2015

The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law

Mark Weston Janis
University of Connecticut School of Law

Oxford Journal of Law and Religion, 2015, 4, 75–93
doi: 10.1093/ojlr/rwu061
Advance Access Publication Date: 16 February 2015
Original article

The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law

Mark Weston Janis*

ABSTRACT

Throughout Europe, religious majoritarian cultures have been traditionally hostile to minority faiths. The European Court of Human Rights has been slow to apply Article 9, religious tolerance. Albeit, today it is generally accepted that no one religion is destined to become the common faith of Europe, it is still very difficult in European law and politics to say how much each of the 47 Member States of the states of the Council of Europe should be permitted to restrict religious liberty domestically to protect and nurture a majoritarian faith, especially a majoritarian Christian faith. Europe, in many ways, is still in the shadow of the Peace of Westphalia, promoting intra-European peace by permitting the Continent's states to adopt, if they wish, their own national visions of a Christian society.

1. INTRODUCTION

Religious freedom may be the oldest as well as the most problematic human right. The notion of religious freedom conflates the rights of individuals with the rights of religious communities, a duality that often results in tension and conflict. Religious freedom, if established for a majority religion, often results in limitations being imposed on the religious freedom of minority faiths. A majoritarian religious community may, in the name of its communal religious freedom, suppress the individual religious freedom of an adherent who seeks to leave them for a new faith or for no religion at all. A majoritarian religion, again exercising its religious freedom, may enlist the state both to support it and to repress minority denominations.

Europe traditionally has not been friendly to religious toleration. From the Roman Empire to our times, the Continent has witnessed one after another fierce religious struggle. The Romans at first suppressed Christianity. Christianity, once adopted by the Empire, dissolved into 1700 years of doctrinal and physical clashes, including the 11th-century schism between Rome in the Catholic West and Constantinople in the Orthodox East, and the fierce 16th- and 17th-century Western rivalry between Rome and dissenting Protestants. In the 20th century, religious bigotry contributed to the slaughter of six million European Jews. Today, religion

* William F Starr Professor of Law, University of Connecticut; Visiting Fellow and Formerly Reader in Law, University of Oxford; Member, Religion, Law, and International Relations Programme, Regent's Park College, Oxford. Email: weston.janis@gmail.com.

still divides Europe's nations. There is a widespread intolerance of Islam, a re-emergence of anti-semitism, and heavily majoritarian cultures, often hostile to minority faiths, all over.

Promoting religious freedom in Europe has been an assigned task, *inter alia*, of the Council of Europe and the European Convention on the Protection of Human Rights and Fundamental Freedoms (the ECHR), especially its Article 9: freedom of thought, conscience, and religion. The ECHR establishes the European Court of Human Rights (the Strasbourg Court) to which individuals and groups of individuals may complain about state infringements of their ECHR rights. Tellingly, the Strasbourg Court was extraordinarily late to turn to Article 9. Only in 1993, long after its consideration of other substantive human rights, did the Strasbourg Court deliver its first Article 9 judgment, *Kokkinakis v Greece*.[1] In *Kokkinakis*, the court held that Greece had infringed a Jehovah Witness's religious freedom by jailing and fining him for trying to convert majoritarian Greek Orthodox adherents to his minority faith.

For the two decades after *Kokkinakis*, the Strasbourg Court has had very little success in charting a steady course for the interpretation and application of Article 9. It is a commonplace to remark that the court's case law on religious freedom is inconsistent. Critics have battered the Strasbourg Court not only for its vagaries, but for being either too soft or too hard in limiting exercises of state power vis-à-vis personal religious rights. This article enters the fray, exploring one aspect of the court's case law and the critical commentary about it: the court's response to cases, like *Kokkinakis,* featuring a complaint about a state's promotion of majoritarian beliefs. I argue that the court's weakness in defining a proper relationship between a state and a majoritarian religious approach reflects a deep-seated European uneasiness about how far to tolerate religious diversity. While it is generally accepted today that no one religion is destined to become the common faith of Europe, a beneficial outcome of the Peace of Westphalia, it is still very difficult both in European law and in European politics to say what measures each of the 47 Member States of the Council of Europe may take to protect and nurture majoritarian beliefs, especially a majoritarian Christian faith. This I term the troubling 'shadow of Westphalia.'

2. WESTPHALIA

Famously, the Peace of Westphalia (1648) settled Europe's 30 Years War (1618–48). Some even date the beginning of the modern international political system from the Westphalian Peace, since it tolled the bell both on the Catholic Church's pretension to be the common faith of Western Europe and on the Emperor's prerogative to intervene in the domestic affairs of the Empire's many polities. Indeed, the very term '"Westphalia" is often used as shorthand for a system of equal and sovereign states; the peace treaties of Westphalia . . . are sometimes said to have established the modern concept of sovereign statehood.'[2] Whatever the

1 Kokkinakis v Greece, Application no 14307/88 (25 May 1993).

2 Benjaman Straumann, 'The Peace of Westphalia as a Secular Constitution' (2008) 15(2) Constellations 173.

adequacy of 'Westphalia' to denote the modern international political system,[3] there is little doubt that some political entities, notably the Netherlands, achieved their formal sovereign status at Westphalia in 1648.[4]

The Catholic Church repudiated the Peace of Westphalia.[5] Pope Innocent X judged Westphalia 'null, void, invalid, iniquitous, unjust, damnable, reprobate, inane, and devoid of all meaning for all time'.[6] Though the Catholic church did not concede the Treaty's religious authority until the 20th century,[7] the Empire and the states concluding the Peace of Westphalia did in 1648 answer more or less conclusively one of the key questions of religious conflict: the right of each sovereign to establish a national Christian confession, whether it be Catholic or Protestant.

