from Belief prompting enquiry as to what this could be.

Moreover, the fact that the word ‘belief’ is often used to refer exclusively to religion. The terms ‘believer’ and ‘non-believer’ are also used to denote those subscribing or not subscribing to a religion, further implying a religious connotation. The diversity of meanings attributed to these central terms has engendered considerable leeway in their elucidation and application. As will be argued, this is not the meaning officially ascribed to ‘belief’ as used in the relevant Articles.

The ambiguity in the language of the relevant Articles has sustained speculation by commentators that their presence may signal the need for different contextual meanings of the same word. This view is reinforced by the fact that Articles 19 ICCPR and 10 ECHR provide, in a different context, freedom of expression, to hold opinions, receive

⁶ See, e.g., Gallianne Palayret, ‘Compatibility/Incompatibility of Shia Islam with Human Rights Standards’ (2004) <www.hrni.org> accessed 9/11/05.

⁷ M. Evans, *Religious Liberty*, 187; 196-7; 201-2; 206; 237-8; 255-6.

⁸ It is also noted that failure to allow for change of a religion or belief would deter people from converting *to* Islam.

and impart information and ideas without state interference, ‘regardless of frontiers’.⁹ This appears to recast the right to freedom of thought with additional terms and concepts, which has meant, as noted below, that some cases based on alleged violations of Freedom of Belief have been considered to be more appropriately considered violations of the right to freedom of expression.

Malcolm Evans speculates that the term ‘belief’ in relation to freedom to manifest ‘religion or belief’ in Article 9 ECHR is meaningless: it is simply a restatement of the word ‘religion’, and, consequently, Article 9 refers only to religion.¹⁰ Non-religious Beliefs, he argues, must fall under the more limited provisions of Articles 10 and 11 ECHR, which do not make provision for manifestation (that is, the application) of non-religious Beliefs.¹¹ By implication, this reasoning would also apply to Articles 18 and 19 ICCPR respectively.

Further, if taken literally, the relevant Articles could be seen to mean that thought and conscience can be had or adopted but cannot be changed or manifest, as one has ‘freedom of thought, conscience and religion’ but can only manifest a ‘religion or belief’. As Carolyn Evans points out, this approach would ‘seem to suggest the strange outcome that an atheist has the right to manifest his or her Belief...but his or her right to hold this Belief is not protected’.¹² She states that there must be a ‘legally important

⁹ Article 19 ICCPR states *inter alia* that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

.....

Article 10 ECHR provides *inter alia* that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

....

¹⁰ See, e.g., his discussion in *Religious Liberty*, 39ff. esp 43.

¹¹ Malcolm Evans, *Religious Liberty*, 203. See also Malcolm Evans, ‘The United Nations and Freedom of Religion: The Work of the Human Rights Committee’ in Rex Ahdar (ed), *Law and Religion*, (Aldershot, Ashgate Publishing, 2000) 35, 41ff). This approach, while it may be superficially attractive, is not in strict accord with the purported approach of the U.N.’s *General Comment 22*, which applies a broad, all-inclusive interpretation overall of Art 18 ICCPR, and the European Court’s interpretation of the net effect of art 9 ECHR, as explained below.

¹² Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, OUP 2001) 53.

distinction' between 'thought and conscience' and 'religion or belief'.¹³ While this conclusion may be drawn from the wording of the relevant Articles (disregarding the view that 'thought' includes all ideas, thus including non-religious Beliefs) there is no indication of just what the distinction could be.

Recognising the difficulty in reconciling the terminology Carolyn Evans concludes that to make sense of understanding the untouchable mental processes that are covered by the freedom of 'thought, conscience and religion', presumptions as to the intention of the Articles must be made. Consequently, she argues, 'Beliefs' should be considered a 'subset' of the broader category of 'thought and conscience' for the purposes of freedom of 'thought, conscience and religion'.¹⁴

There is little doubt that the relevant Articles apply to well-recognised mainstream religions. However, specific reference to 'conscience' and 'religion' appears to promote selective protection to accepted religious beliefs, and cast doubt on the protection provided for non-religious Beliefs. The language of the relevant Articles has thus detracted from a clear understanding of their general purpose in relation to 'beliefs' that are not clearly in accordance with mainstream religions, especially those that are not considered 'religious'.¹⁵

Those who rely on a formalistic (or literal) interpretation of the written law base their reasoning on the premise that certainty and objectivity require treating each word as having an essential role in determining the purpose and meaning of a provision.¹⁶ On this reasoning, the words 'thought', 'conscience', 'religion' and 'belief' in the relevant Articles appear to carry an intended legal significance, with religion thus singled out for special, or at least separate, treatment.¹⁷

¹³ Ibid, 52. Her view appears to be based simply on the choice of different words: there is no formal justification of the different terms.

¹⁴ Ibid, 53.

¹⁵ András Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6(3-4) *International Journal of Constitutional Law* 605, demonstrates how religious policies are 'smuggled' into constitutional law by 'new forms of strong religion' under the guise of Freedom of Belief.

¹⁶ See, e.g., Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 156.

¹⁷ See C. Evans, *Freedom of Religion* 52ff; M. Evans, *Religious Liberty and International Law* 201ff, 289ff; M. Evans, 'The United Nations and Freedom of Religion', 39ff.

To address the ambiguity arising from the use the terms ‘conscience’, ‘religion’ and ‘belief’, it is proposed that the underlying *principles* of the relevant Articles should be identified and their application clarified accordingly. It is suggested that, in line with the relevant Articles, three such principles are involved.

The first principle is freedom of all thought (including ideas and opinions and life stances). Arguably, this principle is expressed in freedom, not only in relation to life stances, but also in relation to speech and assembly. It would therefore be better realised as a stand-alone right, on which these other freedoms feed.

The second principle is the freedom to have, adopt, and change Beliefs, referred to as ‘philosophical convictions’ by the European Court in *Campbell and Cosans*¹⁸ as including ‘those ideas based on human knowledge and reasoning concerning the world, life, society, etc., which a person adopts and professes according to the dictates of his or her conscience’. This terminology is similar to Rawls’s comprehensive doctrines and what I refer to as ‘Beliefs’. It involves those philosophical convictions that constitute personal values as to right and wrong and encompass personal religious and non-religious Beliefs.¹⁹ As noted below, this does not apply to the specific and limited political values that form the principles of liberal democracy as outlined in Chapter 3.²⁰

The third principle is the freedom to behave according to the requirements of one’s personal convictions, subject to recognised limitations in the interests of democratic society.

¹⁸ *Campbell and Cosans v. the United Kingdom*, 25 February 1982, Series A no. 48 at 16, §36:

In its ordinary meaning the word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’, such as are utilised in Article 10 (art. 10) of the Convention, which guarantees freedom of expression; it is more akin to the term ‘Beliefs’ (in the French text: ‘convictions’) appearing in Article 9 (art. 9) - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

¹⁹ The European Court held in *Campbell and Cosans* that the word ‘philosophy’ ‘bears numerous meanings’ and can be applied to ‘fully fledged systems of thought’ or ‘views on more or less trivial matters’. It concluded that neither of these two extremes was appropriate for the former would be too restrictive and the latter too broad, and settled on the cited meaning in relation to Article 9 ECHR: *ibid*, §36. This meaning could be also described as a ‘world view’ or ‘Weltanschauung’. John Rawls describes such convictions as ‘comprehensive doctrines’. Rawls, *Political Liberalism*, 175.

²⁰ E.g., shared principles based on liberal democracy that constitute what John Rawls calls ‘Public Reason’. See John Rawls, ‘The Idea of Public Reason Revisited’, 440: Public reason ‘specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic governments relation to its citizens and their relation to one another’ (at 441-2).

This means that the relevant Articles protect both the right to hold a Belief, which is absolute, and the right to manifest that Belief, which is qualified.²¹

On this reasoning, the relevant Articles provide the right to have, change, adopt or manifest what constitute Beliefs as defined above, without the need to determine whether these amount to a ‘religion’, as the concept of ‘belief’ includes all Beliefs, including religious beliefs.²² The term ‘Freedom of Belief’ on this basis, refers to a specific form of Beliefs, giving clarity to what is referred to in the relevant Articles, while providing the necessary flexibility to include the many varieties of life stances that people espouse.

For this reason, then, it makes sense to distinguish in clear language the liberty to have whatever thoughts and understandings we wish from the liberty to have and express Beliefs as personal life stances.

This proposal lays the groundwork for an approach that dispenses with special reference to, or treatment of, religious beliefs or indeed any other specific personal worldview, in understanding Freedom of Belief. In accordance with Rawls’s model of structural secularism, this perspective gives the same protection to all personal life stances whether they are religious or otherwise. Such an approach would establish the case for both freedom of individual Belief and freedom from the influence of religious or other personal life stances through special treatment by government of particular Belief systems or values, be they religious or non-religious.

6.2.2 Drafting of the relevant Articles

One of the difficulties in determining the meaning of the relevant Articles is the lack of consensus among the drafters over just what they were to cover, evident in the *travaux préparatoires* of the drafting committees. There is a broad formal consensus on non-theism and inclusiveness, but ‘little insight into what the terms meant beyond this’.²³

²¹ *R (ex rel Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15, §20 (Lord Bingham).

²² Indeed the word ‘belief’ is often applied to religion, and the term ‘religious belief’ is also frequently used.

²³ Evans, *Freedom of Religion*, 61.

The debate around what to include is described by Malcolm Evans, who outlines the drafting process of Article 18 both as part of the UDHR (where initially it was Article 16) and as adopted in the ICCPR.²⁴ He points out that in the initial drafting stage of the UDHR the ‘discussions reveal widely divergent views concerning the relationship between the freedom of thought and conscience, and the freedom of religion and the meaning of Belief’.²⁵ Evans concludes that ‘[t]o put the matter briefly, the essential difficulty was that it was entirely unclear what [Article 18] was meant to imply, and the discussion surrounding its adoption provides no clarification’.²⁶ Thus the agreement of members of the drafting Committee of the UDHR to the wording of the Articles ‘reflected a willingness to compromise rather than insist on a common agreement on what should be embraced by such a right’.²⁷

The Drafting Committee of the ICCPR was also divided in its understanding of ‘belief’ in Article 18. Some members of the drafting bodies of the ICCPR considered ‘belief’ to be synonymous with ‘thought’, permitting manifestation of non-religious Belief, but others considered it synonymous with ‘religion’, thereby effectively referring only to ‘religion’ and *excluding* the right to manifest other Beliefs.²⁸ No consensus on this matter was reached, although, according to Evans, ‘the discussion leant towards the *inclusive* interpretation that had received mild endorsement from the Secretariat.’²⁹ Records show that while freedom of religion was a priority for the majority of delegates to the bodies tasked with framing the relevant Articles, they nevertheless formally expressed the intention that the right to Freedom of Belief was to include formally non-religious beliefs.³⁰ The U.N. Commission on Human Rights discussion in determining the wording of Article 18 ICCPR, for example, reported that ‘[n]o restrictions of a legal

²⁴ Evans, *Religious Liberty and International Law*, ch 8. See also Evans, ‘The United Nations and Freedom of Religion’, 39ff; M J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) p 351ff.

²⁵ Evans, *Religious Liberty and International Law* 190. Paul Taylor outlines the concerns expressed by the Muslim countries: see Taylor, *Freedom of Religion* 27ff.

²⁶ Evans, *Religious Liberty and International Law*, 189.

²⁷ *Ibid*, 183.

²⁸ *Ibid*, 203.

²⁹ *Ibid*, 204.

³⁰ *Ibid*, 190ff. See also Ch 8; Tahzib, *Freedom of Religion and Belief* examines the process of deliberation in framing the right to Freedom of Belief, Ch 3, esp 70ff. See also Evans, ‘The United Nations and Freedom of Religion’, p39ff.; Bossuyt, *Guide to the Travaux Préparatoires* p351ff.

character, it was generally agreed, could be imposed on man's inner thought or moral consciousness, or his attitude towards the universe or its creator'.³¹

6.2.3 Approach of UNHRC

The UNHRC, like the European Commission and Court, tended, especially in earlier decisions, to avoid a reasoned explanation for its findings, thus leaving any definition of the words 'thought', 'conscience', 'religion' and 'belief' undefined and open to conjecture.³² The UNHRC considered of the meaning of 'religion or belief' under Article 18 ICCPR in only one communication under the ICCPR First Optional Protocol, which provides for individual applications to the Committee. That was *M.A.B., W.A.T. and J.A.Y.T.*³³ The authors were leaders of the 'Assembly of the Church of the Universe', whose Beliefs and practices 'necessarily' involved 'the care, cultivation, possession, distribution, maintenance, integrity and worship of the "Sacrament" ["God's tree of life"] of the Church'.³⁴ This 'Sacrament' was marijuana. The UNHRC held the communication to be inadmissible, stating simply that 'a Belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant'.³⁵ No indication of why this was so, or what *could* conceivably be brought within the scope of Article 18 ICCPR was provided.

The matter remained unresolved by a more recent consideration by the Committee of the use of *cannabis sativa* by members of the Rastafari sect in South Africa.³⁶ The author of the communication alleged that prohibition of the possession or use of cannabis restricted the manifestation of his religious Beliefs. The Committee accepted Rastafarianism as a religion without explanation, as well as the use of cannabis, as

³¹ Commission on Human Rights, 5th Session (1949), 6th Session (1949), 8th Session (1952): A/2929 Chap VI, §106, cited in Bossuyt, *Guide to the Travaux Préparatoires*, 355.

³² Peter Radan points out that the UNHRC in its earlier decisions consisted of 'a short recitation of the relevant facts, an account of the efforts of the author(s) to seek domestic remedies, an account of the submissions made before the UNHRC, followed, finally, by the decision'. Peter Radan, 'International Law and Religion: Article 18 of the International Covenant on Civil and Political Rights' in Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion: God, the State and the Common Law*, (London, Routledge, 2005), 13. This is also the case with the European Commission, and, particularly in its early days, the European Court.

³³ *M.A.B., W.A.T. and J.A.Y.T. v. Canada* No. 570/1993, U.N. Doc CCPR/C/50/D/570/1993 (1994).

³⁴ *ibid*, §2.1.

³⁵ *ibid*, §4.2

³⁶ *Prince v. South Africa*, App. No. 1474/2006; U.N. Doc. CPPR/C/91/D/1474/2006 (October 2007).

‘inherent in the manifestation of the Rastafari religion’.³⁷ It distinguished *M.A.B., W.A.T. and J.A.Y.T.* because the latter ‘concerned the activities of a religious organization whose Belief consisted primarily or exclusively in the worship and distribution of a narcotic drug’.³⁸ It dismissed the author’s complaint, however, stating that prohibition of certain drugs was justified based on potential harmful effects, and that a general prohibition on drug use was not discriminatory, as it applies to all individuals, regardless of religion or other Belief.³⁹

A further example of ambiguous reasoning by the UNHRC as to what is covered by Article 18 ICCPR can be seen in the case of *MA v. Italy*.⁴⁰ In that case, the UNHRC ruled inadmissible a communication from a person convicted for attempting to re-establish the Fascist Party in Italy. The Committee considered restriction of his actions was:

...justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant.⁴¹

This suggests that the UNHRC left open consideration of fascism as a ‘belief’ under Article 18 ICCPR, taking the idea of Belief into the political sphere and potentially embracing Nazism, communism and other non-democratic ideologies. Questions then arise as to what protection should be granted to political and allegedly anti-social Beliefs.

6.2.4 Approach of the European bodies

The European Commission’s early judgments also lacked a clearly enunciated meaning of ‘belief’. This can also be seen in the case of *X v. Austria*,⁴² which involved prosecution of the claimant for promotion of neo-Nazism. The Commission, without setting out reasons, treated the conviction as an interference with the informant’s rights

³⁷ *ibid.*, §§6.5, 7.2.

³⁸ *ibid.*, §6.5.

³⁹ *ibid.*, §7.3.

⁴⁰ *M.A. v. Italy*, Communication No. 117/81 (decision of 10 April 1984), U.N. Doc A/39/40 (1984) p. 190.

⁴¹ *Ibid.* §13.3.

⁴² *X v. Austria* App. No. 1747/62, 12 Collections (1963) 42, 53-4.

under Article 9 ECHR and went on to hold that the State was justified in suppressing the applicant's activities under Article 9(2) ECHR. Similarly ambiguous were the cases dealing with applications relating to State suppression of fascism⁴³ and communism.⁴⁴ While the European Court has considered specifically applying the protections of Article 9 to the expression of beliefs that involve political parties⁴⁵ it rather dealt with these issues under other ECHR Articles⁴⁶ such as Articles 10 (freedom of expression),⁴⁷ 11 (freedom of assembly and association),⁴⁸ and 17 (destruction of rights and freedoms of others).⁴⁹ This would accord with the view, as expressed by Rawls, that political philosophies and practices are different from personal worldviews.

It also makes sense of the argument for holding freedom of thought to be an independent right, that is, one recognised variously through the right to express freely thoughts and ideas on any topic, assemble peaceably to express them, and to live lawfully according to their personal worldview.

A recent example of the uncertainty that results from the European Court's use of terminology, and failure to provide reasons for its approach to the meaning of 'belief' can be found in *Pretty v. The United Kingdom*.⁵⁰ The applicant, Diane Pretty, was suffering from the last stages of motor neurone disease. She was effectively paralysed from the neck down, with an electronic device with which to communicate, and was being fed by a tube. As the Court noted, the final stages of the disease, with increasing

⁴³ *X v. Italy*, App. No 6741/74 5 Eur Comm'n H. R. Dec. & Rep. (1976) 83.

⁴⁴ *Hazar, Hazar and Açık v. Turkey*, App. No. 16311, 16312, 16313/90 (joined) (admissibility), 72 Eur. Comm'n H.R. Dec. & Rep. 200 (1991), 212; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I.

⁴⁵ Taylor, *Freedom of Religion*, 79-80.

⁴⁶ See, e.g., *ibid*; also *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

⁴⁷ See, e.g. *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I, §37; *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, ECHR 1999-VIII, §§42-3.

⁴⁸ Cases involving political parties considered under Article 11 ECHR include *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, esp, §§90ff. 'The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention': *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 37 ECHR1999-VIII; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, §42-3, Reports of Judgments and Decisions 1998-I.

⁴⁹ *M.A. v. Italy*, Communication No. 117/81 (decision of 10 April 1984), U.N. Doc A/39/40 (1984).

⁵⁰ *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.

respiratory failure, are ‘exceedingly distressing and undignified’ leaving her ‘frightened and distressed’.⁵¹ Nevertheless, she had retained her intellectual capacity and very strongly indicated her wish to end her life with the aid of her husband.

Ms Pretty sought the DPP’s undertaking not to prosecute her husband should he assist her to commit suicide in accordance with her wishes. When denial of this undertaking was supported by all the domestic courts, she applied to the European Court for a ruling that her human rights under the ECHR had been violated, including her right to Freedom of Belief. The European Court, in relation to the alleged violation of Article 9 ECHR, simply stated that:

The Court does not doubt the firmness of the applicant’s views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9(1) of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph [of Article 9].⁵²

The Court did not elaborate. Despite the fact that it had stated that the notion of ‘belief’ in Article 9 ECHR ‘includes non-religious convictions that attain a certain level of cogency, seriousness, coherence and importance’,⁵³ it did not explain *why* Ms Pretty’s convictions did not attain the requisite level of cogency, seriousness, coherence and importance for the purposes of Article 9 ECHR. It therefore missed the opportunity to specify just what ‘opinions’ or ‘convictions’ do constitute a ‘belief’ in the sense protected by Article 9 ECHR. Arguably, given her circumstances, Ms Pretty’s Beliefs in assisted suicide met these criteria, at least for her, but the Court gave no reason for holding otherwise. This raises the unanswered issue of what criteria are legitimately

⁵¹ Ibid, §8.

⁵² Ibid, §82.

⁵³ This was the term used by the European Court in *Campbell and Cosans v. the United Kingdom*, 25 February 1982, §36 Series A no. 48. The European Commission held that the wish to have one’s ashes scattered in a certain place is not a ‘religion or belief’ under Article 9 because it is not a ‘manifestation of any Belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby’: *X. v. Germany*, App. no 8741/79, 24 Eur. Com’n H.R. Dec. & Rep. 137 (1981), 138.

applied to determine the level of cogency, seriousness, coherence and importance, and whether the test is an objective, rather than a subjective, one.

This finding is all the more perplexing because, while disallowing Ms Pretty's claim to a Belief, the Court nevertheless went on to consider (and reject without discussion) whether her case involved a form of manifestation of a religion or belief.⁵⁴ This infused further complexity into the issue. If Ms Pretty's beliefs were not a 'Belief', and therefore not eligible for consideration under Article 9 ECHR, it surely follows that such consideration would be irrelevant. Without supporting justification, it seems the Court has inappropriately applied religionist reasoning to the meaning of 'worship, observance, practice or teaching' to her non-religious views. Ms Pretty's assisted demise could be seen as a manifestation of what to her was a 'coherent view on fundamental problems'.⁵⁵ The Court did not elaborate on why it thought otherwise.

6.3 The meaning of 'religion'

By specifically nominating 'religion' as protected under the relevant Articles, the question is automatically raised, what is religion? This is nowhere defined in the deliberations of the drafters, or in case law. As noted and discussed below, 'belief' *has* been defined.

6.3.1 Difficulty of defining 'religion'

Even if it were to be considered a necessary preliminary for protecting particular liberties, the difficulty of attempting to identify religion distracts from the purpose of the relevant Articles – that is, that both religious and non-religious convictions are equally valued. It has been argued in Chapter 2 that the principles of liberty and equality inform the implementation of human rights. By seeking to determine if a Belief is religious or not, the aim of providing equality and liberty for all Beliefs is compromised. This diverts from the purpose of the relevant Articles in two main ways.

⁵⁴ *Pretty v. the United Kingdom*, no. 2346/02, § 82 ECHR 2002-III.

⁵⁵ Both the European Court and the UNHRC were required to consider the right to assisted death with dignity in the matter of Ramón Sampredo. His daughter Manuella Sanlés Sanlés sought a finding that he had been denied the right, *inter alia* to manifestation of Freedom of Belief. In both instances the tribunals rule the matter inadmissible (given that Sampredo had in fact committed suicide by this time): *Sanlés Sanlés v. Spain* (dec.), no. 48335/99, ECHR 2000-XI; *Manuela Sanlé s v. Spain*, Communicaton No. 1024/2001 (decision of 30 March 2004)U.N. Doc. A/59/40 vol. 2 (2004), 505.

Firstly, there is no universally accepted definition of what religion *is*, as will be demonstrated below. Inconsistent determinations as to whether a Belief is religious or not can end in restriction by decision-makers of freedom for adherents of particular Beliefs that are genuinely considered by others to be religious.

Secondly, those Beliefs deemed to be ‘non-religious’ assume the character of ‘other’, or second-tier, inferior Beliefs.

Macklem argues that a semantic inquiry into the term religion is:

...misplaced...it may tell us how people use the term’ but not ‘what forms of human activity ought to be secured under the rubric of freedom of religion... [It] may tell us how people in general use the word religion, how the legal profession uses it, or how people should use the word if they wish to be understood by their peers. But a semantic account cannot, in itself and without assistance, tell us what form of human activity ought to be secured under the rubric of freedom of religion
....semantic answers should not be given to moral questions...Our concern is not with linguistics but with justice.⁵⁶

He goes on to point out that morality, within its religious realm, can afford to be ‘singular, stable and partial’ – it is suggested that this means each religion is individualist, and not required to change as it need only be responsible to those who have freely committed themselves to its tenets.⁵⁷ However, when morality enters the political realm it becomes *political morality* and, in the case of human rights, one that has been adopted by states parties to the human rights treaties.

As such, morality must be ‘responsible for the well-being of all citizens’ of whatever Belief: it is all-embracing and plural, because those participating are bound by it, notwithstanding their right to leave for a more congenial regime.⁵⁸ It is contended, in

⁵⁶ Timothy Macklem, ‘Faith as a Secular Value’ (2000) 45 *McGill Law Journal* 1, 12.

⁵⁷ Macklem, *ibid*, 21 fn 37. Not all who belong to a religion can be considered to do so voluntarily. Ayaan Hirsi Ali writes from personal experience when she describes women imbued with strict Muslim rules and culture as having ‘internalised their subordination, no longer seeing it as oppression by an external force but as a strong internal shield’: Ayaan Hirsi Ali, *The Caged Virgin* (New York, Free Press 2006), 31. Some members of religious groups suffer penalties for criticising or renouncing their religion. Indoctrination of children may deny members the awareness of any alternatives.

⁵⁸ Macklem, ‘Faith as a Secular Value’, 21 fn 37.

line with Rawls, that it is their acceptance of a ‘duty of civility’,⁵⁹ that binds citizens to reciprocal action with all fellow citizens under the principles of democracy and public reason, and leads to an overlapping consensus – Rawls’s version of political morality.

Attempts by courts in different jurisdictions to determine what constitutes a ‘religion’ indicate the difficulty in developing a legal definition. Courts have tended to take a position somewhere within two different broad approaches. The first is a ‘substantive’ approach, which focuses on the *content* or ‘essence’ of religion, such as belief in the supernatural, life after death or the possession of a soul.⁶⁰ The second is a ‘functional’ approach, focusing ‘not on what religion *is*, but what it *does*’,⁶¹ for example, answering the fundamental questions about existence or provision of comfort or sense of meaning to one’s life. The ‘functional’ approach can be seen in, for example, Australian⁶² and earlier United Kingdom⁶³ and United States⁶⁴ case law.

The United Nations High Commission for Refugees has specifically adopted what amounts to a ‘functional’ approach to the definition of religion in its guidelines on religion-based refugee claims, released in 2004.⁶⁵ It stated that such claims can be based on ‘religion’ as including non-religious convictions (which are centred around the developed life stance and/or values of the person), religion as identity (which is represents membership of a group or community) and religion as a way of life.

⁵⁹ Rawls, *Political Liberalism*, 217. Rawls describes the duty of civility as a duty ‘to be able to explain to one another on those fundamental [political] questions how the principles and policies they advocate and vote for can be supported by the political values of public reason’. It also involve the duty to ‘listen to others and fairmindedness in deciding when accommodations to their views should reasonably be made’.

⁶⁰ Keith Roberts, *Religion in Sociological Perspective* (Belmont, Wadsworth Publishing Company 2nd ed, 1984), 3.

⁶¹ *Ibid*, 7.

⁶² See, e.g., *Adelaide Company of Jehovah’s Witnesses Incorporated v. The Commonwealth* (1943) 67 CLR 116, 116; *Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 120.

⁶³ See, e.g., *Baxter v. Langley* (1868) 38 LJMC 1, 5; *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council* [1957] 1 WLR 1080, 1090; *R v. Registrar-General; ex parte Segerdal* [1970] 2 QB 697, 707.

⁶⁴ See, e.g., *United States v. MacIntosh* 283 U.S. 605 (1931): ‘One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a Belief in supreme allegiance to the will of God’ (Chief Justice Hughes at 634).

⁶⁵ United Nations High Commission for Refugees, ‘Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees’, HCR/GIP/04/06 (2004) 16(3) *International Journal of Refugee Law* 500, 501.

Functional approaches have been more recently adopted in the United Kingdom (reflecting the ratification of the ICCPR and adoption of ECHR provisions in the *Human Rights Act 1998* (U.K.)⁶⁶ and the United States.⁶⁷

A functional approach that sees any Belief system as one that serves the same function as religion would seem to be tautological, leading to the need for a definition of religion in the first place.⁶⁸

This functional approach to the nature of religion has influenced the perception that any actions or traditions allegedly motivated by membership of a ‘religious’ group are protected under the guise of practising their religion. It has generated a reluctance to interfere with such actions for fear of acting contrary to the spirit of the relevant Articles.

Where there is a neutral state and policy based on the principle of public reason, however, what attracts government interest is the *effect* of action and its compatibility with public reason, rather than the inspiration for the action itself.⁶⁹ This further supports the argument that the need to determine just what a religion is or does seems beside the point.

As will be argued in later chapters, the relevant Articles do not protect all actions of individuals, whatever they may be, because of the *status* of their expression as a particular Belief,⁷⁰ belonging to a particular group or expressing tradition. The more

⁶⁶ See, e.g., the rejection of a ‘substantive’ approach to belief in *Regina v. Secretary of State for Education and Employment and others ex parte Williamson and others* [2005] UKHL 15, (Lord Nicholls of Birkenhead at §24).

⁶⁷ See, e.g., Paul Horwitz, ‘Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion’ (1997) 47 *De Paul L.R.* 85, 129.

⁶⁸ Wojciech Sadurski *Moral Pluralism and Legal Neutrality* (Dordrecht, Kluwer Academic Publishers 1990), 173. See also Thomas Berg, *The State and Religion in a Nutshell* (Minnesota, St Paul University Press 1998). 271-5, who outlines three approaches to determining the meaning of religion: (1) defining religion differently under each of the clauses of the First Amendment of the U.S. Constitution: i.e. one definition of religion for the establishment clause (e.g., to include only mainstream established religions) and a different one for the free-exercise clause (e.g. a broader, more inclusive definition); (2) returning to a more traditional understanding of religion; or (3) pursuing an expanded notion of religion, which is nevertheless somehow limited, to avoid including ‘every moral Belief’.

⁶⁹ See discussion of state neutrality in U.S. and Australian courts in Wojciech Sadurski, ‘Neutrality of law towards religion’ (1990) 12 *Sydney Law Review* 450.

⁷⁰ For example, Hamilton refers to Muslims in the U.S. refusing to carry passengers in their taxis who carry alcohol, or to scan pork products in supermarkets: Marci Hamilton, ‘The Dangers of

restricted approach to the expression of Belief through manifestation as described in the relevant Articles and interpreted by the adjudicative bodies will be discussed in Chapter 8.

The difficulty in identifying ‘religion’ is demonstrated by the indeterminate approach of the Australian High Court when it had the opportunity to determine what constitutes ‘religion’ in the case of *Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)*.⁷¹ In that case it rejected theism as a necessary basis for a Belief to be considered ‘religious’. However, it indicated that belief in the ‘supernatural’ generally plays a central role in religion.

The Court was seeking a definition of religion in order to consider whether Scientology was a religion for the purposes of Victorian payroll taxation legislation. Four out of five judges agreed in the centrality of a supernatural being or entity in religious Beliefs, but differed in how Belief in such an entity constitutes a religion.

Mason A.C.J. and Brennan J. applied a twofold test: ‘first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief’, while allowing for variations of emphasis on each of these characteristics.⁷² In relation to religion, they stated:

Protection is not accorded to safeguard the tenets of each religion; no such protection can be given by the law, and it would be contradictory of the law to protect at once the tenets of different religions which are incompatible with one another. Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none.⁷³

It is noteworthy that they added ‘canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of

Accommodation of Religion based on Religious Status, as Opposed to Religiously Motivated Practice, and the Duty of Religious Individuals to Obey the Law’ (2007) *Findlaw Writ* <<http://writ.news.findlaw.com/hamilton/20070405.html>> at 2/10/07.

⁷¹ *Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

⁷² *Ibid*, 136.

⁷³ *Ibid*, 132.

religion'.⁷⁴ As far as the law is concerned, then, where they come into conflict, it would seem that religiously inspired activity is simply 'trumped' by the laws of the land.⁷⁵

Wilson and Deane JJ. held that there is no single characteristic that can be applied to a religion. They preferred 'to formulate the more important of the indicia or guidelines that must be derived by empirical observation of accepted religions'.⁷⁶ The indicia they nominated were a belief in the supernatural, absence of which makes a belief unlikely to be a religion; ideas that 'relate to man's nature and place in the universe and his relation to things supernatural'; codes of conduct; constitution of an identifiable group; and self perception as a religion. These, they said, 'are no more than aids' in determining whether a belief is a religion. However, '[i]t is unlikely that a collection of ideas and/or practices would properly be characterized as a religion if it lacked all or most of them'.⁷⁷

Murphy J. differed from his fellow judges. Quoting Latham J. in *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth*,⁷⁸ he adopted the approach that each person chooses the content of his own religion.⁷⁹ On this reasoning, the categories of religion are not closed,⁸⁰ and while a belief in the supernatural would indicate a belief is religious, also included is 'any body which claims to be religious and offers a way to find meaning and purpose in life'.⁸¹

While it is arguable that the Court's approach can be seen as defining religion as in functional terms – that is, by the functions 'religion' serves for adherents, such as providing a meaning to life and ethical guidelines for behaviour, it is argued here that the language of the case does not provide strong evidence for this. Rather, the judges' reasoning sets out a list of those matters considered to represent the content of religious Belief.

⁷⁴ Ibid, emphasis added.

⁷⁵ Ibid, 136. This view was also implied by Wilson and Dean JJ. at 176.

⁷⁶ Ibid, 173.

⁷⁷ Ibid, 174.

⁷⁸ (1943) 67 C.L.R. 116, at 124.

⁷⁹ *Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 150-151.

⁸⁰ Ibid, 150. He stated at 151 that anybody believing in a supernatural being or beings 'whether physical and visible, such as the sun or the stars, or a physical invisible God or spirit, or an abstract God or entity, is religious'.

⁸¹ Ibid, 150.

An after-effect of this case provides an example of the inconsistency that can arise from attempts to classify Beliefs by whether they are ‘religious’ or not. It also shows the inequality of treatment of different Belief groups when some are given favourable treatment based on their personal convictions. The case has been interpreted to require a belief in some sort of supernatural phenomenon to be granted the special status of ‘religion’ (and thus exemption from taxation) by the Australian Tax Office (‘ATO’). Thus, when the Raelian organisation (a self-nominated religion) sought tax exemption as a religion, the ATO refused to classify it as a religion for tax purposes, as its extra-terrestrial but material masters “Elohim” were held to be not supernatural.⁸² Pointing to the Court’s findings in the *Church of the New Faith* case, the ATO stated in a letter to the Raelian Bishop of the Australian Raelian Movement, Jean François Aymonier, that the ‘two main criteria’ for Beliefs to count as a religion are:

- a belief in a supernatural Being, Thing or Principle; and
- the acceptance of canons of conduct in order to give effect to that belief.

The letter went on to state that the ATO considered that Book Two of the Raelian writings, setting out the doctrines of Raelian Belief, *The Messages of the Elohim*, indicates that the concept of an immaterial God is incorrect and that there is no soul to fly out of the body after death. The Raelians were thus not considered a religious institution.⁸³ In contrast, the ATO considers the Church of Scientology a religion, because of its belief in supernatural intergalactic beings.⁸⁴

⁸² Elohim are extra-terrestrial beings who are ‘our creators’ who first made contact with Earth through the leader of the Raelian religion, Rael.

⁸³ Correspondence from the Australian Tax Office to Mr Aymonier, quoted with permission by him.

⁸⁴ Church of Scientology teachings, it is alleged, include, among stories of other intergalactic activities, the Belief that intergalactic beings space-shipped their galaxy’s surplus population to Earth millions of years ago and disposed of them by burying their frozen bodies in volcanoes and blowing them up with nuclear weapons. Their ‘souls’, known as ‘thetans’ clung to the survivors causing personal problems in all subsequent human generations. These problems can only be resolved by Scientology ‘auditing’, a ritual of interview and confession undertaken with the use of an ‘E-Meter’, a lie detector device. Until the subject is ‘clear’ of their problems they cannot realise their full potential. See, e.g., Mikael Rothstein: “‘His name was Xenu. He used renegades....” Aspects of Scientology’s Founding Myth’ in James R Lewis ed, *Scientology* Oxford OUP 2009, 365.

6.3.2 Self-perception as religion

Perhaps a sign of the difficulty (and futility) in attempting to define religion is seen in the approaches of Wilson and Deane JJ in *The Church of the New Faith v. The Commissioner of Payroll Tax*,⁸⁵ outlined above. They nominated identification of a religion by, *inter alia*, the ‘empirical observation of religions’. Peter Edge points out that if recognition of acceptance as religion by the courts were broad enough, such recognition would give expression to ‘the scope and variety of religious experiences and practices. Nevertheless, this approach would mean that judges would be drawing an analogy between entities ‘without any understanding of why the analogy is to be drawn’.⁸⁶

This approach would create problems, as it distorts the focus of Freedom of Belief. Two or more matters (e.g., things, events or processes) might be dissimilar in most respects, but for the purposes of a particular legal determination, they may be considered analogous. For a judge to make an analogy, however, the matters being compared must share some ‘legally relevant characteristics’,⁸⁷ a process requiring not only observation, but analysis’.⁸⁸ It involves reasoned scrutiny of the characteristics of these matters to identify just what common feature each has to attract the legal principle in question.⁸⁹ In this case, it is argued, the principle in question is the broader goal of protecting the holding and manifesting of personal worldviews. For this purpose, the common feature of Beliefs must involve something other than self-perception as a ‘religion’.

If the law were concerned only with whether doctrines are ‘religious’, it would lose focus on the broader goals of promoting individual autonomy, dignity and freedom through Freedom of Belief as a worldview.⁹⁰ The result would be a special, or privileged, approach to such doctrines, which would be protected solely because they are

⁸⁵ *Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 174 (Wilson and Dean JJ.). See also the idea of self-perception as a religion accepted by Murphy J at 151.

⁸⁶ Edge, *Religion and Law*, 31.

⁸⁷ Ibid, 31. Edge argues persuasively that it is more legally useful to stress *religious interests*, which concentrates on the interests an individual has in particular activity (as the idea of commercial or property interests does in other situations). This recognises the ‘overarching religious guarantees ...constitute part of a broader scheme of protecting human and civil rights’ and emphasises the human-centred nature of the legal systems’ (p. 39).

⁸⁸ Ibid, 32.

⁸⁹ Ibid, 31.

⁹⁰ See section 2.8 above.

labelled 'religious'. This would devalue the life stances of atheists, agnostics and others who are not perceived as religious.

Such an approach would also impede the means to deal with life stances inspired by a mixture of tradition, 'spiritual beliefs' (whatever these may be) and religious doctrines. The broader goal of individual autonomy, dignity and self-realisation would be lost to the priority granted to exclusively religious beliefs so named. In line with Edge's reasoning on this point, then, for protection under the relevant Articles, 'metaphysical' as well as non-religious personal life stances must all be considered 'beliefs' under the relevant Articles.⁹¹

6.3.3 Special treatment of religious Belief

In contrast to equal recognition of both religious and non-religious beliefs, the attempt to make sense of the terminology of the relevant Articles and their association with notions of 'conscience' and 'religion' suggests an intention to accord religion special significance. Most commentary, although recognising that the relevant Articles refer to personal convictions, discuss 'belief' either exclusively or generally in terms of religion only.⁹² Paul Rishworth goes further, in his discussion of the incorporation of similar wording to the relevant Articles in the New Zealand *Bill of Rights Act 1990*. He concedes that '[i]t is conceivable that a bill of rights drafted for the modern secular age would not include freedom of religion' but treat all beliefs as equal.⁹³ However, he notes that the provisions appear to establish a right to manifest 'religion' and 'belief', but not a right to manifest non-religious 'thought' and 'conscience' (presuming one can draw a distinction between these). That distinction, he argues, 'simply reflects the values of the bill of rights tradition, which has long put religion in a special place'.⁹⁴

This appears to place the 'bill of rights tradition' at odds with his view of the U.S. Courts' approach to the U.S. Constitution First Amendment ensuring Freedom of Belief,

⁹¹ I propose that this is the thrust of the argument proposed by Edge, *Religion and Law*, 27-34.

⁹² E.g., Evans, *Religious Liberty and International Law*; Evans, *Freedom of Religion*; Taylor, *Freedom of Religion*. In researching this thesis, the author found little result in response to searching the word 'belief' either online or in indexes. Reference to Freedom of Belief was almost invariably referenced as 'religion'. No books characterized the right as one to 'Belief' in their title.

⁹³ Paul Rishworth, 'Coming Conflicts over Freedom of Religion' in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms*, (Wellington NZ, Brookers, 1995) 225, 257 n 37.

⁹⁴ Ibid, 230.

which he says has ‘understandably’ been concerned to avoid ‘wholesale exemptions from secular laws so as to place adherents of religion in a favoured position over others’.⁹⁵ The intention that religion is to have a pre-eminent or special role in the application of the right to Freedom of Belief is also suggested by the words of Jean-François Renucci, writing for the Council of Europe, who argued that Article 9 ECHR ‘concerns religion in particular’ and points out that it makes ‘specific reference to an individual’s religious conceptions’.⁹⁶

The view that religion is to be given special treatment is supported by the stance of religious adherents that their personal convictions *per se* are superior to others. Eduardo Peñalver, for example argues religious convictions are superior to others because it is both based on a ‘higher authority’ than the state, and is seen as having a ‘singularly all-encompassing, meaning-conferring nature’.⁹⁷

Moreover, notwithstanding the *Pretty* case, the European Court itself has shown some ambivalence toward giving special treatment to religion. In a case involving state prohibition of showing of an allegedly religiously offensive film, the Court declared that Article 9 ECHR guarantees ‘respect for the religious feelings of believers’.⁹⁸ This differs from its approach in a later case dealing with suppression of an allegedly religiously offensive film, in which the issue was regarded as one of freedom of speech, thus avoiding consideration of Article 9 altogether.⁹⁹

⁹⁵ *ibid*, 234.

⁹⁶ Renucci, *Article 9 of the European Convention on Human Rights*, 12. Indeed, despite the general acceptance of the framers of the ICCPR that Article 18 was to include non-religious convictions, ‘some still took the view that the Article was principally concerned with freedom of religion and should be read in that light’ (Malcolm Evans, ‘The United Nations and Freedom of Religion’, 40, footnote deleted).

⁹⁷ Eduardo Peñalver, ‘Treating Religion as Speech: Justice Steven’s Religion Clause Jurisprudence’ (2006) 74 *Fordham Law Review* 2241, esp. 2249ff. Also favouring the view that religious Belief is ‘special’ are Stanley Fish, ‘Mission Impossible: Settling the Just Bounds Between Church and State’ (1997) 97(8) *Columbia Law Review* 2255; Michael McConnell, ‘The Problem of Singling out Religion’ (2000) 50 *DePaul Law Review* 1; Abner Greene, ‘Is Religion Special? A Rejoinder to Scott Idleman’ (1994) 1994 *University of Illinois Law Journal* 535. For dissenting views see Steven Smith, ‘What Does Religion Have to Do with Freedom of Conscience?’ (2005) 76(4) *University of Colorado Law Review* 911; Eisgruber and Sager, ‘The Vulnerability of Conscience’; Christopher Eisgruber and Lawrence Sager, ‘Why the Religious Freedom Restoration Act is Unconstitutional’ (1994) 69(3) *New York University Law Review* 437.

⁹⁸ *Otto-Preminger-Institut v. Austria*, 20 September 1994, §47 Series A no. 295-A.

⁹⁹ *Wingrove v. the United Kingdom*, 25 November 1996, Reports of Judgments and Decisions 1996-V.

In the more recent case of *Murphy v. Ireland*,¹⁰⁰ the European Court upheld the suppression of an advertisement for a meeting to discuss the evidence of the Resurrection of Christ. The Court upheld the State's right to exercise some discretion ('margin of appreciation'¹⁰¹) as to what is 'necessary to protect public safety, order, health or morals' under Article 9(2) ECHR. It concluded that 'a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal life stances within the sphere of morals or, especially, religion'.¹⁰²

A further source of ambivalence in the language of Article 18 ICCPR is the UNHRC itself. In its statement of interpretation of Article 18 ICCPR, *General Comment 22*¹⁰³ the Committee calls for its terms to be 'broadly construed' and treats with concern discrimination against any 'religion or belief'. However, it has been argued that the UNHRC, by failing to say what a 'religion or belief' *is*, and equating 'belief' with 'religion',¹⁰⁴ encourages those implementing the right to Freedom of Belief to focus on traditional religions with institutional characteristics.¹⁰⁵ The result is that the call for the terms 'religion' and 'belief' to be 'broadly construed' loses its initial apparent broad scope in practice. Rather than conclude, as does Malcolm Evans, that the failure to clarify the meaning of the terms underlies the need for setting boundaries between them,¹⁰⁶ I believe that both terms should be considered together to amount to personal life stances. This is surely in line with the egalitarian liberal democratic society Rawls describes.

¹⁰⁰ *Murphy v. Ireland*, no. 44179/98, ECHR 2003-IX (extracts).

¹⁰¹ 'The Court has consistently held that a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision, embracing both the [state legislation limiting manifestation of Belief] and the decisions applying to it, even those given by an independent court'. *Kokkinakis v. Greece*, 25 May 1993, §47, Series A no. 260-A 1993. See also *Handyside v. the United Kingdom*, 7 December 1976, § 48 ff, Series A no. 24; *Lawless v. Ireland*, Eur. Ct. H. R. (ser. B) at 408 (1961).

¹⁰² *Murphy v. Ireland*, §67. The Court dealt with the matter under Article 10 ECHR (freedom of speech). It said 'a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion'.

¹⁰³ ICCPR *General Comment 22*, U.N. Doc. A/48/40 vol. I (1993) 208, §2.

¹⁰⁴ *Ibid*, §2.

¹⁰⁵ Evans, 'The United Nations and Freedom of Religion', 41ff.

¹⁰⁶ *Ibid*, 43.

It is perhaps not surprising that a frequent result of the emphasis on traditional religions is that governments and adjudicators may favour particular social and cultural attitudes towards or against particular religions, even if they do so unintentionally. Different ‘ideologies’ can inform judicial reasoning by the European Court,¹⁰⁷ including personal ideologies based on social, religious or other life stances (for example views on homosexuality as ‘unnatural and immoral’,¹⁰⁸ or the expression of personal opinion and experience of corporal punishment in schools.¹⁰⁹ An extreme example of an unfavourable view of the manifestation of a particular Belief is the description by Judge Valticos in his dissenting opinion in the Case of *Kokkinakis v. Greece*.¹¹⁰

Other examples are not so extreme, and include, *inter alia*, preference for traditional religious beliefs such as Christianity, Islam, Judaism, Buddhism and Hinduism, over other personal life stances.¹¹¹ Decisions that favour specific groups such as religions are made by the state administrations for the purpose of special treatment, notably tax exemptions and grants.¹¹² Preference of one personal life stance, such as religion, over another can become a judgment on whether the particular Beliefs or actions are acceptable to the society or the legal system. As an example, Jeremy Gunn censures the

¹⁰⁷ This is considered in detail in Merrills, *The Development of International Law* Ch 10.

¹⁰⁸ See, e.g., the dissenting judgement of Judge Zekia in *Dudgeon v. the United Kingdom*, 22 October 1981, §3 Series A no. 45.

¹⁰⁹ See, e.g., dissenting judgment of Sir Gerald Fitzmaurice, in *Tyrer v. the United Kingdom*, judgment of 25 April 1978, §12 Series A no. 26 who applies his own personal opinion and experience of corporal punishment.