As set forth in Article V in one of the Treaty's two forms, the Treaty of Osnabrück of 24 October 1648:

> Now whereas the Grievances of the one and the other Religion, which were debated amongst the Electors, Princes and States of the [Holy Roman] Empire, have been partly the Cause and Occasion of the present war, it has been agreed . . . that there be an exact and reciprocal Equality amongst all the Electors, Princes and States of both religions.[8]

Henceforward, each sovereign state could establish, free of outside influence, including that of the Emperor, its own national faith. However, the Treaty's guarantees of religious toleration of dissenting faiths within each state were far less definitive. The exact language of the Treaty concerning internal religious toleration provided:

> It has moreover been found good, that those of the Confession of *Augsburg* [Protestants], who are Subjects of the Catholicks, and the Catholick Subjects of the States of the Confession of *Augsburg*, who had not the public or private Exercise of their religion in any time of the year 1624 and who after the Publication of the Peace shall possess and embrace a Religion different from that of the Lord of the Territory, shall in consequence of the said Peace be patiently suffer'd and tolerated, without any Hindrance or Impediment to attend their Devotions in their Houses and in private, with all Liberty of Conscience, and without any Inquisition or Trouble, and even to assist in their Neighborhood, as often as they have a mind, at the publick Exercise of their Religion, or have them instructed in their Families by private Masters; provided the said Vassals and Subjects do their Duty in all other things, and hold

3 ibid 173–74.

4 CG Roelofsen, 'The Netherlands Until 1813: International Aspects' in HF van Panhuys and others (eds), *International Law in the Netherlands* (Sijthoff & Noordhoff 1978) 3, 13.

5 Norman Bentwich, *The Religious Foundations of Internationalism* (2nd edn G. Allen & Unwin, 1959) 122.

6 Jonathan Havercroft, 'Was Westphalia "All That"? Hobbes, Bellarmine and the Norm of Non-Internvention' (2010) 1 Global Consitutionalism 120, 120.

7 *Pacem in Terris: Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*, 11 April 11963.

8 1 Consolidated Treaty Series 198, art V (1).

> themselves in due Obedience and Subjection, without giving occasion to any Disturbance or Commotion. In like manner Subjects, whether they be Catholicks, or of the Confession of *Augsburg*, shall not be despis'd any where upon account of their Religion, nor excluded from the Community of Merchants, Artizans or Companies, nor depriv'd of Successions, Legacies, Hospitals, Laza-Houses, or Alms-Houses, and other Privileges or Rights, and far less of Church-yards, and the Honour of Burial; not shall any more be exacted of them for the Expence of their Funerals, than the Dues usually paid for Burying-Parish-Churches; so that in these and all other the like things they shall be treated in the same manner as Brethren and Sisters, with equal justice and protection.[9]

Professor Bhuta describes Westphalia's approach to religious toleration: 'The state is far from neutral about religious doctrine and practice in general, but the strategy of toleration in which certain doctrines previously vilified as heretical are treated instead as not threatening to public order provided they remain in their proper place.'[10] He argues that, rather than springing from Westphalia, the broader notion of a legal right to personal religious toleration finds its source in other traditions, perhaps the North American experience, first in the English colonial charters, then in state and US declarations of rights between 1776 and 1789.[11]

3. ARTICLE 9

The wording of Article 9 in the 1950 ECHR was immediately drawn from Article 18 of the United Nations' 1949 Universal Declaration of Human Rights.[12] In turn, the UN Universal Declaration was based upon national traditions of human rights, for example, Magna Carta (1215) in England, the Declaration of Independence (1776) and the Bill of Rights (1789) in the USA, and the Declaration of the Rights of Man and Citizen (1789) in France.[13]

Article 9 provides:

i. 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.
ii. 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

9 ibid, art V (28).

10 Nehal Bhuta, 'Two Concepts of Religious Freedom in the European Court of Human Rights' (2012) EUI Working Paper 2012/33, 4, papers.ssrn.com, accessed 31 December 2014.

11 ibid 5.

12 Art 9 in turn was reflected later in art 10 of the European Union's Charter of Fundamental Rights. Tania Groppi, 'Article 10 – Freedom of Thought, Conscience and Religion' in William BT Mock and others (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2010) 64.

13 Mark W Janis, Richard S Kay and Anthony W Bradley, *European Human Rights Law* (3rd edn Oxford University Press, 2008) 4–12.

> 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.

It was probably the sensitivity of religious issues that long chilled any ardour that the European Court of Human Rights might have had to address cases involving Article 9. As late as 1993, 43 years after the treaty's conclusion and after almost four decades of contentious cases about other ECHR articles decided by the court, Malcolm Shaw, just before *Kokkinakis*, lamented that the Strasbourg Court had up to then never delivered an Article 9 judgment:

> It is to be profoundly hoped that as the century comes to a close and the process of integration in Europe both deepens and widens throughout the continent that the Convention system will be able to play its part through an interpretation of Article 9 and other provisions in mitigating the rising problems of intolerance and discrimination.[14]

Shaw's hopes were soon satisfied in *Kokkinakis*, but only to a degree. Though *Kokkinakis* has passed from being simply one Strasbourg Court case among many into becoming 'the' symbol of what European human rights law ought to do for religious freedom, when one looks at the subsequent case law, one sees the promise of *Kokkinakis* much overshadowed. Let us begin with the by-now familiar story of *Kokkinakis*.

A. *Kokkinakis*

Mr Minos Kokkinakis, a convert to the Jehovah's Witness faith, had been arrested more than 60 times for proselytism and had been already fined and imprisoned by the Greek government. The judgment of the court summarized the facts:

> On 2 March 1986 [Mr Kokkinakis] and his wife called at the home of Mrs. Kyriakaki in Sitia and engaged in a discussion with her. Mrs. Kyriakaki's husband, who was the cantor at a local Orthodox church, informed the police, who arrested Mr. and Mrs Kokkinakis and took them to the local police station, where they spent the night of 2-3 March 1986 . . . . [The defendants], who belong to the Jehovah's Witnesses sect, attempted to proselytize and, directly or indirectly, to intrude on the religious beliefs of Orthodox Christians, with the intention of undermining their beliefs, by taking advantage of their inexperience, their low intellect and their naivety. In particular, they went to the home of [Mrs Kyriakaki] . . . and told her that they brought good news; by insisting in a pressing manner, they gained admittance to the house and began to read from a book on the Scriptures which they interpreted with reference to a king of heaven, to events which had not yet occurred but would occur, etc, encouraging her by means of their judicious, skilful explanations . . . to change her Orthodox Christian beliefs.

14 Malcolm N Shaw, 'Freedom of Thought, Conscience and Religion' in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Law International 1993) 445, 468.

> The court found Mr and Mrs Kokkinakis guilty of proselytism and sentenced each of them to four months' imprisonment, convertible into a pecuniary penalty of 400 drachmas per day's imprisonment, and a fine of 10,000 drachmas.

The penal sentence against Mr Kokkinakis was upheld, although reduced, by the Greek Court of Appeal and Court of Cassation. Domestic remedies exhausted, Mr Kokkinakis complained to Strasbourg. The judgment came down on 25 May 1993, the Strasbourg Court noting that the Greek government had long suppressed proselytism, ruled:

> As enshrined in Article 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.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief, enshrined in Article 9, would be likely to remain a dead letter.

Greece was and is not alone among European states in establishing a majoritarian church. Although the exact relationship may differ, at least a dozen European states, formally establish a religion: Andorra—the Roman Catholic Church (Article 11 of the Constitution); Armenia—the Armenian Apostolic Church (the 1991 law on Freedom of Conscience and on Religious Organization); Denmark—the Danish Lutheran Church (section 4 of the Kingdom's Constitutional Act); UK—the Church of England (Toleration Act 1689, 1 William and Mary, chapter 13) and the Church of Scotland (Church of Scotland Act, 1921, 11 and 12 Geo 5, chapter 29); Finland—the Evangelical Lutheran Church of Finland and the Finnish Orthodox Church (Article 76 of the Constitution); Georgia—the Georgian Orthodox Church (Article 9 of the Constitution); Iceland—Icelandic Lutheran Church (Article 62 of the Constitution); Liechtenstein—the Roman Catholic Church (Article 37 of the Constitution), Malta—the Roman Catholic Church (section 2 of the Constitution); Monaco—the Roman Catholic Church (Article 9 of the Constitution); and Norway—Norwegian Lutheran Church (Article 2 of the Constitution).

This wide tradition of established churches helps explain why it took so long for the Strasbourg Court to apply Article 9 to limit a state's repression of a minority

religious view. In 1991, two years before *Kokkinakis,* one commentator gently suggested another reason for the court's failure up to then to find a breach of Article 9: 'because the rights to freedom of thought, conscience and religion are largely exercised inside an individual's heart and mind'.[15] It may also be that many of the judges on the European Court of Human Rights were uneasy with religious questions, a sentiment prevalent among modern international lawyers.[16] As one recent Strasbourg judge, Ireland's John Hedigan, admitted only a few years ago: 'In matters pertaining to religion, it is perhaps better not to stray too far from home.'[17] Whatever the cause, despite *Kokkinakis,* the reluctance to interfere with majoritarian religious views lingers.