¹¹⁰ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A. This case involved a member of the Jehovah’s Witnesses (a religion the judge disfavoured) who visited a household to discuss his religious views and was subsequently convicted of unlawful proselytism (attempting to undermine a person’s religious beliefs through inducement, fraud or unfair advantage). The alleged ‘victim’, the wife of a cantor in the Greek Orthodox Church, stated that the 15-minute discussion did not influence her Beliefs. Judge Valticos in his dissenting judgment at, §10 described the accused’s actions as those of a ‘militant hardbitten adept of proselytism...an experienced commercial traveller and cunning purveyor of a faith he wants to spread...whose earlier convictions have served only to harden him in his militancy’ who ‘swoops’ on his victim, ‘trumpets’ good news...expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness...’

¹¹¹ Gunn, ‘The Complexity of Religion’. See also section 6.3.1 above.

¹¹² Jeremy Gunn, points out examples of purposes for identifying religions, such as

- whether an entity is a ‘religion’ or ‘religious association’ for purposes of granting legal personality, obtaining tax benefits, or limiting the personal liability of the organizers;
- whether someone has ‘religious’ Beliefs for the purpose of obtaining conscientious objector status; or
- whether someone should be exempted from a law of general applicability on the grounds of religious Belief (e.g., a Sikh motorcyclist being exempted from a requirement to wear a helmet or a Muslim or Jewish slaughterhouse being permitted to kill animals in accordance with ritual laws): 191 fn 14.

European Court for refusing to ‘criticise the [Greek] law that had been used to incarcerate minority believers’.¹¹³

There is evidence of state bias in favour of state-endorsed religions through suppression of non-established religions. For example, in 1996 the European Court pointed out that ‘numerous’ cases showed that the Greek State tended to impose ‘rigid, or indeed prohibitive conditions on practice of religious beliefs by particular non-Orthodox movements, in particular Jehovah's Witnesses’

and that:

...the extensive case-law in this field seems to show a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.¹¹⁴

6.4. The meaning of ‘belief’

Despite the ambivalence noted above, there is a clear intention repeatedly expressed by both the U.N. and the European adjudicative bodies that ‘belief’ is to be given a broad and inclusive meaning.

6.4.1 The U.N. and the Belief Declaration

Apart from the broad approach to the term ‘religion or belief’ already described, the Belief Declaration, adopted by the U.N. in 1981, gives a strong indication of the intention (on paper at least) to give a broad definition to ‘beliefs’. The right to adopt or change one’s religion or belief of one’s choice was omitted from Article 1 at the behest of some Islamic states. In the final document, however, a broad approach to ‘religion or belief’ was established. This occurred by the inclusion of the word ‘whatever’ before

¹¹³ T Jeremy Gunn, ‘Adjudicating Rights of Conscience under the European Convention on Human Rights’ in Joan van der Vyer and Johan Witte (eds), *Religious Human Rights in Global Perspective*, (The Hague, Martinus Nijhoff, 1996) 305, 325. (Gunn believes the Court allows too wide a margin of appreciation to states in their restriction of religious practices). An example of the state persistently and arbitrarily refusing to register an association as a religious association can be found in the case of *Church of Scientology Moscow v. Russia*, no. 18147/02, 5 April 2007.

¹¹⁴ *Manoussakis and Others v. Greece*, 26 September 1996, Reports of Judgments and Decisions 1996-IV. §41ff. See, also, e.g., *Penditis and others v. Greece*, No 23238 Rep 1996, §34-39 and *Tsavachidis v. Greece* (striking out) [GC], no. 28802/95, 21 January 1999. These cases ended in a friendly settlement, with the Court finding breach of Article 9 and claimants allowed to practice their religion.

‘belief’, to stipulate that freedom of thought, conscience and religion ‘shall include freedom to have a religion or *whatever* belief of his choice’.¹¹⁵ Again ‘belief’ is not defined, but the Preamble describes ‘religion or belief’, for anyone who professes one, as constituting ‘one of the fundamental elements in his conception of life’. Article 8 of the Declaration goes on to provide that:

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenant on Human Rights.

The Declaration thus invokes the rights contained in Article 18 UDHR and ICCPR, the former allowing adoption and change of ‘religion or belief’, the latter omitting such a right.

While this discrepancy in the wording of the different documents has been held to be another source of ambivalence as to what is being protected by the relevant Articles by throwing doubt on whether one can change one’s religion,¹¹⁶ Odio Benito, one-time Special Rapporteur on the Right to Freedom of Religion and Belief sought to clarify this. She has stated that the relevant provisions of the UDHR, ICCPR and the Belief Declaration all provide that individuals have the right to ‘leave one religion or belief and to adopt another or to remain without any belief’. She goes on to claim that this right is ‘implicit in the right to freedom of thought, conscience, religion and Belief, regardless of how that concept is presented’.¹¹⁷

¹¹⁵ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* GA Res. 36/55 of 25 November 1981, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51, 1981, Article 1, italics added.

¹¹⁶ See, e.g., Malcolm M. Evans, *Religious Liberty and International Law* 238, who argues that Article 8 ICCPR does not ensure the right to change ‘religion or belief’. It invokes the UDHR (which includes the right to change Belief) and the ICCPR (which weakens it to the right to ‘hold’ a Belief). However, he maintains, the decision of the General Assembly to omit the right to change Belief from the *Belief Declaration* casts doubt on the terms of the UDHR, as it indicates the General Assembly’s revised approach to Freedom of Belief. He concludes that the *Belief Declaration* has had a negative impact on the understanding of the meaning of religion, by ‘adding doubt rather than lending certainty’ (ibid).

¹¹⁷ E.Odio Benito, Human Rights Study Series No 2, U.N. Sales NO E.89.XIV.3, ‘Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on grounds of Religion or Belief’ (1989), §21 quoted in Tahzib, *Freedom of Religion and Belief* 168, n342.

6.4.2 The U.N. and *General Comment 22*

The U.N. has further expressed its intention to cover convictions other than religious beliefs in *General Comment 22* of 1993.¹¹⁸ It stated there that the right to freedom of thought, conscience and religion (which includes the right to ‘have or adopt a religion or belief’) ‘is far-reaching and profound; it encompasses freedom of thought on all matters, personal life stance and the commitment to religion or belief...’¹¹⁹ Moreover, the *General Comment* states that Article 18 ICCPR ‘protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief’ and is ‘not limited in its application to traditional religions or to religions and convictions with institutional characteristics or practices analogous to those of traditional religions’.¹²⁰ The terms ‘belief’ and ‘religion’ are to be broadly construed’,¹²¹ and Article 18 ‘does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice’. Further, ‘[t]hese freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1’.¹²² It is contended here that the strength of the language used does express the overall intention to give equal protection to all personal life stances as defined above.

The view that the U.N. intends equal protection for all ‘beliefs’ as personal life stances gains further credence from its preparatory deliberations on the *General Comment 22* in the UNHRC. There it noted the U.N.’s intention, firstly, that freedom of religion did not have a higher status than freedom of thought, conscience and Belief, and, secondly, that the freedoms in Article 18 ICCPR include all personal convictions, religious or otherwise.¹²³ Paragraph 5 of *General Comment 22* reinforces the equality of all personal life stances by emphasising that the right to change from one religion or belief to another

¹¹⁸ ICCPR *General Comment 22*, U.N. Doc. A/48/40 vol. I (1993) 208.

¹¹⁹ Ibid, §1.

¹²⁰ Ibid, §2.

¹²¹ Ibid.

¹²² Ibid, §§2, 3.

¹²³ Tahzib, *Freedom of Religion and Belief*, 313 quoting U.N. Doc CCPR/C/SR.1162, § 37 (Müllerson), §35 (El-Shafei), §37 (Chanet), §39 (Lallah). It is perhaps also instructive to note that in the original French version of drafts of Article 18, the French term *croyance* was used – a term that is associated with religion or faith. However later versions adopted the French term *conviction*, which, as does its English counterpart, allows for the inclusion of other matters.

is covered by Article 18 ICCPR, and applying Article 18 equally to religious and non-religious Belief.

6.4.3 The European Council and the ECHR

The intention behind Article 9 ECHR has been expressed as similarly broad. The Council of Europe used the UDHR as the model for the ECHR, adopting the same wording. The *travaux préparatoires* of those responsible for drafting the ECHR (the Consultative Assembly) are of limited assistance, as published records are incomplete.¹²⁴ From the evidence available, it seems that religion was a specific focus of discussion, with the Christian religion given predominance.¹²⁵

Notwithstanding this, the final wording in the consultative Assembly's recommendation to the Council of Ministers was to include in the Convention a 'right to freedom of thought, conscience and religion as laid down in Article 18 of the Declaration of the United Nations'.¹²⁶ This proposal was accepted without mention in the debate before the Assembly, and while the Committee of Experts then charged with drafting the Convention accepted the right to Freedom of Belief as set out in the UDHR,¹²⁷ the question of limitation was subject to some dissension and debate.¹²⁸ This dissension was based on different political and religious views of the participating nations, and is significant in the evolution of the right to manifestation of Belief, dealt with in Chapter 8.

6.4.4 Case law: U.N.

The primary reason for the adjudicative bodies not defining the terms 'thought', 'conscience', 'religion' and 'belief' is probably to engender consensus in the outcome of cases without dissenting opinions.¹²⁹ Nevertheless, the majority of decisions that directly address the question of what is covered by Freedom of Belief quite clearly indicate a

¹²⁴ See Carolyn Evans, *Freedom of Religion*, 38ff.

¹²⁵ Ibid.

¹²⁶ *Travaux préparatoires* vol 1 at 174, First Session of the Consultative Assembly.

¹²⁷ It is noted that *General Comment* 22 was finalised much later.

¹²⁸ See, for an account of the drafting of the ECHR M. Evans, *Religious Liberty and International Law*, 262-272. See Carolyn Evans, *Freedom of Religion* 38ff.

¹²⁹ Radan, 'International Law and Religion', 13. He points out that dissenting opinions have become more common in recent years and proposes that 'they are often more valuable for analytical purposes than the joint decision of the remaining members of the UNHRC' (ibid).

broad and inclusionary approach to what is protected by the relevant Articles. For example, despite the lack of a clear definition of what is covered by Article 18 ICCPR by the UNHRC in the cases of *M.A.B., W.A.T. and J.A.Y.T. v. Canada* and *MA v. Italy* (described above at section 6.2.3), one can conclude from these cases that the UNHRC approach is consistent with the view that ‘belief’ is more than a simple opinion. It involves a broader, consistent and comprehensive world-view.¹³⁰

Malcolm Evans points out that while the case law of the UNHRC provides little assistance for forming a definition of ‘religion or belief’, it has adopted *General Comment 22* as an authoritative statement of its understanding of Article 18. However, he goes on to argue that the Committee has ‘failed to distinguish adequately the right to freedom of thought, conscience and religion and the question of discrimination on these grounds.’¹³¹ The result is that there is little said about the ‘core meaning of Article 18’.¹³² The danger herein is a risk of discrimination between one recognised ‘religion or belief’ and another, as well as denial of the rights of those of minority religions and Beliefs.¹³³

6.4.5 Case Law: ECHR

The general approach to interpretation of the Convention by the European Commission and Court has led to a broad understanding of what is protected by Article 9 ECHR. From its earliest judgments, the European Commission considered the Convention to be a ‘living document’, to be interpreted according to the conditions and social standards of the time of consideration of each case.¹³⁴ The European Commission and subsequently the European Court have adopted what Merrills calls the ‘effectiveness principle’ in their approach to interpretation of treaties. That is, an approach that gives the provisions

¹³⁰ By emphasising the exclusivity of the worship of marijuana, the UNHRC is leaving open the question of acceptance of Belief systems with broader world views, but which use marijuana to assist meditation. See, e.g., *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where the Supreme Court of the U.S. held that religious Beliefs will not excuse a person from general, impartial laws governing conduct the State is free to regulate.

¹³¹ M. Evans, *Religious Liberty and International Law*, 208.

¹³² Ibid, 209.

¹³³ Ibid, 210.

¹³⁴ *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, §31; George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21(3) *The European Journal of International Law* 509, 541.

of a treaty ‘the fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning’.¹³⁵

This ‘effectiveness principle’ was expressed by the European Court in *Wemhoff v. Germany*, in which it held that any interpretation of the ECHR should be ‘most appropriate’ in order to ‘realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties’.¹³⁶ The various adjudicative organisations have also taken a generous approach to the principle of interpretation set out in Article 31 of the *Vienna Convention on the Law of Treaties*.¹³⁷ This has resulted in the European Court’s approach being one of the most judicially active ‘in the field’.¹³⁸ In effect, George Letsas has argued, the Vienna Treaty has:

...played very little role in the ECHR case law and...the Court’s interpretive ethic has been very dismissive of originalism and literal interpretation. The Court has instead opted, albeit not consistently, for the moral reading of the Convention rights.¹³⁹

¹³⁵ Merrills, *The Development of International Law*, 89, Ch 10.

¹³⁶ *Wemhoff v. Germany*, 27 June 1968, p 19, §8 Series A no. 7. This case involved the need to choose between different interpretations of Article 5(3) ECHR (providing for prompt appearance before the court on arrest and trial within a reasonable time) where the complainant had been arrested in November 1961 and held on remand until his trial in April 1965.

¹³⁷ Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331. Article 31 provides that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. This consists of the text, including its preamble and annexes; any agreement between the parties relating to the treaty; any instrument in connection with the conclusion of the treaty accepted by the other parties as an instrument related to the treaty; any subsequent agreement between the parties regarding interpretation or application of its provisions; subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; relevant rules of international law; and any special meaning given to a term.

¹³⁸ Merrills, *The Development of International Law* 229: ‘Judicial activism’ is used to describe an approach that eschews strict construction of the law and seeks to produce the most desirable result envisaged by the underlying principle of a law – ‘doing justice in individual cases and, more generally, keeping the law up to date’, at 210. Letsas, ‘Strasbourg’s Interpretive Ethic’, states that the Court has rejected originalism, and rather than following the textual meaning or determining the drafters’ intentions, has ‘paved the way for the development of the doctrines of *autonomous concepts* and *evolutive interpretation*’: 520, (emphasis original). He calls this a ‘moral reading’ of the ECHR (at 512).

¹³⁹ Letsas, ‘Strasbourg’s Interpretive Ethic’, 512 (footnote deleted).

The Court has considered prevailing social values in Europe¹⁴⁰ and referred to texts adopted by other Council of Europe organisations, as well as practice of the International Labour Organisation,¹⁴¹ to promote consistency with other international *fora*.

Ambiguity and contradictions, especially in relation to non-religious Beliefs, have often occurred more through default than detailed consideration. In most cases where breach of Article 9 of the ECHR has been invoked, the European bodies have tended to avoid considering whether the applicant's actions were actually based on a 'religion or belief' by presuming they *were*, and proceeding immediately to consider whether, as manifestations of such Belief, any demonstrated state interference was permissible under Article 9(2). This, it has been argued, prevented adequate clarification of what actions constitute manifestations of a Belief, by bringing them under the protection of Article 9 ECHR.¹⁴²

The first case to determine the coverage of Article 9 ECHR was *Kokkinakis v. Greece*, which gives a formal indication of this expansive approach. There the European Court held that Article 9 ECHR 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 for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

¹⁴³

¹⁴⁰ E.g., it considered the operation across European countries of enforcement procedures in *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; attitudes to homosexuality in *Dudgeon v. the United Kingdom*, 22 October 1981, §60, Series A no. 45; and the death sentence in *Soering v. the United Kingdom*, judgment of 7 July 1989, §102, Series A no. 161.

¹⁴¹ *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993, Series A no. 264, (a case dealing with freedom of association). See also *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A, no. 173, §§36-42 (a case dealing with freedom of speech).

¹⁴² See, e.g., Gunn, 'Adjudicating Rights of Conscience', 315; Martínez-Torrón and Navarro-Valls, 'The Protection of Religious Freedom', 215.

¹⁴³ *Kokkinakis v. Greece*, 25 May 1993, §31, Series A no. 260-A.

This principle has been entrenched in ECHR law, and the dimensions of Article 9 ECHR have been further established in later cases.¹⁴⁴ Jean-François Renucci, in an official Council of Europe publication on Article 9 ECHR, has stated (albeit enigmatically), that Article 9 applies to ‘all personal, political, philosophical, moral and of course religious beliefs and life stances’. It includes, he argues, ‘philosophical ideas and conceptions of all kinds, with specific reference to an individual’s religious conception and his own way of perceiving his social and private life’.¹⁴⁵ Despite his reference to preferential treatment of religion, his language is unmistakably inclusive.

As well as automatically including mainstream Christian religions, the ECHR bodies have held the following to be protected: Judaism,¹⁴⁶ Islam,¹⁴⁷ Hinduism,¹⁴⁸ Jehovah’s Witnesses,¹⁴⁹ the Divine Light Zentrum,¹⁵⁰ the Salvation Army¹⁵¹ and the Church of Scientology,¹⁵² while avoiding exhaustive consideration of their religiosity – possibly because of the inclusiveness assigned the term ‘religion or belief’.¹⁵³ Among the non-church-based Beliefs that have been held admissible for consideration have been ethical

¹⁴⁴ See, e.g., *Buscarini and Others v. San Marino* [GC], no. 24645/94, §114, ECHR 1999-I, recently referred to in *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §90, ECHR 2003-II. In relation to the ICCPR, see §22.

¹⁴⁵ Renucci, *Article 9 of the European Convention on Human Rights*, 12 (footnotes deleted). In the context of this statement, and of the European bodies’ decisions, it is suggested that Renucci means that the ideas and conceptions are to constitute personal convictions. He refers to *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5 (1978), which dealt with pacifism, as an example of a ‘philosophical’ conviction, and describes the term as applying to ‘an individual’s conception of life and, more specifically, of man’s behaviour in society’ (at 12, n 13). He refers to *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44 in relation to private life.

¹⁴⁶ *D. v. France*, App. No. 10180/82 (1983) 35 D&R 199.

¹⁴⁷ *Ahmad v. the United Kingdom*, App. No. 8160/78, 22 Eur. Comm’n H.R. Dec. & Rep. 27 (1981).

¹⁴⁸ *ISKCON and others v. the United Kingdom* App. No. 20490/92, 76-A Eur. Comm’n H.R. Dec. & Rep. 41(1994).

¹⁴⁹ E.g., *Kokkinakis v. Greece*, 25 May 1993, §31, Series A no. 260-A; *Valsamis v. Greece*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.

¹⁵⁰ *Omkananda and the Divine Light Zentrum v. Sweden* App. No. 8118/77, 25 Eur. Comm’n H.R. Dec. & Rep. (1981) 105.

¹⁵¹ *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 57, ECHR 2006.

¹⁵² *X and Church of Scientology v. Sweden*, App. No. 7805/77 16 Eur. Comm’n H.R. Dec. & Rep (1979) 68 .

¹⁵³ See Knights, *Freedom of Religion*, 41.

or philosophical life stances such as opposition to abortion,¹⁵⁴ pacifism,¹⁵⁵ membership of the Communist Party,¹⁵⁶ atheism¹⁵⁷ and choice of children's forenames.¹⁵⁸

The European Court has ruled out cultural or language preferences stating that '[b]y religious and philosophical life stances are meant those ideas on the world in general and human society in particular that each man considers the most true in the light of the religion he professes and the philosophical theories he adopts'.¹⁵⁹ As noted, political ideologies have generally been dealt with as issues of freedom of speech or assembly.¹⁶⁰

The view that Article 9 ECHR applies to a broad range of Beliefs is to be found to in the European Court's approach to Protocol 1, Article 2 ECHR ('P1-2'). P1-2 provides that:

No person shall be denied the right to education. In the case of any functions that it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical life stances.

The relationship of P1- 2 and Article 9 ECHR has created difficulties for the European bodies, as there is a potential conflict between the right of children to an education provided by the state, and the right of parents to determine the nature of education.¹⁶¹

Nevertheless, the use of the term 'conviction' in respect of Article 9 ECHR is supported by the European Commission's interpretation of the term 'philosophical convictions' in

¹⁵⁴ *The Norwegian State Church, Knudsen v. Norway* App. No. 11045/84, 42 Eur. Comm'n H.R. Dec. & Rep. 247 (1985); *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, Series A no. 139.

¹⁵⁵ *ISKCON and others v. the United Kingdom* App. No. 20490/92, 76-A Eur. Comm'n H.R. Dec. & Rep. 41(1994).

¹⁵⁶ *Hazar, Hazar and Açık v. Turkey*, App. No. 16311, 16312, 16313/90 (joined) (admissibility), 72 Eur. Comm'n H.R. Dec. & Rep. 200 (1991).

¹⁵⁷ *Angeleni v. Sweden*, App. No.1 0491/83 (1986) 51 D&R 41.

¹⁵⁸ *Salonen v. Finland* App. No. 27868/95 (Eur Comm HR) 2 July 1997.

¹⁵⁹ Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, p.98, Series A no. 6.

¹⁶⁰ *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 58, Reports of Judgments and Decisions 1998-I; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

¹⁶¹ See, e.g., the discussion on this issue in Taylor, *Freedom of Religion* 165ff; Kjeldsen, Busk Madsen and Pedersen v. Denmark, judgment of 7 December 1976, Series A no. 23; Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, Series A no. 6.

Campbell and Cosans.¹⁶² There the Commission was dealing with the meaning of the term ‘philosophical convictions’ for the purposes of P1-2. It stated in its Report to the European Court that:

...as a general idea, the concept of “philosophical convictions” must be understood to mean those ideas based on human knowledge and reasoning concerning the world, life, society, etc., which a person adopts and professes according to the dictates of his or her conscience.¹⁶³

This approach was endorsed by the European Court decision in the case, which related ‘convictions’ with ‘Beliefs’ in the following way:

In its ordinary meaning the word “convictions”, taken on its own, is not synonymous with the words “opinions” and “ideas”, such as are utilised in Article 10 (art. 10) of the Convention, which guarantees freedom of expression; it is more akin to the term “beliefs” (in the French text: “convictions”) appearing in Article 9 ...which guarantees freedom of thought, conscience and religion – and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.¹⁶⁴

Thus, the term ‘belief’, for the purposes of Article 9 ECHR at least, has been specifically aligned with the term ‘conviction’, which is given a similar meaning. In this way, the European Commission and Court have inclined towards an *inclusive* rather than an *exclusive* focus on what is considered admissible for consideration. However, while it held that while a light worshipper failed to provide adequate evidence of his Beliefs¹⁶⁵ and a self-proclaimed Wiccan failed to satisfy the Commission of the existence of the Wiccan religion,¹⁶⁶ the Commission did not clearly set out just what evidence is required

¹⁶² *Campbell and Cosans v. the United Kingdom*, Apps Nos 7511 /76 and 77 3/76, Report of the Commission (Adopted on 16 May 1980).

¹⁶³ *Ibid*, §92.

¹⁶⁴ *Campbell and Cosans v. the United Kingdom* Court judgment of 25 February 1982, Series A no. 48, §36. Steven Smith, in discussing the importance of protecting Belief, draws the distinction between ‘inert or unacted upon Belief’ and ‘*living, active, embodied Belief*’. It is the latter, he argues, that ‘makes U.S. the persons we are’ and it is that personhood which is protected by the right to Freedom of Belief: Smith, ‘What Does Religion Have to Do with Freedom of Conscience?’, 932-3.

¹⁶⁵ *X v. the Federal Republic of Germany*, App. No. 445/70, 37 Collection 119, 122, (1970).

¹⁶⁶ *X v. the United Kingdom*, App. No. 7291/75, 11 Eur. Comm’n H.R. Dec. & Rep. 55 (1977).

in such cases. The European Court has tended to leave the domestic courts to determine this. The House of Lords in *Regina ex parte Williamson v. Secretary of State for Education and Employment*,¹⁶⁷ for example, has ruled that so long as a claimant holds a Belief, no matter how unreasonable, they should be ‘given the benefit of the doubt’.¹⁶⁸

Additionally, where Beliefs are non-religious, the situation is not quite so clear. The Commission and Court have required that they relate to well-established schools of thought, such as pacifism¹⁶⁹ atheism,¹⁷⁰ and communism.¹⁷¹ A personal conviction is more likely to be accepted if it is supported by an established association.¹⁷² Even so, the European Commission has applied a narrow, religion-based distinction between permissible and non-permissible associations.¹⁷³ Thus an association of doctors opposing abortion was held to be protected by Article 9 ECHR because, while it was neither a religious body nor one promoting a particular world-view, its cause was one that stemmed from religious life stance.¹⁷⁴

The question of whether a cause stemming from a *non-religious* life stance (other than conscientious objection to military service) has not been directly addressed, but it seems unlikely such a cause would be considered a ‘Belief’, thus demonstrating a bias towards religious Belief. The *Pretty* case discussed above is perhaps an example of such a cause. In another case the aim of accessing prisons to give free legal advice to prisoners, although it was idealistic, was held not be considered a ‘belief’ for purposes of Article 9 ECHR.¹⁷⁵ Where an individual claims a non-religious ‘belief’, the matter is most likely to be held to fall outside Article 9 ECHR.¹⁷⁶ Accordingly, the European Commission has

¹⁶⁷ *Regina ex parte Williamson and others v. Secretary of State for Education and Employment and Others*, [2005] UKHL 15.

¹⁶⁸ Knights, Freedom of Religion, 42.

¹⁶⁹ *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5 (1978).

¹⁷⁰ *Angeleni v. Sweden*, App. No. 10491/83, 51 Eur. Comm’n H.R. Dec. & Rep. 41(1986).

¹⁷¹ *Hazar, Hazar and Açik v. Turkey*, App. No. 16311, 16312, 16313/90 (joined) (admissibility), 72 Eur. Comm’n H.R. Dec. & Rep. 200 (1991); *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I.

¹⁷² M. Evans, *Religious Liberty and International Law*, 289ff. There is little guidance on this issue: see, e.g., *Ibid*, 289ff.

¹⁷³ *Ibid*, 292ff.

¹⁷⁴ *Plattform Ärzte für das Leben v. Austria* (Ser. A) App. No. 139 (1988) ECHR This can be contrasted with the case of *Pretty*, see above section 6.2.4.

¹⁷⁵ *Vereniging Utrecht v. the Netherlands*, App No. 11308/84, 46 DR 200 (Dec. 1986) ECHR.

¹⁷⁶ See, e.g., M. Evans *Religious Liberty and International Law*, 292.

avoided direct consideration of the question and declared the refusal to wear prisoner garb by applicants considering themselves political prisoners as unrelated to Article 9 ECHR.¹⁷⁷ It addressed the issue more directly where it held an applicant's wish to have his ashes scattered in his garden was not a 'coherent view on fundamental problems'.¹⁷⁸

Action based on religion or belief thus generally attracts the protection of other rights, such as freedom of speech or assembly, which are subject to similar limitations to freedom to manifest Belief.¹⁷⁹ Freedom to manifest Belief protects specific activities, that is, worship, observance, practice and teaching, the first three of which are usually, but, it is suggested, not exclusively, activities most likely to apply to religion.¹⁸⁰ Freedom of expression (Articles 19 ICCPR and 10 ECHR), and freedom of assembly and association (Articles 21 and 22 ICCPR, and 10 and 11 ECHR) are more likely to be applicable to non-religious Beliefs.

If one compares the permitted limitations that apply to these different rights (set out in the following Table) there seems to be little difference between them, except for additional grounds for limiting freedom of expression, which could be held to included in limitations placed on freedom of Belief anyway. This makes them interdependent elements of a holistic means of self-realisation based on thought, worldviews and their expression or manifestation. Consequently, complaints under the ICCPR or ECHR, alleging violation of several rights, including the right to Freedom of Belief, are often considered as matters of freedom of speech, assembly or association issues, rather than Belief.¹⁸¹

¹⁷⁷ In *McFeeley et al. v U.K.*, App. No 8317/78, 20 DR 44 (Dec. 1980), 76. The Court did not address the issue of whether the applicant had a 'belief' under Article 9, but held that he had not shown that not wearing prison clothes was required by his belief.

¹⁷⁸ *X v. Federal Republic of Germany* App. no. 8741/79, 24 DR 137.

¹⁷⁹ That is, limitations set out in Articles 18, 19, and 21 ICCPR, and Articles 9, 10 and 11 ECHR.

¹⁸⁰ However, non-religious groups have 'civil ceremonies' such as ceremonies for naming, coming of age, marriage and funerals. These are yet to be recognised as 'manifestations' of Belief.

¹⁸¹ E.g., *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II. When the state dissolved a political party that espoused the imposition of theocracy, the complainant members alleged, *inter alia*, breach of Freedom of Belief, expression, association and assembly (Articles 9, 10 and 11 ECHR). Because their aims were political, albeit based on religious Belief, the Court considered the case primarily as one of freedom of association. Finding no breach of Article 11 ECHR, the Court declared unnecessary a separate examination of complaints under other Articles of ECHR.

**TABLE 7: PERMISSIBLE LIMITS TO RIGHTS TO FREEDOM OF BELIEF,
EXPRESSION & ASSEMBLY**

	Freedom of Religion, Belief Expression Association Assembly	Freedom to manifest religion or belief		Freedom of expression		Freedom of assembly and association	
Limitations permitted where they are:	UDHR Art. 29	ICCPR Art. 18	ECHR Art. 9	ICCPR Art. 19	ECHR Art. 10	ICCPR Arts 21, 22	ECHR Art. 11
Prescribed by law.	✓	✓	✓	✓	✓	✓	✓
Necessary in a democratic society.			✓		✓	✓	✓
For interests of public safety.		✓	✓		✓	✓	✓
For protection of public order.	✓	✓	✓	✓		✓	
For protection of (public) health.		✓	✓		✓	✓	✓
For protection of (public) morals.	✓	✓	✓	✓	✓	✓	✓
For protection of the rights and freedoms of others.	✓	✓	✓	✓	✓	✓	✓
In interests of national security.				✓	✓	✓	✓
For territorial integrity.					✓		
For prevention of disorder or crime.					✓		✓
For protection of the reputation of others.				✓	✓		
For preventing disclosure of information received in confidence.					✓		
For maintaining judicial authority & impartiality.					✓		
For general welfare in democratic society.	✓						

It thus seems that interpretations of the Freedom of Belief Articles, both those of the adjudicative bodies and academics, amount in practise to using the term ‘belief’ interchangeably with ‘religion’, as religion *is* a form of Belief, a product of thought and a generator of conscience. The right to Freedom of Belief can become inextricably

interwoven with the right to freedom of expression assembly and association. These rights become a part of the right both to believe and to manifest Belief.

6.5 Conclusion

It is argued in this Chapter that the ordinary meaning of the terms ‘thought’ ‘conscience’ ‘religion’ and ‘belief’ in the relevant Articles have been held by the adjudicative bodies to denote a comprehensive personal life stance, religious or otherwise, attaining ‘a certain level of cogency, seriousness, cohesion and importance’.¹⁸² Freedom of Belief has been interpreted in many cases to that effect. However, the use of the terms ‘conscience’ ‘religion’ and ‘belief’ has introduced unnecessary complexity into the right to adopt or change a ‘religion or belief’. This infusion of religion into the relevant Articles, has contributed to a two-tiered approach in the interpretation of what is protected: ‘religion’ and other ‘belief’, with pre-eminence often given to the protection of religion through establishment of state religions and the advantages and privileges religious organisations and their members enjoy.¹⁸³

Clarification of the relevant Articles is necessary to facilitate the implementation of Freedom of Belief in accordance with its goal as an element of liberal democracy. Consistent with Rawls’s paradigm, the words in the term ‘religion or belief’ should be taken together to mean ‘personal life stances’ in the sense outlined above. Whether a personal life stance can be categorised as ‘metaphysical’, ‘spiritual’ or purely rational is not critical to establishing the existence of that life stance. In Rawls’s terms, this would separate the ‘background culture’ of comprehensive doctrines from the political conception of justice that feeds the notion of public reason.

Such an approach, I maintain, serves governments and courts in their quest for preserving and enhancing human dignity and autonomy better than employing narrow historical and isolationist views based on semantics.

¹⁸² *Campbell and Cosans v. the United Kingdom* Court judgment of 25 February 1982, Series A no. 48, §36.

¹⁸³ The adjudicative bodies accept reference to God in states’ constitutions, state-established churches, collection by the government of church taxes, exemption from taxes for religious organisations and clergy, state funding of church schools and exemption from laws of general application on the ground of religious Belief. See, e.g., Gogineni et al ‘Humanism and Freedom from Religion’, 699; Hamilton *God vs. the Gavel*, chaps 1-7.

On the above reasoning, I conclude, the view that religious freedom is pre-eminent over freedom of other Beliefs cannot be sustained. This interpretation also means that ‘religion or belief’ may be distinguished from ‘ideas’ and ‘opinions’, which are protected by Articles 19 ICCPR and 10 ECHR. The distinction is not to be drawn between religious Beliefs (Articles 18 ICCPR and 9 ECHR), and non-religious Beliefs (Articles 19 ICCPR and 10 ECHR) it is suggested. It is to be drawn between having and manifesting religious or other Beliefs (in worship, observance, practice or teaching) and expression, association and assembly in relation to all ideas and opinions (of whatever nature and including Beliefs).¹⁸⁴ This interpretation is supported not only by the logic of the wording, but, as has been demonstrated, by the decisions of the adjudicative bodies themselves.

Carolyn Evans suggests that, consequent on their definition of ‘religion or belief’, the adjudicative bodies have adopted a restrictive interpretation of what constitutes the practice of ‘religion or belief’. This, she says, has led to protection under the Convention extending only to ‘manifestations that are highly analogous to Christian beliefs’, disproportionately affecting minorities ‘whose practice may be less familiar to the Court’, thus ‘while manifestation of religion or belief has been given more teeth than the internal Freedom of Belief, it has very limited scope and provides little protection to non-traditional forms of practice’.¹⁸⁵ This argument will be considered in the discussion of manifestation of Belief, particularly in Chapter 8.

Chapter 7, firstly, looks at what it means to ‘have or adopt’ a Belief.

¹⁸⁴ See, e.g., Nickel, ‘Who Needs Freedom of Religion?’, 957: ‘Liberties to inquire, believe, and doubt cover all propositions, not just some favoured set.’

¹⁸⁵ Evans, *Freedom of Religion*, 132. See also Evans, *Religious Liberty and International Law*, 291ff.

CHAPTER 7

WHAT IS PROTECTED IN HAVING OR ADOPTING A BELIEF?

7.1 Introduction

Having argued that the relevant Articles are to be interpreted widely to apply to both religious and non-religious Belief, in this Chapter I turn to the second right to which these Articles apply. That is, the right to have, adopt and change one's 'religion or belief'.

The case is made below that to understand the approach of the adjudicative bodies to Freedom of Belief, it is necessary to recognise that they draw a clear distinction between

- (a) the purely 'internal' mental processes of thought (recognised as the absolute right to 'have and adopt' thought, conscience and Belief); and
- (b) the 'external' expression of those processes in outward behaviour.

Some commentators dispute this particular division between thought and action, claiming that having or adopting a particular Belief necessarily entails some kinds of Belief-generated action, as it founds a way of living.¹ Furthermore, they claim that the absolute right to have or adopt 'thought, conscience and religion' has been held by the European Court to protect the *forum internum* – a broad but undefined category of actions and lifestyle that they argue form a core element of having or adopting a Belief.² This has led to the conclusion that the absolute right to thought, conscience and religion thus provides protection from legal obligations that conflict with individual conscience.³

¹ See, e.g., Taylor, *Freedom of Religion*, 115ff; Evans, *Freedom of Religion*, 74ff. Martínez-Torrón and Navarro-Valls, indicate they favour a similar approach in 'The Protection of Religious Freedom', at p. 228.

² Protection of the *forum internum* has been held to include 'freedom from certain forms of coercion to act contrary to one's Beliefs, freedom from being required to reveal one's Beliefs, and protection against the imposition of penalties for holding certain Beliefs': Taylor, *Freedom of Religion*, 20; Tahzib, *Freedom of Religion and Belief* extends the *forum internum* to discrimination, see p. 26; Evans, *Freedom of Religion*, 72ff.

³ E.g., Taylor, *Freedom of Religion*, 120.

‘Conscientious objection’ here refers to not only objection to military service, but also the claim to ‘the right to refuse a legal duty in the name of individual conscience’.⁴

The basic principles established by the adjudicative bodies are critical to understanding their approach to the distinction between having and manifesting Beliefs. Arguments for and against the approach outlined above are considered here, with an examination of case law. I conclude that, when considering Freedom of Belief, the claim that thought and action are indivisible is inconsistent with the principles of Rawls’s model of political liberalism, and is, moreover, contrary to the approach generally adopted by the adjudicative bodies.

The broad interpretation of the scope of the relevant Articles as outlined in Chapter 6 leaves undetermined the distinction between thought and action in relation to Freedom of Belief. It is proposed that establishing just where the distinction lies is also critical in understanding Article 18(2), which provides that ‘[n]o one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice’. If having or adopting Freedom of Belief involves certain action, this needs to be clarified.

It will be argued, adopting the approach of Malcolm Evans rather than the authors cited above, that the adjudicative bodies and others have clearly established that the right to have or adopt a Belief of one’s choice is to be *narrowly* interpreted, the *forum internum* being restricted to protection from indoctrination that violates the individual’s voluntary control of his or her religious and philosophical Beliefs.⁵

7.2 The nature of ‘conscience’

As noted in Chapter 6, the term ‘conscience’ has not been authoritatively legally defined for the purpose of the relevant Articles. The adjudicative bodies rely on generally accepted non-religious notions of what the term ‘conscience’ involves. Non-religious notions of ‘conscience’ hold, for example, that it is the faculty that determines the moral value of one’s actions or motivations, deprecating what is considered wrong, and

⁴ José de Sousa e Brito, ‘Conscientious Objection’ in Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004) 273, 273.

⁵ Evans, *Religious Liberty and International Law* 294-6.

endorsing what is right. It leads to feelings of self-reproach when one does, or contemplates, wrong.⁶

Noel Preston notes that '[c]ultivating a mature ethical life involves the development of an internalized moral authority (*conscience*) or sense of inner direction which is obeyed autonomously, while taking into account the ethical views of others'.⁷ I have stated elsewhere that the study of ethics is:

...the study of rational processes for determining a course of action, in the face of conflicting choices. This study, of necessity, involves the identification, weighing and choice of values. This process must result in the development by a person of an initial moral (value) statement about a particular issue.⁸

The *Macquarie Concise Dictionary* states that 'conscience' is the:

...internal recognition of right and wrong as regards one's actions and motives; the faculty which decides upon the moral quality of one's actions and motives, enjoining one to conformity with the moral law.

This definition does not specify the source of 'moral law', allowing for a source exterior to the individual, and thus religious connotations of the term 'conscience' as the revealed moral law of God. Those claiming special recognition of conscientious objection to the law or public policy tend to concentrate on this religious connotation.⁹ The result is a tendency to privilege religious Belief, and demand exemption from the law for those who have a conscientious objection to it on the basis of religion.

While the term 'conscience' has religious connotations, then, moral codes forming a sense of right and wrong are also part of non-religious Beliefs.¹⁰ Freedom of conscience, according to Rawls, 'generalizes the idea of religious freedom to include freedom of

⁶ The *Macquarie Concise Dictionary* (3rd revised edition, electronic version).

⁷ Noel Preston, *Understanding Ethics*, 2nd edition, (Sydney, Federation Press 1996) 2001, 213.

⁸ Meg Wallace, *Health Care and the Law* (Sydney, Lawbook Co. 3rd ed, 2001), 627, §19.6.

⁹ See, e.g., Stanley Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State' (1997) 97(8) *Columbia Law Review* 2255; Michael McConnell, 'The Problem of Singling out Religion' (2000) 50 *DePaul Law Review* 1, 28.

¹⁰ Non-religious studies of ethics and conscience are, e.g., Dacey, *The Secular Conscience*, (esp. p 18ff); Peter Singer, *Practical Ethics* (Cambridge, Cambridge University Press 1993); Preston, *Understanding Ethics*. Blackmore.

philosophical, evaluative and moral beliefs as well', and includes separation of political decisions from the influence not only of religious tenets, but also of those of '“comprehensive” philosophical and moral doctrines'.¹¹

As will be argued, the adjudicative bodies have taken a similar approach to the idea of conscience. They have recognised that reference to 'conscience' in the relevant Articles includes ideas of right and wrong generated by both religious and non-religious Beliefs, thus viewing conscience as part of the exercise of thought. They have, for example, admitted cases dealing with conscientious objection to military service due to non-religious Beliefs such as pacifism,¹² and objection to taking an oath for political office.¹³

Because the European bodies have at times used the phrase '*forum internum*' to describe the scope of the right to believe¹⁴ commentators noted below claim that these bodies have not adequately protected it. As will be argued, this attributes a broader view of *forum internum* than is intended, and as interpreted by the European Commission and Court. Both have repeatedly treated conscientious objection to mandatory action as an issue of either manifestation of Belief (thus subject to limitations) or of discrimination, rather than violation of the *forum internum*.¹⁵ Cases dealing with manifestation of Belief are considered in Chapter 8.

7.2.1 The *forum internum* as conscience

The effect of introducing the concept of *forum internum* into the scope of coverage of the relevant Articles raises questions as to (a) of what it means, and, by implication, the meaning of the *forum externum*, and (b) whether these concepts are applicable to the relevant Articles. Consideration of these questions is critical for determining whether,

¹¹ Freeman, *Rawls*, 47.

¹² E.g., *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978).

¹³ *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I.

¹⁴ The European Court said, as recently as 2008, that 'Article 9 primarily protects the sphere of personal Beliefs and religious creeds, that is, the area which is sometimes called the *forum internum*'. It went on to say, however, 'Article 9 does not always guarantee the right to behave in the public sphere in a way which is dictated by one's personal Beliefs'. *Blumberg v. Germany*, no. 14618/03, Judgment of 18 March 2008, 3. See also, Series A no. 260-A. The European Commission previously referred to the *forum internum* in *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A and *Van Den Dungen v. the Netherlands*, App. No. 22838/93, 80-A Eur. Comm'n H.R. Dec. & Rep. 147 (1995)1993, 4.

¹⁵ Taylor, *Freedom of Religion* 119.

and if so to what extent, the right to Freedom of Belief justifies privileging objectors to the law by exempting them from compliance.

Examples of claims to exemption include objection to safety requirements that mandate hard hats at construction sites, preventing the wearing of turbans by Sikhs,¹⁶ and laws prohibiting the possession and consumption of certain drugs, infringing on the right of those whose religion revolves around the use of peyote or marijuana.¹⁷

Many governments exempt religious organisations from paying taxes, and other laws of general application. The Australian Government, for example, exempts all religions based on belief in the supernatural from income tax.¹⁸ Compulsory voting¹⁹ and provision of union access to the workplace have also been exempted being considered conscientious objection on religious grounds.²⁰ The United Kingdom has legislated exemption for Sikh adherents from the requirement to wear hard hats on worksites and when riding motorcycles.²¹ Most Western Nations have exempted Jewish and Islamic followers from otherwise generally applicable regulation of the slaughter of animals.²²

Religious bodies are exempted from some provisions of discrimination legislation, and clergy are often privileged from having to disclose criminal activity of penitents to the

¹⁶ E.g., *Karnel Singh Bhinder v. Canada* Communication No. 208/1986 CCPR/C/37/D/208/1986.

¹⁷ E.g., *M.A.B., W.A.T. and J.A.Y.T. v. Canada* No. 570/1993, U.N. Doc CCPR/C/50/D/570/1993 (1994).

¹⁸ Section 23(e) *Income Tax Assessment Act 1936*. The High Court has held that religion involves belief in the supernatural: *Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120. See also the Australian Tax Office website: <<http://www.ato.gov.au/nonprofit/content.asp?doc=/Content/34267.htm&page=22&H22>> accessed 18/11/2010.

¹⁹ See the Australian Electoral Commission website at <http://www.aec.gov.au/Elections/australian_electoral_system/electoral_procedures/Electoral_Offences.html> accessed 18/11/2010. Conscientious objection to voting on religious grounds is recognised: see, e.g. *Report 42 (1984) - Community Law Reform Program: Sixth Report - Conscientious Objection To Jury Service*: '3. Conscientious Objection in Legislation' at <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R42CHP3>> accessed 18/11/2010.

²⁰ Michael Bachelard, *Behind the Exclusive Brethren* (Melbourne, Scribe 2008), 176ff.

²¹ Knights, *Freedom of Religion*, 191, *Employment Act* (U.K.) 1989. Knights outlines other exemptions in the U.K., *ibid*, Chapter 7.

²² See, e.g., *ibid*.

authorities.²³ In Australia, clergy generally are not required, under mandatory reporting legislation, to report crime such as child or spousal abuse.²⁴

Governments have felt pressured to either tolerate religious groups ignoring the law, or to provide specific exemptions for such groups from secular laws that are otherwise applicable to everyone. There is a developing attitude within societies of an expectation that religious freedom includes what has been called in the U.S. a ‘disturbing societal trend by which religious adherents, of a variety of creeds, are increasingly tending to believe and argue that they are above the law’.²⁵

Consideration of the application of the relevant Articles indicates that the concept of *forum internum* as outlined in particular by Carolyn Evans,²⁶ Paul Taylor²⁷ and Bahiyyih Tahzib²⁸ is inappropriately applied to the relevant Articles. It is suggested that their perception of the *forum internum* is based on perceiving the *forum internum* in the psychological sense of deep-seated identity that a Belief system may provide for adherents. It is based on the sense of solidarity and belonging that comes from such activities as the wearing of particular clothing, eating of particular foods and other personal means of identifying with their particular Belief system. This is the normative, cultural and social aspect of the relevant Articles.

This is not the legal concern of the relevant Articles. By classifying such activity legally as an integral part of *holding* a Belief itself, rather than the right to *manifest* that Belief, it is suggested that the principles of democratic freedom and equality are eroded.

²³ Canon law of the Catholic and Anglican churches provide for clergy-penitent confidentiality, while common law in the U.K. and Australia is unclear. In Australia, Victoria, the NT, the Commonwealth, New South Wales and Tasmania include priest-penitent confidentiality privilege in their Evidence Acts and in the U.K. it is subject to common law principles: Renae Mabey, *The Priest-Penitent Privilege in Australia and its Consequences*, <https://elaw.murdoch.edu.au/archives/issues/2006/2/elaw_Renae%20Mabey%20Priest%20Penitent%20Privilege.pdf> accessed 11/112010. In the United States legislation also varies from state to state (See, e.g., Julie Sippel, ‘Comment: Priest-Penitent Privilege Statutes: Dual Protection in the Confessional’ (1994) 43 *Catholic University Law Review* 1127. In all jurisdictions it is uncertain.

²⁴ Wallace, *Health Care and the Law*, 555.

²⁵ Hamilton gives examples of increasing claims for exemptions from the law on religious grounds in ‘The Dangers of Accommodation of Religion’, 2.

²⁶ Evans, *Freedom of Religion*, 72ff.

²⁷ Taylor, *Freedom of Religion*, Ch 3.

²⁸ Tahzib, *Freedom of Religion and Belief* 26.

Individuals, in being permitted to act according to their personal view as to the validity of the law, then become a law unto themselves.

The *forum internum* is described by Paul Taylor as ‘the internal and private realm of the individual against which no State interference is justified’.²⁹ Taylor states that it involves more than mere choice of religion or belief. He argues that there is what he calls a ‘residual scope of the *forum internum*’.³⁰ What this includes is not readily understood, he claims, arguing that the adjudicative bodies have been inconsistent and unclear in their understanding of the *forum internum*.³¹ In Taylor’s view, freedom from coercion to behave contrary to one’s religion or belief is protected by the *forum internum*.³² Thus he seems to include some actions, or refusal to act, as part of the unconditionally protected right to freedom of ‘thought, conscience and religion’. However, as he concedes, this approach has not been taken by the adjudicative bodies. For one thing, it would not be practical or compatible with the human rights of others to allow all conscientious objections to obeying the law.

The adjudicative bodies have chosen to treat matters of alleged coercion in displaying Belief as interference with the right to *manifest* Belief, applying the more restrictive principles that this involves, rather than violation of the absolute right to have a Belief. Taylor can only point to the lack of means to deal with ‘the inevitable conflict with the *forum internum* posed by certain forms of compulsion’.³³ It will be argued that in fact the approach taken by the adjudicative bodies is the more appropriate one in the context of effective rights.

Taylor’s perception of the *forum internum*, while psychologically meaningful, should thus be distinguished from the legal approach to personal Belief, which is concerned with the individual as *citizen*. Citizenship makes a person accountable to fellow citizens and the state for actions that affect their interests, consistent with Rawls’s idea of reciprocity. Freedom of Belief comes at a cost, and that cost is bound up with the requirement for reciprocity, which is specified in the limitation provisions.

²⁹ Taylor, *Freedom of Religion*, 115.

³⁰ Ibid.

³¹ Ibid, 118ff.

³² Ibid, 119.

³³ Ibid.

There is no reference to *forum internum* in United Nations treaties or decisions. As well as case law, *General Comment 22* sets out customs such as diet, dress and language as observance and practice of religion, thus classifying them as manifestation of Belief.³⁴ The Belief Declaration has a more extensive list of what it calls inclusively the right to ‘freedom of thought, conscience, religion or belief’.³⁵

The European Commission and Court, in contrast, do not provide a specific list delineating thought from action, and has described the scope of Article 9 ECHR as protecting ‘the sphere of personal Beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*’.³⁶ It goes on to attribute generally to Article 9 protection of acts ‘intimately linked to these attitudes’ such as worship and devotion. While it did not elaborate on what specifically was meant by the ‘*forum internum*’ the language implies a distinction between Belief itself and action based on that Belief.

³⁴ *ICCPR General Comment 22* Par. 4: ‘The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group’.

³⁵ Article 6. It goes on to state that Freedom of Belief includes:

- (a) to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes;
- (b) to establish and maintain, appropriate charitable and humanitarian institutions;
- (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) to write, issue and disseminate relevant publications in these areas;
- (e) to teach a religion or belief in places suitable for these purposes;
- (f) to solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) to train, appoint, elect and designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief;
- (i) to establish and maintain communications with individuals and communities in matters of religion and Belief at the national and international levels.

³⁶ *C. v. United Kingdom* 10358/83 37 D&R (1983) 142,147, This case held that objection to payment of taxes was not protected by Article 9 ECHR; Malcolm Evans call this a ‘standard recital’ as it was adopted, e.g., in *V. v. the Netherlands*, App. No. 10678/83, 39 Eur. Comm’n H.R. Dec. & Rep. 267 (1984); *Vereniging Rechtswinkels Utrecht v. Netherlands* (1986) 46 DR 200 (ECHR); *Van Den Dungen v. the Netherlands*, App. No. 22838/93, 80-A Eur. Comm’n H.R. Dec. & Rep. 147 (1995), §1 (complainant demonstrated outside abortion clinic); Evans, *Religious Liberty and International Law*, 294ff.

Conversely, if one *does* presume that by referring to the '*forum internum*' the court is referring to the absolutely protected freedoms to entertain 'thought, conscience and religion', and the adoption of 'religion or belief', this creates confusion as to the difference between actions that amount to the *forum internum* and those that constitute manifestation of belief. Further, such an interpretation is in contrast to the adjudicative bodies' approach that acting on conscience comes under Article 9(2) ECHR, which is 'manifestation' of 'religion or belief' and subject to limitation.

7.2.2 Different approaches to the *forum internum* and action

The *forum internum*, as its name implies, has a corollary, the *forum externum*, or 'public face' of Beliefs, through behaviour that reflects personal convictions. There is no meaningful exposition of the *forum externum*, by either the adjudicative bodies or commentators, but it presumably involves manifestation of religion or belief in the relevant Articles, described broadly as 'worship, observance, practice or teaching'.³⁷ As noted above, Article 6 of the Belief Declaration sets out a list of activities included *inter alia* in Freedom of Belief. These are subject to Article 1(3), which applies to manifestation of Belief and its limitations, as does the *General Comment 22*. Article 6 of the Belief Declaration does not, however, draw a distinction between having a Belief and acting on it, so the matter is not resolved there.

If the *forum internum* refers only to private thoughts (which include thoughts related to conscience, religion and Beliefs) without any action or communication of them to others, then its violation would require 'external pressure sufficient to induce a forcible change in inner Belief'.³⁸ Malcolm Evans, who differs from Taylor, sets a threshold for the *forum internum* based on the view that 'provided that the individuals are able to continue in their Beliefs, the forum internum remains untouched and there will be no breach of Article 9(1)'.³⁹ He points to the absolute right to thought, religion and conscience in the first sentence of Article 9 ECHR (and, by implication, Article 18 ICCPR). This right is:

³⁷ E.g., Articles 18(3) ICCPR; 9(2) ECHR and 1 *Belief Declaration*.

³⁸ Evans, *Religious Liberty and International Law*, 294; Evans, 'Freedom of Religion and the European Convention on Human Rights Approaches, Trends and Tensions' in Peter Cane et al, *Law and Religion in Theoretical and Historical Context*, 291, 292.

³⁹ Evans, *Religious Liberty and International Law*, 295. and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International 1998), 752.

...‘narrowly circumscribed’, and ‘cannot be used to extend beyond the scope of the freedom to hold a pattern of thought, conscience or religion beyond the *forum internum* – the ‘private sphere’. In particular it cannot be used to justify claims to exercise rights in the public sphere, since they are unnecessary to private Belief’.⁴⁰

He notes that breaching this threshold would violate other rights as well, such as the right to freedom from torture, inhumane or degrading treatment or punishment, or from the forceful influence of a person’s autonomy of thought.⁴¹ Another way of violating the *forum internum* would be by indoctrination, that is, directing a person in a point of view in a manner that demands or results in uncritical acceptance. Indoctrination would apply at least to those who are not in a position to consider rationally the material with which they are being indoctrinated, such as children.⁴² D. J. Harris *et al* adopt a similar stance in relation to Article 9 ECHR, stating that the internal forum is limited to the choice of religion or belief only, protecting against imposition of penalties for holding Beliefs and indoctrination where this involves positive action directed against the individual.⁴³

If, however, as Taylor suggests, the *forum internum* is seen as including some acts emanating from thought, conscience and religion or belief, there arises an overlap between freedoms expressed in the relevant Articles, and any distinction between protection of thought and action is blurred.

Other writers are less ambivalent in their approach to the *forum internum*. One such writer is Bahiyyih Tazhib, who writes that violation of the *forum internum* includes a very broad category of activity. She argues that the *forum internum* includes enforced or proscribed membership of a religion or belief, discrimination on the ground of religion

⁴⁰ Evans, *Religious Liberty and International Law*, 299. His use of the term *forum internum* is thus restrictive.

⁴¹ Ibid, 294-5. Elsewhere he points to the case of *Kosteski v. “the former Yugoslav. Republic of Macedonia”*, no. 55170/00, § 39, 13 April 2006 where the European Court questioned the sincerity of the applicant’s Belief: ‘What this case makes clear is that the *forum internum* is very much a sphere of inner personal conviction and offers little by way of substantive protection to those seeking to protect the lifestyle generated by their Beliefs from the intrusions of the state’. (Evans, ‘Freedom of Religion and the European Convention’ 293).

⁴² Parents are allowed to ‘indoctrinate’ children, or allow them to be indoctrinated: Evans, *Religious Liberty and International Law*, 356ff.

⁴³ D J Harris, M O’Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths 1995), 360ff.; Taylor succinctly sets out the different positions in *Freedom of Religion*, 116.

or belief, enforced participation in religious practices and recanting a religion or belief or converting to or from a religion or belief.⁴⁴

Similar to Taylor, others, such as Pieter van Dijk *et al*, describe freedom of ‘thought, conscience and religion’ as including the freedom to accept a religion or belief, and ‘not to be obliged to act in a way that entails the expression of the acceptance of a church, religion or belief that one does not share’.⁴⁵ This suggests that they had a broader notion of the *forum internum* than that argued by Malcolm Evans.

7.2.3 State-imposed compulsion and the *forum internum*

Adopting the view that the right to freedom of thought, conscience and religion includes protection of more than freedom of choice of Belief, Taylor argues that it protects ‘freedom from coercion to act contrary to one’s religion or belief...even though an express general provision to that effect would be unacceptable because of its breadth’.⁴⁶ Taylor contends that ‘European and United Nations jurisprudence does not reflect a coherent pattern of protection of the right to believe that enables the individual to resist compulsion to act contrary to Belief generally’.⁴⁷

On the contrary, it will be argued in Chapter 8, there is a clear view by the adjudicative bodies that action equals manifestation. The UNHRC has gone further. In 2003, for example, it found that a coercive program designed to alter the political opinion of an inmate ‘restricts freedom of expression and manifestation of belief under articles 18, paragraph 1 and 19, paragraph 1, both in conjunction with article 26 [of the ICCPR].’

It did not refer to interference with the *forum internum*, or the right to freedom of thought.⁴⁸

The adjudicative bodies thus give only superficial reference to the *forum internum* in matters of compulsion to act contrary to Belief, Taylor maintains, because to do so

⁴⁴ Tahzib, *Freedom of Religion and Belief*, 26.

⁴⁵ van Dijk *et al*, *Theory and Practice of the European Convention on Human Rights*, 758.

⁴⁶ Taylor, *Freedom of Religion*, 119.

⁴⁷ *Ibid*, 118-120. See also *ibid*, 200.

⁴⁸ *Kang v. Republic of Korea*, Communication No. 878/1999 (views of 15 July 2003) U.N. Doc. A/58/40 vol. 2 (2003), p. 152, §7.2.

would mean that such compulsion would not be subject to the prescribed limitations,⁴⁹ an outcome the European bodies in particular seek to avoid.⁵⁰ This, he argues is reflected in the ‘habitual failure of the European institutions in particular to give due acknowledgment to the potential scope of the *forum internum* when ‘directly’ claimed within a core freedom of religion.⁵¹

Steven Smith provides an important perspective on the concept of conscience that accommodates both the significance to the individual of self-realisation through freedom to act according to conscience, while recognising religious and non-religious Beliefs as deserving equal protection.⁵²

Smith’s approach has a different result from that of Taylor. He examines the hypothetical claim of conscientious objection to mandated military service, where that service is accepted by the majority of society as right and just ‘in accordance...with conventional moral principles or commitments’.⁵³ Smith considers the justifications a person could offer for exemption. Unless society as a democratic whole accepts that person’s Beliefs as carrying special value above all others, none of these justifications offer a plausible ground for exemption. Thus, for example, whether objectors cite

- a duty based on objective rules or some form of truth;
- their own subjective view of duty; or
- the values of society;

they must explain, in the end, why their conception of duty is to be preferred over the considered view of society in general as set out in the policy or legislation.

In short, they have to argue why society is wrong and they are right.

⁴⁹ Taylor, *Freedom of Religion*, 119

⁵⁰ Ibid.

⁵¹ Ibid, 119-120.

⁵² Smith, ‘What Does Religion Have to Do with Freedom of Conscience?’

⁵³ Steven Smith, ‘The Tenuous Case for Conscience’ (2005) 10 *Roger Williams University Law Review* 325, 344.

Elsewhere Smith argues persuasively and comprehensively that ‘conscience’ is not simply a part of religious (or other) Belief. It is, he contends in an approach not incompatible with Rawls’s, more appropriately considered to be part of what constitutes ‘personhood’ – where we become ‘full and distinctive persons as our core Beliefs become embodied in our...living’.⁵⁴ It is for this reason he considers that ‘government ought to be especially reluctant to impose injuries on the level of personhood’ one can enjoy,⁵⁵ *not* because it is perceived as part of religion or an entity worthy of privilege in itself. He grants that individuals may each act according to what they believe is right. However ‘doing what we believe to be right does not provide *others*, including society or the state, with any reason to respect or defer to what they believe to be errors of judgment’.⁵⁶

7.2.4 Conscientious objection to military service

The UNHRC treats all action or objection to act based on conscience (‘conscientious objection’) as manifestation of Belief. While Article 8 ICCPR prohibits forced or compulsory labour, this prohibition does not include military service, or substitute service where conscientious objection is recognised by a government. The only specific concession to conscientious objection of any kind by the UNHRC relates to objection to military service. *General Comment 22* §11, states that conscientious objection to military service ‘can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief’. Enigmatically, the right is not absolute, but appears to be subject to State law.⁵⁷ Paragraph 11 provides that:

⁵⁴ Smith, ‘What Does Religion Have to Do with Freedom of Conscience?’, 934. He quotes Christian Smith, *Moral Believing Animals: Human Personhood and Culture* (Oxford, Oxford University Press 2003), 57, who argues for a ‘moral, believing model of personhood’ stating that ‘believings are what create the conditions and shape of our very perceptions, identity, agency, orientation, purpose – in short, our selves (sic), our lives and our worlds as we know them’: 57.

⁵⁵ Ibid, 935, a view reflected in the restriction of limitations of manifestation of Belief in the relevant Articles. It is proposed that Smith’s idea of ‘personhood’ is similar to Nussbaum’s and Sen’s concept of ‘capabilities’, and Rawls’s idea of the worth of liberties (see section 4.6.1 above).

⁵⁶ Smith, ‘The Tenuous Case for Conscience’, 340. Ronald Dworkin distinguishes between the *moral* right to break the law, and the *legal* right to do so: Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth 1978), Ch 7, esp. 186ff.

⁵⁷ This was the approach taken by the UNHRC in *Westerman, Paul v. The Netherlands*, Communication No. 682/1996 (views of 13 December 1999) U.N. Doc CCPR/C/67/D/682/1996.

When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular Beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service.⁵⁸

There is thus an acceptance by some states of alternative service for conscientious objectors. The UNHRC has also pointed to the then Commission on Human Rights *Resolution on Conscientious Objection to Military Service*⁵⁹ acknowledging conscientious objection to military service as part of the right to Freedom of Belief. The status of the right to conscientious objection to military service where it is not recognized by state law is not addressed.

The European bodies have not made specific concession to conscientious objection to military service. Article 4 ECHR prohibits forced labour, except, *inter alia*, for military service, or its substitute where allowed by the state. The European bodies have stated emphatically that conscientious objection to some form of military service is not guaranteed under the ECHR.⁶⁰

7.2.5 Conscientious objection to other state directives

While not labelling them as such, the adjudicative bodies have addressed cases of what amount to conscientious objection to state directives other than compulsory military service. The UNHRC considered the refusal of a Sikh to wear a safety helmet at work as required by law based on his refusal to remove his turban for religious reasons in the case of *Karnel Singh Bhinder v. Canada*.⁶¹ The State submitted that the religiously

⁵⁸ *Foin, Frederic v. France*, Communication No. 666/1995 ICCPR, A/55/40 vol. II (views of 3 November 1999), (2000) 7(2) IHRR 354, §10.3. See also *Maille v. France* (689/1996), ICCPR, A/55/40 vol. II (10 July 2000) 62 ¶10.4; *Venier and Nicolas v. France* (690/1996 and 691/1996), ICCPR, A/55/40 vol. II (10 July 2000) 75 ¶10.

⁵⁹ U.N. Commission on Human Rights 54th Session, Agenda Item 22, Un Doc. E/CN.4/1998/L.93, adopted 1998.

⁶⁰ See, e.g., *Grandrath v. Germany*, App. No. 2299/64, 10 YB ECHR (1967) 626. The European Commission held that ‘As in [Article 4] provision it is expressly recognised that civilian service may be imposed on conscientious objectors as a substitute for military service, it must be concluded that objections of conscience *do not, under the Convention, entitle a person to exemption* from such service’, §32 (emphasis original). In *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, Reports of Judgments and Decisions 1997-III, §117, the Commission also held that the ECHR ‘does not guarantee per se a right for religious ministers to be exempted from military service’. This issue was not considered further.

⁶¹ *Karnel Singh Bhinder v. Canada*, Communication No. 208/1986 CCPR/C/37/D/208/1986.

neutral legal requirement that a safety helmet be worn by all maintenance electricians, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate the right defined in article 18(1) of the Covenant. The UNHRC considered that the prohibition could be seen as either (a) interference with the manifestation of Belief under Article 18, or (b) discrimination under Article 26, in that the author was targeted specifically because of his religion, and stated that in either case the ‘same conclusion must be reached’:

If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well-established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.⁶²

In respect of conscientious objection to other directives, Taylor points to early cases of the European Commission dealing with conscientious objection to legal obligations. Applicants objected to subscribing to a regulatory health program for cattle breeding,⁶³ to paying general taxes when some of these were used for defence expenditure,⁶⁴ or a pension scheme for the aged,⁶⁵ and a third party motor vehicle insurance scheme.⁶⁶ These objections were based on the Belief that it is God, not humans, who ordains our destiny, and it is incumbent on good Christians, not the state, to care for each other. Also considered was the refusal by a doctor who charged patients according to their ability to pay to participate in a compulsory professional pension scheme that involved contributions based on gross income.⁶⁷ The Commission, without specific deliberation, found no breach of Article 9 ECHR in each of these cases, treating them as cases of

⁶² Ibid, §6.2.

⁶³ *X. v. the Netherlands*, App. No. 1068/61, 5 Yearbook (1962), 278.

⁶⁴ *C. v. United Kingdom*, 10358/83 37 D&R (1983) 14210538/83, 142.

⁶⁵ *Reformed Church of X. v. the Netherlands*, App. No. 1497/62, 5 Yearbook (1962) 286.

⁶⁶ *X. v. the Netherlands*, App. No. 2988/66 10 Yearbook (1967) 472, 476. The complainant believed that God determines one's fate, and it is up to the community to care for those who require it.

⁶⁷ *V. v. the Netherlands*, App. No. 10678/83, 39 Eur. Comm'n H.R. Dec. & Rep. 267 (1984), 267.

manifestation of Belief, and applying the test of Article 9(2) requiring (and finding) justification according to permitted limitations to protect the interests of the state or other individuals.⁶⁸

Taylor is not satisfied with the reasoning in these cases, arguing that there was no issue of *manifestation* involved, as the cases involved *inaction* through failure to comply with the laws. While he indicates that he believes the outcomes of the cases may be considered appropriate under the circumstances, it is not certain how he believes they should have been treated. By adopting a broad approach to the *forum internum* such as that adopted by Taylor and others, one would be in effect giving protection to acting (or refusing to act) according to individual values – becoming a law unto oneself.

The goal of the right to Freedom of Belief, it is contended, provides that freedom to entertain a moral conviction is guaranteed without qualification under the right to believe, but acting in accordance with one's personal conscience is limited, based on similar interests of other individuals or the state. The reason for this limitation, as pointed out by Pieter van Dijk *et al*, is that the 'boundlessness of conscience' excludes the feasibility of generally applicable and clear-cut limitations.⁶⁹

The European Commission clarified its approach in the case of *C. v. United Kingdom*⁷⁰ where the applicant, a pacifist. He objected to force of all kind and resisted payment of that portion of his taxes which was, even indirectly, allocated to defence expenditure. The European Commission clearly indicated that it considered conscientious objection to mandatory action a matter of manifestation of Belief:

Article 9 primarily protects the sphere of personal Beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form.

⁶⁸ See, for a detailed discussion, Taylor, *Freedom of Religion* 119, who adopts the approach that violations of the *forum internum* include compulsion to act contrary to one's conscience, even whilst recognising that 'an express general prohibition to that effect would be unacceptable because of its breadth'.

⁶⁹ See, e.g., van Dijk *et al*, *Theory and Practice of the European Convention on Human Rights*, 761ff.

⁷⁰ *C. v. United Kingdom*, App. No. 10358/83, 37 Eur. Comm'n H.R. Dec. & Rep. 142 (1983).

However, in protecting this personal sphere, Article 9 of the Convention does not always guarantee the right to behave in the public sphere in a way which is dictated by such a Belief: for instance by refusing to pay certain taxes because part of the revenue so raised may be applied for military expenditure.⁷¹

The Commission referred to its earlier holding that ‘the term “practice” as employed in Art. 9(1) does not cover each act which is motivated or influenced by a religion or a belief’,⁷² discussed more fully in Chapter 8. The continued use of this approach by the Commission and the European Court⁷³ has led Taylor to comment that it is ‘extremely difficult’ to successfully bring a claim under Article 9 ECHR when laws of general and neutral effect, or those which states are empowered to enact under the human rights treaties, such as welfare and tax laws, clash with someone’s *forum internum*.

It is proposed that there is some confusion in the reasoning Taylor applies to his argument. He states that ‘the dismissal of claims on the grounds of the neutrality of laws alone would involve the fallacy that neutral laws are incapable of giving rise to issues of conscience’.⁷⁴ However, it is argued here that there is in fact no denial that neutral laws may indeed give rise to issues of conscience. The point is that these issues of conscience may not be matters that are protected by Article 9 ECHR, because they (a) do not involve manifestation of Belief as set out by the relevant Articles; or (b) if they do, they are subject to limitation under Article 9(2).

Laws may not be morally acceptable to particular individuals, in which case one may feel personally morally justified in breaking them, but it does not follow that there is a legal right to do so, and the state may be justified in holding one to account.⁷⁵ The European Commission has suggested that political action is the remedy for law to which

⁷¹ Ibid, 147. See also Chief Justice Warren, in the U.S. case of *Braunfield v. Brown*, 366 U.S. 599, 607.

⁷² Ibid. This approach has been well entrenched in the European Court.

⁷³ Examples of recent reference to this principle can be found in the European Court judgments of *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, and 41344/98, ECHR 2003-II, §92 and *Şahin and Others v. Turkey*, no. 19301/92, 10 April 2001 41343/98 and 41344/98, ECHR 2003-II.

⁷⁴ Taylor, *Freedom of Religion*, 126.

⁷⁵ See, e.g., Dworkin, *Taking Rights Seriously*, Ch 7.

one has conscientious objection, unless one can argue the law is a wrongful limitation under Article 9.⁷⁶

Objection to mandatory activity was rejected in the cases of *Valsamis*⁷⁷ and *Efstratiou*.⁷⁸ In both cases, the claimants, Jehovah's Witness schoolgirls, were suspended from school for refusing to participate in a school parade marking Greek National Day. Some of the many parades throughout the country included the Greek military, marking the outbreak of war with Italy. The girls' refusal to participate was founded on their religious convictions. The Court in both cases held that the suspension for refusing to participate in a parade did not amount to an interference with their right to freedom of religion, stating that they could see no reason for offence in activities to the claimants or their parents.⁷⁹ In explaining the reasoning for such an approach, the Court used exactly the same reasoning in both cases:

- the parades can serve both pacifist objectives and the public interest;
- the presence of military representatives does not in itself alter the nature of the parades; and
- they do not deprive the parents of their right 'to enlighten and advise their children', exercise parental functions of education, or guide them in accordance with their own religious or philosophical convictions.⁸⁰

Carolyn Evans argues that it is difficult, if not impossible, to divorce thought and action⁸¹ and points to the comment by H. A. Freeman that 'great religion is not merely a matter of belief; it is a way of life; it is action' and that 'one of the most "scathing rebukes in religion is reserved for hypocrites who believe but fail to act"'.⁸² While at the

⁷⁶ See, e.g., *C. v. United Kingdom* 10358/83 37 D&R (1983) 142 147.

⁷⁷ *Valsamis v. Greece*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI.

⁷⁸ *Efstratiou v. Greece*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI.

⁷⁹ *Valsamis v. Greece*, §32; *Efstratiou v. Greece*, §31.

⁸⁰ *Valsamis v. Greece*, §31; *Efstratiou v. Greece*, §32.

⁸¹ Evans, *Freedom of Religion*, 74ff. She points to Chief Justice Burger's decision in *Wisconsin v. Yoder*, 406 U.S. 203 (1972) 220, where he held that 'Belief and action cannot be neatly confined in logic-tight compartments' and that that religious and other Beliefs and actions are intertwined.

⁸² H. A. Freeman, 'A remonstrance for Conscience' (1958) 106 *Pa. L. Rev.* 806, 826, quoted in Evans, *Freedom of Religion*, 75.

psychological and social level this may be true, in terms of creating legal rights, it is proposed that a distinction may be drawn. The fact that one *can* believe something but fail to act accordingly (or indeed act contrary to one's Belief) disproves the claim that thought and action are indissoluble: one can act according to external pressure, against one's Beliefs.

Evans applies the concept of *forum internum* to freedom of thought, conscience and religion, and gives it a broad scope. She points to cases such as *Darby v. Sweden* involving the imposition by government of church tax on a non-member of the church⁸³ and the *Valsamis* and *Efstratiou* cases involving compulsory participation by Jehovah's Witness (pacifist) students in parades they saw as celebrating war.⁸⁴ Evans proposes that these impositions violate the holding of the individual's religion itself. However, her reasoning is puzzling. In referring to the *Valsamis* and *Efstratiou* cases, she appears to adopt a contradictory approach, stating firstly that:

In neither case did the action of the state go so far that it made impossible (or even particularly difficult) for the individuals to maintain their internal Beliefs, but in each case the State *required the individuals to act* in a way they felt was in direct contradiction to the requirements of those Beliefs.⁸⁵

While the words in italics indicate she recognises that it was action that was the centre of consideration, Evans then goes on to say of the claimants:

They were in effect being asked to recant, by their behaviour, their religion. This conflict between the behaviour required of them and their Beliefs was such that it arguably interfered with the internal as well as the external realm.⁸⁶

Despite claiming that both the 'internal and external realms' were affected in these cases, Evans appears to concede that the applicants' internal Beliefs were not suppressed

⁸³ *Darby v. Sweden*, 23 October 1990, Series A no. 187, §28-35, Annex to decision of the Court.

⁸⁴ *Valsamis v. Greece*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, §31; *Efstratiou v. Greece*, 18 December 1996, Reports of Judgments and Decisions 1996-VI, §32.

⁸⁵ Evans, *Freedom of Religion*, 77-78 (emphasis added). See also pp 72-9 and 170-198 for discussion of compulsion. See also her argument that forum internum is underestimated by the European Court, (at 102).

⁸⁶ *Ibid*, 78.

or changed. This is evidenced by the very fact that they objected to the required action. Malcolm Evans, expressing what I suggest is the better view, points out that:

The freedom of thought, conscience and religion is exercised in the private sphere, the *forum internum*. Penalties, disabilities and criticism do not prevent a person holding a pattern of thought, conscience or religion. The Convention does not prevent society from extracting a degree of sacrifice from individuals who subscribe to certain forms of belief.⁸⁷

However, to penalise a person for simply holding a Belief ‘does lie beyond the limit of acceptability’.⁸⁸ He notes the European Commission held that the compulsory retirement of a military judge for his fundamentalist Islamic views violates Article 9(1) ECHR.⁸⁹

This is a different situation from being required to swear an oath based on the Bible or other religious book,⁹⁰ or swear allegiance to the flag. A daily ceremony swearing allegiance to the flag was required of students by the West Virginia Board of Education. Jehovah’s Witnesses objected, as this contravened their religious Beliefs. The Supreme Court expressed a similar approach to the European Court by its majority decision that:

No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.⁹¹

The fact that the applicants in the *Valsamis* and *Efstratiou* cases complained that they were required to act contrary to their Beliefs indicates that their Beliefs were not changed by the required action. A more relevant criticism is that the Court substituted its

⁸⁷ Evans, *Religious Liberty and International Law*, 304.

⁸⁸ To the extent that it amounts to discrimination on the ground of Belief, it would, of course be a breach of Article 14 ECHR.

⁸⁹ Evans, *Religious Liberty and International Law*, 304. See, e.g., *Kalaç v. Turkey*, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV; The Commission also indicated its disapproval of imprisonment for holding particular beliefs in *Hazar, Hazar and Açık v. Turkey*, App. No. 16311, 16312, 16313/90 (joined) (admissibility), 72 Eur. Comm’n H.R. Dec. & Rep. 200 (1991) (friendly settlement).

⁹⁰ *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I.

⁹¹ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) 624, 641-42.

own opinion for that of the claimants as to whether the purpose of parade or the arrangements for it, could offend the applicants' pacifist convictions.⁹²

Such Beliefs may well give rise to a *moral* impulsion to act, but free will allows one to act otherwise. It is suggested that the perception that thought and action are indissoluble may well apply to the moral imperatives associated with Belief and with the consequent moral disequilibrium and stress of being an 'involuntary hypocrite'.⁹³

This adverse effect should not be underestimated (hence the limited restrictions on Freedom of Belief) but the line is drawn between thought and its manifestation. The very fact that one can act contrary to one's Beliefs indicates that there is a distinction between the internal and external *fora*, even where these Beliefs pervade one's way of life.⁹⁴ I believe that Rawls's model of reflective equilibrium (see above section 3.3.1) would involve a less didactic approach by the Court, which imposed its own view as to what is offensive, and seek a more principled response – for example, one that allowed the children to develop their own interpretation of what the national day meant to them.

One can argue that the European Commission erred in the *Valsamis* and *Efstratiou* in imposing its own view as to the merits of the belief of the applicants that the compulsory children's participation in a national day parade was contrary to their religious beliefs. The European Court was silent on the issue. However, in the later case of *Hasan and Chaush v. Bulgaria*, the European Court, ruling on a leadership dispute within the Islamic community in Bulgaria stated that:

...but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious Beliefs or the means used to express such Beliefs are legitimate.⁹⁵

As Torrón et al point out:

⁹² *Valsamis v. Greece*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI31 §37; *Efstratiou v. Greece*, 18 December 1996, Reports of Judgments and Decisions 1996-VI., §37.

⁹³ 'We want to enjoy our lives, and we want to enjoy them with a good conscience. People who disturb that equilibrium are uncomfortable'. Simon Blackburn, *Ethics: A Very Short Introduction* (Oxford, Oxford University Press 2001) 6.

⁹⁴ H. A. Freeman's rebuke (above) of 'hypocrites' who believe but fail to act itself contains the presumption that the person's Belief remains intact despite the hypocrisy.

⁹⁵ *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, ECHR 2000-XI, §79.

...it is not clear yet whether these words of the *Hasan* decisions will constitute a twist in the former doctrine of the Commission, or whether they will rather be understood as applicable only to the typical expressions of religious liberty and particularly to those directly related to the internal affairs of religious communities.⁹⁶

In sum, the fact that a person can perceive their actions to be coerced means that their Belief is not changed despite their actions. This is not to deny the fact that such coercion may be aimed at eventual voluntary acceptance of a Belief through carrying out an action. However, a violation of the person's thought processes must involve the intention and character of involuntary mind control. Thus, it is argued, coerced action in conflict with a person's Belief is not strictly a violation of the person's thought patterns itself – it is, while coerced, a breach of the right to manifest Belief.

Carolyn Evans also proposes that:

Only very narrow definitions of religion restrict it to the primarily intellectual sphere of developing a system of ideas/beliefs in one's own mind. More sophisticated definitions take note of how religion may play an important role in the way in which people live their whole lives.⁹⁷

It is suggested that this is the critical point. The *forum internum* is the 'primarily intellectual sphere' of thoughts and convictions, and the sense of right and wrong that results from those thoughts and convictions. The relevant Articles do recognise the important role of Belief in the way people live their lives through action and provides protection for it. They also recognise that this protection must be compatible with democratic principles in a society that proclaims itself to be democratic. Evans's 'sophisticated' definitions, it is suggested, are in reality (though no less important) psychological and social ones.

The European Court continued the approach of the European Commission to view action as manifestation in the case of *Buscarini and Others v. San Marino*⁹⁸ where the

⁹⁶ Martínez-Torrón and Navarro-Valls, 'The Protection of Religious Freedom' 234.

⁹⁷ Evans, *Freedom of Religion* 76.

⁹⁸ *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I.

applicants, who were elected to the legislature of San Marino, were required to take the oath laid down by law swearing on the ‘Holy Gospels’. When they demurred, they were refused an alternative form of words, and took the oath under protest rather than forfeit their parliamentary seats. The court treated this as an issue of manifestation of Belief. It held that this was a violation of Article 9 ECHR because it was tantamount to requiring them to swear allegiance to a religion – a requirement that gave them no option (the court drew a distinction between being able to choose another job and inability to take up public office at all).

Adopting a literalist approach to Article 9 ECHR, Taylor argued that, regardless of the outcome, this view of the facts ‘cannot sensibly be characterised as a restriction on the manifestation of one’s own beliefs’.⁹⁹ Viewing the matter more generally, the Court held that the requirement to take a religious oath was inconsistent with the thrust of the Convention. It made the mandate the applicants held to represent different views within society subject to their own prior commitment to a particular set of Beliefs.¹⁰⁰

It seems self-evident that the way in which one conceives behaviour based on Belief – as manifestation of Belief or the very holding of a Belief itself – and whether one adopts a literal or purposive interpretation of the relevant Articles, determines the view one takes. One can conclude from the approach of the European Commission and Court, that protection from state-mandated activity that is contrary to the dictates of conscience is subject to the limitations that apply to the manifestation of Belief, unless they are of such a nature that they imperil the very process of thought itself.

The UNHRC has taken a very narrow view of the right to *have* a Belief, holding that a form of compulsory conversion was in fact a breach of the right to *manifest* Belief. In *Yong-Joo Kang v. Republic of Korea*,¹⁰¹ the author was a dissident who was imprisoned and required to undergo an ‘ideology-conversion system’. This scheme, established by the Government of the Republic of Korea and imposed on political prisoners found guilty of opposing the ruling regime, was designed to induce change in a person’s

⁹⁹ Taylor, *Freedom of Religion*, 130.

¹⁰⁰ *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I, §39.

¹⁰¹ *Kang v. Republic of Korea*, Communication No. 878/1999 (views of 15 July 2003) U.N. Doc. CCPR/C/78//878/1999 (2003).

political opinion by the use of favours and inducements. It was replaced in 1998 with a similar ‘oath of law-abiding system’.

The Government submitted that these processes were justified as being necessary under Articles 18 and/or 19 ICCPR. The UNHRC did not treat this case as an interference with freedom of ‘thought, conscience and religion’ – and thus a violation of the absolutely protected *forum internum* – as might be expected. Rather, it considered the matter as one relating to manifestation of Belief, and determined that the Government’s actions were not justifiable ‘for any of the permissible limiting purposes enumerated in Articles 18 and 19’¹⁰² as they restricted freedom of manifestation of Belief and expression guaranteed by these Articles, in conjunction with Article 26 (which guarantees equality before the law).

The UNHRC has thus treated objection to mandatory behaviour on the ground of religion or belief as a manifestation matter under Article 18 ICCPR. It has treated cases on their facts, finding reason for treating them as questions of coerced manifestation (manifestation impliedly including non-action) rather than breaches of the right to hold a Belief. Thus, as noted above at section 7.2.5, the Committee held that requiring a Sikh railway employee to wear a safety helmet rather than a turban, and to fire him for refusing to do so, was legitimate interference with the manifestation of the claimant’s religion rather than the violation of the right to profess the religion itself.¹⁰³ It held that the state was justified in requiring the helmet on the grounds of safety.¹⁰⁴

Taylor expresses concern that whilst this case rightfully treated the matter as one of manifestation (as did the claimant) he argues that there is a fine line between manifestation of religion through the wearing of headdress and coercion to wear a safety helmet. In taking this approach, Taylor appears to be discounting the fact that the wearing of a safety helmet is not coercive acceptance or rejection of a church, religion or belief – it is compliance with safety regulations.

¹⁰² Ibid, §7.2.

¹⁰³ He also refused a transfer to any other post: *Karnel Singh Bhinder v. Canada*, Communication No. 208/1986 CCPR/C/37/D/208/1986, §2.7.

¹⁰⁴ Ibid.

A more conciliatory approach was taken by the UNHRC in the case of *Boodoo v. Trinidad and Tobago*, which dealt with the coercive shaving of the beard of Muslim prisoners, as well as the removal of prayer books and prayer clothes and prevention from attending religious services. The Committee stated that:

...the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and...the concept of worship extends to ritual and ceremonial acts giving expression to Belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author's allegation...the Committee concludes that there has been a violation of article 18 of the Covenant.¹⁰⁵

Other cases heard by the UNHRC and European Commission and Court reveal that while a name change for religious reasons may be an important part of identity, this was considered a matter of privacy under Articles 17 ICCPR and 8 ECHR respectively.¹⁰⁶ Also, the European Commission and Court have held that conscientious objection to employment duties is to be considered under article 9(2) ECHR (freedom to manifest Belief) rather than article 9(1) (freedom of thought etc.),¹⁰⁷ and thus subject to the limitation clauses.

¹⁰⁵ *Boodoo v. Trinidad and Tobago* Communication No 721/1996/CPPR/C/74D/721/1996, 76, §6.6. Taylor believes that the coercive shaving of beards of Muslim prisoners is 'not religiously neutral since it required the author to forego practices consistent with a state of agnosticism, indifference or even opposition to his own Beliefs. The denial of such Beliefs may be intolerable to the individual'. Taylor, *Freedom of Religion*, 135. This (perhaps exaggerated) result may be a psychological effect of the coerced behaviour, and one rightly to be condemned (which it is) but it does not prevent the prisoner adhering to his beliefs, nor does it make him an apostate.

¹⁰⁶ *A. R. Coeriel and M.A.R. Aurik v. the Netherlands*, Communication No 453/1991 (views of October 1994), U.N. Doc A/50/40 vol. 2 (1995). The Committee found 'that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name', §10.2. The state's reasons for refusing the authors a change of surname for pursuing religious studies were 'that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not "Dutch sounding"'. This it found was a breach of article 17, paragraph 1, of the ICCPR (at, §10.5).

¹⁰⁷ See, e.g., *X v. Denmark* 7374/76/ (1976) 5 D & R 158; *The Norwegian State Church, Knudsen v. Norway* App. No. 11045/84, 42 Eur. Comm'n H. R. Dec. & Rep. 247 (1955) (1985): objection by clergy to rules of performing duties; *Yanasik v. Turkey* App. No. 1452/89 (1993) 74 D & R 14 and *Engel v. Netherlands* (Ser. A) 22 (1976) *X v. U.K.*, No. 8160/78 22 DR 27 1981: soldiers' membership of fundamentalist Muslim movement; *Ahmad v. the United Kingdom*, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27 (1981): teacher forced to resign because he insisted on absenting himself on Fridays for prayer at the local mosque.

As noted above, conscientious objection to general taxation because some of it goes to defence spending has been held inadmissible, as such taxation is permissible under the human rights treaties. The adjudicative bodies have indicated that the appropriate way to deal with objection to their use is through the political system.

It is thus argued that the adjudicative bodies have not taken the expansive view on the *forum internum* described above in considering what is covered by manifestation. They have treated objection to obeying the law on religious or conscience grounds as a form of manifestation of Belief. Indeed, there has been a clear indication that conscience is not on its own a basis for protection of action.

Taylor argues that there is a need for increased protection against coercion to act contrary to one's religion or belief rejecting the approach of treating 'an interpretation of manifestation beyond credible grounds when the applicant could not in any meaningful sense be said to be manifesting Belief'.¹⁰⁸ Malcolm Evans, by contrast argues that the protection offered by the first sentence of Article 9 is 'narrowly circumscribed' and 'cannot be used to justify claims to exercise rights in the public sphere since they are unnecessary to private Belief'.¹⁰⁹ He reasons that this reflects the more general consideration that having the right to freedom of thought, conscience and religion does not mean that its enjoyment need be without cost.¹¹⁰

There is no explicit provision for protecting conscientious objection from coercion in the relevant Articles. However, by adopting the approach they have, the adjudicative bodies have sought to act in the interest of Freedom of Belief in a liberal democratic context, the reasoning adopted by the adjudicative bodies provides. This approach will be considered in the light of Rawls's theory.

7.2.6 Objection to state enforcement of Church taxes

In an apparently perverse exception to the above approach, the European Commission held that the requirement to pay church tax was in fact a violation of the right to hold a

¹⁰⁸ Taylor, *Freedom of Religion*, 342.

¹⁰⁹ Evans, *Religious Liberty and International Law*, 299.

¹¹⁰ Ibid, 300. E.g., Muslim teachers can be required to forego prayers on Fridays if they interfere with their contractual duties: *Ahmad v. the United Kingdom*, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27 (1981); *X v. the United Kingdom*, no. 8160/78, Commission decision of 12 March 1981, Decisions and Reports (DR) 22.

particular Belief. In the case of *Darby v. Sweden*,¹¹¹ Darby, a Finnish citizen, was permanently resident in Finland, but stayed and worked in Sweden during the week. While employed in Sweden he was, according to an international agreement, liable to Swedish, rather than Finnish, tax. He was subject to municipal tax law, which levied a special tax on behalf of the Lutheran Church of Sweden ('church tax') on members of the church. Non-members who were registered as resident in Sweden were eligible for a thirty percent reduction in the amount assessed for them.¹¹²

Having only a temporary abode in Sweden, Darby could not apply for residency status, and thus the residency discount. He argued that his right to Freedom of Belief had been violated under Article 9, and that he had been wrongfully deprived of this property in a discriminatory manner, constituting a violation of Article 14¹¹³ together with Article 1 of Protocol 1 to the ECHR.¹¹⁴

As to violation of Article 9, the European Commission, in its deliberations, held that the legal requirement to pay church tax was not, in this case, a 'manifestation' of religion under Article 9. It was, in the Commission's view a compulsion 'to be involved directly in religious activities against his will without being a member of the religious community carrying out those activities'.¹¹⁵ The Commission distinguished cases involving general taxes, a portion of which may be allocated to a cause objected to by an applicant, which lay within the jurisdiction of the state, objections to be resolved through the political process. These differed from the present case, where the individual is obliged to contribute directly to the church and its religious activities. This, the Commission argued, was a breach of the right to have or adopt a religion under Article 9(1).

¹¹¹ *Darby v. Sweden*, 23 October 1990, Series A no. 187 annex to decision of the Court.

¹¹² The 30 per cent of the church tax that remained after the reduction was supposed to cover the costs borne by the parishes of certain administrative functions such as the keeping of population records and the maintenance of churchyards and other public burial-grounds.

¹¹³ Article 14 of the Convention provides that rights and freedoms established by the Convention 'are to be secured without discrimination on any ground such as...religion'.

¹¹⁴ Article 1 of Protocol No. 1 (P1-1) provides that '...no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. However, '[t]his is not to impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties': *Darby v. Sweden*, 23 October 1990, Series A no. 187 annex to decision of the Court, §29.

¹¹⁵ *Darby v. Sweden*, 23 October 1990, Series A no. 187 annex to decision of the Court, §52.

While commentators see the Commission's statement as portending advent of absolute protection of some forms of conscientious objection, it appears the European Court has not opened the door to such a view. The European Court, to which the Commission referred Darby's case, did not rule on the question of breach of Article 9. It rather found for the applicant on the second argument, that there was a violation of Article 14 together with Article 1 of Protocol 1: that is, the church tax was both unjustified and discriminatory. It consequently ruled that it did not need to deal with the alleged breach of Article 9.¹¹⁶

What was not considered in this case was the favourable treatment through state enforced legislation of the (state) Lutheran Church.¹¹⁷ More critical, however, is the absence in both fora of the failure to recognize state endorsement and subsidization of churches as a breach of Freedom of Belief, which is condoned under the international human rights treaties. This issue is discussed in Chapter 9.

7.3 The 'public/private sphere' dichotomy

Along with the division drawn between the *forum internum* and the *forum externum* of individual life, theorists have drawn a structural dichotomy between the 'private' and 'public' spheres of personal, social and political activity, with each sphere independent of the other. As noted, Rawls rejects the idea of separate 'spheres' or domains of life. He sees the idea of private and public 'spheres' as applying to the *different application of the principles of justice* to either the basic institutions of society, or to the associations within it, with designated basic principles of justice (such as autonomy and personal integrity) applicable to both (see section 5.3.2).

This means that while the state has no business interfering with personal Belief as such, it does have an interest in the maintenance of dignity and self-realisation of individuals as citizens, as has been argued in Chapters 4 and 5.¹¹⁸ This interest is recognised through an overlapping consensus on the principles Rawls describes as underlying justice as fairness.

¹¹⁶ Ibid, §28-35.

¹¹⁷ The case was referred to the European Court, which focused on the fact that the tax was administered in a discriminatory way (residents of Sweden could avoid the tax by registering as dissenters whereas Darby, a non-resident worker in Sweden could not so register).

¹¹⁸ Rawls, 'The Idea of Public Reason Revisited', 470-1.

It is proposed, in line with Rawls, that the ‘separate sphere’ approach to Freedom of Belief is misplaced, and undermines the intent of the relevant Articles, as it cordons off the political values of autonomy and dignity inherent in human rights in an artificially designated ‘private sphere’ where political principals of justice do not apply.

7.3.1. Freedom of Belief and Rawls’s conception of justice

As noted in Part 1, Rawls spells out the ground for protecting what he calls ‘liberty of conscience’.¹¹⁹ His theory recognises the diversity of comprehensive religious, philosophical and moral doctrines in modern society. One cannot expect the development of a common comprehensive doctrine throughout society unless it were to be enforced through oppression: which is, of course, unacceptable. Diversity must be provided for, but according to a conception of justice.

In Rawls’s view, a conception of justice must be one based on considerations external to comprehensive doctrines, that is, a conception that can be endorsed by those holding widely different and even irreconcilable comprehensive doctrines. This can be done in a reasonably stable democratic constitutional regime, he contends, by formulating ‘a free-standing political conception having its own intrinsic (moral) political ideal expressed by the criterion of reciprocity’. The idea is to formulate a conception of justice that ‘reasonable comprehensive doctrines’ can endorse in the form of an overlapping consensus.¹²⁰ Rawls proposes that this occurs in a liberal democracy where persons are free and equal,¹²¹ and reasonable and rational citizens.¹²²

7.3.2 Conscience and Rawls’s overlapping consensus

Rawls argues that ‘reasonable’ comprehensive doctrines (i.e. personal convictions) will ‘affirm [a constitutional democratic] society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion’.¹²³ They will perforce arrive at an ‘overlapping consensus’ with those of different Belief groups for accommodating diverse incompatible Belief systems

¹¹⁹ Rawls, *Political Liberalism*, 291.

¹²⁰ Ibid, xlv.

¹²¹ Rawls, ‘The Idea of Public Reason Revisited’, 450-4.

¹²² Ibid, 481.