B. *Otto-Preminger*

Just the year after *Kokkinakis* the Strasbourg Court abruptly changed course, employing Article 9, not to protect, but to repress a minority challenge to a majoritarian church. In *Otto-Preminger-Institut v Austria*, the court shielded the majoritarian Catholic community from criticism which might otherwise have been allowed under Article 10 which protects the individual's right of freedom of expression.[18] Here are some of the facts as put by the court:

> The applicant, *Otto-Preminger-Institut für audiovisuelle Mediengesialtung* (OPI), a private association under Austrian law established in Innsbruck[,] . . . announced a series of six showings, which would be accessible to the general public, of the film *'Das Liebeskonzil'* (Council in Heaven) by Werner Schroeter. [An] announcement was . . . worded as follows:
>
> Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance by the *Teatro Belli* in Rome and set in the context of a reconstruction of the writer's trial and conviction in 1895 for blasphemy. Panizza starts from the assumption that syphilis was God's punishment for man's fornication and sinfulness at the time of the Renaissance, especially at the court of the Borgia Pope Alexander VI in Schroeters film, God's representatives on Earth carrying the insignia of worldly power resemble the heavenly protagonists.
>
> Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated.
>
> * * *
>
> At the request of the Innsbruck diocese of the Roman Catholic Church, the Public Prosecutor instituted criminal proceedings against OPI's manager, Mr Dietmar Zingl, on 10 May 1985. The charge was 'disparaging religious doctrines,' . . . an act prohibited by section 188 of the [Austrian] Penal Code.

15 Donna Gomien, *Short Guide to the European Convention on Human Rights* (Council of Europe 1991) 69.

16 Mark W Janis, 'Introduction' in Mark W Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff 2004) xiii.

17 John Hedigan, 'Religious Advertising and the European Convention of Human Rights, Congrès des Droits de l'Homme, Istanbul, 16-19 May 2006,' European Court of Human Rights, Doc No 100042.

18 *Otto-Preminger-Institut v Austria*, Application no 13470/87 (20 September 1994).

The Prosecutor prohibited the public showing of the film. The film was seized by the state. In upholding these acts, the Strasbourg Court emphasized the importance of the majoritarian faith in the region:

> 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 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.

Tellingly, the court had turned Article 9 and *Kokkinakis* around on their heads. Rather than being used to protect minority expression, Article 9 was now being employed to safeguard majority religious sentiment. Immediately after *Otto-Preminger*, Jeremy Gunn lamented 'the failure of the European Court to take seriously rights of conscience in its jurisprudence'.[19] Gunn saw three weaknesses in the court's approach: a 'failure to require governments to impose less restrictive burdens on manifestations of conscience', a 'bias against nontraditional religions', and a 'deference to state-established religions'.[20] Tad Stahnke defended the holding in *Otto-Preminger*, arguing that 'it was the manner in which the message was delivered, and not the content of the message, that implicated a restriction on the freedom to deliver it'.[21] A more critical observer, Jonatus Machado, submitted that the *Otto-Preminger* court 'overlook[ed] a violation of the right to freedom of speech' . . . 'the Court failed to give due weight to the notion that freedom of speech must be interpreted in a way that protects shocking, offensive and provocative speech – a notion to which the Court subscribes – including those that promote discourse critical of religion, even (and especially) the dominant religion'.[22]

The *Otto-Preminger* court apparently concluded that Article 9 guarantees a right for a majoritarian religion to be, in some circumstances, sheltered from criticism. But is this right? Was not Article 9 intended to limit governmental abuses of religious freedom, rather than restrict individual religious expression? An 'unsatisfactory' result of *Otto-Preminger* was that it viewed Article 9 as imposing 'a positive obligation to ensure the peaceful enjoyment' of 'religion'.[23] As Jeroen Temperman put it in his

19 T Jeremy Gunn, 'Adjudicating Rights of Conscience Under the European Convention on Human Rights' in Johan D van Vyver and John Witte Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff 1996) 305, 325.

20 ibid.

21 Tad Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law' (1999) BYU L Rev 251, 297.

22 Jonatas EM Machado, 'Freedom of Religion: A View from Europe' (2005) 10 Roger Williams U L Rev 451, 505–06.

23 Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (OUP 2000) 976.

critique of *Otto-Preminger*: 'the Court fails to distinguish between forms of criticism or insult that do actually jeopardize the rights and freedoms of others, and forms of defamation that – although perhaps deplorable in a "moral sense" – do not'.[24] A Strasbourg judge, Willi Fuhrmann, suggested that:

> The Otto-Preminger case seems to indicate that freedom of expression will give way to the freedom of majority religious beliefs. This appears to be at odds with the emphasis that the Court has placed on the pluralism in a democratic society of religious belief encompassing skepticism and agnosticism, which was demonstrated, for example, in the Kokkinakis case.[25]

C. *Murphy*

More of the same followed in *Murphy v Ireland*, decided in 2003.[26] Following along the path of *Otto-Preminger*, the *Murphy* Court saw Article 9 as a means by which to protect a majoritarian religion and to limit both the Article 9 and the Article 10 rights of a minority.