¹²³ Rawls, *Political Liberalism*, 483.

in a well-ordered society. This, he says, is not arrived at by looking to the comprehensive doctrines and ‘drawing up a political conception that strikes some sort of balance of forces between them’.¹²⁴ Rather, it elaborates a ‘political conception as a freestanding view working from the fundamental idea of society as a fair system of cooperation and its companion ideas’.¹²⁵

This seems to imply that adopting measures of expediency for keeping the peace in the face of multiple conflicting personal convictions (for example, by exemption from laws of general application) does not provide independent recognition of the right to Freedom of Belief. Such recognition is more fundamental than that: it is a logical extension of the recognition of justice as fairness.¹²⁶

Overlapping justification, it is argued, makes Freedom of Belief a logical imperative of the premise that each individual has the capacity for self-realisation through the development of personal convictions, thus recognising the necessity of reciprocity. It is also a moral imperative from the recognition of dignity and equality.¹²⁷

It would then follow that the democratic process involves an internal logic that (again at the risk of oversimplification) is characterised as follows: ‘I hold my personal convictions to be based on absolute truth, others hold their personal convictions (that are incompatible with mine) also to be based on an absolute truth. Incompatible personal convictions cannot all be based on absolute truth. If I am to be truly reasonable, I recognise that while I am entitled to hold and manifest my personal conviction, not only must I hold (as part of my personal conviction itself) that others are similarly entitled to manifest theirs. I must also recognise an overlapping consensus of what is good for all’.

This principle contains within itself the requirement that people constrain their exercise of personal convictions to the extent that others can fairly exercise *their* personal

¹²⁴ Ibid, 39.

¹²⁵ Ibid, 40.

¹²⁶ ‘[J]ustice as fairness is not reasonable....unless in a suitable way it can win its support by addressing each citizens’ reason, as explained within its own framework’. Rawls, *Political Liberalism*, 143, and generally Lecture IV.

¹²⁷ Lindholm, in ‘Philosophical and Religious Justifications’, (at p. 50) argues that ‘...people committed for good reasons to mutual respect and solidarity among all human beings, through informed, open-minded, and pluralist discussion and critical study, find that support and advocacy of the modern human rights project is morally compelling’.

convictions. In other words, we are autonomous in private life, but non-public personal convictions must be tempered by public reason when our actions impinge on others. It also recognises subjection to the collectively adopted principles of public good.

Freedom, then, is not freedom for its own sake, nor is it unbridled. We are free to the extent that freedom can be reasonably exercised in Rawls's sense, as described above.¹²⁸

One can conclude that overlapping *consensus* (albeit an ideal) is the logical imperative of the quest for justice as fairness. This is Rawls's basis for the view, adopted by the adjudicative bodies, that not all practices motivated by religion are necessarily protected by the relevant Articles, and that the state is concerned with action that affects interests of others, such as public welfare, health, security and the rights of others.

This is the other side of the principle of freedom espoused by the UDHR. On the one hand, it has changed the relationship of the individual and the state. It has spawned the universal citizen, who has claims against the state wherever they may be, applying the principle of freedom for personal fulfilment through autonomy and dignity. On the other hand, the principle of equality requires that the public interest apply to every individual, for the very purpose of providing equal opportunity for enjoying freedom of Belief for all.¹²⁹ The challenge is to find an effective balance between the two principles of liberty and equality.

7.4 Toleration of Belief

The above approach does not rely simply on political expediency in dealing with different beliefs. Political expediency is, however, a widely accepted justification for protecting Freedom of Belief.

The political expediency model has a historical basis. For example, in the Western world, the acceptance within nations of the right to Freedom of Belief has mostly

¹²⁸ Rawls, *Political Liberalism*, 61.

¹²⁹ If ever there was a clear divide between public and private the UDHR changed that. By its revolutionary stance that individuals per se had rights against the state and each other, it made the political personal by extending the 'arm' of public legality into the personal life of every individual.

resulted from the need for peaceful coexistence among warring religious societies, leading to such agreements as the Treaty of Westphalia in 1648.¹³⁰

In contrast to political expediency, the idea of tolerating behaviour implies that, while one disapproves of it, one endures it with forbearance. However, toleration has been seen by many as involving more than that, causing confusion as to what is expected of it. Christianity, for example, is held as requiring love and forgiveness of those who 'sin'. Many commentators say it involves engagement with those of other beliefs, with attempts to empathise with their values, and generate of some sort of 'respect' for them.¹³¹

Lindholm, for example, laments the fact that 'at its core', toleration does 'not envision, much less require, mutual respect, trust and constructive co-operation'.¹³² He states that:

...this prudential attitude, while extremely valuable in ruling out persecution and intervention in the religious life of others, at the same time subtly emasculates the sympathetic instinct to engage, understand and ultimately respect others. Briefly, toleration tends to enervate serious and focused attention to genuine difference of belief by permitting apathy about others and by filtering authentic religious voice out of the public square.¹³³

While he advocates engaging and understanding others, what counts, Lindholm argues, is not whether each individual or religious group appreciates others' practices or beliefs, but whether each 'on sound internal grounds, supports the public doctrine of the equal inherent dignity and unalienable freedom of all human beings, irrespective of their religion, life stance or any other differences', and that each reasonably trusts others to support freedom of religion or belief for all similarly.¹³⁴

Lindholm here confuses approaches to the meaning of 'toleration', it is argued. Advocating the equal inherent dignity and unalienable freedom of all human beings does

¹³⁰ Lindholm, 'Philosophical and Religious Justifications', 29.

¹³¹ Leslie Griffin, 'Fighting the New Wars of Religion: The Need for Tolerant First Amendment' *Maine Law Review* 62:1 2010,23

¹³² Lindholm, 'Philosophical and Religious Justifications', 45.

¹³³ Ibid.

¹³⁴ Ibid, 46

not require engagement, understanding of, or deference towards, others' points of view, admirable as this might be, while it arguably does require respecting them as persons with rights to hold those points of view.

Lindholm's reference to toleration filtering the 'authentic religious voice out of the public sphere' raises the issue of what and when a 'religious voice' becomes 'authentic', and what exactly is the public sphere. Rawls would answer, I argue, that while the religious voice is legitimate in the 'public sphere' of discussion of ideas, in the 'public sphere' of prescriptive government involving public justification of political institutions and policies in terms others could reasonably accept (the legislature, executive and judiciary), no religious voice is accepted as 'authentic'.¹³⁵

7.4.1 Rawls's approach to toleration

Loving one's neighbour and forgiving their perceived sins, or attempting to appreciate their Beliefs, may be a commendable moral principle to adopt, but is not what Rawls seems to envision as a valid political or legal requirement. Political expediency (where 'no one group is prepared to breach its allegiance to the general consensus for fear of losing ground in influence and numbers'¹³⁶) falls short of the ideal of reciprocity proposed by Rawls, effective though that justification for consensus may sometimes be in maintaining short-term peace.

Political expediency (Rawls calls it 'modus vivendi'¹³⁷) gives pre-eminence to ensuring a specific end (social harmony), rather than formal acknowledgment of the principle of Freedom of Belief in its own right. It could even allow a degree of state suppression of religious difference or free speech where that ensures a harmonious society, as the state may find it easier to institutionalise the oppression than to deal with the religious hatred'.¹³⁸ Thus, expediency does not recognise Freedom of Belief as a specific expression of basic freedoms inherent in democratic society, but rather settles for a means of preventing social disharmony.

¹³⁵ See, e.g. Rawls, 'The Idea of Public Reason Revisited', 462ff; *Political Liberalism*, 216ff.

¹³⁶ Rawls, 'The Idea of Public Reason Revisited', 459.

¹³⁷ See Rawls, *ibid*, 458ff.

¹³⁸ See, e.g., Evans, *Freedom of Religion*, 23. Laws suppressing free speech to prevent offense to religious sensitivities are an example of this.

A truly reasonable approach to personal convictions, Rawls argues, means individuals act, not from the need for expediency but from genuine recognition of Freedom of Belief as inherent in the equal dignity and autonomy of others.

The result of this reasonable approach is toleration as a natural consequence of an overlapping consensus: the expression of respect for the principle of equal opportunity for full enjoyment of the worth of human rights. Toleration is thus a political and legal process, not a part of comprehensive doctrines.¹³⁹ Toleration as a political process, then, is based, not on loving one's neighbour, but at least accepting and abiding the neighbour's difference.

7.4.2 Adjudicative bodies and toleration

One could argue that the human rights treaties are the expression of political expediency for promoting world peace and social justice among people. In the framing of Article 18 ICCPR, for example, the expression of Freedom of Belief became not 'primarily concerned with the religious freedom of believers, but with maintaining order between those espousing different points of view within the framework of a liberal society'.¹⁴⁰

With their focus on breaches of the right to Freedom of Belief in terms of discrimination and coercion, the adjudicative bodies are necessarily limited to considering toleration as a means of expediency. The idea of 'toleration' as applied by both the U.N. and the Council of Europe combines the general, rather imprecise aspirations of education, dialogue and 'respect'.¹⁴¹

¹³⁹ Griffin, 'Fighting the New Wars of Religion', 42

¹⁴⁰ Evans *Freedom of Religion* 207.

¹⁴¹ See, e.g., Plesner, Ingwill 'Promoting Tolerance through Religious Education' in Tore Lindholm, et al, *Facilitating Freedom of Religion or Belief*, 791, esp 795. The UNHRC has held that Article 18 seeks to promote toleration: *Leirvåg v. Norway* No.1155/2003, ICCPR, A/60/40 vol. II (views of 3 November 2004) 203, §9.10; *L. K. v. The Netherlands* (4/1991), CERD, A/48/18 (16 March 1993) 130 (CERD/C/42/D/4/1991) §11.5, 11.6. See the European Court, e.g., *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V. (Translation), 5, 6; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II. §91. See also *Dogru v. France*, no. 27058/05, 4 December 2008, ¶62 *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI. § 108). See also *Serif v. Greece*, no. 38178/97 ECHR 1999-IX. §53. There are Numerous references to the term 'tolerance' in relation to Freedom of Belief in U.N. documents, e.g., Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief*, A/UNHRC/10/8/Add.1, 16 February 2009.

7.5 Conclusion

This chapter has examined the interpretation of the relevant Articles in relation to conscientious objection to mandatory action and the related issue of distinction between freedom of thought and conscience and freedom to manifest Belief. It has been argued that:

- the adjudicative bodies have applied a narrow interpretation of ‘thought, conscience and religion’, and by introducing the concept of the *forum internum*, a different perspective is introduced;
- this perspective has led to the view that the absolute right to thought, conscience and religion provides protection from state-mandated activity, which conflicts with individual conscience; and
- this perspective is not consistent with the right of Freedom of Belief as established by the relevant Articles.

The approach of the adjudicative bodies to the role of conscience in conforming with state prescriptions and prohibitions was considered. This indicates that conscientious objection does not provide a basis for not following the law, thus excluding such objection from consideration as part of the *forum internum*, and rather considering it a matter of manifestation of Belief. Limitation of manifestation of Belief must be justified by the state on the grounds outlined in the relevant Articles, and, while the criteria there must be strictly applied, the State can exercise some discretion in assessing the existence and extent of the necessity limitation, but this discretion is subject to the ultimate supervision of the adjudicative body,¹⁴² and discussed further below.

The imprecise reference to protection by Article 9 ECHR of the *forum internum* by the European Court, and ambiguous use of that term by those using it, leads one to this perspective. A review of the approach of the adjudicative bodies has shown that they have attached a narrow meaning to what has been called the *forum internum*, and relegated all action to the category of manifestation of Belief.

¹⁴² The European Court calls this a ‘margin of appreciation’: see section 6.3.3.

Thus, while thought, conscience and religion are absolutely protected by the relevant Articles, there is no recognition that the relevant Articles envisage an automatic claim to state recognition of Belief-motivated action, or exemption from laws of general application.¹⁴³ Case law has indicated that all action (or, by implication, refusal to act)¹⁴⁴ that is based on Belief is to be considered under the conditions applying to manifestation of Belief, and subject to the prescribed limitations.

The case has been made that the claim that the *forum internum* includes acting on Belief is also inconsistent with the principles of Rawls's model of political liberalism. Equal enjoyment of human rights by all citizens in a liberal democracy, including liberty of conscience and freedom of religion, requires the development of an overlapping consensus among diverse incompatible Belief systems through dialogue and debate. This consensus infuses both personal and family life and government, mediated by the public marketplace of free and open discourse.

With its emphasis on equality in relation to the right to Freedom of Belief, the approach of the adjudicative bodies establishes the role of the individual as citizen, both enjoying the benefits and subject to the responsibilities of the freedoms of liberal society.¹⁴⁵ This means while citizens are not only free to believe what they choose, and to act on that Belief, when such action diminishes the democratic process or adversely affects the rights of others, the state may legitimately limit what he or she does, or refuses to do.

Although it is proposed that Rawls's model of true acceptance and recognition of liberties respecting Belief provides an ideal model of the optimal enjoyment of Freedom of Belief, given the unlikelihood of such a development, it is recognised that we most likely will have to be content with *modus vivendi*. A policy of tolerance is effective only to the extent that it promotes peace and prevents open hostility and discrimination.¹⁴⁶

¹⁴³ Most jurisdictions that make exceptions for conscientious objection to military service nevertheless limit the exceptions to non-combative service. Also, as pointed out by Smith, 'The Tenuous Case for Conscience', 336, a justification for exemption from military service is the non-moral ground of ruling out those who might prove ineffective or even detrimental to the military because of the trauma to them of being required to carry out combat duties.

¹⁴⁴ See Taylor's argument that refusing to act cannot be seen to be manifestation: Taylor, *Freedom of Religion* at 122ff.

¹⁴⁵ See, e.g., Rawls, 'The Idea of Public Reason Revisited', 50.

¹⁴⁶ Ibid.

However, we can only facilitate true Freedom of Belief by aiming for an ideal of political liberalism like that propounded by Rawls.

Issues surrounding manifestation of Belief are dealt with in the next Chapter.

CHAPTER 8

WHAT IS INVOLVED IN MANIFESTING A BELIEF?

8.1 Introduction

Having argued that action motivated by Belief is interpreted by the adjudicative bodies as *manifestation* of Belief, in this Chapter I review the nature of manifestation of Belief and its permitted limitations. Interpretation of the relevant Articles will be considered in the light of Rawls's theory of political liberalism, and the conclusion drawn that, while the approach to manifestation of Belief generally presupposes a liberal democracy, there are issues of contention that arise.

The relevant Articles provide that '[e]veryone has the right to 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'. Not only is there a right to practice one's Belief, but also a right *not* to practice it.¹ Moreover, manifestation, as indicated, is subject to limitations. The UDHR relies on a general limitation clause covering all rights.² The ICCPR, Belief Declaration and ECHR state that freedom to manifest Belief shall be subject only to limitations that are (a) prescribed by law, and (b) necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.³

As argued above (section 3.3.3) in Rawls's approach to political liberalism the principle of reciprocity places restraints on the actions of individuals and groups to the extent that

¹ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A, p. 17, §31; and *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I, ¶34).

² Article 29(2) UDHR provides that 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

³ Article 18(3) ICCPR provides that 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

Article 1(3) *Belief Declaration* provides that 'Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.

Article 9(2) ECHR provides that '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'.

they impede the generally accepted freedoms of others. This is based on the premise of individual reasonability and procedural justice.⁴ It is argued below that, in principle at least, the adjudicative bodies adopt a similar approach, in that the right to manifest Belief is as much a restraint as a freedom. Both restraint and freedom are balanced according to the principles of proportionality, or in Rawls's terms, justice as fairness.

8.1.1 Impartiality of the state

It was noted in Chapter 3 that Rawls required the state to be impartial in respect of Belief in its governance. The European Court has repeatedly emphasised the requirement of the State to be neutral and impartial. This 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'⁵ to ensure social harmony:

What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome.⁶

The impartiality of the state is 'not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.'⁷ However, it will be argued in Chapter 9 that by not requiring state-Belief separation, the relevant Articles have not adequately ensured this, compromising the equal Freedom of Belief.

As well as impartiality towards the manifestation of Belief, the European Court has held that members of Belief organisations (despite the constraints of the Belief itself) are entitled to participate in the political life of the state, particularly in respect of their

⁴ See, e.g., Rawls, *Political Liberalism*, II, §2, esp. 48ff. 'Reasonable' people want to cooperate with others on reasonable terms they can all accept; appreciate the consequences of the burdens of judgement; have a sense of justice; want to be seen as reasonable, or fair or just: Freeman, *Rawls*, 481.

⁵ *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I, §123.

⁶ *Ibid*, §116

⁷ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI §107. See also *Manoussakis and Others v. Greece*, 26 September 1996, Reports of Judgments and Decisions 1996-IV, §47; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, ECHR 2000-XI, §78; *Refah Partisi (the Welfare Party) and Others v. Turkey* §GC, nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, §91; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I. §43ff.; *Serif v. Greece*, no. 38178/97 ECHR 1999-IX, §53.

maintenance of identity and culture.⁸ This two-dimensional aspect of reciprocity is in line with Rawls's position, that while groups may be entitled to preserve their own culture and convictions, all citizens are entitled, in the end, to participate in political activity (see above section 5.3.1).

8.1.2 Belief must be genuine

Firstly, Rawls saw Belief as a genuine commitment to a 'comprehensive doctrine' – a world view that is more than mere opinion but a commitment to a set of values for living (section 3.3.3). The European Court held that it must be satisfied that the applicant genuinely subscribes to the Belief in question. In one case, for example, an employee claimed a breach of Article 9 ECHR by his employer who refused him leave from work on several Fridays, to observe the prayer and other requirements of his Muslim religion.⁹ He claimed that as citizens were legally entitled to paid religious holidays, his freedom to manifest his religious Beliefs was curtailed.

The Court noted that 'the notion of the State sitting in judgment on the state of a citizen's inner and personal Beliefs is abhorrent and may smack unhappily of past infamous persecutions'. However, where an employee claims a special right to a particular exemption, it is neither oppressive nor in breach of Article 9 ECHR to require 'some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion'.¹⁰

Other than the brief rejection of the worship of marijuana as a genuine Belief,¹¹ the UNHRC has been loath to consider the nature of a person's alleged Belief and whether they really do entertain that Belief, preferring when relevant to consider such matters on

⁸ *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I, §39; *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV and *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, ECHR 2001-VIII.

⁹ *Kosteski v. "The former Yugoslav Republic of Macedonia"*, no. 55170/00, § 39, 13 April 2000.

¹⁰ *Ibid*, §39. In cases concerning conscientious objection the authorities may legitimately require strong evidence of genuine religious objections to justify exemption from the civil duty of military service (e.g. *N. v. Sweden*, no. 10410/83, Commission decision of 11 October 1984, D.R. 40 p. 203; *Raninen v. Finland*, no. 20972/92, Commission decision of 7 March 1996).

¹¹ *M.A.B., W.A.T. and J.A.Y.T. v. Canada* No. 570/1993, U.N. Doc CCPR/C/50/D/570/1993 (1994).

other grounds, such as freedom of speech or assembly, thereby finding it unnecessary to consider Article 18.

8.2 ‘Manifestation’ of Belief

Once satisfied that those alleging breach of the relevant Articles have a genuine Belief, the adjudicative body must consider whether the complainant’s action or refusal to act is a manifestation of that Belief.

8.2.1. Basic statement: UNHRC

U.N. General Comment 22 lists what is included in the manifestation of Belief and the Belief Declaration sets out all activity that is included in Freedom of Belief:

TABLE 8: MANIFESTATION OF BELIEF: UDHR & BELIEF DECLARATION

General Comment 22, §4	Belief Declaration, Art 6
<p>Worship includes</p> <ul style="list-style-type: none"> • ritual and ceremonial acts giving direct expression to Belief; • practices integral to such acts; • building of places of worship; • the use of ritual formulae and objects; • the display of symbols; and • the observance of holidays and days of rest. <p>Observance and Practice includes</p> <ul style="list-style-type: none"> • ceremonial acts; • customs; • dietary regulations; • wearing of distinctive clothing or head coverings; • participation in rituals associated with certain stages of life; • use of a particular customary group language. <p>Practice and teaching includes:</p> <ul style="list-style-type: none"> • acts integral to the conduct by religious groups of their basic affairs, such as: <ul style="list-style-type: none"> ○ freedom to choose their religious leaders, priests and teachers, ○ freedom to establish seminaries or religious schools ○ freedom to prepare and distribute religious texts or publications. 	<p>Freedom of Belief, subject to the limitation provision, includes, inter alia, freedom</p> <ul style="list-style-type: none"> (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (b) To establish and maintain appropriate charitable or humanitarian institutions; (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (d) To write, issue and disseminate relevant publications in these areas; (e) To teach a religion or belief in places suitable for these purposes; (f) To solicit and receive voluntary financial and other contributions from individuals and institutions; (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief; (i) To establish and maintain communications with individuals and communities in matters of religion and Belief at the national and international levels.

The UNHRC has also stated that the term ‘worship, observance, practice or teaching’ covers ‘a broad range of acts’.¹² It is notable that the UNHRC has even included enforced adoption of a particular Belief as a violation of the right to manifest, rather to hold or adopt, a particular Belief. In *Kang v. Korea*, a dissident was convicted and sentenced to, *inter alia*, a rehabilitation process involving changing his ideology through an ‘ideology conversion system’. The Committee considered that the State had:

...failed to justify [the ‘ideology conversion system’ designed to induce change in a person’s political opinion by the use of favours] as being necessary for any of the permissible limiting purposes enumerated in Articles 18 and 19, and thus restricted freedom of expression and manifestation of Belief as set out under these Articles, in conjunction with Article 26 (which guarantees equality before the law).¹³

Proselytising, on the other hand, is considered a legitimate form of manifestation. The UNHRC held that for numerous religions, including that of the applicants, ‘it is a central tenet to spread knowledge, to propagate their Beliefs to others and to provide assistance to others’.¹⁴ The European bodies have agreed that reasonable proselytising is not a breach of Article 9 ECHR.¹⁵

Although it is apparently broad, Malcolm Evans argues that the list set out in *General Comment 22* is in fact restrictive. The four forms of manifestation provide an exhaustive catalogue, but the interpretation placed on those four heads ‘limits their scope to acts closely and directly connected to the formal practice of religious rites and customs’. This

¹² *ICCPR General Comment 22*, §4; See discussion in W. Cole Durham, ‘Facilitating Freedom of Religion or Belief Through Religious Association Laws’ in Tore Lindholm et al, *Facilitating Freedom of Religion or Belief*, 321.

¹³ *Kang v. Republic of Korea*, Communication No. 878/1999 (views of 15 July 2003) U.N. Doc. A/58/40 vol. 2 (2003), p. 152, §7.2.

¹⁴ *Sister Immaculate Joseph et al v. Sri Lanka* Communication No.1249/2004 (views of 21 October 200) U.N. Doc.CCPR /C/85D/1249/2004, §7.2.

¹⁵ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A §48: ‘First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others’.

excludes activities that may ‘flow from religious convictions’.¹⁶ The Committee recognises that the ‘private’ practice of Belief is not to encroach on the ‘public’ life of public reason, and the need, while maximising the liberty of each individual, to restrain activity that violates the rights of others.

In one case before the UNHRC that caused a (brief) consideration of manifestation of Belief and its context, a teacher, Malcolm Ross, published several books and pamphlets and made public statements, including a television interview, reflecting controversial, allegedly religious opinions concerning abortion, conflicts between Judaism and Christianity, and the defence of the Christian religion.¹⁷ Ross claimed his rights under both Article 18 ICCPR (freedom to manifest religious belief) and Article 19 ICCPR (freedom of speech) had been breached. While Ross’s activities were carried out separately from his teaching, a Board of Inquiry held that they contributed to the creation of a ‘poisoned environment within [the school district] which greatly interfered with the educational services provided to [a parent] and his children’.¹⁸

The European Commission first considered whether Article 19 ICCPR (freedom of expression) had been breached. It found that Ross’s comments had violated the ‘rights or reputation’ of persons of Jewish faith, and created a ‘poisoned school environment’ for Jewish children in the school district. Disciplinary action against Ross had thus not breached Article 19.¹⁹

In relation to Article 18 ICCPR, the UNHRC found that:

- the author’s activities were not manifestations of a religion, ‘as he did not publish them for the purpose of worship, observance, practice or teaching of a religion’; and

¹⁶ Evans, ‘The United Nations and Freedom of Religion’, 216. See also his comments in ‘The Work of the Human Rights Committee’, at 44ff, where he concludes that a person cannot necessarily ‘practice what they preach’ (ibid, 46). Paragraph 4 of *General Comment 22* defines manifestation as ‘acts integral to the conduct by religious groups of their basic affairs’. For a comment on the narrow approach see Durham, ‘Facilitating Freedom of Religion or Belief Through Religious Association Laws’, 358 n183.

¹⁷ *Ross v. Canada* Communication No. 736/1997 CCPR/C/70/D/736/1997 (views of 26 October 2000) .

¹⁸ Ibid, §4.3.

¹⁹ Ibid, §11.5, 11.6.

- disciplinary action taken against the author was ‘not aimed at his thoughts or Beliefs as such, but rather at the manifestation of those Beliefs *within a particular context*’, thus engaging questions of freedom of speech as well as religion;
- consequently, Article 18 had not been violated by the disciplinary action taken against Ross.²⁰

There is little further case law on the meaning of ‘manifestation’ of Belief by the UNHRC, as emphasis appears to fall on permitted limitations of Freedom of Belief. Malcolm Evans expresses the view that a comparatively restrictive interpretation, based on religious practice, has been placed on the meaning of ‘manifestation’, despite its apparently broad scope as set out in the relevant documents.²¹

8.2.2 Basic statement: European bodies

The ECHR does not set out a list of what constitutes manifestation of Belief, and the European Court has not considered in detail what is involved in manifestation of Belief. The Court seems more concerned with the limitations that apply to manifestation.²² However, the broad interpretation of the concept of ‘practice’ by both the European Commission and Court has led to their avoidance of ‘delving deeply into the parameters of worship, teaching and observance’, so that ‘the key to understanding what amounts to a manifestation for the purposes of Article 9 lies in determining the scope of ‘practice’’.²³

The scope of ‘practice’ was somewhat modified by the principle that not all acts motivated or inspired by a Belief could be considered as manifestation of Belief. Added to this was the requirement that only practice ‘intimately linked’ to a Belief, was to be considered.

²⁰ Ibid, §11.8 (emphasis added). It noted that similar limitations were relevant to both Articles 18 and 19.

²¹ Evans *Religious Liberty and International Law*, 216.

²² See, e.g., *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI §104. Malcolm Evans provides a critique of the European Court’s approach in ‘Freedom of Religion and the European Convention on Human Rights’, 300ff. See discussion below at section 8.5.2.

²³ Evans, *Religious Liberty and International Law*, 306.

This approach was first set out in *Arrowsmith v. United Kingdom*,²⁴ and reinforced by the European Court.²⁵ The applicant in the *Arrowsmith case* had been convicted under the *Incitement to Disaffection Act* 1934 (U.K.) section 1.1 for inciting soldiers to neglect their duty. She had distributed leaflets to British soldiers, exhorting them, *inter alia*, to refuse to serve in Northern Ireland or to go absent without leave and seek asylum in Sweden. Addresses in Sweden were provided, from which legal advice or social help could be obtained.

Her appeal rights exhausted, Ms Arrowsmith applied to the European Commission, alleging, *inter alia*, that she had been denied the right to manifest her pacifist Belief as guaranteed under Article 9 ECHR, and her right to freedom of expression under Article 10 ECHR. The Commission accepted pacifism as a Belief under Article 9.²⁶ It also accepted that this was a genuine Belief held by Ms Arrowsmith at the time.²⁷

The Commission next considered whether the distribution of the pamphlets was a ‘manifestation’ by the applicant of her Belief, citing the four examples of manifestation in Article 9(2) ECHR (that is, worship, observance, practice and teaching). Responding to the applicant’s claim to be ‘practising’ her Belief, the Commission held, in words that would be adopted in later cases, that the term ‘practice’ ‘does not cover each act which may be motivated by a Belief’.²⁸ It explained that:

...public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist Belief. However, when actions of individuals do not actually express the Belief concerned they cannot be considered to be as such protected by Article 9(1), even where they are motivated or influenced by it.²⁹

²⁴ *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5 (1978).

²⁵ See, e.g., *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, §§27-31 (no interference with the right guaranteed by Article 9 where a military officer with fundamentalist Beliefs was compulsorily retired for breach of discipline); *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, §§105 and 212 (wearing of headscarf at school).

²⁶ *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5 (1978), §69.

²⁷ *Ibid.*, §68.

²⁸ *Ibid.*, §71.

²⁹ *Ibid.*, §71. It would seem that the Commission was using the term ‘expression’ in a broad sense, that is, to include not only linguistic or artistic means of demonstrating one’s Belief (as appears to be the

In considering the pacifist conviction of Ms Arrowsmith, the Commission determined that the thrust of the leaflet was to express opposition to government policy on Northern Ireland. It was also directed solely at soldiers who might be posted to Northern Ireland, and could have been written by non-pacifists (indeed it contained material that could be held to infer that fighting in some circumstances could be justified).³⁰ Accordingly, in prosecuting and convicting the applicant the Government was motivated, ‘not by her holding particular opinions, including pacifist views, but by the fact that her action in distributing the leaflets constituted the offence of incitements to disaffection’.³¹

This ruling established firmly the restrictive approach the European Commission and Court were to follow in determining the scope of what constitutes ‘practice’ of Belief. It became known as the ‘*Arrowsmith* test’, that is, requiring the activity in question to be closely connected to the nominated Belief, and central to its manifestation. Whilst this may imply that only those acts that are directly expressive of a Belief are protected, the Court did not elaborate or specify just what actions would be included.

The European Commission has continued this distinction between actions constituting *manifestation* of a Belief and those that are *motivated by* a Belief in other areas to reject activities as religious practice.³² Applicants have been required to demonstrate that their religion or belief *obliged* them to act in a certain way. Adoption of the *Arrowsmith* case has been held to be a demonstration of the European bodies’ failure to treat action as part of the *forum internum*, as discussed in Chapter 7.³³

limited use of the term in Articles 19 ICCPR and 10 ECHR that deal with freedom of expression), but also by other unspecified means, including action.

³⁰ Ibid, §72.

³¹ Ibid, §103.

³² The following are examples of actions held to be merely motivated, rather than mandated, by religion: underage marriage permitted by Islamic law: *Khan v. United Kingdom* App. No. 11579/85, 48 HR Dec & Rep. 89 (1981); Buddhist prisoner sending letter to religious publication: *X v. United Kingdom* App. No. 5442/72, 1 Eur. Comm’n HR Dec & Rep. 41 (1974); setting up a legal association: *X v. Austria*, App. No. 8652/79, 26 Eur. Comm’n H.R. Dec. & Rep. 89 (1981); refusal by a Jew to hand a *gett* (notice of divorce) to his ex-wife thus preventing her remarriage: *D v. France*, App. No. 10180/82, 35 Eur. Comm’n H.R. Dec. & Rep. 199 (1983).

³³ See, e.g., Evans, *Freedom of Religion* 115. Evans has argued that the result is a lack of clarity and difficulty in maintaining coherence in the application of this approach, and that the Commission has paid almost no attention to the specific facts of later cases, but has cited the *Arrowsmith* test and used it to dismiss cases.

As indicated above, then, the adjudicative bodies, and the European ones in particular, have quite clearly indicated that while there is a permissible ‘margin of appreciation in assessing the existence and extent of an interference’ the limits that can be placed on this interference must be strictly constrained according to the provisions of the relevant Articles.³⁴ What constitutes manifestation of Belief in the first place is also to be strictly conceived. Given that restrictions must be based on proportionality (which is arguably a form of reasonability), it is proposed that the adjudicative bodies have instituted a requirement similar to Rawls’s concept of public reason.

The *Arrowsmith* case was a starting point for clarification of just what is protected by article 9 ECHR. As noted, the Commission did not help the remaining confusion by its qualification of a statement in the later case of *C v. United Kingdom* that Article 9 primarily protects the sphere of personal Beliefs, which it noted some call the *forum internum*. It qualified this protection by stating that it did not confer the right to refuse to obey laws provided for in the ECHR, that apply neutrally generally in the public sphere and do not impinge on freedoms granted by Article 9 of that Convention.³⁵

As a result, Taylor argues, it is:

...extremely difficult to bring any claim successfully under Article 9 of the European Convention when *manifestation* of Belief conflicts with laws that are general, neutral, or which fall within the burden which States are entitled to impose under particular Convention Articles, such as those relating to pensions under social security or taxation.³⁶

This is even harder, Taylor says, ‘in cases relating to pensions involving coercion because of the inappropriateness of applying the *Arrowsmith* test of manifestation to interference by coercion’.³⁷ Applicants must argue that their non-compliance with the law in question actually *expresses* the Belief concerned and that the practice of their Belief is unjustifiably restricted. Taylor states:

³⁴ ICCPR General Comment 22, §8; See, e.g., *Manoussakis and Others v. Greece*, 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, §44.

³⁵ *C. v. United Kingdom* 10358/83 37 D&R (1983) 142, 147.

³⁶ Taylor, *Freedom of Religion*, 127 (emphasis original).

³⁷ Ibid.

A legal requirement compelling the applicant to act in a particular way is not comparable to a restriction which limits the applicant's chosen outward manifestation of belief. Whenever *Arrowsmith* reasoning is applied to cases of coercion, analysis is based entirely upon the individual's reaction to State compulsion rather than on the issue of whether such compulsion is permissible *a priori*.³⁸

However, it is proposed that this argument is flawed for two reasons. Firstly, compelling the applicant to act in a particular way *can* constitute restriction of manifestation of Belief, given that objecting to act in a particular way can be held to be the expression of a belief in preference for an alternative way of acting.

Secondly, the validity of the person's refusal to act according to law *depends* on whether the law is 'permissible [i.e. justifiable under the limitation provisions] *a priori*'. Otherwise, it would suffice for applicants to show that they have a conscientious objection to a particular law, permitting exemption from the law whenever this occurred. Given the wide diversity and nature of Beliefs, the practice of some of which (through either action or inaction) can be quite harmful to others, this could lead to an unacceptably wide recognition of individual views of right and wrong.

The 'Arrowsmith test' was applied in the case of *Ahmad v. United Kingdom*.³⁹ A Muslim teacher was refused leave for 45 minutes on Fridays for prayers at a mosque. The Commission found that he had placed himself of his own free will in a position where he was unable to attend the mosque. The Commission's approach indicated that where it is not *required* by the religion or belief, there is no undeniable right to follow a particular religious practice.

One of the justifications for the finding in this case and others dealing with employment, is the acceptance of the employment in the first place. Where a person accepts the conditions of employment, the adjudicative bodies have been unwilling to accept claims of violation of religion or belief. The European Commission reasoned that this was

³⁸ Ibid, 128.

³⁹ *Ahmad v. the United Kingdom*, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27 (1981).

because by taking the position the teacher had voluntarily agreed to the restriction.⁴⁰ It also reasoned that the applicant implied by this agreement that he did not deem it necessary to attend prayers.

Jeremy Gunn decries the fact that undertaking a job or other commitments can lead to ‘a simple contractual waiver’ of the right to manifestation of Belief.⁴¹ In reply, it is argued the obligation of the government (or private employer) to cater to religious requirements after employees had agreed to fulfil specified conditions would go beyond the preservative nature of the right to Freedom of Belief. Anti-discrimination law addresses unfair discrimination against such people, insisting that such actions amount to discrimination where there is *not* a specific or constructive waiver of the right to, say, take time off for prayers and it is not necessary or reasonable to prevent the practice.

The European Court has continued the approach of the Commission by adopting the view that there is no violation of Article 9 where there is a voluntary acceptance of a position that involves restrictions on the person’s manifestation of religion, as a term of employment or office, and the person is not obliged to take, or continue in, that position.⁴² The choice must be a genuine one, however, and consistent with the values of the Convention.⁴³

8.3 Limitations to the manifestation of Belief

In practice, the right to Freedom of Belief becomes an issue when someone is required to act, or refrain from acting, in accordance with the tenets of their Belief. The relevant Articles set out the grounds on which the State may legitimately impose limitations on

⁴⁰ See also *Karlsson v. Sweden*, no. 12356/86, 57 Eur. Comm’n H.R. Dec. & Rep. 172, 175 (1988) (clergyman taken to have agreed to adhering to state religion tenets as condition of appointment); *The Norwegian State Church, Knudsen v. Norway* App. No. 11045/84, 42 Eur. Comm’n H. R. Dec. & Rep. 247 (1955) (clergyman taken to have agreed to undertake state services – conducting marriages and keeping birth register – as part of appointment); *X. v. Federal Republic of Germany*, no. 8741/79, 24 Eur. Comm’n H.R. Dec. & Rep. 137, 138 (1981) (wish to have ashes scattered in a garden did not amount to a Belief).

⁴¹ Gunn, ‘Adjudicating Rights of Conscience’, 315 fn. 48

⁴² See also cases involving the military and potential lack of autonomy, such as *Larissis and Others v. Greece*, judgment of 24 February 1998, Reports of Judgments and Decisions 1998-I; *Kalaç v. Turkey*, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.

⁴³ E.g., in the case of *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I it was not compatible with the thrust of the Convention to make the mandate held as a member of parliament to represent different views within society subject to prior commitment to a particular set of Beliefs (at, §39).

the manifestation of Belief. It is made clear that these are the only grounds on which the limitations may be imposed.

Articles 18(3) ICCPR and 1(3) Belief Declaration state that:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 9(2) ECHR stipulates the same limitations, but adds that they must be 'necessary in a democratic society'.

Is the interpretation and implementation of the provision in accordance with the political liberalism espoused by Rawls? It was noted in section 3.3.1 above that for Rawls, just decision-making in the face of variable social circumstances is determined by the legitimacy of the decision-making procedure itself, and if the procedure is fair, the outcome is accepted as fair. It was also argued at section 3.3.2 that, for Rawls, secularism as state neutrality and indifference to comprehensive doctrines, as well as its separation from them, is a fundamental basis for a just society. At section 3.3.3 it was proposed that this secular approach to government is based on the principle of public reason. With this basic framework of justice in mind, the limitation provisions will be considered.

8.3.1 Specified criteria only

Given that individuals have a right to manifest their Beliefs, a fair procedure in determining their limitation by government or others would seem to require that limitations be minimal, and the grounds for limitation strictly interpreted. The recent case of *Svyato-Mykhaylivska Parafiya v. Ukraine*⁴⁴ sets out the European Court's approach to the strictness of the limitation provision of Article 9(2) ECHR. It held that:

...the list of these restrictions, as contained in Articles 9 and 11 of the Convention, is exhaustive and they are to be construed strictly, within a limited margin of appreciation allowed for the State and only convincing and compelling reasons can

⁴⁴ *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, 14 June 2007.

justify restrictions on that freedom. Any such restriction must correspond to a “pressing social need” and must be “proportionate to the legitimate aim pursued”.⁴⁵

The Court went on to say that its task is to determine whether the state’s actions were justified in principle and proportionate to the legitimate aim pursued. The state’s actions must be in conformity with the principles embodied in the Convention and based on ‘an acceptable assessment of the relevant facts’.⁴⁶

As noted above (e.g. section 3.3) Rawls advocates freedom to manifest Belief subject to the principle of reciprocity,⁴⁷ based on public reason – including human rights and the principles of democracy. The grounds for limiting the manifestation of Belief in the relevant Articles set out more specific criteria, that is, proclaimed law regarding public safety, health, order and morals and the rights of others. Many individual decisions of the adjudicative bodies have been criticised for their interpretation of these criteria on the ground that they operate to unduly restrict the manifestation of Belief.⁴⁸ This chapter is more concerned with the broad principles and reasoning underlying the procedure adopted by the adjudicative bodies rather than debating the merits of particular decisions.

Underlying the limitation provisions of the relevant Articles is the principle established by both the UNHRC and the European Bodies that the state has no right to interfere with

⁴⁵ Ibid, §137. See, also, e.g., *Wingrove v. the United Kingdom*, 25 November 1996, Reports of Judgments and Decisions 1996-V, §53.

⁴⁶ *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, 14 June 2007, §138. See also *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I, § 47.

⁴⁷ Reciprocity, according to Rawls is ‘a moral requirement on citizens and officials; they should reasonably believe that the terms of cooperation (laws etc.) they propose be reasonably acceptable to others as free and equal citizens, and not as manipulated, dominated, or under pressure of being socially or politically inferior. This is the basis for the liberal principle of legitimacy’: Freeman, *Rawls* 481-2. See also Rawls, *Political Liberalism*, 15ff.

⁴⁸ Manfred Nowak and Tanja Vospernik, ‘Permissible Restrictions on Freedom of Religion or Belief’ in Tor Lindholm, et al, *Facilitating Freedom of Belief: a Deskbook*, 86 at 172 argue that case law shows the ‘difficulties of striking a fair balance between the manifestations of a freedom of religion on one hand and protection of public interests as well as human rights of private persons on the other’. They give a succinct account of some of decisions they believe apply these criteria too broadly (such as the prohibition of religiously-inspired headwear), thus inhibiting manifestation of Belief. See also Evans, ‘Freedom of Religion and the European Convention on Human Rights’.

decisions by churches and other Belief organisations relating to internal issues such as who are clergy and teachers, and (within prescribed limits) what is taught.⁴⁹

Firstly, government restrictions on manifesting Belief must be ‘prescribed by law’. This provides the democratic principles of political participation, with the resulting overlapping consensus through public reason.

The recent case of *Dogru v. France* summarises the European Court’s case law on what is meant by ‘prescribed by law’. This case involved a Muslim student who wore a headscarf to physical education and sports classes. This practice infringed students’ legislative ‘duty of assiduity’, the school’s internal rules, occupational and health rules and a decision of the *Conseil d’État* that signs of religious affiliation were contrary with the proper conduct of physical education classes. The Court held that what is ‘prescribed by law’ includes everything that goes to make up the written law, including enactments of lower rank than statutes and the relevant case-law authority.⁵⁰ Such law should be accessible to the persons concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail.⁵¹

There is here a requirement that the government act according to the same principles as those set out by Rawls – that is, an overlapping consensus based on public reason, acceptable to all, based on the democratic presumption that law is enacted subject to a transparent procedure representative of the equal opportunity for participation by all citizens. This is the ideal, but it follows the criteria for the procedural justice of political liberalism.

⁴⁹ E.g., the UNHRC held that a teacher appointed by the Catholic Church to teach religion in a government school who advocated ‘liberation theology’ could, however, be disciplined by the Catholic Church: *Paez, v. Colombia* Communication No. 195/1985, CCPR/C/39/D/195/1985, 23 August 1990. The European Court held that the prosecution of a man who ‘acted as a religious leader of a group who willingly followed him [when the state had appointed another cleric] can hardly be considered compatible with the demands of religious pluralism in a democratic society’ *Serif v. Greece*, no. 38178/97, ECHR 1999-IX, §51. See also *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, nos. 412/03 and 35677/04, 22 January 2009. State interference in internal disputes within religious communities, and criminalising a leadership role in a religious community could not be justified.

⁵⁰ *Dogru v. France*, no. 27058/05, 4 December 2008, §52.

⁵¹ *Ibid*, §49.

8.3.2 The role of ‘Necessity’ in restricting manifestation of Belief

The relevant Articles require that any restriction on manifestation of Belief must be *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. This is based on the premise that states are best placed to determine what is necessary to protect them.

In determining what is ‘necessary’ to justify limiting the manifestation of Belief, the UNHRC has based its decision-making on whether state action has ‘reasonable and objective criteria’, which is a formula for determining allowable state discretion:

The Committee observes that not every differentiation of treatment will constitute [unjustified] discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁵²

In the case of *Waldman v. Canada*,⁵³ the Committee also determined that where a distinction based on Belief is enshrined in the Constitution this does not automatically render it reasonable and objective, and thus valid under the ICCPR. Section 93 of the Canadian Constitution grants each province in Canada exclusive jurisdiction over education, including denominational school funding. The basis of the complaint in this case was the preferential treatment of Roman Catholic schools permitted in Ontario.

Under the Ontario *Education Act* section 122, Roman Catholic schools (‘separate schools’) were the only religious schools entitled to the full public funding, along with state schools. The applicant was required to pay fees for his child’s education at a Jewish private school, and complained that the sole funding of Catholic schools was discriminatory under Article 26 ICCPR (guaranteed equality). The UNHRC rejected the State party’s argument that the fee was non-discriminatory because of the Constitutional provision for denominational funding, and ruled that the exclusive funding of Roman Catholic schools was a breach of Article 26 ICCPR.

⁵² *ICCPR General Comment 18 (37)*, U.N. Doc. CCPR/C/21/Rev1/Add.1 (1989) reprinted in U.N. Doc. A/45/40 vol 1 Annex V. (1990), 174., §13; *S.W.M. Broeks v. the Netherlands* Communication No. 172/1984 (views of 9 April 1987) U.N. Doc. A/42/40 (1987), §13.

⁵³ *Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (5 November 1999), §10.4.

The UNHRC has also indicated that in considering alleged state interference with Freedom of Belief, it is appropriate to consider the context of the particular case at hand. The case of *Hudoyberganova v. Uzbekistan*,⁵⁴ for example, involved a university student wearing a headscarf (referred to by both parties as a ‘hijab’) on campus, a practice which was prohibited by the university authorities. In this case, neither party offered sufficient detail on the specific attire that was worn, and the state gave no justification for the prohibition. In its findings, the Committee indicated that it took into account, *inter alia*, the ‘specifics of the context’ of a case, and as it was unable to do this here through lack of information, found a violation of Article 18 on the part of the State.⁵⁵

The case of *Ross v. Canada* (discussed above at section 8.2.1) considered the religious opinions expressed by a teacher out of school and their alleged creation of a poisonous environment within the school district. The Committee weighed such factors as the circumstances of the case, the makeup of the local society, the influence and responsibilities of teachers and the social ramification of speech.⁵⁶

While the UNHRC has not offered a definitive description of what is ‘necessary’, it has further stated that:

... paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.⁵⁷

A useful case for understanding the reasoning of the UNHRC is *Malakhovsky and Pikul v. Belarus*.⁵⁸ The authors were members of the Minsk Vaishnava community (community of Krishna consciousness), one of seven such communities registered in Belarus, which distinguished between a registered religious *community* and a registered

⁵⁴ *Hudoyberganova v. Uzbekistan* Communication 931/2000.

⁵⁵ Ibid, §6.2. However the dissenting judgments in that in coming to its present decisions the Committee had in fact acted on limited information that did not provide an adequate means of grasping the ‘specifics of the context’.

⁵⁶ *Ross v. Canada* Communication No. 736/1997 CCPR/C/70/D/736/1997 (views of 26 October 2000), §11.4ff.

⁵⁷ ICCPR *General Comment* 22, §8.