> [Murphy] is a pastor attached to the Irish Faith Centre, a bible based [Protestant] Christian ministry in Dublin. In early 1995 the Irish Faith Centre submitted an advertisement to an independent, local and commercial radio station for transmission. The text of the advertisement read as follows:
>
> 'What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour-long video by Dr. Jean Scott PhD on the evidence of the resurrection from Monday 10-Saturday 15, April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm.'
>
> The radio station was prepared to broadcast the advertisement. However, in March 1995 the Independent Radio and Television Commission ('IRTC') stopped the broadcast pursuant to s 10(3) of the Radio and Television Act 1988 ('the 1988 Act').
>
> * * *
>
> [In 1997,] the [Irish] High Court found that the IRTC had not infringed s. 10(3) of the 1988 Act. It further considered that the unspecified right to communicate guaranteed by Art. 40(3) (1) of the Constitution was at issue since the advertisement had, as its principal purpose, the communication of information. However, it found that s. 10(3) was a reasonable limitation on the right to communicate and that there were good reasons in the public

24 Jeroen Temperman, 'Protection Against Religious Hatred under the United Nations ICCPR and the European Convention System' in S Ferrari and R Cristofori (eds), *Law and Religion in the 21st Century: Relations between States and Religious Communities* (2010) 215, 216.

25 Willi Furhmann, 'Perspective on Religious Freedom from the Vantage Point of the European Court of Human Rights' (2000) BYUL Rev 829, 837.

26 *Murphy v Ireland*, Application no 44179/98 (10 July 2003).

interest for the ban. [In 1998, the Irish Supreme Court rejected the appeal of the applicant who then applied to Strasbourg.]

The [Strasbourg] Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society. As para. 2 of Art. 10 expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Art. 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.

[T]here is little scope under Art. 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest. However, 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. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever-growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended.

* * *

[T]he domestic courts found that the Government was entitled to be prudent in this context. In particular, the High Court considered relevant the fact that religion had been a divisive issue in Northern Ireland. It further considered that Irish people with religious beliefs tended to belong to a particular church so that religious advertising from a different church might be considered offensive and open to the interpretation of proselytism. Indeed, the High Court pointed out that it was the very fact that an advertisement was directed towards a religious end which might have been potentially offensive to the public. The Supreme Court also emphasised that the three subjects highlighted by s. 10(3) of the 1988 Act concerned subjects which had proven 'extremely divisive in Irish society in the past' and it also agreed that the Government had been entitled to take the view that Irish citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements could lead to unrest.

* * *

In the circumstances, and given the margin of appreciation accorded to the State in such matters, the Court considers that the State has demonstrated that

> there were 'relevant and sufficient' reasons justifying the interference with the applicant's freedom of expression within the meaning of Art. 10 of the Convention.

The Strasbourg Court found unanimously that there was no violation of Article 10. Like *Otto-Preminger*, *Murphy* repudiated *Kokkinakis*. Why if Jehovah's Witnesses were protected by the Convention to go door to door, probably offending the dominant Orthodox majority in Greece, may not Protestants go on the air, probably offending the dominant Catholic majority in Ireland, or religious sceptics challenge the premises of Christianity? As Professor Johan van der Vyer pointed out, 'controversies centered upon the right to spread one's faith and the right to convert others remain a stumbling block in efforts to establish universal respect for, and adherence to, the vital components of religious freedom as contemplated by the founders of the United Nations.'[27]

Did the court fail to pay adequate attention to Article 9 rights in *Murphy*? Take, for example, this passage:

> [T]here is little scope under Art. 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest. However, a wider margin of appreciation is generally available to the Contracting States when regulating matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.

In a critique, Jeroen Temperman wondered why the *Murphy* Court did not discuss whether the facts of the case supported a conclusion that the advertisement was offensive 'and, if so, whether the expression (the radio commercial) was likely to have led to instances of discrimination on grounds of religion or other violations of religious rights'.[28]

Note the Strasbourg Court here does not even attempt to balance Article 9 and Article 10 freedoms; it simply disregards Article 9 rights altogether. It seems that *Murphy* understands manifesting one's religion more as a problem of freedom of expression than as an issue of freedom of religion. However, the Irish judge then in Strasbourg, John Hedigan, employed *Murphy* as his principal example when exploring Article 9 at a conference. He explained, 'the reason I have chosen this case is because although decided under Article 10 and the right to communicate, to receive and impart information, the rationale of the decision relates in great part to matters arising under Article 9 and how Governments deal with conflicting interests thereunder.'[29]

The Strasbourg Court, retreating from *Kokkinakis*, was reluctant to apply Article 9 in *Murphy*, holding 'there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions', and arguing that it was up to the states, not Strasbourg, to decide the proper

27 Johan D van der Vyver, 'Limitations of Freedom of Religion or Belief: International Perspectives' (2005) 19 Emory Int'l L Rev 499, 502.

28 Temperman (n 24) 219.

29 Hedigan (n 17).

limits on manifestations of religion. But is not the role of the court to fashion common European standards of human rights? A common strand in *Otto-Preminger* and *Murphy* is that the court employed the margin of appreciation to give the defendant states—Austria and Ireland—the discretion to limit manifestations of religion according to national rather than European conceptions. This deference by Strasbourg helps explain the court's decisions to treat both as non-Article 9 cases, focusing instead on Article 10. Indeed, as we see, Article 9 was used by the court counter-textually to justify a limit on individual religious rights.

Reflecting on cases like *Otto-Preminger* and *Murphy*, Malcolm Evans was rueful: Strasbourg law 'is as likely to hinder as it is to assist the realization of the goals of tolerance and religious pluralism which are said to be what it is seeking to achieve'.[30] He complained that in 'many states – like it or not – religious difference is seen as a threat to public order'.[31] Evans criticized the Strasbourg Court:

> It is very difficult to explain to states that they are, on the one hand, bound to strive for religious toleration and pluralism through a policy of strict neutrality between all forms of religion and belief whilst at the same time insisting that it is quite legitimate for the state to prohibit public forms of religious manifestation which the state considers to undermine the essential political foundations when many consider those foundations to be religious.[32]
>
> '[T]here appears to be a danger that it is the interests of the state which are now assuming a clear priority as against the religious rights of individuals and communities – and this is not what human rights protections are meant to be about.'[33]

In a like manner, Niraj Nathwani observed that the Strasbourg Court read into these religion cases, 'a right to be protected in their religious feelings'.[34] However, this protection was extended only to protect 'majority religions; [although] [m]inority religions, especially those religions that are associated with ethnic minorities, need protection much more than majority religions'.[35] Nathwani argued, 'Adherents of majority religions have to accept that freedom of expression extends to all expressions, including those that offend, shock and disturb.'[36]

30 Malcolm D Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Cane, Evans and Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 291.

31 ibid 312.

32 ibid 312–13.

33 ibid 315.

34 Niraj Nathwani, 'Religious Cartoons and Human Rights – A Critical Legal Analysis of the Case Law of the European Court of Human Rights on the Protection of Religious Feelings and its Implications in the Danish Affair Concerning Cartoons of the Prophet Muhammad' (2008) 13 European Human Rights Law Review 488, 503–04.

35 ibid 504

36 ibid 506.

D. *Lautsi*

For a brief moment, it seemed the Strasbourg Court might be returning to a *Kokkinakis*-like perspective on minority challenges to majoritarian religions. In a unanimous 2009 judgment, a seven-judge Strasbourg Court chamber in *Lautsi v Italy*,[37] held 'that the presence of the crucifix in [Italian state] classrooms goes beyond the use of symbols in specific historical contexts'. A non-believer 'sees the display of the crucifix as a sign that the state takes the side of Catholicism'. 'The State has a duty to uphold confessional neutrality in public education.'

However, after widespread protests in Italy, the court reversed itself as a 17-judge Grand Chamber over-turned the Second Section's *Lautsi* decision two years later:[38]

> The Court further considers that the crucifix is above all a religious symbol. The domestic courts came to the same conclusion and in any event the Government have not contested this. The question whether the crucifix is charged with any other meaning beyond its religious symbolism is not decisive at this stage of the Court's reasoning.
>
> There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.
>
> However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.
>
> The Government, for their part, explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.
>
> The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development.
>
> * * *
>
> The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact

37 *Lautsi v Italy*, Application no 30814/06 (Second Section, 13 November 2009).
38 *Lautsi v Italy*, Application no 30814/06 (Grand Chamber, 18 March 2011).

that there is no European consensus on the question of the presence of religious symbols in State schools speaks in favour of that approach.

* * *

[A] crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influencer on pupils comparable to that of didactic speech or participation in religious activities.

The Court observes that, in its judgment of 3 November 2009, the Chamber agreed with the submission that the display of crucifixes in classrooms would have a significant impact on the second and third applicants, aged eleven and thirteen at the time. The Chamber found that, in the context of public education, crucifixes, which it was impossible not to notice in classrooms, were necessarily perceived as an integral part of the school environment and could therefore be considered 'powerful external symbols . . .'.

The Grand Chamber does not agree with that approach.

* * *

[T]he effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of die following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity. Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were 'often celebrated' in schools; and optional religious education could be organised in schools for 'all recognised religious creeds.' Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.

In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claim that the second and third applicants had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.

Lastly, the Court notes that the first applicant retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions. It follows from the foregoing that, in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, the authorities acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching. the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

> The Court accordingly concludes [15-2] that there has been no violation of Article 2 of Protocol No. 1 in respect of the first applicant. It further considers that no separate issue arises under Article 9 of the Convention.

In the false spring between the *Lautsi* judgment of the Chamber and that of the Grand Chamber, Zachary Calo attacked the *Lautsi* Chamber from a majoritarian religious perspective, arguing that the Chamber reflected a 'Europe [that] has increasingly cut itself off from traditional religious beliefs and practices in a manner that has left it a pervasively secular culture.'[39] He believed that 'the Court's commitment to a mode of secular logic has been particularly important in limiting its ability to render decisions consistent with the principle of normative religious pluralism.'[40] Hence, the court was guilty of assuming that religion is 'more a problem . . . than a solution'.[41] Calo believed that modern human rights doctrine was at fault: 'Human rights drew upon inherited religious concepts and categories but was ultimately cut off from any dependence on those religious foundations.'[42] He concluded that 'the problem with the secular tradition of human rights is not simply that it denies forms of religious expression but that it cuts off human rights from their deepest source of meaning.'[43]