⁵⁸ *Malakhovsky and Pikul v. Belarus* No. 1207/2003; U.N. Doc. CCPR/C/84D/1207/2003.

religious *association*. The authors state that they were denied the right to manifest their religion, as only registered religious *associations* could establish monasteries, religious congregations, religious missions and spiritual educational institutions, or invite foreign clerics to preach or conduct other religious activity. The Committee considered that these activities form part of the authors' right to manifest their Beliefs. A key basis for refusing registration was the need for an approved address. As the community had indicated it would use the premises for collective purposes, the address it provided for its activities was held to violate safety rules set down for non-residential activities.⁵⁹

The Committee considered whether this limitation on the authors' right to manifest their religion was 'necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others'. It noted *General Comment No 22*, paragraph 8, which requires the prescribed limitations (a) to be interpreted strictly; (b) to be applied only for those purposes for which they are prescribed; and (c) directly related to and proportionate to the specific need on which they are predicated.⁶⁰ The Committee agreed that the conditions under which premises may be registered for use for religious activities must satisfy relevant public health and safety standards were both 'necessary for public safety, and proportionate to this need'.⁶¹ However, it went on to decide that:

...the State party has not advanced any argument as to why it is *necessary* for the purposes of article 18, paragraph 3, for a religious association, in order to be registered, to have an approved legal address which not only meets the standards required for the administrative seat of the association but also those necessary for premises used for purposes of religious ceremonies, rituals, and other group undertakings. Appropriate premises for such use could be obtained subsequent to registration.⁶²

⁵⁹ Ibid, §7.4.

⁶⁰ Ibid, §7.3.

⁶¹ Ibid, §7.5.

⁶² Ibid, §7.6.

The principle has thus been established by the UNHRC that unless the state can demonstrate that limitations it places on the manifestation of Belief are necessary according to Article 18(3), there has been a violation.⁶³

Despite this, the UNHRC has shown a willingness to allow a degree of state discretion in determining what is ‘necessary’. In *Westerman v. The Netherlands*,⁶⁴ the UNHRC held that conscientious objection to military service is ‘a clear manifestation of the freedom of thought, conscience and religion recognized by article 18 of the Universal Declaration of Human Rights’.⁶⁵ In so doing, the Committee pointed to the growing acceptance by states of alternative service for conscientious objectors. It also pointed to the then Commission on Human Rights draft resolution on conscientious objection to military service,⁶⁶ acknowledging conscientious objection to military service, sponsored by the State party and 11 other European States. Thus, while adopting an approach that ties manifestation to the particular forms set out in Article 18(3) ICCPR, the UNHRC indicates a preparedness to consider developing policy of states-parties in some circumstances.

The ‘objective and rational’ approach of the UNHRC, while not specifically using Rawls’s terminology of procedural justice, is arguably a way of making practical a similar notion justice as fairness. While considering individual circumstances, it invokes the goal of maximising Freedom of Belief while ensuring equal regard for all.

⁶³ For example it found that Article 18(3) had been violated in the face of the Korean Government’s failure to demonstrate the necessity of subjecting the dissident author to a coercive ‘ideology conversion system’ to change his thinking in *Kang v. Republic of Korea*, Communication No. 878/1999 (views of 15 July 2003) U.N. Doc. A/58/40 vol. 2 (2003), p. 152, §7.2. It also found that the proscription of the wearing of what was called a ‘hijab’ by the Tashkent State Institute for Eastern Languages in Uzbekistan was a violation of Article 18(3) ICCPR, based on the absence of evidence of necessity: *Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004), §6.2.

⁶⁴ *Westerman, Paul v. The Netherlands*, Communication No. 682/1996 U.N. Doc. CCPR/C/67/D/682/1996 (13 December 1999).

⁶⁵ *Ibid*, §9.3. The UNHRC has taken a more liberal approach to recognizing conscientious objection than the European bodies: whereas the latter have required evidence of membership of a recognised Belief organisation, the UNHRC has insisted on no differentiation between particular groups: *Brinkhof v. The Netherlands*, Communication No. 402/1990 U.N. Doc. A/48/40 vol. 2 (1993), (1994), §9.3. For a comparison of the two jurisdictions, see Taylor, *Freedom of Religion*, 192ff.

⁶⁶ E/CN.4/1998/L.93. Text adopted by the Assembly on 29 June 2007 (27th Sitting).

8.3.3 The role of the ‘Margin of Appreciation’ in restricting manifestation of Belief

In determining whether restriction of manifesting Belief violates Article 9(2) ECHR, European case law has taken a somewhat different perspective to the UNHRC. While allowing the need for the restraints of necessity, in its consideration of individual circumstances it has arguably relied more on a ‘margin of appreciation’ that is, a degree of discretion on the part of states in accordance with local needs and conditions as they are seen to be better placed than the international court to evaluate these.⁶⁷ Nevertheless, the national authorities’ decision-making must be based on necessity, and remains subject to review by the Court for conformity with the requirements of the Convention,⁶⁸ which, as noted above, is to be construed strictly.⁶⁹

The scope of the margin of appreciation depends on the relationship between the State and religions and its significance in society, and a fair balance must be struck between competing interests.⁷⁰ As there is no common agreement between states as to the requirements of public safety, health, order and morals or the rights of others, the margin of appreciation tends to be relied on in cases involving Belief. In line with Rawls, the Court has held that:

...a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position...Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society...It is precisely this constant search for a balance between the

⁶⁷ See, e.g., *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, §48.

⁶⁸ *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003- VIII, §101.

⁶⁹ *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, 14 June 2007, §137.

⁷⁰ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, §110; See also *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII, §84; *Wingrove v. the United Kingdom*, 25 November 1996, Reports of Judgments and Decisions 1996-V., §58; *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A, § 31; *Manoussakis and Others v. Greece*, 26 September 1996, Reports of Judgments and Decisions 1996-IV, §44.

fundamental rights of each individual which constitutes the foundation of a “democratic society”.⁷¹

The concepts of ‘necessity’ and allowing for a ‘margin of appreciation’ are ways of instituting the Rawlsian principle of justice as fairness. They allow for consideration of the circumstances of the case, the Beliefs of those involved and the social and cultural environment. In theory at least, by drawing a balance between the individual’s right to freedom to manifest Belief and the public good and fundamental rights and freedoms of others, procedural justice is facilitated. This is the foundation for substantive justice, the details of which will always be a matter of contention (see, for example, discussion of the cases of *Valsamis v. Greece* and *Efstratiou v. Greece*, above at section 7.2.5 and *Dogru v. France* below at section 8.3.5).

8.3.4 Public safety, order, health, or morals or the fundamental rights and freedoms of others

The substantive grounds for limitation of manifesting Belief are not considered in detail here, as it is the process of determining justifiable limitation, rather than attempting to generalize on what are such vague concepts as to be mostly dependent on the margin of appreciation or what is ‘objective and rational justification’. Reliance has thus been placed on the proportionality of the state’s action in relation to the potential harm to those concerned, and while one may agree with the procedure espoused by the court, individual cases invite individual consideration in terms of the justice of outcome.

8.3.5 Differential treatment

The European Court has held that where practices based on religious Belief enter into conflict with certain legally imposed obligations, a State may have to provide the possibility of certain exemptions, the absence of which may lead to a form of indirect discrimination. Thus, the ECHR not only prohibits discrimination by treating people in analogous situations differently without providing an objective and reasonable justification. The right not to be discriminated against in the enjoyment of the rights

⁷¹ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, §108. See also *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, §63; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §112, ECHR 1999-III; *United Communist Party of Turkey and Others v. Turkey* pp. 21-22, §45; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, §99.

guaranteed under the ECHR is also violated when States without an objective and reasonable justification *fail* to treat differently persons whose situations are significantly different.⁷²

Article 14 ECHR, which states that rights ‘shall be secured without discrimination’,⁷³ complements the other substantive provisions of the ECHR and the Protocols. It does not operate on its own, as it can only be invoked where the alleged discrimination relates to one of the rights and freedoms safeguarded by the other substantive provisions. It may, however, be invoked where rights under the ECHR are applied, but in a discriminatory way, and such discrimination ‘has no objective and reasonable justification’, or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’. Moreover, states can, with some degree of circularity, rely on a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.⁷⁴ As a result, the European Court has distinguished between discrimination through simply treating people differently, and discrimination through *inappropriate* differential treatment, allowing through ‘objective and reasonable justification’ the differential treatment of those whose circumstances differ significantly.⁷⁵

The UNHRC has initially taken the view that Freedom of Belief only comprises freedom from state interference with the manifestation of Belief, and there is no positive obligation for states to provide special assistance through dispensation from legislative

⁷² *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV, §44.

⁷³ Article 14 provides that

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.

⁷⁴ See, e.g., *Kosteski v. “the former Yugoslav. Republic of Macedonia”*, no. 55170/00, 13 April 2000, §44. See also *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, §24, *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X, §37 *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII, §86.

⁷⁵ *Thlimmenos v. Greece*, §44. The applicant was refused employment as an accountant following criminal conviction for conscientious objection. The Court held that as the conviction did not imply ‘dishonesty or moral turpitude’ likely to undermine professional service, to treat a convicted conscientious objector on the same basis as a convicted felon was a breach of article 14 ECHR (non-discrimination in rights) rather than article 9 ECHR. See also Taylor *Freedom of Religion*, 189.

obligations to members of religious groups.⁷⁶ This appears to be at odds with its later statement in General Comment 18(37) that:

...the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.⁷⁷

This, it is argued, does not invite the *privileging* of religion or other Belief, but rather the ‘levelling of the playing field’.⁷⁸ The affirmative action is not to be aimed at a specific Belief, but at general conditions providing for equal manifestation of all Beliefs. It accords with Rawls’s approach of ‘equal consideration’ of all interests, set out in Chapter 6, based on impartiality of the state, through the application of public reason. Rawls claimed that special measures favouring religious beliefs such as state funding of pilgrimages or building of grand places of worship would violate state impartiality and equal regard (see above, section 5.3.1).

8.3.6 When the right to manifest Belief is foregone

The European Court ruled that a person can be held to have agreed to forego a particular practice of their Belief. In the case of *Dogru v. France*,⁷⁹ for example, the applicant, a student who refused to follow the dress code of her secondary school by her refusal to remove her headscarf during physical education was expelled. The European Court held that the applicant was made aware of the content of those rules and the consequences of non-compliance, and undertook to observe them.⁸⁰ The interference in her religious

⁷⁶ E.g., *Karnel Singh Bhinder v. Canada* Communication No. 208/1986 CCPR/C/37/D/208/1986, §4.5.

⁷⁷ *General Comment 18 (37)* U.N. Doc. CCPR/C/21/Rev1/Add.1 (1989) reprinted in U.N. Doc. A/45/40 vol.1, Annex VI (1990), 17, §10.

⁷⁸ Indeed, the provision of a ‘level playing field’ is what Malcolm Evans describes as the goal of the state according to recent developments within the European Court: ‘Freedom of Religion and the European Convention’, 299ff.

⁷⁹ *Dogru v. France*, no. 27058/05, December 2008. A similar case regarding the wearing of the veil at school is *Köse and Others v. Turkey* (dec.), no. 26625/02, ECHR 2006.

⁸⁰ The relevant rules were accessible since they consisted mainly of provisions that had been duly published, and of confirmed case-law of the *Conseil d’Etat*. The Court also pointed out that by signing the internal rules when she enrolled at the secondary school, the applicant was made aware

practice was also regarded as having been ‘prescribed by law’ and justified under Article 9(2).

In cases like this, where the applicant’s prior agreement to activities has been held to negate their claim to unreasonable interference with manifestation of Belief, the Court has taken into consideration the availability of alternative arrangements. The House of Lords, considering the provisions of the ECHR under the U.K. *Human Rights Act 1988* held that an Islamic student who faced expulsion for refusing to wear her school uniform, having agreed to wear it, and who could attend another, more suitable school, was not the subject of a violation of her right to manifestation of Belief.⁸¹ Where a minister of the state church of Denmark objected to the prohibition of activities he imposed on his parishioners, the Commission held that Freedom of Belief is exercised by the freedom to leave a church if one disagrees with its teachings.⁸² An applicant who had chosen to be a civil servant was held to have accepted the terms of dress.⁸³ Parents enrolling children in a state school were held to have agreed to the curriculum, and they could enrol them in a private school if they objected to it.⁸⁴ Parents who objected to sex education in state schools could enrol their children in a subsidised private school.⁸⁵ A teacher was held to have accepted employment that did not allow him leave to pray on Fridays, and was free to seek other employment.⁸⁶ A university student was denied a

of the content of those rules and undertook to comply with them, with her parents’ agreement: Ibid, §59.

⁸¹ *R (ex rel Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15. The school consulted widely with parents, staff and Imams from three local mosques and the *shalwar kameeze* (sleeveless smock-like dress with loose trousers tapering at the ankles) was accepted as appropriate. The dress code was explained to parents and students both before and on enrolment, with letter sent reminding parents. The respondent in fact wore the *shalwar kameeze* for two years before objecting, and her sister wore it throughout her time at the school (per Lord Bingham, §7-9). The Muslim Council of Britain ‘Dress Code for Women in Islam’ had no recommended style, but modesty is to be observed at all time, and trousers with long tops or shirts are ‘absolutely fine’ (per Lord Bingham §15). See also judgments of per Lord Hoffman §50 Lord Scott §89.

⁸² *X v. Denmark*, App. No. 7374/76, 5 Eur. Comm’n H. R. Dec. & Rep. 157, 158. This principle was followed in cases such as *Karlsson v. Sweden*, No. 12356/86, 57 Eur. Comm’n H.R. Dec. & Rep. 172, 175 (1988) (clergyman taken to have agreed to adhering to state religion tenets as condition of appointment); *The Norwegian State Church, Knudsen v. Norway* No. 11045/84, 42 Eur. Comm’n H. R. Dec. & Rep. 247 (1955) (clergyman taken to have agreed to undertake state services – conducting marriages and keeping birth register – as part of appointment); *E & GR v. Austria*, No. 9781/82, 37 DR 42 (objection to regulations requiring the payment levied on members of church).

⁸³ *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006-II.I.

⁸⁴ *Konttinen v. Finland*, App. No. 24949/94 (1996) 87 D&R 68 158.

⁸⁵ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, §54.

⁸⁶ *Ahmad v. the United Kingdom*, App. No. 8160/78, 22 Eur. Comm’n H.R. Dec. & Rep. 27 (1981).

certificate of graduation because she refused to be photographed without a headscarf as required. She was held to have agreed to abide by rules of the secular university at which she enrolled, and could have enrolled in a more amenable university.⁸⁷ An applicant was held to have agreed to working conditions in accepting employment, and could resign rather than work on Sundays.⁸⁸ An applicant accepted military discipline when joining the army, and could resign if he objected to this.⁸⁹ An applicant could easily import meat slaughtered under specific requirements of a minority Jewish sect, so inability to acquire it in France was not a breach of his rights under article 9 ECHR.⁹⁰

This line of authority has been criticised by Malcolm Evans,⁹¹ who argues that the European Court is heading too far towards ‘brush[ing] aside the reality of church-state relations and with it a foundational element of national identity in many member states of the Council of Europe’.⁹² Evans presumes that there is by default a relationship involving some degree of affiliation between church and state. This, Evans argues, raises the issue of balancing ‘respect by others *for* religion’ and ‘respect *by* religions for others’. Criticism in more direct terms was offered by the by Court of Appeal,⁹³ and the House of Lords,⁹⁴ which questioned whether an alternative avenue of accommodating manifestation should really be ‘impossible’ before limitation of manifestation is reasonable,⁹⁵ but:

...even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and

⁸⁷ *Karaduman v. Turkey*, App. No. 16278/90 (1993) 74 D&R 93.

⁸⁸ *Stedman v. United Kingdom*, App. No. 29107/95, 89-A (1997) D&R 104.

⁸⁹ *Kalaç v. Turkey*, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.

⁹⁰ *Cha'are Shalom Ve Tsedek v. France*. This line of authority was followed in See also *R (ex rel Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (per Lord Bingham at, §23).

⁹¹ Evans, ‘Freedom of Religion and the European Convention’, esp. 296ff.

⁹² *Ibid*, 303.

⁹³ See, e.g., *Copsey v. WWB Devon Clays Ltd* 2005 EWCA Civ. 932, §§31-39, 44-66.

⁹⁴ *Regina v. Secretary of State for Education and Employment and others ex parte Williamson and others* [2005] UKHL 15, §39.

⁹⁵ For example, *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII, §80.

remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established.⁹⁶

8.4 Specific considerations

8.4.1 Education

Choice is at the heart of Belief, according to Rawls, and implied in the relevant Articles, but choice is an empty idea unless the individual has the capacity for choice, and the opportunity to be aware of Beliefs from which to choose.

People, as members of society are imbued with a particular concept of the world and meaning of life from early childhood determined by their parents, family and community, when they have little capacity or opportunity to evaluate and choose a Belief. While these capacities and opportunities arrive with adulthood, and many individuals change or revise their Beliefs, upbringing is a very powerful influence. It may not even occur to people to question, or they may be coerced or pressured into manifesting a Belief they have abandoned.⁹⁷

This becomes a particular issue in the education of children. The point is illustrated by the United States Supreme Court judgement in *Wisconsin v. Yoder*.⁹⁸ The respondents, members of the conservative Amish religion, refused to send their children to public or private school after they had graduated from the eighth grade, in contravention of the law, which mandated school attendance until the age of 16. Instead, children were kept in the community to learn the basic requirements for the simple Amish lifestyle. The Court accepted that they sincerely believed attending high school was contrary to the Amish religion and way of life and that compliance with the law would endanger the salvation of all concerned. The Court upheld the Wisconsin State Supreme Court finding that compulsory mandatory secondary school attendance for the Amish was a violation of their First Amendment right to Freedom of Belief. The Court held that ‘the traditional

⁹⁶ *R (ex rel Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

⁹⁷ E.g., ‘Stereotypes are reinforced by persistent patriarchal attitudes and assumptions that women’s place is in the home supported by men. Male superiority prevails, also in industrial societies, and can amount to an ideology’: Geneva-Based NGO Committee on Freedom of Religion or Belief and NGO Committee on the Status of Women, ‘Working Paper: Unofficial Summary in English of E/CN.4/2002/73/Add.2, 5 April 2002’, §92.

⁹⁸ *Wisconsin v. Yoder*, 406 U.S. 203 (1972); Carolyn Evans, *Freedom of Religion* 76.

way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.’⁹⁹ The Court went on to find that:

...compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon Belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.¹⁰⁰

However, this case raises the question of choice. It is critical that the opinion of the students themselves was not considered, only that of the parents. At grade eight they are most likely old enough to decide if they wish to further their education. Douglas J., dissenting in part from the majority, offered a different perspective to the majority of the court:

It is the future of the student, not the future of the parents, that is imperilled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today...It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.¹⁰¹

The question of free will complicates the simple model of all individuals being free to choose their Belief. While one cannot dictate how people view the world, or set their personal values, Rawls insists that at least appropriate compulsory education should prepare children for participation in political life (which provides them with the capacity

⁹⁹ *Wisconsin v. Yoder*, 406 U.S. 203 (1972), 216.

¹⁰⁰ *Ibid*, 218.

¹⁰¹ *Ibid*, 245-6. Despite this, Article 14 of the *Convention on the Rights of the Child*, guarantees Freedom of Belief, and gives parents the right to provide direction in exercising this right ‘consistent with the evolving capacities of the child’ *Convention on the Rights of the Child*, Opened for signature 20 November 1989/1249 UNTS 13, entered into force September 2 1990.

and opportunity for choice), and the ability to realise their potential for autonomy. The relevant Articles condone segregation for special education of children by religious groups, requiring only that education in relation to Belief be objective and impartial for those whose parents desire it to be exempt from religious instruction.

8.4.2 Secularism as a basis for limiting manifestation of religion

The European Court has more recently (for example, in the case of *Dogru v. France*¹⁰²) clearly established that action to protect the principle of secularism falls squarely within the margin of appreciation of the State.¹⁰³ While the meaning of ‘secularism’ has not been definitively described by the Court, it has considered secularism in the French and Turkish context, where secularism is the constitutional guarantor of democratic values.

In *Dogru v. France*, the Court looked at Turkey, considering that secularism in Turkey ensures that freedom of religion is inviolable; citizens are equal; individuals are protected from both arbitrary interference by the State (including manifesting a preference for a particular religion or belief) and external pressure from extremist movements. It held that this interpretation of secularism also applied in France.¹⁰⁴

The European Court has also recently emphasised that intervention by the State to preserve the secular nature of the political regime must nevertheless be considered necessary in a democratic society.¹⁰⁵ Consequently, prohibiting the wearing of headscarves for identity photos by a university without further interference with the applicant’s religion could be considered necessary to preserve the secular nature of the institution.¹⁰⁶

Further, the Court approved the Turkish Constitutional Court ruling that allowing pupils to wear the Islamic headscarf is incompatible with the principle of secularism since the

¹⁰² *Dogru v. France*, no. 27058/05, 4 December 2008.

¹⁰³ *Ibid*, §75.

¹⁰⁴ *Ibid*, §§66-69.

¹⁰⁵ *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

¹⁰⁶ See, e.g., *Karaduman v. Turkey*, App. No. 16278/90, 74 DR 93 (Dec 1993).

headscarf is in the process of becoming the symbol of a vision that is contrary to women's freedom and the fundamental principles of a secular state.¹⁰⁷

Cases involving limitation of religious activity for the purpose of upholding secularism are based on duties relating to public service. Examples are the military, government institutions, or political parties where the principle of secularism is constitutionally established, and where the government's principle of secularism is compromised. In the military, for instance, cases such as *Kalaç v. Turkey*¹⁰⁸ and *Başpınar v. Turkey*¹⁰⁹ involved the removal of personnel for their involvement in a fundamentalist sect that promoted the pre-eminence of religious rules. The court found that the applicants were not dismissed for their religious opinions and Beliefs, or their performance of religious duties (which they were allowed to perform) but because their conduct 'breached military discipline and infringed the principle of secularism'.¹¹⁰

Despite the frequently stated 'restrictive' language of the Court, Malcolm Evans, among others, questions the breadth allowed the margin of appreciation.¹¹¹ Evans specifies that while the formal structure within which Freedom of Belief operates does not predetermine a particular outcome, the European Court has shifted from taking 'no direct role in the religious life of believers'¹¹² to an interventionist and restrictive approach, to ensure a 'level playing field'.¹¹³

Evans seems concerned that the court has moved too far towards requiring religious manifestation to be compatible with the core values of democracy and human rights, which it (apparently wrongly) equates with tolerance and pluralism, demanding not only

¹⁰⁷ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, §§93, 99.

¹⁰⁸ *Kalaç v. Turkey*, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.

¹⁰⁹ *Başpınar v. Turkey*, no. 29280/95, 30 October 2001.

¹¹⁰ In *Kalaç v. Turkey*, the court found that the applicant (1) belonged to and participated in the activities of the Süleyman community, which was known to have unlawful fundamentalist tendencies; (2) had given it legal assistance, taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect; (3) carried out instructions from the leaders of the sect (§30). In *Başpınar v. Turkey* the applicant, a non-commissioned officer, was a member of the Nakşibendi sect. He adopted extreme religious ideology and his superiors considered him an undisciplined and insubordinate soldier.

¹¹¹ Evans, 'Freedom of Religion and the European Convention', 300ff. See also Taylor, *Freedom of Religion*, 184ff.; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 479ff.

¹¹² Evans, *ibid*, 300.

¹¹³ *Ibid*, 299ff.

a respect by outsiders for religion, but a respect by religion for outsiders.¹¹⁴ It thus construes any forms of manifestation which do not exhibit these virtues as a threat to those values. Consequently, it endorses secularism as a ‘tangible manifestation of neutrality’.¹¹⁵

This, Evans argues, ‘amounts to an attempt to brush aside the reality of church-state relations and with it a foundational element of national identity in member states of the Council of Europe’,¹¹⁶ in contrast with a more individualist former approach, which ‘did not prevent the privileging of a form of religion in the public life (or of excluding all religions from public life) provided that all individuals were in fact capable of enjoying their freedom of religion or belief’.¹¹⁷ ‘Indeed’, he maintains, ‘one might be tempted to conclude that such an approach makes article 9 as much a tool for restraining the manifestation of religion or belief as it is a means of upholding it’.¹¹⁸ The argument of this thesis is that this is precisely the purpose of article 9, and the most effective way of ensuring equal Freedom of Belief for all.

It is not the purpose of this thesis to argue the appropriateness of individual decisions, except to make the case that preservation of structural secularism in government institutions as propounded in Chapter 3 (i.e. freedom from ideological bias) is a legitimate concern of the Court.¹¹⁹ It was submitted above (section 3.2.2) that Rawls’s in effect advocated secularism as a structure for political liberalism. The European Court has held that in deciding what is ‘necessary in a democratic society,’ consideration can

¹¹⁴ Ibid, 300.

¹¹⁵ Ibid, 306. It has been argued in Ch 3 that secularism is basic to liberal democracy. See also Chapter 9.

¹¹⁶ Ibid, 303.

¹¹⁷ Ibid, 305.

¹¹⁸ Ibid, 308

¹¹⁹ See, Lindholm, ‘Philosophical and Religious Justifications’, esp. Parts C and E. Lindholm disagrees with Evans’s argument that there has been a diminution in the importance of achieving Freedom of Belief by its incorporation into human rights. He states that it instead ‘constitutes an elevation of internationally binding protection of freedom of religion or belief so as to properly fit the structural constraints and cultural dynamics of modern societies’ (ibid).

be given to the fact that secularism, which presupposes government denominational neutrality, is a Constitutional principle in the relevant country.¹²⁰

Evans may argue against the particular application of the process of justice according to a Rawlsian model of political liberalism in individual cases, however, he appears to be proposing an approach that privileges religion and presumes a bond between Church and State.¹²¹ One may disagree with the particular findings of the court in individual cases, arguing that the court's approach to limitation of manifesting Belief provides too much or too little discretion to the state (which the author concedes may occur in some cases, especially those relating to the wearing of religious symbols). However, it is proposed that the *procedural justice*, borne of true state impartiality ('separation') as proposed by Rawls, is not incompatible with a just and fair recognition of Belief if the principle of equal consideration and reflective equilibrium are applied in each case. There is room for discussion about nuances, and finding an appropriate balance between opposing interests.

This can be seen in the so-called 'headscarf cases', which are a particularly controversial issue arising from limits placed on manifestation of Belief. The wearing of the 'Islamic headscarf' in educational institutions first became an issue in France in 1989.¹²² The responsible French Minister referred to 3,000 such cases when addressing the Senate in 1994.¹²³ He produced a report for the President of the Republic on 11 December 2003. The picture it presented of the threat to secularism 'bordered on the alarming'.¹²⁴ It claimed that instances of behaviour and conduct that run counter to the principle of secularism are on the increase, particularly in public society. The reasons for this were said to be difficulties experienced by Islamic immigrants to France in integrating, the living conditions in many suburbs, unemployment and feelings of alienation and discrimination. Consequently, the immigrants were responsive to encouragement to

¹²⁰ See, e.g., re wearing a headscarf in school, *Dogru v. France*, no. 27058/05, 4 December 2008., §64; *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, §114; *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V.

¹²¹ See Evans, 'Freedom of Religion and the European Convention'.

¹²² *Dogru v. France*, no. 27058/05, 4 December 2008, §21.

¹²³ Report of the National Education Inspectorate, submitted to the Minister in July 2005: '*Application of the Act of 15 March 2004*'. Cited in *ibid*, §21.

¹²⁴ Conseil D'État : Commission de Reflexion sur l'application du Principe de Laïcité dans la République, November 2003 (*Commission to consider the Application of the Principle of Secularity in the Republic*) (the 'Stasi Commission'), cited in *Ibid*, §21.

reject the values of the Republic and were consequently considered a threat to Republican authority that called for its reinforcement, especially in schools. The Report went on to say:

...for the school community...the visibility of a religious sign is perceived by many as contrary to the role of school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes the principles and values that schools are there to teach, in particular, equality between men and women.

The European Court has held that in a democratic society the State is entitled to restrict the wearing of the Islamic headscarf if this was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety.¹²⁵ In the case of *Dogru v. France*, for example, where the applicant was a schoolteacher in charge of a class of small children, the Court also considered that a 'powerful external symbol such as the wearing of a headscarf might have on the freedom of conscience and religion of young children, who were more easily influenced, and its proselytising effect,'¹²⁶ as it appeared to be imposed on women by religious authority. Moreover, it is hard to reconcile with the principle of gender equality.¹²⁷

Despite this, the margin of appreciation is considered by the Court to be particularly appropriate in dealing with the wearing of religious symbols in educational institutions, as there is no uniform European conception of 'public order', or 'protection of the rights of others', and must be left up to the State concerned. However, this does not exclude the need to respect the rights set out in the Convention, nor for supervision of their implementation by the Court.¹²⁸

Accordingly, the Court has accepted that regulation of educational institutions may vary in time and in place according to the needs and resources of the community and

¹²⁵ See, e.g., *Dogru v. France*, no. 27058/05, 4 December 2008; *Karaduman v. Turkey*, App. No. 16278/90, 74 DR 93 (Dec 1993); *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V.

¹²⁶ *Dogru v. France*, no. 27058/05, 4 December 2008, §40.

¹²⁷ *Ibid.*, §64.

¹²⁸ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI esp. §109-110; *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V., esp. p.12 electronic copy; *Dogru v. France*, no. 27058/05, 4 December 2008, esp., §§71-5.

competent authorities must be left some discretion in this sphere.¹²⁹ Similarly, the Human Rights Committee has indicated its willingness to look at “context” in assessing alleged violations of the ICCPR. In *Hudoyberganova v. Uzbekistan*, the Committee concluded that there had been a violation of Article 18 of the ICCPR, and noted that it had reached its decision “duly taking into account the specifics of the context.”¹³⁰

8.5 Conclusion

The wording of the limitation provisions of the relevant Articles indicates a form of political liberalism along the lines proposed by Rawls. The provisions specify maximum freedom curtailed only by the necessity to ensure the integrity of a democratic society and preserve the rights of all. While the differences in the language used makes it difficult to rule there is a direct correlation between Rawls’s model and the relevant Articles, there is, as indicated throughout this Chapter, a significant degree of similarity between the two.

Firstly, both Rawls and the adjudicative bodies call for impartiality of the state, and its non-interference in the affairs of Belief organisations. Other than being satisfied that a Belief is being sincerely held, the state is not concerned with the tenets of any Belief system, or the form of organisation of Belief systems, unless they interfere with the integrity of the state or of others. What constitutes manifestation of Belief is to be broadly construed, but it must be ‘intimately’ tied to the Belief itself, as not every action motivated by a Belief is to be recognised as manifestation of that Belief. This gives voice to the democratic principle of reciprocity with its obligation to ensure all enjoy equal freedom.

Secondly, both the adjudicative bodies and Rawls have created broad principles and left it to societies to generate their own overlapping consensus as to public reason for determining the limits to personal freedom. The ICCPR and ECHR have set out the grounds for such limits, but there is a broad discretion allowed states through the

¹²⁹ See, for a consideration of the issue, *Leyla Şahin v. Turkey* [GC], no. 44774/98, 2005-XI esp., §109. The ECHR has held that public order ‘varied on account of national characteristics’. *Manoussakis and Others v. Greece*, 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, §39. Yourow, Howard, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Kluwer Law International 1996), esp. 188ff.

¹³⁰ Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004), § 6.2.

‘proportionality’, ‘objective and rational justification’, and ‘margin of appreciation’. These are aimed at permitting the robust establishment through the democratic process of an overlapping justification for limiting manifestation of Belief, based on an overlapping consensus of particular societies.

Despite this flexibility, limitations are perforce restricted to those specified, and must be necessary to realise the objectives noted in the relevant Articles, based on the public good and rights of others. Specific instances of the adjudicative bodies’ reasoning are examined, and the conclusion is drawn that they, like Rawls, have in mind a form of structural secularism as the basis for any society that seeks to honour the right to Freedom of Belief.

The fact that in reality, this ideal is not fully realised is dealt with in the next Chapter.

CHAPTER 9: THE RELATIONSHIP BETWEEN STATE AND BELIEF

Even where “secularism” is mentioned as an accepted concept having constitutional value, it is often subject to the unprincipled wishy-washiness of balancing — or disregarded in the name of proportionality — for the sake of free exercise of religion.¹

9.1 Introduction

Earlier Chapters have argued that the equal enjoyment of Freedom of Belief demands impartiality on the part of government. It is an essential element of liberal democracy and the right to Freedom of Belief. The case is made in this Chapter that:

- the relevant Articles and adjudicative bodies have failed to require adequately a separation between government and religious or non-religious Belief. Instead they recognise a degree of interrelationship between the two²; and
- this separation is necessary for full enjoyment of the equal right to Freedom of Belief.

My argument is based on the premise that full and equal Freedom of Belief requires clear disassociation of the state from Belief systems and organisations thus assuring both Freedom *of* Belief, and freedom *from* its influence.

In this chapter I propose that state disengagement with Belief systems and organisations is not well established in the international human rights treaties, and that ‘neutrality’ has come to mean much less than this. In practice the term ‘neutrality’ has been used to denote various levels of accommodation of particular Beliefs, or all Beliefs (particularly religious beliefs) in state governance. This means that the omission of a requirement for separation between the state and Belief systems and organisations has resulted in the

¹ Sajó, ‘Preliminaries to a Concept of Constitutional Secularism’, 605, 617.

² See, e.g., the European Court’s recognition of compulsory religious symbols in state schools. The Grand Chamber overturned the Chamber decision (*Lautsi v. Italy*, no. 30814/06, 3 November 2009) that the compulsory display of a crucifix in public school classrooms was a breach of the ECHR. Nine European countries, four non-government (religious-based organisations) and 37 members of the European Parliament collectively submitted briefs supporting display, and six human rights non-government organisations opposed the display.

toleration of state-Belief entanglement in the guise of providing ‘equal’ aid rather than no aid to religion. The result is unequal treatment because of Belief, and a consequent failure to effect a truly equal Freedom of Belief for all citizens:

The Covenant [ICCPR] does not require the separation of church and state, although countries that do not make such a separation often encounter specific problems in securing their compliance with articles 18, 26 and 27 of the Covenant.³

I will argue that state-Belief *separation* rather than state-Belief *accommodation* is the most rational and effective means of facilitating Freedom of Belief.

The idea of a constitutional provision for non-establishment of religion was pioneered in the U.S. Constitution and followed in the Australian Constitution, among others.⁴ This ‘non-establishment principle’ is the logical accompaniment to the right to exercise religious belief freely (the ‘free exercise principle’). It is expressed as the prohibition of ‘establishment of religion’ by the state. This has been described as requiring ‘separation of Church and State’ by the U.S. Supreme Court, but even that Court has adopted the lesser ‘neutrality’ interpretation (see below, section 9.2.1).

The failure to provide adequately for State-Belief separation in the international human rights treaties appears to arise from the general acceptance of the government endorsement, or preferment of particular Belief systems or organisations. Political considerations were, however, most prominent, as States participating in drafting the human rights treaties wished to maintain historical and traditional practices.⁵

State accommodation of Belief can occur even where there is formal state-Belief separation. For example, Timothy Challens describes the entanglement of religion and state in the U.S., despite constitutional state-Belief separation:

³ Martin Scheinen, concurring opinion, *Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (5 November 1999), §1.

⁴ First Amendment of the U.S. Constitution; Section 116 of the Australian Constitution.

⁵ Carolyn Evans and Christopher Thomas give this as a reason for tolerance of state religion in article 9 ECHR: ‘Church-State Relations in the European Court of Human Rights’ (2006) *2006 Brigham Young University Law Review* 699 at 706. Literature on the preparation of article 18 ICCPR, considers the recognition of state religion mainly in the context of prohibition of proselytism. Bossuyt, *Guide to the Travaux Préparatoires*, refers to the concern of delegates to prevent ‘uncertainty and difficulty for those States whose constitutions or basic laws were religious in origin or character’ (p. 360).

Religion's influence on politics in America is so strong today that the question may no longer be literally couched as the relationship between church and state, first because religion's grasp far exceeds the institutional organisation of any church, and second because not only does religion reach throughout state structures but also has its fingers into the internal and external non-state activities that cross boundaries of all types. [W]hile no church has been established in the United States religion has become embedded throughout the structure of the state, not only in the background culture but in the public forum.⁶

9.2 The state-Belief relationship

The term 'neutrality' in relation to state-Belief relationships is also problematic. A secular liberal state has been 'long understood as best encapsulated by the idea of the state's neutrality towards religion', Wojciech Sadurski writes, 'but what is required by neutrality is no means clear and unambiguous'.⁷ He considers (rightly, in the author's view) that the problem lies in uncertainty about the reasons for adopting state disengagement from Belief. This is discussed below.

The idea of the state remaining 'neutral' towards Belief systems and organisations has been broadly divided into two main categories: neutrality that involves equal promotion of the exercise of Belief, allowing for positive intervention by states equally in all Beliefs (hereafter 'state-Belief accommodation') or neutrality that involves state separation from such Beliefs through a stance of non-intervention (hereafter 'state-Belief separation').

The term 'neutrality' can describe procedures appealing to values such as impartiality, consistency of application, and 'equal opportunity for the contending parties to present their claims'.⁸ Justice as fairness, according to Rawls, is not procedurally neutral, with

⁶ Challans, Timothy, 'Rawls versus Habermas on Religion, Politics, and War' (2007) *School of Advanced Military Studies International Symposium on Military Ethics* <http://www.usafa.af.mil/jscope/ISME2007/Papers/Challans_Rawls_v._Habermas.doc> accessed 28/2/2007, 9.

⁷ Wojciech Sadurski, 'Neutrality of law towards religion' (1990) 12 *Sydney Law Review* 450, 421.

⁸ Rawls, *Political Liberalism*, 191-4.

an absence of values, as it relies on the common ground of an overlapping *consensus* of values.⁹ It is also perforce not immune from the effect or influence of values, as it is:

...surely impossible for the basic structure of a constitutional regime not to have important effects and influence as to which comprehensive doctrines endure and gain adherents over time, and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are.¹⁰

W. Cole Durham has developed taxonomy for classifying different state approaches to freedom of religion that is a useful reference point in setting out my argument for a secular government that seeks a clear and complete separation of Belief-based systems and the state. Because church-state relationships are flexible and can change over time, Durham establishes a continuum between total theocracy and total separation of church and state. He points out, however, that the situation cannot be expressed in a simple single scale from theocracy to separation. Repression of religion can occur even where there is constitutional separation of church and state where it takes the form of intolerance of religion, such as occurred under USSR state atheism.¹¹

Durham produces a diagram that expresses the flexibility of such relationships.¹² In this diagram he represents freedom of religion as a multi-factorial right, that depends on the degree of formal state-church separation (e.g. constitutional establishment, endorsement or disestablishment) and formal or informal state attitudes and policies (such as cooperation, toleration or conversely, persecution). These may be in flux, he points out, and absence of freedom of religion can occur whether there is separation of church and state or not. There may be constitutional separation from the church, but no freedom of religion. Similarly, extreme theocracy or religious monopoly will inhibit religious

⁹ Ibid, 191-4.

¹⁰ Ibid, 193.

¹¹ See, e.g., Harold Bowman, 'Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory' in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives*, (The Hague, Martinus Nijhoff, 1996) 285, 289.

¹² Durham, 'Perspectives on Religious Liberty', 18.

expression. However, even where there is established religion, he argues, there may be a large degree of religious freedom.¹³

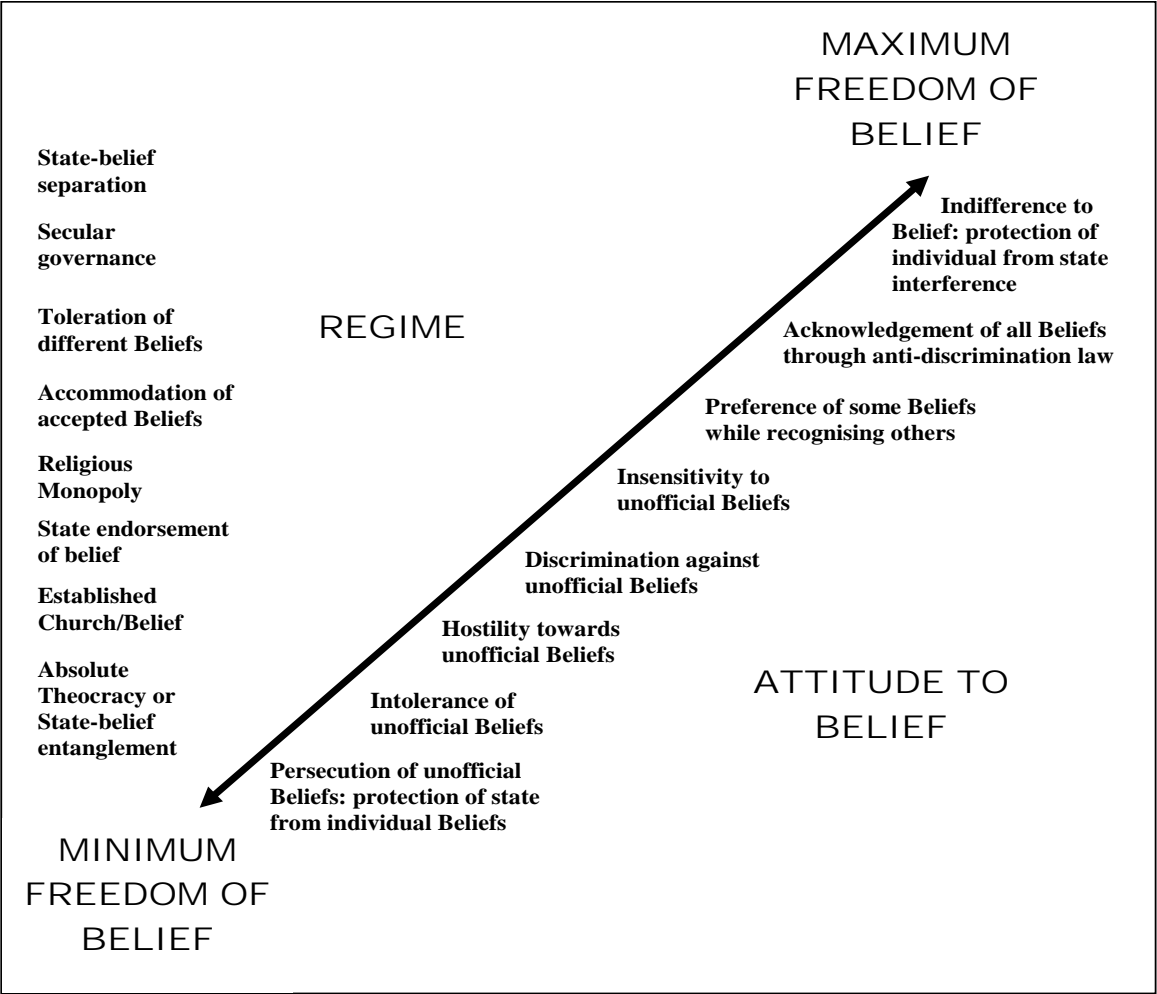
This model is valuable for its insight, but it is proposed that it does not adequately take into account the fact that establishment or endorsement of a religion by a state will inevitably result in any freedoms being nevertheless exercised within the *shadow* of the majority values and Beliefs. Nations will then identify themselves, whether formally or by implication, as ‘Judeo-Christian’ (as has Australia)¹⁴ or ‘Islamist’ (as has Iran), with either subtle or more overt marginalisation of those who do not belong to the majority Belief.

The effect of different state-Belief regimes on Freedom of Belief, particularly in relation to religion, is better appreciated in the diagram that follows.

¹³ Ibid, 20ff.; Rex Ahdar and Ian Leigh, ‘Is Establishment Consistent with Religious Freedom’ (2004) 49 *McGill Law Journal* 635, 638ff.

¹⁴ See, e.g. the Speech by his Excellency the then Governor-General of Australia to the Anglican Synod, Government House Canberra, 24 October 2007, at <<http://www.gg.gov.au/speech.php/view/id/290/title/reception-for-anglican-synod>>, accessed 18/11/2010; Marion Maddox: ‘God under Gillard’ in *Quest* Macquarie University Research Journal, Issue 3 2010, 16.

TABLE 9: STATE-BELIEF RELATIONSHIPS



This flowchart is designed to represent the degree of Freedom of Belief and attitudes of Belief in different regimes, ranging from theocratic states (with maximum state control of Belief) to those with separation of the state and Belief systems and organisations (with no state control of Belief). The different state-belief relationships are indicated on the left, with corresponding government attitudes to some Beliefs are indicated along the arrow. Freedom to exercise freedom of Belief grows correspondingly with the diminution of entanglement of the state.

The above diagram can only give broad indications, as it may not accurately address the complexity of political vagaries and social variables that may result in differing experiences of individuals in the same regime. It is suggested, however, that where there is no clear separation of state and Belief, any freedom is nevertheless exercised in the

shadow of the influence of state-endorsed or established religious or ethical Beliefs. It has been questioned, for example, whether a state has acted in compliance with the right to freedom of religion where possible state intolerance and persecution results in those belonging to a minority religion being required to ‘quietly’ and covertly practice their religion.¹⁵

There is a wide variety of Beliefs, sects and religions worldwide, and a variety of approaches to state involvement with religion.¹⁶ It has been estimated that of the world’s nations there are 10 religious states (e.g. the Vatican, Iran and Saudi Arabia) and 100 secular states with an established religion (e.g., Greece, Denmark, Germany, and the U.K.). There are 95 secular states without an established religion, favouring none (e.g. U.S., France and Turkey), and 22 secular states that are hostile to religion (e.g. China, North Korea).¹⁷

Some states discriminate against all religions.¹⁸ Conversely, others are fully theocratic and may prohibit or interfere with the practice of alternative Beliefs.¹⁹ In between these

¹⁵ In the case of *Applicant NABD of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 29, a refugee applicant was returned to his home country despite the need to hide his religious beliefs for fear of persecution. Kirby J, dissenting, said at, §113:

Reading the [ICCPR] in the context of international human rights law, specifically as that law defends freedom of religion, helps to demonstrate why the imposition of a requirement that a person must be “discreet”, “quiet”, “low profile” and not “conspicuous” is incompatible with the objects of the Convention, properly understood. True, the human rights of the applicant for protection must be accommodated to the human rights of other individuals, both in the country of nationality and in the country in which protection is sought. Violent, aggressive or persistently non-consensual conduct “for reasons of ... religion” are not protected by the Convention, any more than by other instruments of international law. Yet neither is it an answer to an assertion of a “fear” of being “persecuted for reasons of ... religion” that such “fear” is not “well-founded” because it can be avoided by the behavioural expedients of discretion, quietness, maintaining a “low profile” and so forth. Such an approach is incompatible with the inclusion of religious freedom in the Convention.

¹⁶ The following draws on information from Joanne O’Brien and Martin Palmer, *The Atlas of Religion* (London, Earthscan 2007), 47; Evans, *Freedom of Religion*, 20-21 and Ahmet Kuru, ‘Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion’ (2007) 59 *World Politics* 568 570.

¹⁷ Kuru, ‘Passive and Assertive Secularism’, 570.

¹⁸ E.g., China, Vietnam, (state declared atheism); Turkmenistan, Zimbabwe (no state commitment to Belief).

¹⁹ E.g., Iran, Saudi Arabia, Jordan.

extremes, some states have an established religion but tolerate others.²⁰ Several require the monarch, head of state or government to be of a given religion.²¹

A state may establish a state church while formally permitting freedom of religion,²² or provide constitutionally that there will be no state church, but nevertheless involve itself with religion.²³ These states are nominally secular but blend the roles of religious institutions and Beliefs with those of the state. The State may provide special privileges to a particular church as in Spain, which has a concordat with the Catholic Church providing for a number of financial or other special privileges not provided other religious institutions.²⁴

Finally, there are countries with a strong separation of religion and state, at least in principle. For example, Turkey has a strong secularist constitution of which the preamble states ‘as required by the principle of secularism, sacred religious feelings shall in no way be permitted to interfere with state affairs and politics’. Section 24 allows freedom of religion but prohibits the use of religious Beliefs for personal or political influence to any extent ‘basing the fundamental social, economic, political, and legal order of the State on religious tenets’. Article 68 prohibits programs that conflict with the ‘principles of the democratic and secular Republic’. France’s Constitution in its preamble [Article 1] describes France as a Republic, ‘indivisible, secular, democratic

²⁰ E.g., Greece, U.K., Iceland, Holy See, Denmark, Scotland, Bulgaria, Bolivia, Paraguay, Argentina (Christianity); Iraq, Algeria, Libya, Morocco (Islam); Nepal (Hinduism). The U.K. has established the Church of England to the extent that the monarch is the head of the Church, the House of Lords includes bishops from the Church and no other Church, certain public ceremonies such as coronations follow Church ritual and the law specifies the religious affiliation of Royalty.

²¹ E.g., the U.K., Algeria, Norway, Denmark, Libya, Nepal, Bhutan, Bangladesh and Iran.

²² The ‘Evangelical Church of Iceland shall be the National Church in Iceland and shall, as such, be supported and protected by the State’: Constitution of the Republic of Iceland No. 33, 17 June 1944 (as amended), art 63, cited in Evans, *Freedom of Religion*, 20.

²³ Ibid. The Basic Law of Germany (1949) states that ‘there shall be no state church’ (however its preamble refers to ‘responsibility before God and humankind’, and the state enforces church taxes). The Constitution of Ukraine also, while invoking ‘responsibility before God’ states that the church and religious organisations are to be separate from the state and school. Ireland, has no formally established religion but establishes religion *de facto* by invoking religion in the Constitution and enforcing religious values.

²⁴ For an up-to-date commentary on Concordats see the webpage <<http://www.concordatwatch.eu>>.

and social'.²⁵ The 1905 law, after providing for Freedom of Belief, states in section 2 that the state does not recognise, salary nor subsidise any religion.²⁶

Most states (with the notable exception of Islamic nations) have some form of legislative prohibition on discrimination on the grounds of religious Belief. Evans points out, in respect of European countries, that there is no consensus that this commitment requires the separation of church and state or necessarily leads to disestablishment.²⁷

Continuing his examination of state-Belief relationships, Durham provides a description of the different relationships that occur.²⁸ This description is set out in the following list of possible regimes:

TABLE 10: STATE-BELIEF REGIMES

'Established-church' regimes	Include theocracies; state monopoly of religious affairs, with limited or no toleration of minority groups (e.g., some Islamic states); state church, but theoretical freedom of Belief for all (e.g. U.K., Greece).
'Endorsed-church' regimes	Include states with formally endorsed (but not established) particular religion, which is favoured and politically influential.
'Cooperationalist' regimes	Include states that fund and favour particular religion(s) without constitutional or other formal endorsement. May be through concordats (e.g. Spain, Italy and Poland) or policies (e.g. German 'church tax' of members of mainstream religions).
'Accommodationist' regimes	Include states with formal state-Belief separation, but '[N]o qualms about recognizing the importance of religion as part of national or local culture, accommodating religious symbols in public settings, allowing tax, dietary, holiday, Sabbath and other kinds of exemptions, and so forth'. ²⁹
'Separationist' regimes	Clearer and rigorous separation of roles. Prohibit state support or funding of any religious activity, as well as any appearance of influence over, or identity with any religious group. The same applies for religious groups <i>vis-à-vis</i> the state. Religion considered a strictly private matter, and totally divorced from public affairs.

²⁵ Evans, *Freedom of Religion*, 20.

²⁶ *Loi du Décembre 1905 Concernant la Séparation des Églises et de L'État*, (Journal Officiel du 11 décembre 1905). Article 2 abolishes all state spending on religious activity.

²⁷ Evans, *Freedom of Religion*, 22.

²⁸ Durham, 'Perspectives on Religious Liberty', 21-25.

²⁹ Ibid, 21.

Durham also cites state patterns of inadvertent legislative or bureaucratic hostility, subtle or not-so-subtle privileging of mainline or dominant groups, and overt persecution. These can occur within the different regimes listed above.³⁰ Australia, for example, includes features of both ‘cooperationalist’ and ‘accommodationist’ regimes.

Of these models, Durham prefers the ‘accommodationist regime’ (which, it is argued here, is similar to ‘benevolent neutrality’) claiming that history shows this to provide maximum Freedom of Belief. He maintains that ‘substantial’ Freedom of Belief can be achieved in ‘cooperationalist’ or ‘endorsed-church’ regimes, but concedes that minority groups will be marginalised and lack resources for functioning where funding goes to major churches, which members of the minority groups may feel thus coerced to support. As argued above, reference to ‘benevolent neutrality’ is misleading. It accepts the favouring of particular religions under the guise of impartiality.

Durham rejects a stricter separationist approach, dismissing its argument that religious Beliefs should not receive special treatment on the ground that ‘differential treatment does not necessarily violate equality norms if there is a rational basis for the differentiation’.³¹ His approach appears based on the view that there is not merely a rational basis but a compelling justification for reasonable accommodation in the case of religious Belief. His conclusion states: ‘On the religious freedom gradient, history has demonstrated that a “rule of law” constraint on permissible limitations on manifestations of religious freedom is not adequate’.³² He quotes with approval James Madison to emphasise this point: ‘One of the most important features of religious liberty – one that makes it a fundamental and inalienable right – is that it is prior, “both in order of time and in degree of obligation, to the claims of Civil Society”’.³³ In the context of his

³⁰ Ibid, 23.

³¹ Ibid, 24. See also Rex Ahdar and Ian Leigh, ‘Is Establishment Consistent with Religious Freedom?’ who argue, for example, that a ‘weak’ form of establishment is consistent with religious freedom, and that ‘an historic religion supported by a majority of citizens performing valuable social, educational and cultural functions might well be ‘deserving’ in a broad sense of state assistance than a recent, tiny, insular community’ (at pp. 671-2). This is, of course to confound religion with social welfare, and to grade the merits of a religious Belief on such welfare.

³² Durham, ‘Perspectives on Religious Liberty’, 24, 43-44.

³³ Ibid, 44 fn 89, quoting Madison “Memorial and Remonstrance Against Religious Assessments”, reprinted as an Appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947) However, Boston points out that Madison was ‘stricter on separation than any other president, including Jefferson’: Boston, *Why the Religious Right is Wrong*, 81.

writing, Durham would appear to be giving religious expression a pre-eminence over other rights and arguably the rule of law because of an inherent quality it possesses.³⁴

No doubt religion can provide social benefits to individuals, such as meaning to life, values to live by, identity among significant others and solace to peoples' lives in times of crisis, and its benefits should be given adequate recognition. However, Durham does not cite any *unique* contribution religion makes to society (as opposed to, say, non-religious humanitarian practices) that earns it a pre-eminent claim to protection over other rights, such as those of freedom of expression, assembly and association. Writers who argue that religion has something special to offer that merits special protection point to inspiration for good works and human rights, such as charities and the abolitionist movement in the U.S. It has been noted above that, whilst religious Beliefs may contribute to social cohesion, harmony and good order, non-religious Beliefs can be just as effective.³⁵ My argument is about favouring religion *per se*, not charitable works.

The reference to 'compelling' justification invokes the test set out in the U.S. *Religious Freedom Restoration Act* ('RFRA') of 1990. That Act provided that the Government was not to substantially burden a person's exercise of religion, even where the burden results from a law of general application, unless the government could demonstrate that it provided the least restrictive means of addressing a compelling governmental interest.

This law was enacted to overrule the prevailing approach of the U.S. Supreme Court in *Department of Human Resources of Oregon v. Smith*,³⁶ which held that generally applicable, religion-neutral criminal laws with the 'incidental effect' of burdening

³⁴ This argument is also made in detail by Patrick Garry, 'Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion' (2005) 57(1) *Florida Law Review* 1, 37ff.

³⁵ William Marshall, 'What is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence' (2000) 75 *Indiana Law Journal* 193, 204 considers the many reasons given for favouring religion and argues that these all of these features can apply to secular groups and individuals. There are, e.g., many secular charities and humanitarian-inspired programs as well as non-religious leaders who have demonstrated their concern for their work in promoting the social good. Gregory Paul demonstrates that 'non-religious, pro-evolution democracies contradict the dictum that a society cannot enjoy good conditions unless most citizens ardently believe in a moral creator' and shows a correlation between high religiosity and social dysfunction in the U.S.: 'Cross-National Correlations of Quantifiable Societal Health with Popular Religiosity and Secularism in the Prosperous Democracies' (2005) 7 *Journal of Religion and Society*, 1.

³⁶ *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

religious conduct did not offend the First Amendment.³⁷ In the 1997 case of *City of Boerne v. Flores*,³⁸ however, the Supreme Court held that by enacting RFRA Congress had exceeded its powers by altering the terms of the free-exercise provision of the U.S. Constitution in its application of RFRA to the States, and that the Court's precedent was to apply in this case.

The precise implications of *City of Boerne v. Flores* are not clearly spelt out, but it would seem that the general approach of the U.S. Supreme Court to RFRA is that the Constitution 'does not require a government to accommodate incidental burdens on religious conduct resulting from neutral, generally applicable laws'.³⁹ It would appear from *City of Boerne v. Flores* that RFRA has not provided a blanket freedom from state laws in the exercise of religion and a case-by-case approach is required. Overall, however, the application of RFRA is uncertain.⁴⁰

The two principles of free-exercise (freedom) and non-establishment (equality) in relation to Freedom of Belief can come into conflict. The U.S. Supreme Court has sought a balance between rigid state-Belief impartiality holding that when this leads to restriction on the practice of religious or other personal convictions, it can defeat the purpose of free exercise of those convictions.⁴¹ This has led to ambivalence in interpretation of the principles, and inconsistency in the Court's approach.⁴²

³⁷ Ibid, 878-9.

³⁸ *City of Boerne v. Flores*, *Archbishop of San Antonio* 521 U.S. 507. For a detailed examination of the effect of this case on protection of religion by law see Hamilton, *God vs. the Gavel*, especially Chs 8 and 9. She states that she is told that proponents of RFRA have 'all 50 states in [sight] to enact mini-RFRAs.' Marci A Hamilton, 'The Constitutional Rhetoric of Religion' (1998) 20 *UARL Law Journal* 619, 621.

³⁹ Hamilton, 'The Constitutional Rhetoric of Religion', 619, quoting *Department of Human Resources of Oregon v. Smith*, 888-9.

⁴⁰ Tim Gardiner, *The RFRA Needs to be Repealed Now* (2006) Humanist Network News <www.NetworkNews.org> at 18 May 2006.

⁴¹ See, e.g., *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

⁴² For example, the term 'play in the joints' has been invoked to describe the situation where state action is *permitted by the free-exercise principle but not required by the non-establishment principle*, that is, while some limits on action may be demanded by the state, one does not lose the right to practice the core requirements of one's religion. The concept was applied by the U.S. Supreme Court in *Locke v. Davey* 540 U. S. (2004) to uphold the state restricting a benefit in the form of a university scholarship to the respondent to pursue a devotional theology degree when he was otherwise eligible to receive it. The scholarship could nevertheless be awarded for attendance at universities that required students to undertake Bible and other studies. The Court determined that this was a case that involved the 'play in the joints' between the establishment and the free-exercise clauses of the Constitution's First Amendment. The link between government funding (non-establishment) and

9.2.1 The concept of state-Belief separation: the U.S. influence

The idea of state-Belief separation has been influenced by the U.S. approach to Freedom of Belief. This approach is expressed in the two principles contained in the First Amendment of the U.S. Constitution. The first, the ‘non-establishment principle’, is limited to requiring that the state must not formally establish any church or religious institution as a state church or religion, or require any religious test for any government position.⁴³

The purpose of the non-establishment principle is seen as threefold: to protect religious institutions from interference by the state, the state from interference by religion, and individuals from interference by religion.⁴⁴ It is considered a necessary condition of the second principle, the ‘free-exercise principle’, which protects the freedom to have and manifest Belief. But non-interference must also include non-preferment. Put simply, religious groups do not attract any special protection under the free exercise clause as long as governments do not seek to regulate them in a way that discriminates against specific religious groups.⁴⁵

religious training (free-exercise) was broken by the choice allowed the recipient – it did not require the applicant to choose between the scholarship and his religion. See also Marshall, William ‘The Inequality of Anti-Establishment’, Durham, ‘Perspectives on Religious Liberty’.

⁴³ E.g., *Everson v. Board of Education* 330 U.S. 1 (1947) per Black J, at 15-16.

⁴⁴ Many U.S. States have been more specific and restrictive. Those that sought to avoid an establishment of religion around the time of the founding fathers placed in their constitutions formal prohibitions against using tax funds to support the ministry (e.g., Georgia. Const., Art. IV, §5 (1789) which provided that ‘[a]ll persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own’). Others that provided that no-one can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent are Philadelphia (Const., Art. 11(1776)); New Jersey. (Const., Art. XVIII (1776)); Delaware (Const., Art. I, §1(1792)); Kentucky (Const., Art. XII, §3 (1792)); Vermont (Const., Ch. I, Art. 3 (1793)); and Tennessee (Const. Art. XI., §3 (1796)); and Ohio (Const., Art. VIII, §3 (1802)). See *Locke v. Davey* 540 U. S. (2004), 9 (Renquist CJ). Currently, ‘thirty-seven states have constitutional provisions that explicitly forbid state financing of religious organizations, and ten states have constitutional provisions that extend these limitations to both “direct” and “indirect” financing’: Lupu, Ira and Tuttle, Robert, *The State of the Law 2003: Developments in the Law Concerning Government Partnerships with Religious Organisations* (The Roundtable on Religion and Social Welfare Policy <http://www.rockinst.org/pdf/faith-based_social_services/2003-12-the_state_of_the_law_2003_developments_in_the_law_concerning_government_partnerships_with_religious_organizations.pdf>, 2003), accessed 5/3/2010, 54.

⁴⁵ Derek Davis, ‘The Thomas Plurality Opinion: The Subtle Dangers of Neutrality Theory Unleashed’ in Stephen Monsma (ed), *Church-State Relations in Crisis: Debating Neutrality*, (Lanham, Rowman & Littlefield Publishers, Inc, 2002) 75, 90. See also Stephen Monsma ‘Substantive Neutrality as a Basis for Free Exercise - No Establishment Common Ground’ (2000) 42 *Journal of Church and State* 13, 23-4.

This non-establishment principle is what the U.S. Supreme Court has taken further and categorised as ‘separation of church and state’ imposing a strict notion of non-establishment.

Justice Black, in the U.S. Supreme Court case of *Everson v. Board of Education* described separation as including the following criteria:

1. The state cannot:
 - set up a church;
 - pass laws which aid one or all religions, or prefer one religion over another;
 - force or influence someone to attend or not attend a church against their will;
 - force someone to profess a Belief or disbelief in any religion; or
 - openly or secretly, participate in the affairs of any religious organization or group and vice versa.
2. No religious organizations or groups can openly or secretly, participate in the affairs of any government.
3. No person can be punished for:
 - entertaining or professing religious Beliefs or disbeliefs;
 - attending or not attending church.
4. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion.⁴⁶

Since the 1980s, however, the U.S. Supreme Court has been increasingly willing to accept government involvement in religion, favouring the free exercise principle over

⁴⁶ *Everson v. Board of Education* 330 U.S. 1 (1947), per Justice Black 15-16; Derek Davis argues that this principle was overturned in the case of *Mitchell v. Helms* 530 U.S. 793 (2000): see Davis ‘The Thomas Plurality Opinion: The Subtle Dangers of Neutrality Theory Unleashed’ in Stephen Monsma (ed), *Church-State Relations in Crisis: Debating Neutrality*, (Lanham, Rowman & Littlefield Publishers, Inc, 2002), 75.

the non-establishment principle, while not fully discarding the latter.⁴⁷ Different names have been given to this accommodationist approach, some confusingly calling it simply ‘neutrality’ as opposed to state-Belief separation,⁴⁸ others referring to it as ‘benevolent neutrality’, (as opposed to strict neutrality or church-state separation).⁴⁹ I use the terms state-Belief *accommodation*, as opposed to state-Belief *separation* (Wojciech Sadurski calls the former notion of neutrality as ‘equal-aid’ and the latter ‘no-aid’).⁵⁰

9.2.2 The Case for state-Belief Separation

9.2.2.1 Problems with accommodationism/ ‘state neutrality’

Accommodationism, with its emphasis on free exercise, paves the way for government funding of religious activity and special favourable treatment of religious groups. I argue, like Rawls, that accommodationism is *unfair*.⁵¹ It is inevitably discriminatory, with discretionary singling out of particular Beliefs for privileged treatment of specific Beliefs and Belief organisations. It results in the diversion of public moneys and resources to sectarian interests, political and social influence being weighted in their favour. It causes marginalisation, disadvantage to ‘other’ Beliefs and Belief interests, and the inability for equal manifestation of Belief. This is considered more fully below.

State-Belief accommodation focuses on the individual’s right to manifest Belief (liberty), arguing that the state can (and should) equally support all Beliefs. States have, in the name of neutrality, accepted the erection of religious symbols in public settings, exemptions from the general law such as tax exemptions, exemptions based on dietary requirements (e.g., from laws requiring humane treatment of animals) and employment conditions (e.g., discrimination on the ground of religion, or observance of holy days).⁵² A degree of church-state partnership was endorsed in the U.S. case of *Mitchell v. Helms*,⁵³ demanding that Government aid (in this case to religious schools) does not

⁴⁷ Stephen Monsma (ed), *Church-State Relations in Crisis: Debating Neutrality*, (Lanham, Rowman & Littlefield Publishers, Inc, 2002), 4ff.

⁴⁸ As does Monsma: Ibid.

⁴⁹ See, e.g., *Mitchell v. Helms* 530 U.S. 793 (2000) which sets out clearly the distinction between the majority adoption of state ‘neutrality’, as opposed to the minority application of the principle of state-Belief separation.

⁵⁰ Sadurski, ‘Neutrality of law towards religion’, esp. 453.

⁵¹ See Rawls, ‘The Idea of Public Reason Revisited’, 458ff, esp. 460.

⁵² Durham, ‘Perspectives on Religious Liberty’, 21.

⁵³ *Mitchell v. Helms* 530 U.S. 793 (2000).

amount to advancing religion, providing, said the Court, the aid is offered on a neutral basis and the aid is secular in content.⁵⁴

The term ‘benevolent neutrality’ was coined earlier, somewhat confusingly, by the U.S. Supreme Court in *Walz v. Tax Commission of the City of New York*. There, Chief Justice Burger, delivering the opinion of the Court, endorsed a ‘benevolent neutrality which will permit religious exercise to exist *without sponsorship and without interference*’ (my emphasis). However, ‘benevolent neutrality’ is not so rigid as to prevent any deviation from drawing an ‘absolutely straight line’ between church and state.⁵⁵

This terminology is confusing in its attempt to deal with complex reality. It is suggested, however, that true neutrality is in fact just that: it is neither ‘benevolent’ (favouring) nor ‘malevolent’ (disfavouring), not only in intention, but also in effect. The concepts such as ‘neutrality’ and ‘benevolent neutrality’ have been used to condone some degree of entanglement of state and Belief, while seeming to maintain disengagement of the state from favouring particular Belief systems. It is based on the principle that the use of government aid to further religious interests is not to be government assistance of religion, so long as the aid is formally earmarked for a secular purpose. Thus the ‘divertibility’ of aid from secular to religious purposes does not count, in the Supreme Court’s eyes, only the *purported aim* of the aid (such as money for materials, remedial education services, interpreters for the deaf, etc.) is important, even if these resources are diverted by the recipient institution and used for indoctrination.⁵⁶

Given the increasing involvement of religious and other private organisations in erstwhile government activities such as welfare, education, and other administrative activities, the line between government and these organisations has become blurred in effect, if not in intention. The arguments presented in section 9.2.2.2 in favour of separation shows how it addresses the unfairness of accommodationism.

⁵⁴ Davis, ‘The Thomas Plurality Opinion’, 81.

⁵⁵ *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), 669.

⁵⁶ See, e.g., *Mueller v. Allen* 463 U.S. 388 (1983), (tax credits for parents to send their children to religious school); *Witters v. Washington* 474 U.S. 481 (1986), (financial support for blind student at bible college); *Zobrest v. Catalina Foothills School District* 509 U.S. 1 (1993) (interpreter for hearing impaired student at religious school); *Agostini v. Felton* 521 U.S. 203 (1997), (remedial services to children at religious school) *Mitchell v. Helmes* 530 U.S. 793 (2000), (financial aid for materials for religious schools).

It is the role of religion to evangelise and bear witness, so in many cases preferment of religious groups' secular activities in practice indirectly becomes the advancement of religion.⁵⁷ Religious incursion into governance, as stated, has also promoted the entanglement of state and Belief. The issue thus becomes one of striving to prevent state sponsorship and interference.⁵⁸ Further, throughout the world, religion pervades the very notion of human rights.⁵⁹ Recognition or preference of some religions over others by the state through 'benevolent neutrality' has led to disadvantage for other faith-based Beliefs (particularly those of minority groups) and non-religious individuals and associations.⁶⁰

Total state-Belief separation is probably an unlikely political expectation for any nation across the world. Jonathon Fox, in his extensive survey of religion and the state concludes that:

...no matter what one's perspective on the data, GIR [government involvement in religion] remains ubiquitous throughout the world. No matter how one defines and operationalizes SRS [separation of religion and state] a large majority of the world's states do not have it.⁶¹

Accommodationism is justified by arguing that it provides for the history or identity of particular societies. It responds to the demand that 'this is the accepted, historically evolved way we do things around here.' It could be argued that Rawls is indeed allowing such considerations in his conception of the public political culture, allowing a form of accommodationism within the political conception of justice. While he does indeed allow for history and culture to play a part in state-Belief relations, my reading of his

⁵⁷ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A §48: 'Christian witness...corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church'.

⁵⁸ For an extensive coverage of the issue of 'benevolent neutrality' versus separation, see Stephen Monsma (ed), *Church-State Relations in Crisis*.

⁵⁹ 'In the East, more so than in the West, human rights perceptions are...conditioned by uncompromising tenets of religious belief'. This has 'permeated the entire spectrum of particular rights, including the very notion of religious freedom per se': Van der Vyver, 'Introduction', xii.

⁶⁰ E.g., Fox, *A World Survey of Religion and the State*, discusses different levels of support and privilege granted religion in former Soviet Bloc countries as they are considered 'part of the traditional heritage', at 150ff.

⁶¹ *Ibid*, 100.

work, as described, leads me to conclude that this does not mean accommodation in terms of privileged treatment of Belief.

As noted in section 3.3.3, Rawls adopts a wide view of public political culture, which ‘comprises the political institutions of a constitutional regime and the *public traditions* of their interpretation (including those of the judiciary) as well as *historic texts and documents that are common knowledge*.’⁶² His ‘wide view’ allows for many variations of history and culture. Principles and practices compatible with comprehensive doctrines may play a part in a politically liberal conception of justice, but only so long as they are within the general rubric of liberal democracy. Human rights and the rule of law are social, religious and cultural, as well as political, aspects in such societies.⁶³

Given that his view that liberal democracy involves separation of church and state,⁶⁴ and is based on an overlapping consensus I conclude that Rawls rejects accommodationism and by implication becomes structural secularism, providing for state-Belief separation.

My criticism of the differential treatment of Beliefs through state accommodation is not based solely on the fact that it violates the fundamental liberal-democratic principle of equal citizenship. It is also *unfair* in Rawls’s terms. He makes this point in *Political Liberalism*.⁶⁵

Firstly, however, I argue that state neutrality of effect is simply not viable. State-Belief separation (or no-aid) focuses on the state’s withdrawal from intervention with Belief (liberty *plus* equality), on the basis that this is the only way to ensure that all Beliefs can flourish equally. As noted above, the principles of liberty and equality are claimed to be mutually incompatible when the liberty to manifest Belief is burdened by state intervention in religious activities in the name of equality.⁶⁶

Notwithstanding this, Wojciech Sadurski maintains that both the free exercise and non-establishment principles should not be seen as two separate injunctions. They are

⁶² Rawls, *Political Liberalism*, 13,14 (my emphasis).

⁶³ Ibid, 27 The public political culture of a democratic society formulates solely, ‘so far as possible’ a political conception of justice in a democratic society.

⁶⁴ Rawls, ‘The Idea of Public Reason Revisited’, 476.

⁶⁵ E.g., Rawls, *Political Liberalism*, 330.

⁶⁶ E.g., wearing religious regalia, religiously-approved food preparation, consuming otherwise illegal drugs, etc.

‘unified within a common scheme of state neutrality’ towards Belief.⁶⁷ This is evocative of Rawls’s view that the apparent contradictions of liberty and equality can be reconciled (see above section 4.6.1).

Sadurski, who follows Rawls’s approach, argues that to describe an action as neutral, we must first determine a baseline of neutral activity in relation to religious belief that is ‘normal’, from which all departures are considered non-neutral.⁶⁸ For example, Sadurski says, a religious person in a normal liberal environment can, for example, go to church, pray and access ministers. Removal of a person from that environment and thus depriving them of the normal means of accessing religious activity, justifies compensatory measures, hence governments provide chaplaincy services to the military, or prisons. Conversely, as prayers in state schools are not a ‘normal’ state function for state schools, religious needs are not removed from children through omission of prayers in state schools, so redress is unnecessary.⁶⁹

On my understanding of his use of his term ‘normalcy’, Sadurski is not advancing a political conception of justice. Nor is he arguing that it involves accommodation of religious or cultural mores simply because ‘this is the way we do things around here’. Rather he is simply pointing to the fact that *in liberal societies*, it is normal to carry out religious activity separate from government education facilities. As he explains it:

To describe a practice as neutral, *with respect to conflicting moral (and religious) conceptions*, we must imagine a baseline of action (or non-action) by a neutral agent (here the government) which establishes, as it were, a normal situation, by reference to which all departures from the baseline may be judged as non-neutral.⁷⁰

That he is referring to ‘normalcy’ within a liberal democratic context is also borne out by two further points Sadurski makes. Firstly, he goes on to say that only in unusual circumstances where the state deprives a person of the normal free exercise of his or her Beliefs (through, e.g., limits to freedom in the military or prisons) may the state be

⁶⁷ Sadurski, ‘Neutrality of law towards religion’, 433.

⁶⁸ Ibid.

⁶⁹ Ibid, 434. Where parents argue that religion is central to a child’s upbringing, Sadurski argues that the baseline (‘normalcy’) is secular education. Anything above or beyond that is not a responsibility of the state education system.

⁷⁰ Sadurski, ‘Neutrality of law towards religion’, 433 (my emphasis).

expected to compensate for that loss of freedom.⁷¹ Secondly, he argues that ‘only by fully disentangling itself from all religion-based functions, can the law maintain its position of complete neutrality’.⁷²

Different types and areas of exemptions raise different issues (for example, exemptions from military service, monogamy, Sunday closing, etc.). But specifics aside, they all highlight the same fundamental problem: they constitute privileges for one religion that do not apply to other religions or to the non-religious. Granting Belief-based exemptions can result in discrimination between religions, they can discriminate on the ground of religion (neglecting non-religious Belief), and they can discriminate against those who object on non-moral grounds (such as loss of income through prohibition of trade on Sundays).

Given that Freedom of Belief includes non-discrimination between religious and non-religious beliefs, Sadurski points out that:

...you cannot, without running into absurdity be neutral between x and everything that is non- x (which by definition includes that which is irrelevant to x)...one cannot be neutral between religion and everything that is non-religion...equal aid for religion and non-religion is not a viable interpretation of the ideal of neutrality’.⁷³

For example, aid to any non-religious group, such as arts, he says, would require giving equal aid to all other groups, including religious and non-religious groups. The same aid would have to be given to them all, regardless of perceived need or effect. In these terms, non-religion could also include groups that disadvantage religion. Thus, for Sadurski, the only *truly* neutral approach is one of state-belief separation.⁷⁴

My argument, then, is that separation of the institutions of government and state involvement of religious or non-religious Belief is a cornerstone of public reason, on which Rawls’s liberal democracy is based, with legislation and policy subject to justification that is acceptable to members of a pluralist society, regardless of Belief.

⁷¹ Ibid, 451.

⁷² Ibid, 454.

⁷³ Ibid.

⁷⁴ Ibid.

Promoting separation of religion and state increases the possibility that no Belief system or organisation is perceived to be privileged by the state.

Nowak and Vospernik comment:

At a time when state-backed religious fundamentalism is increasing rather than decreasing, it will be very difficult to implement the main principle underlying the very concept of freedom of religion or belief: that states should keep a neutral position vis-à-vis all religions and should only interfere if this is absolutely necessary for mediating between conflicting religious groups or for the protection of certain public interests and human rights of others.⁷⁵

Writers who make strong arguments for an accommodationist approach to state-Belief neutrality⁷⁶ prioritise freedom for (some) individuals at the expense of equality of that freedom for all. These writers reject a strict separation of state from religious organisations, maintaining that separation denies any place for religion in the public arena, with some adopting the multicultural approach that allows for government recognition of group rights over individual rights. They favour a policy that purports to treat all religions equally (non-religious organisations are not generally considered).

A further justification arises when a religious organisation provides non-religious, charitable activities such as education, health care and welfare. It is necessary, proponents of favouring religions organisations argue, to allow such organisations to maintain their religious identity. This state-Belief neutrality approach would also allow such activities as prayer and religious instruction in schools for those who wish to participate, the display on government property of religious symbols, and use of government premises for any religious activity on a theoretically non-discriminatory basis.

⁷⁵ Nowak and Vospernik, 'Permissible Restrictions', 172.

⁷⁶ See, e.g., Monsma (ed), *Church-State Relations in Crisis* ed, esp Ch 13; Stephen Monsma and Christopher Soper, *The Challenge of Pluralism* (Plymouth, Rowman & Littlefield Publishers Inc. 2nd ed, 2009). As noted above, there is an extensive discussion of the separation and neutrality approach the judgments in *Mitchell v. Helms*. William Marshall states the reasons against restricting the role of religion in political decision-making are, firstly, restriction is artificial if not impossible; secondly it 'undercuts society's ability to make informed moral and political judgments'; and thirdly it inappropriately forces religious and religious values to be 'privatized' or 'marginalized'. William Marshall, 'The Other Side of Religion' (1993) 44 *Hastings Law Journal* 843.

Rex Ahdar and Ian Leigh⁷⁷ suggest that a degree of church-state entanglement and discrimination in favour of a particular religion is acceptable: ‘the point is surely not to treat all religions equally... but to treat all religions with due concern and respect’. They propose that historically entrenched and socially useful religions should be given preference over others, invoking ‘classical’ justifications (e.g., God, as the ultimate source of authority; religious underpinnings providing legitimacy for secular institutions; and governmental responsibility for spiritual welfare).

This privileging of particular Beliefs is in effect including religious belief as a part of government activity, it is argued, as it politically empowers identified religious values.

Even government funding of non-religious activities by Belief-based groups can result in undue influence on the part of those organisations.⁷⁸ Evans and Thomas comment:

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.⁷⁹

They note that where church tax is compulsory and enforced through the government (such as in Germany) where citizens are required to register their religious affiliation, and citizens are required to apply to the government to relinquish their religion and gain remission from the tax, it is ‘an intrusion into privacy that the Court views with surprising equanimity’.⁸⁰

⁷⁷ Ahdar and Leigh, ‘Is Establishment Consistent with Religious Freedom’ 671ff. This approach conflates social services with Belief.

⁷⁸ See, e.g., Tushnet, ‘Questioning the value of Accommodating Religion’; Ira Lupu, ‘Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion’ (1991) 140 *University of Pennsylvania Law Review* 555esp 582ff.; Smith, ‘The Tenuous Case for Conscience’; Marshall, ‘The Other Side of Religion’.

⁷⁹ Evans and Thomas, ‘Church-State Relations’ 713.

⁸⁰ Ibid, 714.

Evans and Thomas maintain that '[t]he danger of establishment to religious minorities should not be overlooked'⁸¹ and point to 'cases where an established church intruded too far into the lives of non-believers and the Court struck down the law in question'.⁸²

As a political force, religion can lead to acrimony and social divisiveness, and a sense of fear generated by religion can lead to intolerance, repression, hate and persecution. Issues of possible discrimination arise when assignation of benefits to a particular religious or other group is required. Favourable discrimination can arise when the state funds pervasively sectarian institutions: the religious institution not only receives the benefit of the service, it also obtains control over the provision and accessibility of the public resources in question. For example, it can nominate the Belief of its employees, who may be required to participate in religious activities. Publicly funded jobs involving secular functions such as teaching geometry can be reserved for teachers of a particular faith.⁸³

It is not difficult for the state to develop a funding program that is theoretically 'neutral' for a particular Belief group for their secular activities. There is no need for a secular group to be offering similar activities:

A legislature would merely need to state a secular objective in order to legalize massive aid to all religions, one religion, or even one sect, to which its largesse could be directed through the easy exercise of crafting facially neutral terms under which to offer aid favouring that religious group.⁸⁴

⁸¹ Ibid, 707 n 41. Arcot Krishnaswami, in his U.N.-sponsored study of religious discrimination warned that the mere existence of an established church 'usually connoted severe discrimination – and sometimes even outright persecution – directed against dissenters' although this is not always the case: Arcot Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices' U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), U.N. Pub. No. 60.XIV.2), 46-7.

⁸² E.g., the requirement for MPs to swear an oath of allegiance: *Buscarini and others v. San Marino*. Greek laws that made it especially difficult for minority religions to gain government permission to establish places of worship were held to be in breach of the ECHR. See *Manoussakis and Others v. Greece*, 26 September 1996, *Reports of Judgments and Decisions* 1996-IV.

⁸³ Alan Brownstein, 'The Souter Dissent: Correct but Inadequate' in Stephen Monsma (ed), *Church-State Relations in Crisis: Debating Neutrality*, (Lanham, Rowman & Littlefield Publishers, Inc, 2002) 151, 159.

⁸⁴ Souter J, in *Mitchell v. Helms* 530 U.S. 793 (2000), edited and reproduced in Monsma, *Church-State Relations in Crisis*, Ch 2, at 51 n1).

Such a program may discriminate against other Belief groups who provide different but socially advantageous activities, or who do not apply for funding (a particular group may not countenance the idea of government funding, or is too small to qualify for it).⁸⁵

The neutrality principle fosters the development of publicly funded programs such as public libraries, recreational facilities, welfare programs and day care centres, based on religious or other Belief. While such services are beneficial when untainted by religious objectives, Brownstein argues that funding of religious groups for such services fosters:

...a particular kind of politicizing of religion that results when the proprietary interests of faith communities become susceptible to political deliberation and manipulation and there is increasing fragmentation of both political and public life along religious lines.⁸⁶

The case of *Kokkinakis v. Greece*,⁸⁷ noted that 'Christian witness', which corresponds to 'true evangelism', was described 'in a report drawn up in 1956 under the auspices of the World Council of Churches' as 'an essential mission and a responsibility of every Christian and every Church'.⁸⁸

The neutralist view maintains that Government aid to religious or other Belief organisations is limited to aid necessary to further some legitimate secular purpose, on the same level as that offered to non-religious recipients. This assumes that equal amounts of aid to religious and nonreligious schools will have exclusively secular and equal effects, both on external perception and incentives to attend different schools. In fact such aid may be used indirectly, if not directly, for religious purposes. For example, no matter what the supposedly secular purpose of the law, aid may be diverted to religious schools to directly support religious teaching in addition to secular education, or, by providing resources for non-religious teaching, can leave teachers or resources free for religious activities:⁸⁹

⁸⁵ Brownstein, 'The Souther Dissent', 160.

⁸⁶ Ibid, 161.

⁸⁷ 25 May 1993, Series A no. 260-A.

⁸⁸ Ibid, §48.

⁸⁹ So held in *Mitchell v. Helms* 530 U.S. 793 (2000), (edited and reproduced in Monsma, *Church-State Relations in Crisis*, Ch 2; Davis, 'The Thomas Plurality Opinion', 81. Money can be diverted to

...in practical terms, neutral disbursements of public aid to religious institutions cannot remain purely neutral. Some criteria must exist by which government agencies determine their beneficiaries; however, establishing a minimal qualification that simply verifies that the practices of recipients conform to law will not prevent conflict over the nature of groups receiving aid.... The argument here is that by forcing the public to fund ... institutions that may or may not adhere to beliefs and practices consistent with those of the larger society, an inherently contentious situation is created'.⁹⁰

9.2.2.2 Why State-Belief Separation?

State-Belief separation has the potential to eliminate the unfairness of accommodationism and its inevitable inequality. It seeks to provide true equal opportunity for freedom of Belief by offering benefits to none (the so-called 'level playing field'). By its disengagement from comprehensive doctrines, moderated by the use of anti-discrimination policies, the state avoids the inevitable unfairness arising from discretionary government decision-making regarding eligibility for favourable (or unfavourable) treatment of disparate, and possibly contradictory, Beliefs and Belief organisations. No-one would have a privileged access to the common resources of society simply because of 'their [sectarian] conceptions of the good'.⁹¹

Whereas state accommodation of Belief is unfair by treating specific beliefs differently, separation promotes fairness by promoting equal opportunity for all to practice their Beliefs. 'The believer, the religion shopper, the founder of a new religion, the syncretistic new age seeker, the theologian, the doubter, and the atheist all find shelter in the broad basic beliefs [of civil society]'.⁹² U.S. citizens, for example, are among the most religious people in the world, while their government is restricted from promoting,

religious means, as to require otherwise would be 'unworkable' (see summary of Court's decision in the first paragraph of Justice O'Connor's decision, reproduced in Monsma, *Church-State Relations in Crisis*, 21). See also Denise Meyerson, 'Why Religion Belongs in the Private Sphere, Not the Public Square' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge, Cambridge University Press, 2008) 44, 55-57.

⁹⁰ Davis, 'The Thomas Plurality Opinion', 90.

⁹¹ Rawls, *Political Liberalism* 330.

⁹² Nickel, 'Who Needs Freedom of Religion?', 951.

endorsing or funding religious institutions or religious beliefs. This separation of church and state enhances the diversity of belief in American life.⁹³

State-Belief separation avoids unfairness by distinguishing *personal and/or religious moral principles* from *society-wide, political moral principles*. The former are personal, and the business of the individual. The latter are the legitimate concern of government in formulating prescriptive policies for everyone. They involve principles of public political culture. As they are subject, in Rawls's view to an overlapping consensus, they remove the unfair influence of historical connotations, preconceptions, biases and political manipulations contained in many current approaches to religious belief, including the pressure for *prima facie* exemption of religious practices from the rule of law, including criminal law.

Where there is state-Belief separation, the state fairly avoids imposing any practice or prohibition based on religious doctrine – such as prayers in Parliament or local council meetings – surely an unfair practice that can result from accommodationism.

Unfair financial and political influence is avoided by state-Belief separation.⁹⁴ State-belief separation means religion and other Belief are above politics. Government resources (taxpayer dollars) would not be applied to activities that promote particular religious beliefs or activities. Tax exemptions for religion (other than genuine charitable works) means millions of dollars are lost to state revenue for pressing social services. Funding of religious activities also amounts to millions of dollars (see below 9.5.2, 9.5.3). Government is not funding conflicting moral interests.

Separation from Belief prevents unfair state interference in religious or other practices. Government accommodation of religious activity is often subject to specific conditions

⁹³ While religious bodies attempt to influence government in the US, the constitutional 'non-establishment' principle and the Supreme Court role in enforcing it constitute a bottom line protection against creeping religious influence in government.

⁹⁴ For example, in Australia, for the purposes of tax exemption 'religion' is limited to a 'religious institution'. A religious organisation is one that has a belief in a supernatural being, thing or principle and the acceptance of associated canons of conduct. (<http://www.ato.gov.au/nonprofit/content.aspx?doc=/content/34269.htm&page=10> These characteristics are necessary but not enough, the Government tax website tells us, 'for an organisation to be an institution. Its activities, size, permanence and recognition will be relevant.'

as to where and how it may be carried out.⁹⁵ This control can compromise the tenets of the religious body, result in division within the religious community, divert church resources to fulfil government requirements, and even force changed religious tenets or practices. The danger of state-established religion to religious minorities has also been well recognised.⁹⁶

Finally, state-Belief separation avoids unjust marginalisation of non-members of favoured associations, and consequent denial of protection or privilege. This denial can result in resentment and social disharmony. With separation, only religious activity that is contrary to the welfare of others is restricted.⁹⁷ Separation is overall socially *inclusive*, not *exclusive*.

9.2.3 Rawls, structural secularism, neutrality and State-Belief separation

I have argued that Rawls implicitly endorsed the conception of structural secularism in section 3.3.5, with his use of the ‘proviso’ that justification of prescriptive governance is based on the liberal conception of justice. This conception of justice can take into account history and culture (including comprehensive doctrines). In a liberal democracy, however, this conception of justice is based on ‘basic liberties’ similar to internationally accepted human rights instruments (see section 4.6). Rawls’s model of political liberalism excludes state adoption of comprehensive doctrines (religious or otherwise) as grounds for coercive policy, providing nevertheless for the right to adopt a Belief of one’s choice. Rawls’s implied structural secularism includes not treating religious belief as somehow distinctive.

Further, Rawls also stated that separation between government and ‘church’ is necessary for the protection of the state from religion, but also religion from the state.⁹⁸ Along with the majority of those who subscribe to separation, he refers only to religion and church

⁹⁵ Mark Tushnet, ‘Questioning the Value of Accommodating Religion’ in Steven Feldman, ed., *Law and Religion: A Critical Anthology* (New York University Press, 2000), p. 250

⁹⁶ Evans and Thomas, ‘Church-State Relations’ 713. See also e.g., Tushnet, ‘Questioning the value of Accommodating Religion’; Ira Lupu, ‘Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion’ (1991) 140 *University of Pennsylvania Law Review* 555esp 582ff.; Smith, ‘The Tenuous Case for Conscience’; Marshall, ‘The Other Side of Religion’.

⁹⁷ That is, limitations which are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others: Article 18(3) *International Covenant on Human Rights*.

⁹⁸ Rawls, *Political Liberalism*, 476.

in expressing this view. However, as well as his advocacy of separation, it appears from his inclusive definition of comprehensive doctrines, and his proviso, that he recognises non-religious beliefs in his approach. While his reference to such separation is brief, some implications can be made from Rawls's claims in relation to public reason and neutrality.

Rawls saw neutrality of the state towards Belief as being neutrality of *aim*.⁹⁹ He argued that 'justice and fairness as a whole' (which gives effect to overlapping consensus) 'hopes to satisfy neutrality of aim in the sense that basic institutions and public policy are not to be designed to favour any particular comprehensive doctrine'.¹⁰⁰ Despite the possibility of unequal *effect*, then, neutrality of *aim* requires disassociation of institutions performing public functions from any one personal conviction.

Following Rawls's reasoning, including his characterisation of political conceptions of justice as expressing a 'kind of normative value',¹⁰¹ Sadurski uses the concept of the 'normal' when considering what is state neutrality' with respect to conflicting moral and religious) conceptions'.¹⁰² (see above 9.2.2.1). He claims that it is the purpose to be served by neutrality that is central to its understanding, and this purpose is based on what is considered 'normal' when dealing with such conflicts. In normal circumstance, he argues the stance of the government is to give 'no-aid'.¹⁰³

Neutrality of aim also requires that institutions and policies seek, and be *seen* to seek, to instigate and protect legislation and policy that can be endorsed by citizens generally as within the scope of a public political conception of fairness and justice. In other words, it is suggested, neutrality is only truly conducive to Freedom of Belief if it involves a

⁹⁹ Ibid, 192.

¹⁰⁰ Ibid, 194. It is 'surely impossible for the basic structure of a constitutional regime not to have important effects and influence as to which comprehensive doctrines endure and gain adherents over time, and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are' (Ibid, 193)..

¹⁰¹ Ibid, 484 n91.

¹⁰² Sadurski, 'Neutrality of Law Towards Religion' 433.

¹⁰³ This is his argument in 'Neutrality of Law Towards Religion'.

strict disassociation (that is, *separation*) of the state from influencing, or being influenced by, particular Beliefs.¹⁰⁴

After extensive study of state neutrality, Wojciech Sadurski, who adopts the Rawlsian approach, concludes that:

It is inherently non-neutral to provide a higher level of protection to religious beliefs than to deeply held and ethically argued secular moral views, in granting exemptions from shared duties and burdens in a society. It is also inherently non-neutral to fund, subsidize and otherwise support religious bodies, including religiously affiliated schools, thus advancing the position of a particular religious denomination.¹⁰⁵

9.3 The state and Belief: the U.N. approach

While they are directed at defending Freedom of Belief, the U.N. international human rights treaties do not require neither separation of the state from Belief systems or organisations, nor do they prohibit establishment of a state religion, church or Belief organisation.¹⁰⁶

The *travaux préparatoires* for Article 18 UDHR and ICCPR indicate a clear intention that this was to be the case, the most likely reason being the desire to maintain the support of nations that did not want to relinquish historical or cultural institutions or practices.¹⁰⁷

Provisions preventing discrimination on the ground of ‘religion or other opinion’ (UDHR Article 2, ICCPR Article 26), indirectly require some degree of separation of the state from personal conviction. Article 2(2) of the Belief Declaration, explicit in

¹⁰⁴ Note, for example Catriona McKinnon’s conclusion that *laïcité*-as-civic-duty is indeed logically ‘the most promising value for a democratic society of equals’ (above, section 3.3.5).

¹⁰⁵ Sadurski, *Equality and Legitimacy*, 193.

¹⁰⁶ *Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (5 November 1999) esp. the concurring judgment by Martin Scheinin, §1, who points to ICCPR General Comment 22, §9.

¹⁰⁷ See, e.g., Carolyn Evans and Christopher Thomas give this as a reason for tolerance of state religion in article 9 ECHR: ‘Church-State Relations in the European Court of Human Rights’ 706. Bossuyt, *Guide to the Travaux Préparatoires*, 360.

what it means in prohibiting discrimination on the grounds of religion or other Belief provides indirectly for state neutrality:

For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose *or as its effect* nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis (my emphasis).

On the other hand, *General Comment 22* indicates that the state may establish an official or traditional religion, so long as it does not:

...result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.¹⁰⁸

The UNHRC has questioned, but not determined, whether the existence of an official state religion might jeopardise freedom of religion or belief.¹⁰⁹ Jonathon Fox claims that of the six Western democracies with an active state religion, all but one, Malta, place some restrictions on minority religions, and five give some religion preferential treatment.¹¹⁰ This raises the issue of the influence and pressure for social and occupational acceptance by an established religion.