At the same time, Susanna Mancini observed that '[i]t is curious that the Court used the margin of appreciation to protect *minorities* when the majority religion happens to be Islam.'[44] She contrasted the court's headscarf cases with 'all the cases such as *Otto Preminger*, in which the Court protected the sensibilities of mainstream Christianity'.[45] She applauded the Chamber's decision in *Lautsi*, since '[b]y refusing to resolve a conflict between the religious majority and ideological/religious minorities on the basis of the doctrine of margin of appreciation, the European Court finally embraced a veritably counter-majoritarian role.'[46] She argued that this was crucial since 'domestic mechanisms may not always be able [to] perform such a task, as the majority culture and sensibility often end up prevailing.'[47] However, as we know, such optimism was short lived.

After the Grand Chamber's judgment in *Lautsi*, Andrea Pin deplored the *Lautsi* Chamber decision, which was seen in Italy as 'attacking the roots of Italian institutions and society'.[48] He argued that 'the pluralism that is allowed by the ECHR does not contemplate not-impartial or not-neutral states.'[49] 'It endangers the very model

39 Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights' (2010) 26 JL Religion 261, 268.
40 ibid 268.
41 ibid, quoting Richard John Neuhaus, 'Secularization' (2009) 190 First Things 24.
42 Calo (n 39) 271.
43 ibid 280.
44 Susanna Mancini, 'The Crucifix Rage: Supranatural Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6 ECL Rev 6, 23.
45 ibid.
46 ibid 25.
47 ibid.
48 Andrea Pin, 'Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and the State' (2011) 25 Emory Int'l L Rev 95, 144.
49 ibid 147.

of the European state.'[50] '[O]ne can question whether the established churches or official religions of other European states could survive scrutiny if challenged under the European Convention.'[51]

John Witte and Nina-Louise Arold applauded the Grand Chamber's judgment in *Lautsi*.[52] In their view, the case showed that the Strasbourg Court accepted that 'religious symbols often have redeeming cultural value.'[53] Importantly, 'the Court left Italy to decide for itself how to balance the religious symbolism of the Catholic majority and the religious freedom and education rights of its atheist minorities.'[54] 'Religious freedom does not give a minority of hecklers a veto over majoritarian policies.'[55]

In like manner, European Dignity Watch, an advocacy group, commended the Grand Chamber for reversing the Chamber's judgment in *Lautsi*. Their enthusiasm sat comfortably under the shadow of Westphalia, a tradition of limited toleration of internal dissenting views: 'It is in the competence of each State, not the judges in Strasbourg, to decide the basis of their political identity and how they should relate to religious denominations.'[56]

4. THE SHADOW OF WESTPHALIA

It is revealing to note that Article 9 cases after *Kokkinakis* continue to play a relatively minor role in the jurisprudence of the court. In 2011, for example, although there were a staggering 1,157 judgments rendered by the Court (875 by Chambers, 269 by Committees, and 13 by Grand Chambers), only five concerned Article 9.[57] Two years later it was much the same story: in 2013 only six Article 9 judgments out of 919 Strasbourg Court judgments.[58] It is no wonder cases are few. What little the court does decide concerning freedom of religion is unhappily inconsistent with the values of *Kokkinakis*.

In *Mouvement Raelien Suisse v Switzerland* in 2012 a sharply divided (9-8) Grand Chamber held that a Swiss canton's prohibition of a poster campaign by an arguably religious group, the Raeliens, was within the state's Article 11 margin of appreciation.[59] The movement's founder, Claude Vorilhen ('Raël') claimed to be in contact with extraterrestrials, the 'Elohim' who are claimed to have created life on earth and principal religions, for example, Christianity, Judaism, and Islam. The majority of the court found the speech in question to be commercial, and hence less protected than political speech under Article 10. The eight dissenting judges believed that it was

50 ibid.

51 ibid.

52 John Witte Jr and Nina-Louise Arold, 'Lift High the Cross: Contrasting the New European and American Cases on Religious Symbols on Government Property' (2011) 25 Emory Int'l L Rev 5.

53 ibid 53.

54 ibid.

55 ibid 54.

56 European Dignity Watch, 'European Court of Human Rights: Crucifixes in Public Schools Do not Violate Freedom of Religion of Atheists' <http://www.europeandignitywatch.org> (18 March 2011) accessed 7 January 2014.

57 Council of Europe (2012) 54 Yearbook of the European Court of Human Rights 2011 13, 48.

58 2013 Statistics <www.echr.coe.int> accessed 1 December 2014.

59 *Mouvement Raelien Suisse v Switzerland*, Application no 16354/06 (Grand Chamber, 13 July 2012).

'difficult to accept that a lawful association with a website that has not been prohibited, should be prevented from promoting its ideas through posters that are not unlawful in themselves'.