The Committee has further inferred by its questioning of state activities that it considers separation of church and state a desirable feature of Freedom of Belief.¹¹¹ Activities questioned include payment by the state of salaries and pensions of ministers of religion; regulation by the state of church affairs; the requirement that religions register with the state; and registration of members of religious groups.¹¹² The U.N. Special Rapporteur

¹⁰⁸ ICCPR *General Comment 22*, §§10, 11.

¹⁰⁹ See, e.g., Taylor *Freedom of religion*, 197.

¹¹⁰ Fox, *A World Survey of Religion and the State*, 111. Active state religion involves, e.g., government administered church taxes, mandatory religious education, church involvement in government activity. Fox lists other countries with active state religion as Denmark, Finland, Iceland, Greece and Norway. He also lists other countries with preferred treatment of a particular religion as Ireland Italy, Luxemburg New Zealand and Portugal. He describes Australia as having ‘moderate separation’ (at 114).

¹¹¹ Tahzib, *Freedom of Religion and Belief*, 260ff.

¹¹² Ibid.

on freedom of religion or belief as well as the UNHRC have indicated concern that minority status (institutionalised by state endorsed or established religion) and criteria, method, purpose and effects of registration (or non registration) of religions could result in a form of institutionalised discrimination against non-recognised Belief systems.¹¹³

Despite this, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹¹⁴ Art. 4(2) states that:

States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

Articles 1 to 4 specify that this is to be through government measures that include protection and encouragement of conditions for the promotion of group identities. These measures involve granting special competence to these minorities to participate effectively in decision-making affecting them, non-discrimination against them, and positive steps to provide equality by and before the law.¹¹⁵ *General Comment No. 23* on Article 27 ICCPR points out that that such measures must respect the non-discrimination and other clauses of the Convention.¹¹⁶ This, it is argued, results in significant ambiguity as to the U.N. perception of the state-Belief relationship.

The result is ambivalence as to the meaning of state ‘neutrality’, with case law of the UNHRC clearly indicating a focus by the Committee on the individual citizen and his or her Freedom of Belief in particular situations. This neglects consideration of the overall relationship of the state and religious or other Belief, as demonstrated below.

¹¹³ Ibid; Taylor *Freedom of religion*, 197.

¹¹⁴ UNGA Res. 135, 47th Sess. 2(1) 210; U.N. Doc. A/Res/47135 (18 Dec. 1992).

¹¹⁵ This raises the issue of boundaries between state and Belief: Johan van der Vyver, ‘The Relationship of Freedom of Religion or Belief Norms to other Human Rights’ in Tor Lindholm, W. Cole Durham and Bahia Tahzib-Le (eds), *Facilitating Freedom of Belief: a Deskbook*, (Leiden, Martinus Nijhoff, 2004), 87ff.

¹¹⁶ CCPR/C/21/Rev. 1/Add.5, 26 April 1994 §6.2, 8.

9.4 The state and Belief: Approach of the European bodies

Much more has been said on state-Belief relations by the European bodies. Resolution 1804 of the European Parliamentary Assembly¹¹⁷ expresses its ambivalent approach to the idea of ‘separation of church and state’. Paragraph 4 states that ‘[t]he Assembly reaffirms that one of Europe’s shared values, transcending national differences, is the separation of church and state’, a ‘principle that prevails in politics and institutions in democratic countries’. On the other hand, in paragraph 5, the European Court recognises that states can organise relationships between the state and the church ‘in compliance with the provisions of the European Convention on Human Rights’ and ‘member states today show varying degrees of separation between government and religious institutions *in full compliance with the Convention*’ (my emphasis).

The ECHR does not specify separation of the state from Belief. Framers were aware of the constitutional separation in states such as the U.S. and France, but were also conscious of the need to retain support of those nations that desired to retain historical religious and cultural practices. Further, they, and later the European Commission and Court, were of the opinion that appropriately restrained state involvement with religion would render separation not necessary to ensure Freedom of Belief.

Establishment of an active state church or religion is thus not in itself a breach of the ECHR.¹¹⁸ While not specifying the boundaries of the relationship between the state and Belief, the case of *Kokkinakis v. Greece* entrenched the democratic basis of Freedom of Belief in European human rights case law. It stated this freedom as:

...a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.¹¹⁹

The European 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

¹¹⁷ *Council of Europe Recommendation 1804* (2007), text adopted by the Assembly on 29 June 2007 (27th Sitting).

¹¹⁸ *Darby v. Sweden*, 23 October 1990, Series A no. 187 annex to decision of the Court, §47 (1989).

¹¹⁹ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A, §31.

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.¹²⁰

Nevertheless, the European Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and Beliefs, and stated that this role is 'conducive to public order, religious harmony and tolerance in a democratic society'.¹²¹ It also considers that 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,'¹²² or interfering with their internal affairs.¹²³

An exception is made where internal differences involve property, or to ensure an association is required to fulfil certain requirements for entitlement to state recognition for benefits such as tax exemptions, or financial support such as social services.¹²⁴ Additionally, the Court also requires the State to ensure mutual tolerance between opposing groups to ensure everyone's beliefs are respected.¹²⁵

In sum:

The state itself, therefore, must be democratic and pluralistic in order to fit within the requirements of the ECHR, and it must respect religious freedom, but within those boundaries, there is no requirement or prohibition of establishment between church and state.¹²⁶

¹²⁰ *Darby v. Sweden*, 23 October 1990, Series A no. 187 annex to decision of the Court, §45.

¹²¹ *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, §91.

¹²² *Ibid*, §92. See also (see, *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII, §4. *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR 2001-XII, §123.

¹²³ Roland Minnerath, 'The Right to Autonomy in Religious Affairs' in Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004) 311, 311-314.

¹²⁴ Durham, 'Facilitating Freedom of Religion or Belief Through Religious Association Laws'.

¹²⁵ *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, §91. See also *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR, 2001-XII, §§123, 128.

¹²⁶ Evans and Thomas, 'Church-State Relations', 700 (footnotes omitted). See also Martínez-Torrón and Navarro-Valls, 'The Protection of Religious Freedom', 217.

Notwithstanding this, the provisions of the international instruments have even been interpreted as specifically endorsing state involvement in the establishment of state religions and the favouring of specific religious groups. Thus, say Javier Martínez-Torrón, and Rafael Navarro-Valls:

Not even privileged collaborations between states and certain churches, in the form of hidden confessionality of the state (as in Greece), or in the form of state churches (as in England or in some Scandinavian countries), have been considered contrary to the European Convention.¹²⁷

The aim of Article 9 ECHR, they conclude, is to provide only an *adequate* guarantee of the right to freedom of religion and Belief. Its purpose:

...is not to establish certain uniform criteria for church-state relations in the Council of Europe member states nor – even less – to impose a compulsory secularism (*laïcité*). The background of this approach is the idea that the state's attitude towards religion is primarily a political issue and is the result, to a large extent, of the historical tradition and the social circumstances of each country.¹²⁸

Thus, for example, in the case of *Kokkinakis v. Greece*¹²⁹ the European Court did not question that the close connection of the Greek Orthodox Church with the state was a legitimate political choice.¹³⁰ In a decision just handed down,¹³¹ the Grand Chamber has overturned a Chamber decision that mandatory display of a crucifix in government classrooms is a breach of the ECHR. Nine countries joined in appealing this decision to the Grand Chamber, which overturned the decision invoking *inter alia*, a state's right to exercise a margin of appreciation based on its judgment of community interest. Two

¹²⁷ Martínez-Torrón and Navarro-Valls, 'The Protection of Religious Freedom', 216.

¹²⁸ Ibid, 216-217.

¹²⁹ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A.

¹³⁰ Martínez-Torrón and Navarro-Valls, 'The Protection of Religious Freedom', 217. See also Commission's report in *Holy Monasteries v. Greece*, 20 EHRR 1 (1995) (ECtHR 301, 9 December 1994), which ended with a friendly settlement (Rep. Com. 13092/87 and 13984/88, 14 January 1993; accepted by the Court on 1 September 1997, (Reports of Judgments and Decisions 1997-V).

¹³¹ *Lautsi v. Italy* [GC], no. 30814/06, 18 March 2011.

judges dissented, arguing that the ‘positive’ duty of tolerance and mutual respect means the margin of appreciation is limited.¹³²

9.5 Law Found Wanting: Special consideration for religion in practice

We see, then, a diversity of approaches across nations, from theocracies such as Iran and Saudi Arabia, to states proclaiming separation of religion and the state, such as the U.S. and France. Jonathon Fox states ‘[t]here is a tendency of most states to give preference to some religions over others’.¹³³ He estimates that 85.1% (149) of the 175 states he examined, either ‘support some religions over others, place restrictions on some religions that are not placed on others, or both’.¹³⁴ Fox nominates the main reasons as:

- protection of indigenous culture from outside influence (particularly in Orthodox Christian states of eastern Europe);
- protection from religions considered dangerous (particularly in Western and Eastern Europe);
- protection of religion as national identity, or playing a role in government (particularly in Muslim countries);
- protection of a symbiotic relationship between religion and state (particularly Middle Eastern states) ;
- protection of Belief practices resulting from historical inertia (to some extent in most states).¹³⁵

Fox considers that absolute separation of religion and state is ‘exemplified only by the United States of America’,¹³⁶ a claim that is refuted above.¹³⁷ However, he concludes

¹³² Ibid, Dissenting judgment of Judge Malinverni and Judge Kalaydjieva, 50.

¹³³ Fox, *A World Survey of Religion and the State*, 353.

¹³⁴ Ibid.

¹³⁵ Ibid, 354-5.

¹³⁶ Ibid, 359.

¹³⁷ At section 9.5 above. The two states considered to rigidly separate religion and state are the U.S. and France. However, it is argued that even these countries exhibit a degree of state-religion entanglement. In relation to the U.S., see Monsma, Stephen (ed) *Church-State Relations in Crisis*. In relation to France see Jean Baubérot, ‘The Place of Religion in Public Life: The Lay Approach’ in

that ‘no matter how it is measured most states do not separate religion and state’¹³⁸
Indeed, government involvement in religion has risen in 86 – almost half – of the states
he reviews between 1990 and 2002.¹³⁹

Thus, Fox concludes, ‘[n]o matter how one views the larger picture, some aspect of
religion remains a significant influence on at least some aspects of society and
politics.’¹⁴⁰

As indicated, the international human rights treaties do not require state-Belief
separation. Areas of positive entanglement of state and Belief countenanced by the
relevant Articles apply in both the ICCPR¹⁴¹ and the ECHR.¹⁴² Some examples of
permitted entanglement of state and Belief follow.

9.5.1 Religious ‘vilification’

The ICCPR establishes the rights to ‘seek, receive and impart information and ideas of
all kinds’ through any media, the only restrictions being those necessary for ensuring
respect of the rights or reputations of others, national security or public order or
health.¹⁴³

Adopting an approach of state ‘benevolent neutrality’ (which has similar connotations to
‘margin of appreciation’) has led to the provision of special protection against ‘religious

Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or
Belief*, 441.

¹³⁸ Fox, *A World Survey of Religion and the State*, 359.

¹³⁹ Ibid, 356.

¹⁴⁰ Ibid, 364.

¹⁴¹ See discussion in Taylor, *Freedom of Religion*, 153ff.

¹⁴² Evans and Thomas, ‘Church-State Relations’.

¹⁴³ Article 19 ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

vilification', blasphemy or sacrilege. These offences have then been invoked by adherents to some religions to prevent others questioning their Beliefs and activities. It has been used as a means of silencing others on the ground of alleged 'vilification', or defamation, becoming a political tool that results in the erosion of liberal democracy.

Resolutions calling on member States to take specific measures to 'combat defamation of religion' through legislation and other measures have been passed by both the Human Rights Council (and the Human Rights Commission before it), as well as the General Assembly.¹⁴⁴ Those countries voting against the resolution, including Australia, have argued that while they condemn intolerance and discrimination on the ground of religious belief, there are problems with the approach taken by proponents of the resolution.¹⁴⁵ Maxim Grinberg in his study of the history and application of the prohibition of 'defamation of religions' argues that member states of the OIC restrict freedom of expression under the guise of 'combating defamation of religion'.¹⁴⁶

Finally, on December 19 2011 the UN General Assembly voted unanimously adopt a resolution on 'combating religious intolerance' that does not include prohibition of 'defamation of religion'.¹⁴⁷

Article 20 ICCPR requires the prohibition of '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Hatred itself is not prohibited, with the inference that hatred is purely an internal feeling and does not amount to action. Manfred Nowak argues that the wording of article 20 is

¹⁴⁴ E.g., resolutions 1999/82 of 30 April 1999, 2000/84 of 26 April 2000, 2001/4 of 18 April 2001, 2002/9 of 15 April 2002, 2003/4 Human Rights Resolution 2005/3, Commission on Human Rights resolution 2002/9 (see E/2002/23- E/CN.4/2002/200, see chap. VI); United Nations General Assembly resolution condemning defamation of religion (Resolution 62/154, adopted 18 December 2007). This last resolution was adopted by a majority of 95 votes in favour, with 52 against and 30 abstentions. It was rejected by the United States, New Zealand and Australia.

¹⁴⁵ The Australian Human Rights and Equal Opportunity Commission in its submission to the U.N. agreed on the intolerability of vilification and discrimination on the grounds of religious belief, but rejected the U.N. approach because (1) the resolution focuses primarily on one religion (Islam) rather than all religions, and (2) 'the concept of defamation is not applicable to religions and, therefore, is invalid in human rights discourse which should address the rights and freedoms of individuals'. *Report of the Australian Human Rights and Equal Opportunity Commission to the United Nations High Commissioner for Human Rights*, 4 July 2008, http://humanrights.gov.au/partnerships/religious_defamation/ at 12/12/09, §1.2.

¹⁴⁶ Maxim Grinberg 'Defamation of Religions v. Freedom of Expression: Finding the Balance in a Democratic Society' (18 *Sri Lanka Journal of International Law* 2006).

¹⁴⁷ United Nations General Assembly, Resolution 66/176, 2011.

not clear, but it does not prohibit advocating ‘hatred in private circles that instigates non-violent actions of racial or religious discrimination’. What the framers of the Covenant had in mind, he argues, is the prevention of ‘public incitement to hatred and violence within a state or against other states and peoples’.¹⁴⁸

There is no definition of ‘discrimination’ in the ICCPR, but the Belief Declaration article 2(2) defines ‘intolerance and discrimination based on religion or belief’ as ‘any distinction, exclusion, restriction or preference based on religion or belief’ the purpose or effect of which nullifies or impairs *inter alia* the right to the equal exercise of Freedom of Belief.

Case law has demonstrated the difficulty in determining acceptable and unacceptable speech that offends. This is borne out, for example, by the extensive discussion (and individual reasoning of judges) in the UNHRC case of *Faurisson v. France*.¹⁴⁹ In that case, an academic was convicted under laws prohibiting the contestation of the existence of, *inter alia*, the extermination of Jews in Nazi concentration camps. He publicly expressed doubt about the Holocaust. While the UNHRC held that the author had a right to express an opinion in general, it concluded that two statements he made, indicating that the Holocaust was a ‘myth’ and a ‘dishonest fabrication’, served to strengthen anti-Semitic fervour.¹⁵⁰ The legislation prohibiting such statements was held to be compatible with the ICCPR, as necessary for respect of the rights and reputations of others.

The UNHRC’s finding in *Ross v. Canada* was noted above (section 8.2.1). There it was held that statements by the author against the Jewish faith were ‘discriminatory against persons of the Jewish Faith’ and ‘denigrated the faith and beliefs of Jews’.¹⁵¹ In doing so the UNHRC considered, not the author’s beliefs as such, but the ‘manifestation of those beliefs within a particular context’.¹⁵²

¹⁴⁸ Nowak, Manfred, U.N. *Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhine, N.P. Engel 1993), 365.

¹⁴⁹ Communication No. 550/1993, U.N. Doc A/52/40 1999 Vol II, 84.

¹⁵⁰ Ibid, §9.6.

¹⁵¹ *Ross v. Canada* Communication (views of 26 October 2000) No. 736/1997 CCPR/C/70/D/736/1997 §11.5.

¹⁵² Ibid, §11.8.

There is a line to be drawn between offence through ridicule and incitement to hatred and violence. Amir Butler, the executive director of the Australian Muslim Public Affairs Committee has argued, for example, that the Victorian legislation prohibiting ‘religious vilification’¹⁵³ has ‘served only to undermine the very religious freedoms’ it was supposed to protect’.¹⁵⁴ He argues that it is impossible to draft religious vilification prohibitions properly, because of their very nature, as religions are inherently sectarian:

If we believe our religion is the only way to Heaven, then we must also affirm that all other paths lead to Hell... Yet this is exactly what this law serves to outlaw and curtail: the right of believers to passionately argue against or warn against the Beliefs of another.¹⁵⁵

Steve Edwards points to claims that ‘Muslims and Christians are using the legislation as a tactical weapon, engaging in mutual surveillance for the sole purpose of silencing one another’.¹⁵⁶

The European Court has accepted applications relating to alleged religious vilification, and tended to allow suspension of material considered to offend the religious sensitivities of the public, applying the ‘margin of appreciation’ broadly.¹⁵⁷ In the case

¹⁵³ *Racial and Religious Tolerance Act 2001* (Vic) s8. (1) ‘A person must not, on the ground of the religious Belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons’.

¹⁵⁴ Amir Butler, ‘Why I’ve Changed My Mind on Vilification Laws’, *The Age* (Melbourne), 4 June 2004. See also Garth Blake, ‘Promoting Religious Tolerance in a Multifaith Society: Religious Vilification Legislation in Australia and the U.K.’. *The Australian Law Journal*, (2007) 81: 386-405.

¹⁵⁵ Ibid. See also Steve Edwards, ‘Do We Really Need Religious Vilification Laws?’ (2005) 21(1) *Policy* 30. For an outline of Australian vilification laws, Jenni Whelan and Christine Fougere, ‘Proscription of Hate Speech in Australia’ (Paper presented at the XVIth Congress of the International Academy of Comparative Law, Brisbane, 14th - 20th July 2002); John Perkins, ‘Religion and Vilification’ (2005) Autumn/Winter 2005 *Dissent* 53; *Fletcher v. Salvation Army Australia (Anti-Discrimination)* [2005] VCAT 1523 (1 August 2005); *Islamic Council of Victoria v. Catch the Fire Ministries Inc.* [2004] VCAT 2510 (22 December 2004). Carolyn Evans presents concisely arguments both in favour of, and against, hate speech legislation, considering the benefits and pitfalls of each in ‘Religious Freedom and Religious Hatred in Democratic Societies’ University of Melbourne Legal Studies Research Paper No. 236; *Human Rights 2006: The Year in Review*, Marius Smith, ed., pp. 155-168, Monash University, 2007, <<http://ssrn.com/abstract=993654>>. See also Feenan Dermot, ‘Religious Vilification Laws: Quelling Fires of Hatred?’ (2006) *Alternative Law Journal* 31 153 Laws; Peter Edge, ‘Extending Hate Crime to Religion’ 8 *J.C.L.* 7 2003; Ben Clarke, ‘Freedom of Speech and Criticism of Religion: What are the Limits?’ (2007) 14(2) *Murdoch University Law Journal*, 94.

¹⁵⁶ Edwards, ‘Do We Really Need Religious Vilification Laws?’, 33.

¹⁵⁷ See, for a discussion of the case law Taylor, *Freedom of Religion*, 84ff.

of *Otto Preminger-Institut v. Austria*,¹⁵⁸ the applicant association announced a series of public showings of a film considered offensive to religion called *Council in Heaven*. The charge was ‘disparaging religious doctrines’ under section 188 of the Penal Code.

The State Court of Appeal considered that artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance. It further held that indignation was ‘justified’ for the purposes of section 188 of the Penal Code only if its object was such as to offend the religious feelings of an average person with normal religious sensitivity.¹⁵⁹

The European Court agreed that prohibiting exhibition of the film was not a breach of Article 9, upholding, *inter alia*, what it declared as ‘the respect for the religious feelings of believers as guaranteed in Article 9 (art. 9)’.¹⁶⁰ The Court said:

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.¹⁶¹

In the later case of *Wingrove v. the United Kingdom*, concerning a film allegedly offensive to religion¹⁶² the Court continued this approach and stated:

The Court notes at the outset that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner “as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic,” which is “fully

¹⁵⁸ *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A.

¹⁵⁹ *Ibid*, §13.

¹⁶⁰ *Ibid*, §47.

¹⁶¹ *Ibid*, §56.

¹⁶² *Wingrove v. the United Kingdom*, 25 November 1996, Reports of Judgments and Decisions 1996-V.

consonant with the aim of the protections afforded by Article 9 (art. 9) to religious freedom.”¹⁶³

In relation to religious belief, the Court held, this aim, imposes ‘a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory’.¹⁶⁴

Again, the Court favoured religious sensitivities in the case of *Murphy v. Ireland*.¹⁶⁵

This case involved an advertisement on radio for a video ‘on the evidence of the resurrection’, which was suspended by the Government. Although the advertisement itself was not offensive, simply providing the date and time of showing of the purportedly factual video, its prohibition was held to be justified. The Court invoked the state’s right to a margin of appreciation, deferring to what it referred to as the ‘extreme sensitivity of the question of broadcasting of religious advertising in Ireland’ and that ‘religious advertising from a different church might be considered offensive and open to the interpretation of proselytism’.¹⁶⁶

These decisions can be compared with earlier findings of the European Commission,¹⁶⁷ which treated public expressions of opinion considered offensive to religious beliefs as coming under article 10 ECHR (free speech) rather than article 9 ECHR (Freedom of Belief). The general view of the Commission in those cases was that, so far as article 9 is concerned, religious beliefs are not beyond criticism, and it considered whether the applicant was restricted in the holding or manifestation of Belief. The later cases discussed above blur the distinction between the two articles, raising the question of the weight to be given protection of religious sensitivities as a protection granted by article 9, as opposed to that to be given the protection of freedom of speech under article 10.¹⁶⁸

¹⁶³ Ibid, §48.

¹⁶⁴ Ibid, §52.

¹⁶⁵ *Murphy v. Ireland*, no. 44179/98, ECHR 2003-IX (extracts).

¹⁶⁶ Ibid, 73.

¹⁶⁷ *Church of Scientology and 128 of its members v. Sweden*, App. No. 8282/78, 21 Eur. Comm’n H.R. Dec. & Rep. 109 (1980); *X v. Sweden*, No. 9820/82 (1984) 5 EHRR 297; *Plattform ‘Ärzte für das Leben’ v. Austria*, 21 June 1988, Series A no. 139.

¹⁶⁸ Taylor, *Freedom of Religion*, 101, states that there is a clear pattern emerging from the adjudicative bodies that hate speech and gratuitous offence must reach a ‘sufficient degree of severity’, but this degree is not certain. He gives a very useful and extensive discussion of the issue, *ibid*, at 77ff.

In line with the Commission, the Council of Europe recommended in 2007 that, while ‘gratuitous insults’ should be ‘discouraged’, freedom of expression ‘cannot be restricted out of deference to certain dogmas or the beliefs of a particular religious community’.¹⁶⁹

9.5.2 Financial and political benefit

Much has been written about government involvement in religion to the latter’s detriment.¹⁷⁰ Not so much has been written on the benefits accruing to religion through government-generated privileges it receives. This can be through legislation, or more subtly through government patronage, even in countries considered to have a high level of state neutrality such as Australia and the United States, as the following examples demonstrate.

Australia has in effect adopted the ‘benevolent neutrality’ approach to the relationship between the state and Belief systems. The Australian Constitution in similar terms to that of the U.S., states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.¹⁷¹

Whilst the U.S. Supreme Court was originally influenced by the interpretation by Jefferson of the U.S. provisions as creating a ‘wall of separation’ between church and state,¹⁷² this approach has evolved into ‘benevolent neutrality’ as described above in section 9.2.1. Indeed, Derek Davis argues that:

¹⁶⁹ Council of Europe Recommendation 1804 (2007), §19.

¹⁷⁰ See, for example, Roman Podoprighora, ‘Freedom of Religion and Belief and Discretionary State Approval of Religious Activity’ in Lindholm et al, *Facilitating Freedom of Religion or Belief*, 425; W. Cole Durham, ‘Facilitating *Freedom of Religion and Belief* through Religious Association Laws’, *ibid*, 321.

¹⁷¹ Constitution of the Commonwealth of Australia, s.116. The U.S. Constitution provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’ and ‘[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.’ (Constitution of the United States of America, First Amendment and Article VI, Clause 3 respectively).

¹⁷² This phrase was used by Thomas Jefferson in his reply to correspondence from the Danbury Baptist Association in 1802, reproduced in Robert Boston, *Why the Religious Right is Wrong about Separation of Church and State*, Amherst, N.Y., Prometheus Books 265. See, e.g., *Everson v. Board*

Given the time-honored right of religious bodies to be active participants in the American political process, it is not surprising that the United States Supreme Court has not seriously challenged this basic right.¹⁷³

The Australian High Court, on the other hand, rejected the notion that there is a separation of ‘church and state’ in Australia. It has taken a narrow approach to the meaning of ‘establishing’ a religion (constitutional institution of an official state religion),¹⁷⁴ and inferred an approach similar to state-Belief ‘benevolent neutrality’ by allowing state aid to religious schools for nominally non-religious purposes.¹⁷⁵

This approach has resulted in allowing blanket tax exemption and other privileges for religions associations because the ‘advancement of religion’ is considered in itself a public benefit, making most religious organisations automatically charities.¹⁷⁶ The state has outsourced many of its welfare responsibilities to Church-based welfare agencies. These welfare agencies are granted exemption from anti-discrimination legislation in hiring staff and conditions of work, can offer religious services as part of their activities, and use their work as a ‘religious mission’.¹⁷⁷

of Education, 330 U.S. 1 (1947), which established the requirements for separation of religions and state. The case of *Lemon v. Kurtzman* 403 (U.S.) 602 (1971) established a three-part test for legislation to ensure state-Belief separation: the law must have a secular purpose, neither advance nor inhibit religion, and not foster excessive governmental entanglement with religion.

¹⁷³ Derek Davis, ‘Separation, Integration and Accommodation: Religion and State in America in a Nutshell’ (2001) 43 *Journal of Church and State* 5, 9.

¹⁷⁴ In *Attorney-General (Vic.) Ex Rel. Black v. The Commonwealth* (1981) 146 CLR 559 Barwick CJ held that ‘establishing any religion’ ‘involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth’ (p. 582). Of the other judges Gibbs J considered that establishing a religion means ‘conferring on a particular religion or religious body the position of a state (or national) religion or church’ (p. 604) and Stephen J. said “establishing” means the constituting of a religion as an officially recognized State religion (p. 605). Only Murphy J. approved the U.S. approach of interpreting ‘establishment’ as involving separation of church and state (p.622-3). However, these statements were *obiter dicta*, being tangential to the facts of the case.

¹⁷⁵ Tony Blackshield argues that according to the judgment, ‘it would be constitutionally open to the Commonwealth “to patronise, protect and promote” a particular sect or religion’ so long as this was not done pursuant to a perceived institutional obligation of patronage, protection or promotion’, and that government aid to support the building of a cathedral would not infringe s.116: ‘Religion and Australian Constitutional Law’ in Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion: God, the State and the Common Law* (London, Routledge, 2005), 82, 98.

¹⁷⁶ See, e.g., Australian Tax Office Australian Government, ‘Getting started - Income tax guide for non-profit organizations’ at <http://www.ato.gov.au/print.asp?doc=/content/34263.htm>, accessed 1/6/2006.

¹⁷⁷ Stephen Monsma and Christopher Soper, *The Challenge of Pluralism* (Plymouth, Rowman & Littlefield Publishers Inc. 2nd ed., 2009), 121.

Also considered permissible are state funding of religious schools,¹⁷⁸ and direct funding of religious activities (including religious activity in government schools). It is reported that the Commonwealth Government contributed fifty-five million dollars for the Catholic Church's week-long 'World Youth Day' Rally ('WYD') in 2008,¹⁷⁹ as well as formally associating itself with the activity.¹⁸⁰ Prime Ministers have publicly associated themselves with religious activities by addressing religious conferences and gatherings, and offering financial assistance to religious activities.¹⁸¹ The current Prime Minister has announced more than 200 million dollars to fund chaplains in public schools. These are mainly provided by Christian organisations.¹⁸²

Australian State Governments also give favours to the Churches. Land tax and other taxes are exempt or reduced, and clergy are largely excused from disclosing criminal activity of which they become aware. The NSW Government also contributed over one hundred million dollars in funds or services to WYD, including the provision of public service personnel and government facilities for the week-long activities.¹⁸³ In South Australia, a senior Catholic, Monsignor David Cappo, was appointed as an unelected

¹⁷⁸ Though the High Court argued that such funding is to be considered for education in general, rather than religion: *Attorney-General (Vic.) Ex Rel. Black v. The Commonwealth* (1981) 146 CLR 559.

¹⁷⁹ The Commonwealth committed \$35 million towards security and visa costs, with an additional 'pledge of \$20 million to help relocate racehorses from Randwick' (Linda Morris, 'Taxpayers' \$95m bill for World Youth Day', *The Sydney Morning Herald*, 16/11/2007) <<http://www.smh.com.au/news/national/taxpayers-95m-bill-for-world-youth-day/2007/11/15/1194766868787.html?page=fullpage>> accessed 6/1/2011).

¹⁸⁰ Prime Minister Kevin Rudd was personally involved in Government support given to the Catholic Church World Youth Day by the Federal Government. He appointed an Ambassador to the Vatican to 'enable Australia and the Holy See to be able to work together on the great challenges we face in the world': Linda Morris, Jonathon Dart and Mark Davies, 'Fischer to be Our Man in Vatican', *Sydney Morning Herald* (Sydney), 22/7/2008, News 3, <<http://www.smh.com.au/news/world-youth-day/fischer-to-be-our-man-in-vatican/2008/07/21/1216492357011.html>> accessed 6/1/2011. Rudd also appointed a Christian minister as his personal adviser on moral and ethical policy: Andrew West, 'Rudd Spiritual Adviser Sees a Leadership Role', *Sydney Morning Herald* 26 February 2008, 2.

¹⁸¹ See, e.g., John Warhurst 'The Religious Beliefs of Australia's Prime Ministers' <http://www.eurekastreet.com.au/article.aspx?aeid=24159>, accessed 18/11/2010.

¹⁸² See, e.g. 'The Prime Minister puts her faith in chaplaincy', ABC News online at <<http://www.abc.net.au/news/stories/2010/08/10/2978352.htm>>, accessed 13/11/2010.

¹⁸³ Morris, 'Taxpayers' \$95m bill for World Youth Day'. The *World Youth Day Act 2006* (NSW) established a World Youth Day Co-ordination Authority, to co-ordinate and deliver government services in relation to World Youth Day 2008 and related events. The Authority's role was to provide public transport, regulate access to roads and venues, provide accommodation facilities for thousands of attendees, create offences relating to the event and provide public servants for providing information and direction of pedestrian and vehicular traffic. The Federal and NSW Governments also paid out \$41 million compensation to those adversely affected by the use of Randwick Racecourse for the Papal Mass held there, which required a 10-week shutdown (including re-housing of 700 horses).

member to the executive committee of the South Australian Government.¹⁸⁴ It would also seem that the South Australian Government paid \$70,000 funding to hold a memorial service in Adelaide for Pope John Paul II.¹⁸⁵

This government financial and political support of mainstream religious organisations has promoted their significant wealth and influence.¹⁸⁶

Marci Hamilton points to examples of religious influence on the legislature in the U.S.¹⁸⁷ These include the establishment of federally sponsored legislative exemptions from prohibition for faith-based medical neglect of children by the Nixon administration, the requirement of a compelling state interest to burden religious conduct by the Clinton administration.¹⁸⁸ She also notes the increased promotion of ‘faith-based initiatives’ (involving government approval and funding of religiously inspired and administered social services) under the Bush administration. She cites the ‘publicly-groomed perception of incapacity or powerlessness’ of, and widespread discrimination against, faith-based groups, which is supported by the notion that only faith-based groups are capable of providing welfare.¹⁸⁹

¹⁸⁴ *The Australian* of 4-5 February 2006 noted that ‘the appointment of a non-elected, non-government person to cabinet – let alone a senior church figure – is unprecedented in Australia’.

¹⁸⁵ Kate Reynolds, Democrats Member of the Australian Parliament ‘revealed documents showing the church simply sent a one-sentence invoice to the government for \$70,000 after it requested funding to hold a memorial service in Adelaide for Pope John Paul II’: see, e.g. *Catholic News* 3 February 2006 <<http://cathnews.acu.edu.au/602/22.php>> accessed 6/1/2011.

¹⁸⁶ If religion were a corporation, ‘it would be one of the biggest and fastest-growing in the country, accounting for more than \$23 billion in revenue in 2005’ (excluding donations on collection plates and credit cards: Adele Ferguson, ‘God’s Business’ (June 29-July 5 2006) *Business Review Weekly* 43. For this they are unaccountable to the state, and not taxed. See also, e.g. Lenore Nicklin, ‘God’s Property’ *The Bulletin* 14 April 1998 20; Max Wallace, *The Purple Economy: Supernatural Charities, Tax and the State* (Melbourne, Australian National Secular Association 2007), esp Part 2.

¹⁸⁷ Hamilton, ‘What does “Religion” mean in the Public Square?’, 1163ff; Hamilton, *God vs. the Gavel*, Part 1. In *God vs. the Gavel*, Hamilton notes that legislation in the U.S. provides exemption from reporting child abuse, even out of the confessional (p.9, 12ff.); for causing death through neglect for religious reasons (p.34ff); discrimination legislation by religious bodies (173ff). See also Timothy Challans, ‘Rawls versus Habermas on Religion, Politics, and War’ (2007) School of Advanced Military Studies International Symposium on Military Ethics. <http://www.usafa.af.mil/jscope/ISME2007/Papers/Challans_Rawls_v._Habermas.doc> accessed February 28, 2007, 9; Sam Harris, *The End of Faith* (London, Free Press 2004), 45.

¹⁸⁸ Hamilton, ‘What does “Religion” mean in the Public Square?’, 1153. She quotes Justice Stevens as stating that this law was ‘a legal weapon that no atheist or agnostic can obtain’: *City of Boerne v. Flores*, *Archbishop of San Antonio* 521 U.S. 507, 537. See also generally, Hamilton, *God vs. the Gavel*, Part 1.

¹⁸⁹ Hamilton, ‘What does “Religion” mean in the Public Square?’ 1168.

Generous tax exemptions for religious organisations are also available in the U.S. W. Cole Durham, for example, points out that religions benefit more than non-profit organisations in relation to tax exemptions. He states that while non-religious groups must ‘file extensive information establishing their charitable character’ to obtain tax-exempt status, religious groups do not have to do so.¹⁹⁰ As a consequence of ‘added protection for religious groups against various types of governmental regulation and red tape, it is not surprising that a large percentage of groups elect to organize their affairs as some type of religious corporation’.¹⁹¹

9.5.3 Taxation

By omission, the ICCPR, and by specification the ECHR,¹⁹² do not provide any person or association an *inherent* entitlement to exemption from general taxes, however, there is no prohibition from *state-endowed* entitlement to such a privilege. The UNHRC stated that, while Article 18 ICCPR protects the right to hold and manifest Belief, including objection to military expenditure, ‘the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of the protection of this article’.¹⁹³

The European Commission has likewise held that taxation for the purposes of general government spending, in which no person directs their contribution to any specific cause, is permitted by the ECHR.¹⁹⁴ Thus the use of taxpayers’ money for government grants to religious organisations, such as the grants to the Catholic Church, and provision of facilities for the international World Youth Day gathering in Australia is not considered a breach of Article 18 ICCPR, as no-one is prevented from having or manifesting a Belief, despite preferential treatment of a particular religion.¹⁹⁵

¹⁹⁰ Durham, W Cole, ‘Facilitating Freedom of Religion or Belief’, 321, 341 n 110.

¹⁹¹ Ibid, 341.

¹⁹² ECHR First Protocol, Article 1; *C. v. United Kingdom* 10358/83 37 D&R (1983) 142, 148.

¹⁹³ *J.P. v. Canada*, Communication No. 466/1991 (Decision of 7 November 1991), U.N. doc. A/47/40 (1994), 426, §4.2. See also *J.v.K. and C.M.G.v.K-S. v. The Netherlands*, Communication No. 483/1991 (decision of 23 July 1992), U.N. Doc. A/47/40 (1994); *K.V. and C.V. v. Germany*, Communication No. 568/1993 (decision of 8 April 1994) U.N. Doc. A/49/40 vol. 2 (1994) p. 365.

¹⁹⁴ *C. v. United Kingdom* 10358/83 37 D&R (1983) 142, 147; *Darby v. Sweden*, Annex to decision of the Court. §47ff.

¹⁹⁵ This is not to consider breach of Article 26 ICCPR (prohibition of discrimination on the ground of *inter alia*, religion).

Exemption from taxes such as income tax, property tax and council rates, can amount to a very considerable financial benefit to an organisation, particularly where it participates in commercial or other activity not directly related to the practice of its Belief. The ‘commercialisation’ of charitable activities by religious or other groups has led to an industry with an increasingly high management sector, with well-subsidised personnel and property, and a corresponding increase in political and social influence.¹⁹⁶

Religious or other Belief organisations may impose taxes on their adherents, and these may be enforced by the state. The European Court ruled that the payment of tax to the church is not a ‘manifestation’ of a Belief.¹⁹⁷ The state may also collect taxes on behalf of a church,¹⁹⁸ and authorise the imposition of state-enforced taxation on members, despite the fact that this requires notification of Belief and/or renouncing a Belief, a requirement otherwise considered unacceptable under Article 9 ECHR.¹⁹⁹

However, the case of *Darby v. Sweden*, discussed above at section 7.2.5, drew the distinction between taxes imposed by a church for direct religious purposes, and those imposed for the provision of state-related activities carried out by the church, such as maintenance of records of births, deaths and marriages, or of cemeteries. The former are the prerogative of the church, and can only be imposed on members, the latter are applicable to members and non-members alike.²⁰⁰

The European Court has established that maintenance of birth and death registers or responsibility for burial sites by a religious body are ‘[t]asks of a non-religious nature which are performed in the interest of society as a whole’ and the state can decide who

¹⁹⁶ For example, the Australian *Business Review Weekly* reported that Australia, ‘The five big churches had revenue of more the \$21.7 B in 1994’: Adele Ferguson, ‘Charity Inc’., *Business Review Weekly* (Sydney), 24-30 March 2005, 45. The income from non-religious activity (including commercial properties and private enterprises such as hospitals and nursing homes) would constitute a large proportion of this income and thus of public revenue foregone in taxes. Not all jurisdictions are as generous as Australia. Most jurisdictions disallow unrelated commercial activity of churches from tax exemption. Australia and New Zealand allow exemption from taxation from all major forms of church income.

¹⁹⁷ *Lundberg v. Sweden* App. no. 36846/97, ECHR (2001), 7.

¹⁹⁸ *Gottesmann v. Switzerland*, App. No. 10616/83, 40 Eur. Comm’n H.R. Dec. & Rep. 284 (1984).

¹⁹⁹ *E & G. R. v. Austria*, App. No. 97681/82, 37 Eur. Comm’n H.R. Dec. & Rep. 42 (1984); Taylor, *Freedom of Religion*, 40.

²⁰⁰ *Darby v. Sweden*, 23 October 1990, Series A no. 187 annex to decision of the Court, §51. The Commission estimated that 30% of the Lutheran Church’s tax could be held to be applicable to non-religious activities.

will carry them out and how they should be financed. It also has a wide margin of appreciation in these decisions.²⁰¹ Thus, a ‘dissenter’s tax’ levied on non-members of the Swedish Church, less than that imposed on Church members and reflecting the proportion church activities comprising such ‘civil’ tasks, was not a violation of Article 9 ECHR.²⁰²

The European Commission has allowed singular tax exemption of the Catholic Church based on a Concordat with the Holy See providing for reciprocal obligations (exemption in return for the Church placing historical, artistic and documentary material at its disposal).²⁰³

The European bodies have also held that the state may also allocate tax revenue to activities that are contrary to particular religious or other Beliefs, or to provide privileges to Belief organisations through special funding. The provision of either of these benefits does not breach the relevant Articles, so long as they do not prevent individual exercise of Freedom of Belief, or discriminate adversely against non-adherents to the Belief.

9.5.4 Negotiating privilege

Governments have adopted an approach to providing religious freedom by direct negotiation with various groups concerned, to determine with them what would provide a satisfactory outcome. This has been used particularly in developing policy in relation to ensuring equal opportunity for women and different racial groups.²⁰⁴ It has also been advocated for use in relation to different religious groups, in the sense that governments and parties involved come to an agreement based on the interests of the parties concerned.²⁰⁵ In relation to enhancing some aspects of lifestyle equality, it may well be a

²⁰¹ *Lundberg v. Sweden* App. no. 36846/97, ECHR (2001), 7. See discussion by Evans and Thomas, ‘Church-State Relations’, 713.

²⁰² See generally, *Lundberg v. Sweden* App. no. 36846/97, ECHR (2001).

²⁰³ *Iglesia Bautista “El Salvador” and Ortega Moratilla v. Spain* App. No. 17522/90, 72 Eur. Comm’n H. R. Dec. & Rep. 256 (1992).

²⁰⁴ On negotiating privilege, see Linda McClain, ‘Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations’ *Fordham Law Review*, Vol. 72, p. 1569, 2004 Social Science Research Network Electronic Paper Collection at: <<http://ssrn.com/abstract=588425>> accessed 12/5/2007; Penni Richmond, Kate Hughes and Karen Schucher ‘The Role of Unions in Furthering Women’s Equality’, prepared for the LEAF National Forum on Equality Rights, *Transforming Women’s Future: Equality Rights in the New Century* 4-7 November 1999, Vancouver, B.C.

²⁰⁵ For examples of negotiation of religious privilege in Spain see Lasia Bloß, ‘European Law of Religion – organizational and institutional analysis of national systems and their implications for the

legitimate process. In relation to religion, it allows individual churches and religious figures to enhance political, economic and social benefits and influence through special favours in the guise of equal treatment. Rather than ensuring state disassociation from religious or other Belief, this has resulted in a de facto entanglement of state and Belief, and the potential marginalisation of those excluded from these benefits. Some examples of negotiating privilege have been discussed in the previous section.

One form of ‘negotiated equality’ that has been rejected by the European Court is the adoption by the state of faith-based tribunals or bodies to dispense the law. Such was the basis of a proposal by the government of Ontario to include recognition of shari’ah in its Arbitration Act. This proposal would follow on from the government’s gradual allowance, throughout the 1990s, of religious groups such as Jews, Catholics and Jehovah’s Witnesses to set up religious arbitration bodies under the Arbitration Act to settle family matters without the intervention of the courts. In effect, the proposal would give legal sanction and weight to religious Belief and traditional culture.

The proposal in question would have added Islamic shari’ah to that which can be applied to certain areas of law, such as family law and other domestic arrangements.²⁰⁶ Whilst participation was to have been in principle voluntary, and provision for appeal to the higher courts was proposed, an appeal would be virtually impossible for those such as women involuntarily subjected to the very culture that was running the arbitration, despite their public consent to submit to its dictates. It is important in this context to note that the Islamic religion does not countenance apostasy.²⁰⁷

Because of opposition from non-religious and some religious groups, the Canadian proposal was not only withdrawn, the Premier, Dalton McGuinty in September 2005

future European Integration Process’, Jean Monnet Working Paper 13/0 NYU School of Law New York, NY 10012 USA, 39ff.

²⁰⁶ A detailed consideration of the issues surrounding the adoption of Shari’ah Courts/Tribunals in Canada and outline of submissions from interested parties, are contained in the Report to the Ontarian Attorney-General, by Marion Boyd, ‘Protecting Choice, Promoting Inclusion’ (2004). <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>> accessed 5/3/2010. See also Dominic McGoldrick, ‘Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws’ *Human Rights Law Review* (November 12 2009), who discusses issues surrounding the adoption of Shari’ah law and points out that both formal and informal sharia’ah courts and tribunals have been operating in the U.K. quoting an estimate that there are as many as 85 such bodies (p.35).

²⁰⁷ See, e.g., Applicant NABD of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, [2005] HCA 29, §21, (McHugh J); §§76, 77, 89-90 (Kirby J).

announced that there should be one law for all in Ontario and Canada. This prompted him to reject not only introducing shari'ah tribunals, but also all religious tribunals acting under the Arbitration Act.²⁰⁸

Formal and informal policies and practices of deference to socially established and favoured religious institutions, are socially divisive, and result in their often-unjustified prominence in influencing policy and judicial decisions. If free exercise of Belief is taken too far it involves the state in effect establishing religion (theocracy), or other personal convictions (tyranny) as part of state policy.

The European Court considered the entanglement of church and state by the state endorsement of religious courts, citing, *inter alia*, the above reasons, in the case of *Refah Partisi v. Turkey*.²⁰⁹ In that case, the Court upheld the dissolution of a political party advocating the establishment of religious courts for relevant religious adherents as necessary in a democratic society to protect the rights and freedoms of others. The Refah Partisi adopted a platform aimed at setting up a plurality of legal systems, and to apply shari'ah to the internal or external relations of the Muslim community and expressed the possibility of recourse to force as a political method.²¹⁰

The Court went on to hold that a plurality of legal systems was inimical to the values of the ECHR. There is no guarantee of individual rights and freedoms by the government as it endorses the requirement of individuals to obey laws of their religious group rather than those that apply to the general population.²¹¹ Such a move would 'do away with the State's role as guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society'. Individuals would be obliged to obey the 'static' rules imposed by religion rather than the democratic laws of the state. It would also 'infringe the principle of non-discrimination

²⁰⁸ Douglas Thomas, *Humanist Network News* <www.HumanistNetworkNews.org> accessed 14/9/2005.

²⁰⁹ *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

²¹⁰ *Ibid*, §116.

²¹¹ *Ibid*, § 119.

undeniably between individuals as regards their enjoyment of public freedom' and govern 'individuals in all fields of public and private law according to their religion'.²¹²

Where there is a state religion, or where there are different laws for different groups, the Court will apply stricter scrutiny than otherwise. It may, as it did with the Refah Party, disallow the adoption of different laws for different Belief groups.

The European Court said in the *Refah Partisi* case that shari'ah 'faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable and that principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it'. It concluded that the introduction of shari'ah cannot be reconciled with 'the fundamental principles of democracy, as conceived in the Convention taken as a whole', as shari'ah also offends rights relating to criminal law, the status of women, and interferes in all aspects of public and private life.²¹³ The Refah case thus holds that laws incompatible with human rights are not protected by the ECHR, which 'precludes any legal system where divine mandate means that some or all laws are considered beyond challenge'.²¹⁴

²¹² Ibid.

²¹³ Ibid, § 123. The question of just what constitutes shari'ah law is not always clear. Sharia'ah refers to 'not a single set of laws, but the several overlapping legal systems', however 'all forms of shari'ah use the Qur'an and the Sunnah, the narrated traditions of the prophet as their basis' which Omar Ha-Redeye calls the 'immutable Basic Code: Ha-Redeye, 'The Role of Islamic Shari'ah in Protecting Women's Rights' (2009) <<http://ssrn.com/abstract+1526868>> accessed 5/3/2010, at 4-5. Abdullahi Ahmed An-Na'im states that

'It would be heretical for a Muslim who believes that *Sharih* is the final and ultimate formulation of the law of God to maintain that any aspect of that law is open to revision and reformulation by mere mortal and fallible human beings. To do so would allow human beings to correct what God has decreed': 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' 9 *Human Rights Quarterly* (1987) 1, 10.

Although he believes some social and political aspects of shari'ah can and should be adapted to modern society, An-Na'im argues that 'Belief in the Qu'aran as the final and literal word of God and faith in the Prophet Mohammed as the final prophet remain the essential prerequisites of being a Muslim' (ibid, 17). All Muslims seem to be agreed that there is some fundamental, immutable core of Shari'ah law. Just what it is may vary.

²¹⁴ Evans and Thomas, 'Church-State Relations', 712. It has been argued that Shari'ah is not fixed. See, e.g., Omar Ha-Redeye, 'The Role of Islamic Shari'ah in Protecting Women's Rights'. However, he has to concede there that there is an unchanging, immutable portion of Shari'ah, the Q'ran and the Sunna, which is separate from 'ever-evolving interpretive law, (*fiqh*)' (at 4) that is dependent on judicial rulings ('discretionary public policy practices') to 'address social ills' (at 7). These are not determined by the people, but by the (male) scholars and imams. The very fact that Shari'ah is based on religion and not the will of the people means it is not democratic.

In sum, the *Refah* case ‘demonstrates that establishment of a religion must at least not have a profound effect on the political and legal system of a country’.²¹⁵ The boundary line is characteristically imprecise.

Concordats between states and the Holy See are another form of negotiating privilege for particular religious Beliefs.²¹⁶ Arrangements between the state and Belief groups or institutions can greatly inhibit the experience of freedom of or from particular Beliefs. A recent example is the sentencing by the Italian Court in Camerino, of Judge Luigi Tosti to seven months in gaol and one year of exclusion from public buildings, as well as suspension from functions and remuneration for refusing to sit in the presence of religious symbols in the courtroom, placed there by law. This conviction is despite Article 3 of the Italian Constitution of December 1947, which provides that all are equal before the law regardless of, *inter alia*, religion.

Despite this constitutional guarantee, Italian law is subject to a directive made by the fascist Minister Rocco in 1926, and never rescinded. This directive is based on the Lateran Treaty and the Church-State Concordat between Italy (under Mussolini) and the Papacy in 1929. The Concordat was renewed by the socialist Prime Minister Craxi in 1984. On 19 November 2005 the Pope and the Italian Prime Minister agreed that the Italian Government and the Catholic Church would continue to ‘collaborate within the framework of the Lateran Treaty’,²¹⁷ thus compromising the constitution and separation of Church and State.²¹⁸ In a ruling dated February 17, 2009, the Court of Cassation (Supreme Court) in Rome acquitted Judge Tosti of all charges.²¹⁹

²¹⁵ Ibid, 713.

²¹⁶ For a list of the many concordats between different nations and the Holy See, see Concordatwatch, ‘List of concordats 1801-2004’ (2007) <<http://www.concordatwatch.eu>> accessed 12/10/2007. Some of these are still in effect.

²¹⁷ International Humanist and Ethical Union, ‘Call for the Acquittal of Judge Tosti’ (2006) <<http://www.iheu.org>> accessed 9/02/ 2006.

²¹⁸ For example, the European Commission held that it is not discrimination to grant the Catholic Church tax exemptions provided for in a Concordat between the respondent State and the Holy See which involves reciprocal obligations, but it is discrimination to refuse the same tax treatment to another church which has not concluded a similar agreement with the State: *Iglesia Bautista ‘El Salvador’ and Ortega Moratilla v. Spain* App. No. 17522/90, 72 Eur. Comm’n H. R. Dec. & Rep. 256 (1992), 261-2 .

²¹⁹ See <<http://www.iheu.org/judge-tosti-cleared>> access 18/11/2010.

9.5.5 Education

Neither the ICCPR²²⁰ nor the ECHR²²¹ prohibit state funding of Belief-based schools, despite their advancement of religion through propagation of religious or other Belief. There is an obligation on states to refrain from imposing any specific religious instruction in schools, and there is no obligation to provide for religious instruction.²²² The UNHRC has stated that:

...the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria.²²³

General religious education, as opposed to religious instruction, may be part of government school curricula under the relevant Articles. The UNHRC and European Court require such teaching to be ‘objective, critical and pluralistic’.²²⁴ While indoctrination against parents’ wishes is prohibited, religious instruction may be delivered in non-denominational schools, but the state must refrain from indoctrination that is not in accord with parents’ wishes..²²⁵ Overall:

²²⁰ ICCPR Article 18(4). *ICCPR General Comment* 22, §6 states that article 18(4) ICCPR ‘permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way’. It also states that children should be granted non-discriminatory exemptions or alternatives from religious instruction that ‘accommodate the wishes of parents and guardians’ including those who do not believe in any religion. *Leirvåg v. Norway* No.1155/2003, ICCPR, A/60/40 vol. II (views of 3 November 2004) 203, §14.2; *Hartikainen v. Finland* Communication No. 40/1978 CCPR/C/12/D/40/1978 9 April 1981, §10.4.

²²¹ *Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (1952), opened for signature by the Council of Europe on November 4, 1950, E.T.S. No. 9, entered into force September 3 1953. See, for a similar approach to the UNHRC, the ECHR case of *Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-VIII.

²²² *Evans, Freedom of Religion*, 88ff. This was specifically held by the European Commission in *X & Y v. United Kingdom*, 31 Eur. Comm’n H.R. Dec. & Rep. 210 (1982), 31; *X v. United Kingdom*, 14 Eur. Comm’n H.R. Dec. & Rep. 179, 180 (1978).

²²³ *Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (5 November 1999), §10.6.

²²⁴ See, e.g., *Hartikainen v. Finland* Communication No. 40/1978 CCPR/C/12/D/40/1978 9 April 1981, §10.4; *Leirvåg v. Norway* No.1155/2003, ICCPR, A/60/40 vol. II (views of 3 November 2004) 203; *Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-VIII, §84(h).

²²⁵ *Angeleni v. Sweden*, 51 Eur. Comm’n H.R. Dec. & Rep. 41, (1986), §4.1; *The Norwegian State Church, Knudsen v. Norway* App. No. 11045/84, 42 Eur. Comm’n H. R. Dec. & Rep. 247 (1955).

...while the tests, such as 'general and objective' teaching, seem appropriate in the abstract, in application the Commission and Court have been reluctant to explore the way in which such teaching may put pressure on students to take religiously specific instruction and to reveal their religion to the State and school authorities.²²⁶

The result of such pressure is seen in the cases of *Leirvåg v. Norway*²²⁷ and *Folgerø and Others v. Norway*,²²⁸ both of which chronicled the stigmatisation of children, and problems within the family caused by the withdrawal of children from religion instruction in school. 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.²²⁹

The state has relatively wide discretion when it comes to what religions are to be taught in schools, with the potential to shore up the dominant religion.²³⁰ This has been limited to some extent by the Protocol 12 of the ECHR, to which only a few states (excluding some of the largest European states) are party. Protocol 12 applies the prohibition of discrimination on the grounds of *inter alia* religion or belief, to all activity, not just those covered by the rights contained in the ECHR.²³¹ As only a few nations are party to this Protocol, the result is a two-tiered system across Europe, requiring some to refrain from any discrimination on the nominated ground, and requiring others to refrain from

²²⁶ Evans, *Freedom of Religion*, 96.

²²⁷ See, e.g., *Leirvåg and ors v. Norway*, Communication No. 1155/2003 (views of 3 November 2004). An expert in minority psychology concluded that both children and parents (and in all likelihood the school) experienced conflicts of loyalty, pressure to conform and acquiesce to the norm, and for some of the children bullying and a feeling of helplessness (at §2.5). There was also conflict of loyalties between school and home (at §3.3); a daughter was teased because she did not believe in God, and when excused from religious instruction, 'she was placed in the kitchen where she was told to draw, sometimes alone, and sometimes under supervision. When her parents became aware that banishment to the kitchen was used as a punishment for pupils who behaved badly in class, they stopped exempting her from lessons', §4.2

²²⁸ *Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-VIII, esp., §65-68.

²²⁹ *CJ, JJ & EJ v. Poland*, 84-A Eur. Comm'n H.R. Dec. & Rep. 46 (1996); see also Evans, *Freedom of Religion* 95-96.

²³⁰ See, e.g. M. Evans, *Religious Liberty and International Law*, 342-62; Evans, *Freedom of Religion*, 95ff.

²³¹ According to Evans and Thomas, 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: Evans and Thomas, 'Church-State Relations', 704 n23.

discrimination only when this affects the ECHR rights. Evans and Thomas comment, that:

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.²³²

9.8 Concluding remarks

While both the U.N. and the European bodies espouse ‘state neutrality’ towards Belief, what this means in practice is ambiguous and uncertain, and two broad approaches have resulted: one of ‘equal-aid’ and one of ‘no-aid’ to the furtherance of religious or other beliefs and organisations. The European Commission has specified ‘separation of church and state’ as a guiding principle, but, as with the notion of neutrality, this is equally uncertain and ambiguous. The result has been a substantial involvement of government in the advancement of some Beliefs (especially religion), to the detriment of others.

The question as to whether the state should fund faith-based bodies that provide services to the community, such as schools and hospitals has resulted in different approaches. These differences appear based on whether priority is given to the free exercise of Belief (interventionist, accommodationist or ‘equal-aid’), or the need for government disassociation from Belief-based activity (non-interventionist, or ‘no-aid’).

The absence of more detailed consideration of state-Belief separation in Rawls’s work leaves a gap in his model of Freedom of Belief. This gap is not closed by the international human rights instruments. They recognise state-established or favoured religions or churches, so long as this does not result in the exercise of direct or indirect coercion to subscribe to them. This acceptance of state-Belief entanglement is made clear in the *travaux préparatoires*,²³³ *General Comment No. 22*,²³⁴ and decisions by adjudicative bodies as described above. However, while *General Comment 22* makes it clear that not only is discrimination against those not belonging to the state-sponsored

²³² Ibid 717.

²³³ Bossuyt, *Guide to the Travaux Préparatoires*, 360. See U.N. Doc. A/2929, 48 (§108)

²³⁴ ICCPR *General Comment 22*, §9.

religion to be avoided, but cautions against ‘giving economic privileges to them,’²³⁵ this principle is more honoured in the breaking than the observance.

Advocates of the primacy of liberty argue for a degree of state entanglement with Belief systems, accepting preference for such Beliefs in terms of government funding, tax relief and government involvement in religious or other Belief-based practices. This, it has been argued, *inter alia*, accepts a degree of institutionalised discrimination.

Alternatively, those who attempt to temper liberty with equality reject state privilege based solely on an association’s advancement of any particular Belief. Funding should be directed only at the provision of secular services otherwise required of the state such as education, medical treatment and welfare, and distributed evenly on that basis.

Issues surrounding the entanglement of the state with Belief through its funding of Belief-based activities have been noted. Problems of unfair discriminatory treatment arise, even when their functions include those that are ostensibly secular.

It is argued above that the approach of Sadurski is in line with that of Rawls. Sadurski maintains that the central issue is what he calls ‘no-aid’ or separationist neutrality, as the ‘equal-aid’ approach necessarily involves discrimination: between religions, and between religious and non-religious Belief.

This raises questions regarding Belief-based associations that perform state responsibilities with the supplementary agenda of proselytising.²³⁶ The division between religious and non-religious activity of these associations could be difficult to draw, as many religions consider they have a mandate to proselytise, recruit and influence government, even where carrying out secular functions.²³⁷ It is made even more difficult in Australia, where tax law exempts non-charitable religious organisations from income tax, including income from commercial activities. Additionally, following English precedent from the 17th century, it provides that the ‘advancement of religion’ itself is

²³⁵ Ibid.

²³⁶ In their study of funding of religious welfare groups in Australia, Monsma and Soper point to the officially endorsed ‘religious mission’ of such groups: Monsma and Soper, *The Challenge of Pluralism*, 121. In Australia, for example this has been openly acknowledged by religious groups in the education and welfare sectors as the underlying function of their educational or welfare activities: (ibid).

²³⁷ See, e.g., ibid.

considered a charity, and thus receives the added benefits for which charities are eligible, without being required to do good works, or to account for their expenditure of public moneys.²³⁸

Sadurski rejects this ‘equal-aid’ (accommodationist) approach:

...when we...translate the two interpretations of neutrality into the ‘no-aid’ versus ‘equal aid’ controversy, the plausibility of the latter conception of neutrality disappears. One *can* apply the equal-promotion theory of neutrality to the impartiality of the state between different religions (trying to accommodate their demands to an equal degree), but it is not possible for the state to equally promote religious and non-religious interests.²³⁹

It has been pointed out, however, that even if it is applied to religion only, equal-aid ‘neutrality’ is necessarily non-neutral, in that the state decides criteria determining what constitutes a religion and the terms of aid, leading to institutionalised discrimination, albeit unintentional.

It is recognised that a strict state-Belief separation may be, in practical terms, difficult to achieve, but proposed that it is the only logical approach to a ‘pure’ model of Freedom of Belief, and in practice worth seeking in order to maximise equal access to Freedom of Belief for all. Whichever of the two approaches to state neutrality one takes, it is proposed that toleration of state-Belief entanglement is a potential threat to the free and equal exercise of Freedom of Belief. State-Belief entanglement promotes uncertainty and unfair inequality, as well as potential undue political religious influence. This entanglement, it is argued, is inconsistent with liberal democracy, including Rawls’s view of political liberalism that requires the three-fold protection of state-Belief separation: ‘religion from the state, state from religion, and citizens from their churches’.²⁴⁰ To better facilitate human rights, and in particular the right to Freedom of Belief, the relationship between state and Belief must be given more consideration, with a clear ‘wall of separation’ between them elaborated and enforced.

²³⁸ Wallace, *The Purple Economy*, esp. Part 2, gives a comprehensive study of the effects of the financial privileging of religion in Australia.

²³⁹ Sadurski, ‘Neutrality of law towards religion’, 453.

²⁴⁰ Rawls, *Political Liberalism*, 476.

CHAPTER 10: CONCLUSION AND PROPOSED REVISED PERSPECTIVE

10.1 Introduction

In this chapter, I summarise the arguments set out in the thesis (section 10.2). These suggest that the relevant Articles protect absolutely the holding and adoption of all Beliefs as defined above, but set a limit on the protection of the manifestation of those Beliefs. I will propose a new perspective on the right to Freedom of Belief that facilitates its equal and universal enjoyment by reconsidering the relationship between the state and Belief systems and organisations, in line with what is argued is the ideal of liberal democracy adopted by the international human rights treaties (section 10.3).

10.2 Conclusion: current perspectives deficient

This thesis has argued that, despite the diverse religious or cultural conceptions of human rights, all members of the United Nations have pledged themselves to uphold human rights and fundamental freedoms equally for all without distinction as to religious or other Belief. By their membership of the United Nations, over 190 member states have adopted the UDHR, which sets out, *inter alia*, the right to Freedom of Belief. One hundred and sixty one nations are party to the ICCPR – the international human rights treaty that gives legal expression to the UDHR. It may be argued that this is often more for other political purposes than guaranteeing the rights it promotes. Not taking it seriously, however, is a betrayal of those who rely on governments to honour their commitments.

It was then proposed that while these rights (as set out in the relevant Articles) include the absolute freedom to believe what one will, the equal right for all to manifest their religion or belief (in worship, observance, practice or teaching) presupposes a regime based on some form of democracy. The principles involved are set out in the UDHR, and repeated to some extent in the ICCPR and ECHR. Individual freedom to manifest one's Belief is thus constrained by the responsibility of reciprocity towards others to ensure they enjoy similarly equal freedom. The conclusion was drawn that the idea of Freedom of Belief to which members of the U.N. have subscribed is consistent with the principles of political liberalism described by Rawls. These involve universal and equal suffrage and right of participation in the political process, political pluralism, civil

liberties and government that is transparent, accountable and impartial to religious or other Belief.

The approach of John Rawls, with his model of political liberalism, was adopted here as a theoretical framework for examining the meaning and implementation of the relevant Articles (Chapters 2 – 4) arguing that it specifically addresses the issue of equal enjoyment of all of the right to Freedom of Belief in pluralist societies. The case was made that through the concept of public reason based on an overlapping consensus on the nature and values of government, we can judge the extent to which the interpretation and implementation of the relevant Articles meet the requirements of liberal democracy.

Chapter 3 laid the groundwork for holding that liberal democracy as described by Rawls provides for a structurally secular state – one where secularism is not a philosophy in itself, but a means for freedom to entertain any philosophy. This, it is argued is the effect of Rawls's view of liberal democracy, even though he used the term secularism only to denote philosophical secularism. Government, he held, is based on public reason, expressing an overlapping consensus on the social good, rather than on personal ideology. Separation of church and state is a necessary corollary.

Recognising that not all nations are liberal democracies, Rawls listed what he calls 'basic human rights' (the minimalist position for toleration of societies other than liberal democracies) considered in Chapter 4. He provides a distinction between 'decent but nonliberal societies' – societies that implement what he calls 'basic human rights' and societies based on political liberalism – implementing 'basic liberties' – whose goal is a more equitable and liberal society for all. Societies providing 'basic human rights' are founded on minimal acceptable standards of human dignity and freedom, while societies expounding 'basic liberties' promote equality, individual autonomy and self-fulfilment, which are exemplified in political liberalism. The international human rights treaties are based on such principles.

Rawls's model of political liberalism, while it is a theoretical ideal, is offered as a flexible and realistic analytical tool for considering different societies and their varying approaches to the exercise of rights and liberties, providing a benchmark for full equality of Freedom of Belief. One can apply it to assess the interpretation and implementation of the relevant Articles, providing a model of adherence to human rights as set out in the

international human rights treaties, on the basis that these envisage a similar theoretical ideal. This, it is argued, is especially useful in a world where many have signed the treaties, proclaiming their commitment to human rights, but often neglect their implementation.

Rawls considered the increasing pluralism of Beliefs in any given society, and called for the recognition by individuals of the right for everyone to equal consideration in having and manifesting their particular Beliefs. To facilitate the reciprocity required in such consideration, he advocated the generation of an ‘overlapping consensus’: a recognition of values that all could agree with, regardless of personal Beliefs. This consensus would be the foundation of public reason: a set of principles for governance. Accordingly, public reason is indifferent to Belief, and there would be a separation of the state from any specific Belief system or organisation.

Equality is an essential element of Freedom of Belief, it was argued in Chapter 5, and by formulating his two Principles of Justice, Rawls paved the way towards a distinction between political equality and what I call ‘life-chance equality’. The former refers to substantive equality of the opportunity for participation in political life, where equality of treatment is a priority. The latter refers to equality of material benefits for the realisation of personal self-fulfilment, where equality of treatment is likely to depend on social and financial circumstances. It was argued that this distinction provides a means of harmonising the seemingly contradictory elements of liberty to manifest Belief and the limitations imposed to ensure equality with others in the exercise of that liberty.

On this reasoning, it is essential to recognise the necessary restrictions imposed on the individual to ensure equal freedom of others to manifest their Beliefs. This is consistent with the basic liberties that underlie political liberalism, and expressed in the international human rights treaties. These contain within themselves *limits* as well as freedoms. In effect, they proclaim the freedom both *of* one’s own Belief and *from* the Beliefs of others.

Having laid the groundwork for a conception of liberal democracy, Chapters 6-9 examined the interpretation and implementation of the right to Freedom of Belief by the adjudicative bodies.

It was pointed out that Freedom of Belief covers all comprehensive personal life stances, religious or otherwise, that attain ‘a certain level of cogency, seriousness, cohesion and importance’,¹ despite the use of the terms ‘conscience’ ‘religion’ and ‘belief’ in the relevant Articles. The perception by courts and commentators that religion attracts by its very nature some degree of privilege over other Beliefs is thus clearly refuted.

The distinction between the ‘private’ sphere of personal life based on conscience and the ‘public’ sphere of governance was examined in Chapter 7. The view is proposed that the application of human rights to all individuals has to some extent reached into the private sphere of everyday living, ensuring some basic rights of autonomy and equality. This is reflected in Rawls’s scheme of justice that reaches into social organisations and belief systems, including religious institutions and the family, providing every individual with rights that cannot be taken away. The view of some commentators that the absolute right to have or adopt a Belief (the *forum internum*) includes protected action based on that Belief is considered and contested, referring to the case law of the adjudicative bodies (see Chapter 6).

It was also proposed that the interpretation of relevant Articles more properly relegates all activity to the category of *manifestation* of Belief, thus becoming subject to the limitation provisions of the relevant Articles. A further perception is thereby contested: that Freedom of Belief recognises an absolute right to protection from state-mandated behaviour that conflicts with individual conscience (Chapter 7).

The limitations of the right to Freedom of Belief were examined in Chapter 8, with the conclusion that manifestation of Belief is not absolute, but protected, subject to the requirements of liberal democracy. The state is restricted in the extent to which it can interfere with the manifestation of Belief, but it can (and should) do so in the interests of preserving the principles of liberal democracy, including the rights of others. In other words, it can act to ensure what Rawls called each person’s ‘equal claim to a fully adequate scheme of equal basic rights and liberties,’ to be ‘compatible with the same scheme for all’.

¹ *Campbell and Cosans v. the United Kingdom* Court judgment of 25 February 1982, Series A no. 48, §36. See discussion above section 6.4.5.

Finally, the state-Belief relationship was considered in Chapter 9. Here it is concluded that the relevant Articles tolerate an entanglement between the state and Belief systems and organisations that results in institutionalised discrimination through the favouring of one or more religious or other Beliefs at the expense of non-recognition of others. The perception is refuted that the establishment, endorsement or otherwise favourable treatment of particular religious or other Belief systems or organisations is consonant with the right to Freedom of Belief. Although he states that there should be a separation of Church and State, Rawls failed to consider this issue in greater depth. It was argued that acceptance of state-Belief entanglement is a significant weakness in the right to Freedom of Belief.

10.3 A new perspective for facilitation of Freedom of Belief

It is proposed that the above analysis suggests a different perspective is needed to facilitate Freedom of Belief in line with the principles of liberal democracy outlined in the UDHR and favoured by Rawls. Ideally, the right to Freedom of Belief should be rewritten, it is argued, to provide more effectively for equal enjoyment of the right by all citizens, regardless of their Belief. Given that human rights as currently set out are deeply entrenched in international thinking and expressed in multiple international human rights treaties, it is obviously not feasible to suggest rewriting the right to Freedom of Belief in those documents. A more modest proposal for a change in perspective must suffice at this time. However, the proposed revised perspective set out below could well inform any future national Bill of Rights such as that recently recommended for Australia,² without compromising the right to Freedom of Belief as set out in the relevant Articles, and facilitating its equal expression by everyone.

10.3.1 Freedom of thought as a stand-alone freedom

Given that the absolute right to ‘thought, conscience and religion’ includes more than religious thought, and given the complementary rights to freedom of expression and association, it is suggested that reference to religion and conscience in relation to thought in pronouncements of Freedom of Belief are unnecessary. It is proposed that the

² National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Canberra, 2009)
http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads accessed 27/1/2010.

right is simply the freedom to entertain and pursue any thought or idea without interference by others. It needs to be more clearly associated with freedom of speech and assembly. This removes the perception that the relevant Articles favour religion as noted in Chapter 6. It is proposed that a right to independent and autonomous thought and opinion should be thus clearly considered a stand-alone right for the sake of clarification. Freedom in respect of manifestation of Belief, expression of ideas and assembly flow from this central right.

10.3.2 No special treatment for religion

As the right to Freedom of Belief covers all personal life stances, regardless of their source, the reference to religion in the freedom to ‘have or to adopt a religion or belief of [one’s] choice’ is also unnecessary. It is confusing and potentially divisive, leading to the assertion that religion deserves privileged recognition by the state.

Eisgruber and Sager argue that it is religion’s vulnerability to discrimination that warrants its protection.³ However, they point out, *protection* rather than privilege is at the basis of freedom of religion. On this reasoning, any Belief vulnerable to discrimination warrants protection. What they say in relation to the U.S. Constitution and freedom of religion applies generally:

What is needed is a fresh start. We need to abandon the idea that it is the unique value of religious practices that sometimes entitles them to constitutional attention. What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns.⁴

Although the relevant Articles are part of documents that are deeply entrenched in the universal psyche, and the result of very complex international politics, one should not be surprised at these suggested changes. If a democratic society is indeed based on liberty and equality, one would expect an interpretation of the relevant Articles to lead to a

³ Eisgruber and Sager, ‘The Vulnerability of Conscience’, 1245-1315.

⁴ Ibid, 1248.

‘levelling out of the playing field’ to cover all personal life stances equally, whether they involve ‘religion’ or not. At least, as Johan van der Vyver reasons:

For purposes of applying the international standards of the freedom under consideration, defining “religion” may be avoided, since the same entitlements incorporated into freedom of religion also constitute the substance of freedom of belief. A belief need not be qualified by religious convictions, and the fact that it is not so qualified will not deprive it of the same protection afforded to freedom of religion.⁵

This levelling out would mean that conscience, a sense of right and wrong, would also be considered an element of Belief. If one is to seek effectiveness in determining the meaning of the provision for Freedom of Belief, it is argued, both adjudication and a consideration of the literature show that it is not a matter of taking each of the terms ‘conscience’ ‘religion’ and ‘belief’ and attempting to define them with precision. It is rather a matter of determining the context and purpose of the provisions in which they appear. This involves making sense of their vagueness, circularity and interchangeable use in a way that gives effect to them, as part of a ‘living document’.⁶

The perspective proposed, then, is based on the view that both the right to have a Belief and the right to manifest it in effect apply to personal life stances of any kind, whether faith-based or otherwise. As argued above, the view that Freedom of Belief covers all personal life stances is based on (a) the principles of liberal democracy, namely liberty and equality⁷, and (b) the principles of interpretation adopted by the adjudicative bodies themselves. This, it is argued, clearly indicates a broad, all-inclusive approach to what is protected by the right to Freedom of Belief.

The case is thus made that freedom of religion is, as is freedom of all personal life stances, one part of all fundamental freedoms and human rights. These include, freedom of thought, opinion, Belief, speech⁸ and association,⁹ and underlie the rights to dignity,

⁵ van der Vyver, ‘The Relationship of Freedom of Religion or Belief’, 117.

⁶ This issue is pursued above, section 6.4.5.

⁷ These are described above, section 1.4.

⁸ For example, van der Vyver, ‘The Relationship of Freedom of Religion or Belief’, at page 108, points to *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A, (at §55), and *Larissis and Others v. Greece*, judgment of 24 February 1998, Reports of Judgments and Decisions 1998-I, (at §51) as

autonomy and personal integrity. Freedom of religion is grounded in these rights.¹⁰ This approach proposes a dispassionate outlook on both religious and other personal life stances, questioning the views of writers such as Peñalver¹¹ who favour religious Belief over others. His view that legal interference with the practice of religion is uniquely problematic: ‘problematic in a way that is unlike the harm inflicted by interfering with other sorts of expressive conduct’¹² is thus refuted.

I have argued that this according of superiority to ‘divine’ law over the laws of the land defies the principles of democracy. The view that only religion provides an ethical community ignores the depth and comprehension of such non-religious life stances as humanism, rationalism¹³ and other non-theistic philosophies. Other philosophical and ethical views can constitute a person’s identity, and institutions and other areas of social life have elaborate structures that are enormously important to people.¹⁴ Thus both religious and other personal life stances are placed in perspective, enmeshed in a

cases demonstrating the ‘complementary interaction’ between the right to freedom of religion or belief and the right to freedom of speech.

⁹ For example, van der Vyver, 110 points to *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV. and the *United Communist Party of Turkey and Others v. Turkey* as highlighting the ‘entanglement of freedom of religion or belief with freedom of assembly and association’.

¹⁰ Nickel, ‘Who Needs Freedom of Religion?’, 946. He lists these rights as: Freedom of Belief, thought and inquiry; communication and expression, (UDHR art 19, ICCPR art 19, ECHR 10); association (UDHR 20, ICCPR 21, ECHR 11); peaceful assembly (UDHR 20, ICCPR 22, ECHR 11); political participation (UDHR 21, ICCPR art. 25) and movement (UDHR 13; ICCPR art 12); economic liberties (UDHR art 17; ICCPR art 26 (equality before the law)); privacy and autonomy in the areas of home, family, sexuality and reproduction (ICCPR art 17, ECHR art 8) and the right to freedom to follow an ethic, plan of life lifestyle or traditional way of living (UDHR Art 18; ICCPR art 18; ECHR art 9) at p. 941.

¹¹ Peñalver, ‘Treating Religion as Speech’, 2249 ff.; Horwitz, ‘Scientology in Court’, 127; Garry, ‘Religious Freedom Deserves More’. Also favouring the view that religious Belief is ‘special’ are Stanley Fish, ‘Mission Impossible: Settling the Just Bounds Between Church and State’ (1997) 97(8) *Columbia Law Review* 2255; Michael McConnell, ‘The Problem of Singling out Religion’ (2000) 50 *DePaul Law Review* 1; Abner Greene, ‘Is Religion Special? A Rejoinder to Scott Idleman’ (1994) 1994 *University of Illinois Law Journal* 535. For dissenting views see Steven Smith, ‘What Does Religion Have to Do with Freedom of Conscience?’ (2005) 76(4) *University of Colorado Law Review* 911; Eisgruber and Sager, ‘The Vulnerability of Conscience’; Christopher Eisgruber and Lawrence Sager, ‘Why the Religious Freedom Restoration Act is Unconstitutional’ (1994) 69(3) *New York University Law Review* 437.

¹² Peñalver, *ibid.*

¹³ For a brief explanation of the Beliefs of humanism see, e.g., Alfred Hobson and Neil Jenkins, *Modern Humanism: Living without Religion* (Washington, North East Humanists 2005). Rajaji Ramanadha Babu Gogineni and Lars Gule, ‘Humanism and Freedom from Religion’ in Tore Lindholm, W Cole Durham and Bahia G Tahzib (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden, Martinus Nijhoff, 2004), 699.

¹⁴ See Nickel, ‘Who Needs Freedom of Religion?’ 957; Gunn, ‘The Complexity of Religion’, 200ff.

plethora of rights that reach across the whole spectrum of human activity, leading to acceptance of people regardless of their opinions and Beliefs.

10.3.3 Non-specification of religion as a facilitator of Freedom of Belief

The proposal for removal of special treatment of religion in the language of Freedom of Belief is a view also advocated by James Nickel.¹⁵ As he argues, his approach places equal value on the protection of religious Belief, along with others. Consequently the right to Freedom of Belief would become more compatible with the principles of liberal democracy generally, providing equality of consideration for all individuals, facilitating the freedom of everyone, religiously inclined or otherwise, to hold and manifest a personal conviction of choice on an equal basis.

Given Rawls's interpretation of Freedom of Belief as involving all personal comprehensive doctrines, his advocacy of separation of church and state, and the adoption of an overlapping consensus within society for governance, it is proposed that the non-specification of religion in the expression of Freedom of Belief is consonant with his notion of political liberalism.

Non-specification of religion reinforces the disassociation of the state from Belief-based organisations and tenets. It throws into question the view that religious Beliefs are superior to other Beliefs as they involve a supernatural authority that overrides that of the state and/or that only such beliefs provide a comprehensive ethical, metaphysical and life force context for living.

Removing special treatment of religion means that public policy requires justification through public reason, eliminating bias and discrimination in favour of or against Belief-based organisations. For example, it leads to scrutiny of bias in government registration as a religion, without which communities cannot do such things as hold services, teach, or receive international religious or other leaders.¹⁶

¹⁵ Nickel, 'Who Needs Freedom of Religion?'

¹⁶ It has been pointed out that biased or unreasonable restrictions on registration of religion are:
 ...a violation of religious freedom since the right to organize religious services, study and teach religion, publicize one's own Beliefs and other activities have a direct impact on the human right to freedom of religion: 2005 Human Rights

However, removal of bias is a two-way street. The above arguments lead to the proposal that Freedom of Belief is not just a matter of government recognising the integrity of Beliefs (religious or otherwise), but equally one of Beliefs recognising the requirements of reciprocity according to public reason. If not, society tends towards theocracy or dictatorship. A broad, more inclusive approach, such as institutionalised rights-based scrutiny of governance,¹⁷ would provide more appropriate recognition of action as based on human rights, whether Belief-inspired or otherwise.

It follows from this reasoning that freedom to manifest Belief, with the specifically nominated grounds for its limitation by government, would be considered along with freedom of speech, association and assembly, and the limits that can be placed on each of these. Prohibition of discrimination would also apply accordingly.

Not giving religion a special status would lead to increased focus on the necessity to consider the effect of actions resulting from manifesting a particular Belief, rather than the nature of the Belief itself. According to this approach, decisions made about manifestation of any Belief should be based on whether they involve actions central to Belief that constitute worship, practice, teaching or observance,¹⁸ considered against the grounds for limitation set out in the international instruments. Thus, it would be appropriately concerned with the *effect* of manifestation of Belief on others, and whether this effect is inimical to the proper functioning of the state or the rights of others. The kind of Belief that motivates it would not be an issue.

Organizations' Report on Ukraine, cited in *Svyato-Mykhaylivska Parafiya v. Ukraine*, §91.

¹⁷ For example, legislation that requires Government scrutiny and certification that legislation and policy is in accordance with the principles to consider human rights principles in government policy-making (e.g., *Human Rights Act 2004* (ACT), *Bill of Rights Act 1900* (NZ) and *Human Rights Act 1988* (U.K.)). The adoption of such legislation leads to the opportunity for a broad, all-encompassing approach to Freedom of Belief that actively seeks to avoid conflict with the conscientious requirements of particular groups when it is not necessary to prohibit them.

¹⁸ The broad and therefore often vague interpretation given to 'worship, observance, practice or teaching' is discussed above at section 8.2. See discussion in M. Evans, *Religious Liberty* of the U.N., 215ff and the European Bodies, 304ff, who considers the approach in fact strict and exclusive of Beliefs that are unconventional. As noted, the case of *Arrowsmith v. the United Kingdom*, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978), held that not all Belief-inspired action is protected.

This reasoning challenges the view that the importance to the individual believer alone of different actions meets the required level of justification¹⁹ for limiting them. It is suggested that this approach is not as radical as it might seem to those who cherish freedom of religion. Under the international human rights instruments, the permissible limits on Freedom of Belief are similar to those applying to freedom of speech and association. The required justification is more critically dependant on the proposed actions meeting the criteria for limitation under the relevant Articles.

The above approach is consistent with Rawls's contention that reasonable comprehensive doctrines in a democratic society will recognise public reason, and legitimate law following public reason on constitutionally essential or basic justice matters is politically and morally binding on all citizens. This is so even where such recognition may 'not be thought the *most* reasonable, or the *most* appropriate' in specific cases.²⁰

Equal regard for all beliefs (but not a policy of 'equal treatment') avoids marginalisation of non-adherents of recognised mainstream religions (and thus denial of protection) which can result in resentment and social disharmony. 'Religious liberty is more secure when non-religious people see it, not as a special concession to the orthodox, but rather as simply an application of liberties and rights that all enjoy'. Thus, those who do not accept a particular personal conviction would see that ability to undermine the convictions of others would 'come at a cost to their own liberties'.²¹

A further way in which liberal democracy would be enhanced by non-specification is its questioning of *favourable* treatment of institutions because of their categorisation as 'religion'. Tax concessions, land grants, special funding and undue influence over political activity would be considered (based on public reason) similar to any other discriminatory treatment. State deference to religion or any other Belief for its own sake would be weighed against the principles of democracy and found wanting.²² This would promote separation of state policy and administration from religious or other Belief system or organisation, ensuring state independence from Belief. However, individuals

¹⁹ C. Evans, *Freedom of Religion* 32; Nickel, 'Who Needs Freedom of Religion?' 952.

²⁰ Rawls 'The Idea of Public Reason Revisited', 446 (emphasis added).

²¹ Nickel, 'Who Needs Freedom of Religion?', 951. See also Rawls, *Justice as Fairness*, 6ff.

²² See above section 9.5.

would not be deprived of the equal protection of their personal convictions, religious or otherwise.

Non-specification of religion facilitates the perception that rights to personal integrity, privacy and especially freedom of expression or assembly are all part of individual identity and self-realisation, along with manifestation through worship, observance, practice or teaching related to Belief.²³ It is critical for liberal democracy to focus on the principle that all manifestations of Belief should be subject to the one principle of protection. By providing for equality this approach removes the effect of historical connotations, preconceptions, biases and political manipulations contained in many current approaches to religious Belief, including the pressure for *prima facie* exemption of religious practices from the rule of law, including criminal law.²⁴

10.3.4 Separation of ideas from actions

The perspective proposed would avoid the fallacy of equating personal moral principles with society-wide, political principles. This fallacy leads to weighing the importance ('weight') of rights according to their social benefit in the eyes of those concerned rather than to focus on the more objective approach set out in the international instruments (discussed further below).²⁵

James Nickel distinguishes between the *scope* of a liberty or right - the 'benefit, freedom, power, or immunity that it confers upon its holders' and its *weight* - its 'strength or power to prevail when it conflicts with other considerations'.²⁶ Religiously inspired charitable activity such as health care and welfare leads many to consider that the value to society of such activities by religious groups is a valid consideration in determining the 'weight' of their right to Freedom of Belief. Rather, it is argued, a distinction should be drawn between the actual manifestation of a personal conviction itself, and activity that may be *inspired* or *encouraged* by that conviction. In this way the

²³ That is, limitations which are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

²⁴ See examples from the U.S., above section 9.5.2.

²⁵ See Nickel, 'Who Needs Freedom of Religion?', 954. He also refutes the idea that religion is a unique form of identity arguing that other philosophical and ethical views can be included in the constitution of a person's identity, and that institutions and other areas of social life have elaborate structures that are enormously important to people.

²⁶ Ibid, 952.

essence of a liberty (such as particular forms of worship or rituals) which are given special protection can be distinguished from its margins or less-central areas (such as actions inspired or recommended by a Belief but peripheral to it), the latter being nonetheless protected but subject to different criteria. This is in line with the approach taken by the adjudicative bodies in considering what forms of manifestation are protected as a right, as pointed out above, for example in the *Arrowsmith* case (see above, section 8.2.2).

Whilst Nickel specifically addresses his views to religion, and specifies Freedom of Belief as a ‘generic right’, he does state that ‘considerations that make religious activities more or less important as areas of liberty are the same ones that make other common activities more or less important as areas of liberty’.²⁷ He adds ‘Liberties to inquire, believe, and doubt cover all propositions, not just some favoured set’.²⁸

The ‘weight’ of religious belief does not depend, then, on its ‘religious’ nature, it shares its weight with other ‘highly-protected liberties’, such as freedom of thought, association and speech, and other broad areas of action.²⁹ Regulation of any action associated with these broad areas of endeavour does not always require compelling state need, as not all Belief-based action is of equal (or any) material benefit to society.³⁰ Rawls’s model of political liberalism places much store on this principle.

While the benefit of any activity to the community is a valid consideration for beneficial treatment by the state, the advancement of religion *per se* as a ground for privileged treatment is rejected. The perspective proposed throws into question exemption of organisations from taxes on the sole ground that they are classified as ‘religious’, and the classification of the ‘advancement of religion’ as a charity in itself.³¹

It is thus argued that the scope of a right sets out the criteria for its limits, its weight is determined by its importance when considered *alongside conflicting rights* (not its social

²⁷ Ibid, 955.

²⁸ Ibid, 957.

²⁹ Ibid, 952.

³⁰ Ibid, 954.

³¹ Religious institutions in Australia have been dubbed ‘supernatural charities’ by Max Wallace, as they are legally charities because they ‘advance religion’ and belief in the supernatural is the central prerequisite for recognition as a religion. On both criteria they are eligible for tax exemptions: Wallace, *The Purple Economy*, 4.

efficacy). These must be adjusted to accommodate each other, be they right to freedom of speech, freedom to manifest personal convictions, freedom of assembly or movement, or any other right. Rawls does this through reflective equilibrium, discussed above at section 3.3.1.

The right to manifest personal convictions, then, does not depend on the content or social efficacy of the actions involved – unlike good works, it need have no social value in the eyes of non-adherents. Community welfare activities such as education and health care that are carried out by religious institutions are not manifestations of religion for the purpose of the right to Freedom of Belief. Welfare services have the same value to society that they would have if undertaken by non-religious agencies. One could then argue that where social welfare services are to be funded by public money, religious agencies should be subject to requirements of transparency and public accountability, including separation of charitable works from the advancement of religion for tax purposes. Again, the issue is rather whether there are grounds for limiting manifestation according to the human rights instruments.³²

10.3.5 Separating personal sentiments from Belief

Difficulty in determining just what constitutes manifestation of Belief is exacerbated by the fact that views vary on whether some activity is central to an established religion or not, as religion in modern times has often become something that people make up as they go.³³ It is also exacerbated by the recognition of non-religious Beliefs of all kinds in the relevant Articles. This runs the danger of focusing on the personal feelings of the individual involved rather than whether the action complained about is a limitation of manifestation of Belief.

However, questioning the privileging of a right to religious belief above other Beliefs provides an analysis that persuasively argues that manifestation of religion may not be considered essentially more important than manifestation of other Beliefs. For example, an assembly is just that: a political assembly may be considered more important than a religious one in some circumstances. The provision of a soup kitchen or medical

³² Limitations that are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

³³ This term is attributed to Marion Maddox, by David Marr, 'Politics and religion: crossed paths', *Sydney Morning Herald* December 26 2009.

treatment is just that: one inspired by religious fervour is no more valuable to society than one inspired by non-religious humanitarian considerations. The performance or non-performance of deeds central to the practice of a personal conviction, however, becomes a right, the interference with which requires adequate justification.

Non-specification of religion avoids a narrow clause-bound focus on the right as expressed by the relevant documentation (such as the meaning of ‘religion’, what is included in ‘belief’ and what constitutes ‘manifestation’ of Belief”). A broad and socially inclusive approach to Freedom of Belief accordingly disregards whether Belief is religious or otherwise. In relation to ‘manifestation’ of Belief it would mean a focus on the action itself, its relationship to the Belief and whether it is compatible with the principles of liberal democratic society. While giving recognition to all personal convictions then, this approach would thus resist exaggerating the importance of freedom of religion. In effect, then, protection of all liberties that involve the expression of a Belief would become one element, albeit essential, of autonomy and equality, and hence human rights in general.

Non-specification of religion facilitates an integrated forum for those who hold different personal convictions. It focuses on the common factor of liberty in whatever area of ideas is being considered: ‘The believer, the religion shopper, the founder of a new religion, the syncretistic new age seeker, the theologian, the doubter, and the atheist all find shelter in the broad basic Beliefs’.³⁴

The appreciation of the complexity of determining what a religion is, and of the wider contextual implications of this, leads to the conclusion that it is impractical to attempt to adjudicate matters based on whether they can be classed as religious and leads to argument that we do not need to define it. William Marshall argues that courts would have to decide if the alleged Belief was ‘religious’, whether the person was sincere in his or her Belief and the role of the Belief in the person’s religious order (he does not mention those not belonging to a recognised religion). Indeed, ‘the notion that such

³⁴ Nickel, ‘Who Needs Freedom of Religion?’, 951.

inquiries could be standardised across religious traditions may itself offend religious liberty concerns by placing religious Belief and practice into cookie-cutter modes'.³⁵

It is argued here that freedom to act upon deliberation and opinion is a form of license from the state. While under principles of democracy and recognition of equal autonomy and dignity individuals are entitled to act as they wish, such action can be limited by the interests of the orderly administration of society. When the Beliefs upon which one acts are central to a personal conviction, however, the state is limited in its entitlement to restrict those actions. On this approach it is recognised that the formulation of the specific right to Freedom of Belief is aimed at ensuring due weight is given to the protection of those personal convictions that amount to Beliefs.

10.3.6 State-Belief Separation as 'no-aid'

The concept of separation, it is contended, is thus central to Freedom of Belief. Freedom of Belief that is founded on equality is incompatible with any form of state entanglement with Belief systems, as it has been argued above that the 'no-aid' or separationist neutrality model of Sadurski as opposed to what he calls the 'equal-aid' or 'benevolent neutrality' approach. Thus, a strict state-Belief separation is required to provide for true equality in the enjoyment of Freedom of Belief, as state-Belief entanglement necessarily involves discrimination: between religious beliefs, and between religious and non-religious Beliefs.

Rawls did advocate separation of 'religion from the state, state from religion, and citizens from their churches'.³⁶ However, he did not develop this idea in any detail. It was concluded in Chapter 9 that the relationship between state and Belief must be given more consideration, with a clear 'wall of separation' between them elaborated and enforced.

In summary, it is proposed that a Rawlsian approach to equal Freedom of Belief for all would recognise six central principles, based on liberal democracy,

³⁵ Marshall, 'What is the Matter with Equality?', 209.

³⁶ Rawls, *Political Liberalism*, 476.

First, there is a need to rethink the concepts involved in ensuring that we recognise the right of everyone to adopt and express his or her Beliefs (non-political worldviews), addressing incoherence, inconsistency and inequity in the interpretation and implementation of the right to Freedom of Belief. It is necessary to clarify what is intended by such a right, and just how it should be implemented, in the light of the liberal democracy the international human rights treaties envisage.

Second, freedom of thought should be established as a separate, all-embracing freedom, with the omission of specific consideration of conscience or religion. Considering the right to freedom of expression and assembly, as well as the general underlying principles of personal autonomy and dignity, the right to freedom of thought is a foundational principle whose application applies beyond what is called here personal convictions.³⁷

Third, there is no justification for special conditions for manifestation of religious Belief, and reference to religion in that respect is thus not only unnecessary but counterproductive. Freedom to manifest religious Belief is in fact a derivative right, deriving from other fundamental rights, more generally the right to dignity and autonomy, and more particularly the right to Freedom of Belief, freedom of speech and freedom of association. It can also be derived from other rights such as the right to life, liberty of the person, privacy and security.

Fourth, non-specification of religion (or indeed any other specific personal conviction such as humanism) provides a more equitably focused approach to Freedom of Belief. It would, for example, broaden the approach to Freedom of Belief to encompass a plethora of other rights, such as personal autonomy and security as well as freedom of speech, association and assembly. It would reach across the whole spectrum of human activity, and the confusion between culture, race and religion would be less challenging.

Fifth, clear recognition of the right to be free from the influence of personal convictions of others is required, so that state endorsement or promotion of any particular system of Belief is prohibited.

³⁷ Thus prohibiting any form of mind control or indoctrination.

Finally, there should be clear constitutional separation of the state from religious or other Beliefs. This involves recognition that state neutrality requires, not that all Beliefs, *as Beliefs*, be favoured equally by the state, but that *no* Beliefs on that basis be granted privileged treatment.

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