In *Eweida and Others v the United Kingdom* in 2013 a chamber of the court reached apparently contrasting results about an individual's right to manifest religion.[60] It upheld the right of Ms Eweida to wear a cross at work on her British Airways uniform. Contradicting the conclusion of the British courts, the Fourth Section held that 'Ms. Eweida's cross was discreet and cannot have detracted from her professional appearance.' However, another complainant, Chaplin, who worked as a nurse on a geriatric ward was not so protected by Article 9. '[T]he reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms. Eweida.' Another British applicant who lost her job was also not protected when, as a registrar, she refused to register same-sex unions which she believed to be against the Christian faith. The court found her dismissal to be within the UK's Article 9 margin of appreciation, noting that the state 'aimed to secure the rights of others which are also protected under the Convention'. Similarly, the court held against a counsellor who, working for a private company, refused to provide psycho-sexual counselling services equally to heterosexual and homosexual couples, also on Christian religious grounds. Again, the court noted 'that the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination'.

In 2014, in *SAS v France*, the Grand Chamber ruled 15 to 2 that France should be permitted to ban full-face veils on women in public places.[61] Despite the fact that only two of the Council of Europe's 47 Member States banned full-face veils (the other state being Belgium), the court concluded:

> [T[here is little common ground amongst the member states of the Council of Europe as to the question of the wearing of the full-face veil in public. The Court thus observes that, contrary to the submission of one of the third party interveners, there is no European consensus against a ban. Admittedly, from a strictly normative standpoint it is very much in a minority position in Europe: except for Belgium, no other member state of the Council of Europe has, to date, opted for such a measure. It must be observed, however, that the question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European states. In some it has been decided not to opt for a blanket ban. In others, such a ban is still being considered. It should be added that, in all likelihood, the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of member states, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.

60 *Eweida and Others v United Kingdom*, Application nos 48420/10 and 59842/10 (15 January 2013).
61 *SAS v France*, Application no 43835/11(1 July 2014).

With all due respect, the court doth protest too much. Repeating several times words to the effect that 'there is little common ground', 'no European consensus', 'simply not an issue', and 'there is no consensus', does not make it so. Forty-five to two seems to be a remarkable European consensus, no matter how much the court would wish it away.

Rather than an absence of a European consensus, what seems at work in *SAS* is the court's reluctance to interfere in majoritarian attitudes to religion:

> [T]he respondent state has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more the requirements of 'living together.' From that perspective, the respondent State is seeking to protect a principle of interaction between individuals which is in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society. It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.

The court in *SAS* kept to the permissiveness of *Otto-Preminger*, *Murphy*, and *Lautsi*, and allowed the national majority to set rules limiting manifestation by adherents of minority religions. *SAS* makes clear its reliance on judicial deference following from an application of the margin of appreciation:

> [T]he Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. [I]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.

In other words, France had a wide margin of appreciation in the present case.

What has gone wrong with the court and Article 9? Looking for an historical answer, Yannis Ktistakis has argued that the founders of the Strasbourg system were more concerned with constituting a political weapon of juxtaposition to the atheistic proposal of Communists than in moderating 'the peaceful coexistence of Christian states'.[62] Only after the fall of Communism in 1989, did the Court turn its attention to 'the rivalry of civilizations and religions.'[63] Similarly, Nehal Bhuto stressed the centrality of 'Jacques Maritain's Christian personalist thought', embodied in one of his

62 Yannis Ktiskakis, 'The Protection of the *forum integrum* under Article 9 of the ECHR', in Spielmann and others (eds), *The European Convention of Human Rights as a Living Instrument: Essays in Honour of Christof L Rozakis* 285, 286 Bruylant (2011).

63 ibid.

follower's condemnation of the denial of the 'moral freedom to choose among courses' in Communist Russia, Fascist Spain, and 'Moslem countries.'[64]

The President of the court, Nicolas Bratza of the UK, concluded that '[i]t is, of course, impossible for the Court to provide an all-encompassing answer' to the challenges facing it over Article 9.[65] He attributed the problem to the 'very different religions and cultural backgrounds' of the 47 Member States and the Court's 'need to respect very different constitutional traditions.'[66]

In my opinion, the court probably has gone as far as it wants to go given the currents of modern European social, political, and cultural cohesion. This is, I think, the continuing shadow of Westphalia. Now, as in 1648, Europe accepts that each sovereign state is entitled to choose its own national approach to religion, including a choice heavily weighted in favour of a majoritarian religion, officially established or not. Moreover, the Strasbourg Court usually permits a state to protect its majoritarian confession from minority challenges. The protection is justified variously: protecting the majority from mocking scornful criticism (*Otto-Preminger*), protecting the state from divisive religious alternatives (*Murphy*), advancing a national cultural identity (*Lautsi*), terming a religious manifestation 'commercial' (*Mouvement Raelien*), protecting the rights of others (*Eweida*), or repecting a national social choice (*SAS*). Modern Europe, still in its Westphalian shadow, promotes intra-European peace by permitting states to establish their own distinct national visions of the role of religion in society. Protecting minority religious challenges to such national visions is, despite *Kokkinakis*, usually a step too far out of the shadow of Westphalia for the Strasbourg Court.

64 Bhuta (n 10) 6.

65 Nicolas Bratza, 'The Precious Asset: Freedom of Religion under the European Convention on Human Rights' (2010) 14 Ecc LJ 256, 258.

66 ibid 257–58.